

**THE PARTICIPATION OF DEVELOPING COUNTRIES IN THE
DISPUTE SETTLEMENT SYSTEM OF THE WTO**

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ABSTRACT

International trade relations have become much more legalised under the World Trade Organization (WTO) than under the former international trade system created pursuant to the General Agreement on Tariffs and Trade (GATT). The Dispute Settlement Understanding (DSU) of the WTO clearly represents a shift toward a rule-oriented, legalistic and adjudicative approach, which is intended to enhance that status of, and confidence in, the WTO dispute settlement system. The approach is likely to ensure greater stability and predictability in the system by encouraging precise decisions on the merits of disputes and discouraging infractions. Its greater binding effect serves as a powerful disincentive to those Members who have a propensity to favour unilateral measures to solve international trade disputes. This is particularly beneficial for developing countries that sought a system which recognises their disadvantaged position compared to the greater bargaining and retaliatory power of developed countries. However, despite the positive assessment of the WTO dispute settlement system, the functioning of the system is working against the interest of developing countries in having an efficient dispute settlement system that considers their needs and deals fairly with their disputes.

This thesis examines the participation of developing countries in the dispute settlement system of the WTO, and argues that they are in a disadvantageous position compared to their developed counterparts. The system's failure to effectively address or efficiently deal with this position is an evidence of its bias against and deficiency towards developing countries' participation. The thesis focuses on the problematic issues developing countries face throughout their use of the system. It also considers the role that the DSU has played in addressing these issues and the efficiency of that role in restraining and limiting their effect on developing countries' participation in the system. The thesis analyses some ideas on the reform of the DSU that have been proposed through WTO negotiations or literature, and discusses their applicability on the current dispute settlement system. Finally, the thesis employs these proposals along with its discussion on the subject to introduce a reformed model of the DSU which is more sensitive to developing countries' concerns in the system in order to help providing an understanding of how such modifications could be carried out in future reforms on the DSU.

CANDIDATE'S CERTIFICATE

This is to certify that I, Saleh Al. Shraideh, have not submitted this research work for a higher degree to any other university or institution other than Macquarie University. This thesis, to the best of my knowledge and belief, contains no copy or paraphrase of work published by another person, except where duly acknowledged in the text.

Saleh Al. Shraideh

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TABLE OF ABBREVIATIONS

AB	Appellate Body
AD	Anti Dumping
ACWL	Advisory Centre on the WTO Law
ATC	Agreement on Textiles and Clothing
CVD	Countervailing Duties
EC	European Community
ECJ	European Court of Justice
EU	European Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATT	General Agreement on tariffs and Trade
GATS	General Agreement on Trade in Services
GNI	Gross National Income
GSP	Generalised System of Preferences
ICITO	Interim Commission for the ITO
ICJ	International Court of Justice
IMF	International Monetary Fund
ITO	International Trade Organisation
LDC	Least-Developed Country
MFN	Most-Favoured Nation
NGOs	Non-Governmental Organisations
PPA	Protocol of Provisional Application
S & D	Special and Differential
SCM	Subsidies and Countervailing Measures
TMB	Textiles Monitoring Body
TRIMS	Trade-Related Investment Measures

TRIPS	Trade-Related Aspects of Intellectual Property Rights
UR	Uruguay Round
US	United States
WB	World Bank
WTO	World Trade Organisation

Chapter 1: Establishing the Linkage: Multilateral Trade Liberalisation, International Dispute Settlement, Developing Countries and Special Treatment

1.1. Introduction

Free international trade has always been seen as a key aspect of international economic development. Free trade gives countries access to world markets for goods, services and knowledge, and fosters the specialisation of economic activity into areas in which countries have a comparative advantage, such as the developed countries' comparative advantage in technology and the developing countries' comparative advantage in raw materials. These aspects introduce free international trade as a source of increased and sustained growth. However, adjustment costs and measures to safeguard the interests of developing countries must be considered in the design of policies. It is important to understand and address the impact of policy reform on developing countries, and to take explicit actions to facilitate adjustment. This is because addressing the interests of all trading countries creates an inviting environment that encourages participation in free international trade, considering that it is in the interest of a multilateral trading system to accommodate the largest number possible of trading countries.

Therefore, the regulation of international trade in the post-war era has always been a growing area of interest, taking into account the progressive development that occurred during the period of more than 40 years between the creation of the General Agreement on Tariffs and Trade (GATT) as a limited provisional agreement and the Uruguay Round (UR) that established the World Trade Organization (WTO) as a sophisticated multi-agreement system that regulates many aspects and forms of international trade.

The creation of the GATT in 1947 was part of the new post-war policy to achieve countries' integration into an open multilateral trading system through regulating

national practices affecting international monetary flow as well as trade. This came alongside the basic aim of the GATT to establish economic and trade relations with a view to raising living standards, ensuring full employment and growth in the volume of real income and effective demand, developing the full use of the resources of the world and the production and exchange of goods.¹

The GATT was based on a system of reciprocal and mutually advantageous arrangements aimed at the elimination of discriminatory treatment in international trade, and the substantial reduction of tariffs and other barriers to trade.² Since its drafting, the GATT was meant to be a multilateral agreement with a universal interest in trade liberalisation. It was open for countries that were to commit to the new rules of international trade. However, one of the most difficult problems that faced the GATT was how developing countries could be integrated into the system.³

1.2. The Integration of Developing Countries into a Free Multilateral Trading System

Developing countries have traditionally expressed that their main interest in the trading system is the speedy process of growth and development.⁴ However, the small economies of developing countries, which are often concentrated on a few product lines and regarded as more vulnerable to external shocks than developed countries, have made developing countries adopt a different approach to the benefits and costs of the trading system than that followed by most other countries.⁵

Benefits for developing countries in the trading system were expected from an effective rules-based multilateral system, which is able to set limits on the trade policies of other countries, especially the more powerful ones, and provide more opportunities and better assurances of market access for developing countries'

¹ *General Agreement on Tariffs and Trade (GATT)* (1947), Preamble.

² Ibid.

³ John Jackson, *International Economic Relations* (4th ed, 2002) 1167.

⁴ Ibid 1177.

⁵ Ibid.

products to developed countries' markets.⁶ However, the costs are less obvious because developing countries demanded different trade policy disciplines than those applying to developed countries. Extra freedom from trade policy disciplines and less restriction on their use of their own policy were among their demands of different treatment in order to achieve their growth and development objectives.⁷

Developing countries believed that increased industrialisation and development is the only way to achieve increases in income and output, which would not be promoted through liberal trade policies because of the prevailing patterns of international trade, where they tended to specialise in raw material and primary commodity exports, characterised by low and volatile price.⁸ There was a consensus among many developing countries that liberal trade policies would harm the development of infant industries, continuing the dependence on raw material and primary commodity exports, and creating balance-of-payments difficulties.⁹ Therefore, they sought to promote their industrialisation through import substitution, export subsidies, trade controls and non-reciprocity in their relations with developed countries.¹⁰ Developing countries' understanding of the multilateral trading system affected their attitude towards their participation in negotiations and correspondingly resulted in a limited role in shaping the direction of the institution.

The UR, which was the most comprehensive round of negotiations in the multilateral trading system that lasted eight years from 1986 to the end of 1993, reformed the multilateral trading system in ways that have the potential for the greater integration of developing countries.¹¹ It strengthened the dispute settlement mechanism by adding greater certainty and predictability in its procedures, which offers a better protection against the larger and more powerful developed countries and a better chance for developing countries to prevail in a bilateral trade dispute against them than would

⁶ Ibid.

⁷ Ibid.

⁸ Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the WTO' (Policy Research Working Paper No 2388, World Bank, Washington, DC, 2000) 3.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid 13.

have been possible outside the WTO rules.¹² The UR also carried, through several of its agreements, the potential for significant market access improvements in areas of interest to developing countries. In this context, the UR negotiations in market access covered areas not previously subject to GATT disciplines, such as agriculture, textiles and clothing, which are of particular interest to developing Members.¹³ It also eliminated Voluntary Export Restraints, which had been significant barriers in areas such as footwear and leather products, and are of a particular interest to developing countries, by establishing the Agreement on Safeguards.¹⁴

These changes came after many developing countries started rethinking the appropriateness of their trade policies for development.¹⁵ The effectiveness of infant industry protection, trade controls and restrictions became questionable as tools for industrialisation and long-term sustainable development.¹⁶ Experience seemed to suggest that these policies contributed to slow growth or decline in per capita income, while open trade policies led to strong growth in both exports and per capita income.¹⁷ The UR changes came also after an increased recognition among developing countries of the value of their active participation in multilateral negotiations through reciprocal commitments and concessions in areas of export interest as a result of the less favourable outcome of the Kennedy and Tokyo Rounds.¹⁸

However, there has been a need, since the creation of GATT 1947, to address the fact that developing countries are intrinsically disadvantaged in their participation in international trade, and that trade policies that would maximise sustainable development in developing countries are different from those in developed

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid 10.

¹⁶ Ibid.

¹⁷ Ibid 11.

¹⁸ Both the Kennedy Round of negotiations, which ended in 1967, and the Tokyo Round, which ended in 1979, resulted in cuts on tariffs on industrial goods. The average reduction in tariffs following each round was less favourable to developing countries than developed countries. While the Kennedy Round resulted in a 36 per cent reduction on goods of export interest to developed countries compared to 26 per cent for those to developing countries, the Tokyo Round resulted in a reduction of 33 per cent for developed countries compared to 26 per cent for developing countries, cited in Michalopoulos, 'Role of Special and Differential Treatment', above n 8, 6–7.

countries.¹⁹ Therefore, any multilateral trading system must take into account this intrinsic weakness in specifying developing countries' rights and responsibilities.²⁰

These conceptual premises were behind the UR focus on providing special and differential (S&D) treatment for developing countries. This policy emerged because of a radical shift in GATT policy towards developing countries from its original setting of uniformly applied rights and obligations to all contracting parties. This special treatment was reflected in a number of important policies of GATT targeting developing countries' participation in the system. These policies include the Generalised System of Preferences (GSP) for developing countries, which focused on providing greater trade concessions to developing countries' trade, and the Enabling Clause of 1979, which provided for preferential treatment and market access for developing countries.

The UR agreements continued to be guided by the general S&D principles agreed in previous negotiating rounds of GATT. S&D provisions for developing countries regarding market access through GSP were maintained, along with flexibility on agriculture and export subsidies.²¹ Moreover, the UR agreements introduced new elements of S&D by providing for transitional timeframes and technical assistance in the implementation of the various agreements introduced in the WTO.²² These two new elements were introduced simply as a result of developing countries' lack of institutional capacity to implement the commitments demanded of them in some of the new areas covered by the WTO.²³ They would not have signed the UR agreements had they not been promised both additional time and technical assistance to build the necessary capacity.²⁴

The legal texts of the agreements embodied in the WTO contain a very large number of provisions regarding differential and more favourable treatment for developing

¹⁹ Ibid 15.

²⁰ Ibid.

²¹ Ibid 14.

²² See *Agreement on Sanitary and Phytosanitary Measures (SPS)* Article 9.1, and *Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS)* Article 67.

²³ Michalopoulos, 'Role of Special and Differential Treatment', above n 8, 14.

²⁴ Ibid 15.

countries. Moreover, there are additional references to the Least-Developed Countries, which, for example, benefit from longer transition periods in the implementation of certain agreements such as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). While much has been made of the increasing participation of developing countries in the UR agreements on the same basis as other Members, the UR agreements are replete with S&D provisions.²⁵

1.2.1. The Issue of Special and Differential Treatment for Developing Countries

The current situation of most developing countries, of under development and limited political and economic credentials, finds its roots in modern history in the colonial era. Many of these countries were colonies of the major colonial powers for a long period, creating a second-class group of countries that continues to exist today. During the colonial era, these countries never used to have an influence over the world's issues, or their own issues for that matter, and this situation created an ideology that continues to this day in politically limiting the decision-making process in the world to a group of countries that used to be colonial powers. The limited economies of developing countries result from a number of factors: as residue from the colonial era under which the economy of many colonies was used to service the economy of the colonial powers, geographic elements such as the lack of natural resources or isolation, or ongoing economic mismanagement and corruption.

Apart from the historical legacy of colonial economic exploitation, the difficulties developing countries are currently facing are self-inflicted in many cases. Dictatorships and government corruption are two of the most common elements that give rise to social, political and economic problems in countries that otherwise have great potential. This situation prompts the question: why do we have to provide special and differential treatment to countries that create their own misery?

²⁵A *Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements*, Legal Instruments and Ministerial Decisions, GATT 1994, COM.TD/510, Geneva. Examples of these S&D provisions exist in Article 15 of the Agreement on Anti-dumping, Article 27 of the Agreement on Subsidies and Countervailing Measures, and Articles 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8 and 24 of the DSU.

Regardless of the factors behind developing countries' development issues and limited economic abilities, the aim of the WTO multilateral trading system is to integrate as many economies in the world as possible and to create world-scale trade collaboration under one principle of free trade in a way that is beneficial to all participating countries. The limits on developing countries' economies mean that they cannot compete with other more established economies unless some sort of special treatment is offered to make up for their disadvantageous position. Without special treatment, developing countries would find themselves in unbeneficial multilateral trading arrangements and would return to unilateral trade policies. Therefore, offering special and differential treatment for developing countries is an essential part of the WTO aim of achieving more integration into the system.

In the context of the dispute settlement system, it is important to have equal standing between countries and an equal opportunity for them to make claims of unlawful trade practices in order to maintain the integrity and credibility of the system. It is no secret that developing countries do not always have the financial and legal resources sufficient to employ the dispute settlement system effectively. This puts developed countries in an advantageous position and gives them more chances to secure a preferential outcome. Therefore, to provide equal opportunity for all countries, it is important to provide special and differential treatment for developing countries to limit the gap in resources between the two groups of countries.

1.2.2. Dispute Settlement and the Integration of Developing Countries into the System: Establishing the Link

Although many international treaties do not have a dispute settlement mechanism providing automatic access to adjudication or arbitration, there has always been a need to have an effective and compulsory dispute settlement system in the WTO multilateral trading system. This need comes from the nature of international trade relations, and the trading countries' desire to ensure the protection of their rights in the multilateral trading system.

For developing countries, however, an effective dispute settlement system does not only have to be available to enforce the multilateral trading agreements and keep the balance of rights and obligations, it also has to be able to differentiate effectively between developing countries and developed countries. Unlike developed countries, most developing countries do not have the economic or political power to supplement their recourse to dispute settlement, which makes such a system the one and only option available for them to protect their trading rights. However, developing countries' lack of resources makes this option even harder to achieve. Therefore, it is only sensible that an effective dispute settlement system would address and deal with such difficulties in a way that would close the gap between developing countries' ability to participate in the dispute settlement system and that of developed countries, and create an equally accessible system.

Developing countries will have greater confidence when they believe that the multilateral trading system is supported by a dispute settlement system that provides them with the measures to overcome any obstacles that might affect equal standing between them and developed countries. Developing countries' confidence that their rights are protected and enforced effectively would lead to a greater confidence in the multilateral trading system itself, which would overcome one of the main obstacles of integration: the lack of trust that resulted from years of neglecting developing countries' interests during the GATT years.

1.2.3. The Dispute Settlement Understanding as a Tool for Achieving a Better Integration of Developing Countries into the WTO

The Understanding on Rules and Procedures Governing the Settlement of Disputes or the so-called Dispute Settlement Understanding (DSU) has been the flagship of the WTO. In fact, an effective dispute settlement system and its potential benefits for developing countries were one of the main persuasive factors for several of these countries to agree to the UR agreements.²⁶

²⁶ C Raghavan, 'The WTO and its Dispute Settlement System: Tilting the Balance Against the South', (Trade and Development Series No. 9, The Third World Network, 2000), 1.

The DSU followed a similar mechanism to the other UR agreements in addressing the need of developing countries for special and differential treatment. It adopts the principle of fewer obligations or differing rules as well as more flexibility in dealing with disputes involving developing country Members. The new dispute settlement system was considered a significant positive for developing countries interests in the WTO system.²⁷ Its mechanism, compared to the GATT system, is much more legalistic, time-bound, predictable, consistent and binding in nature. The provisions of appeal, negative consensus and cross-retaliation are some of the major improvements over the old system. In other words, it is based on an 'adjudicatory' model, unlike the negotiatory model of the past.

One could argue that developing countries have not been able to reap fully the benefits of the dispute settlement procedures of the WTO. Some empirical studies of its operation suggest that developing countries also face difficulties in asserting their rights under the new system. The legalised dispute settlement system of the WTO has been hailed as a new development in international economic relations in which law, more than power, might reign. Hudec, who prepared a detailed statistical analysis of all GATT dispute settlement cases between 1948 and 1989, concluded that the quantitative analysis of individual country performance makes it clear that the GATT dispute settlement system was, at the margin, more responsive to the interests of the strong than to the interests of the weak.²⁸ The evidence for this hypothesis occurs in all phases of performance: in the rates of success as complainants, in the rates of non-compliance as defendants, in the quality of the outcomes achieved and in the extent to which complainants are able to carry complaints forward to a decision.²⁹ Hudec addresses as the most important finding in this regard the very substantial difference in the rates of withdrawal before a ruling is made, suggesting that the weaker countries encountered significantly greater barriers at the outset of the process.³⁰

However, even though the rule-based dispute settlement system of the WTO promised results that were more even-handed, some studies suggest that developing countries

²⁷ Ibid 4.

²⁸ Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1990) 353.

²⁹ Ibid.

³⁰ Ibid.

also face difficulties in asserting their rights under the new system. Busch and Reinhardt conclude from a statistical analysis of the operation of the DSU during the first five years that developing countries encountered even greater difficulties in bringing complaints under the WTO than under the GATT. Their explanation to this hypothesis is that:

By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews and compensation arbitration; by judicialising proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential of two years to the defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing developing countries contemplating litigation.³¹

One may argue that the DSU evidently represents a shift towards a rule-oriented, legalistic and adjudicative approach, which would enhance that status of and confidence in the WTO dispute settlement system. The approach is likely to insure greater stability and predictability in the system by encouraging precise decisions on the merits of disputes and discouraging infractions.³² Its greater transparency and binding effect will serve as a powerful disincentive to those Members who have a propensity to favour unilateral measures to solve international trade disputes. This is particularly beneficial for developing countries that sought and fought for a fairer, equitable and just system that recognises their disadvantaged position compared with the greater bargaining and retaliatory power of developed countries.³³

In addition, the greater complexity of panel findings is a result of the fact that the new system has overcome the narrowness of the old system, which focused solely on disputes over trade in goods and thus impeded its ability to respond to various other aspects of contemporary international trade. The new system deals with disputes over nearly every trade and trade-related aspect.

³¹ Marc Busch and Eric Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', (Paper presented at the University of Minnesota Law School Conference on the Political Economy of International Trade Law, 15–16 September, 2000) 13–14.

³² Alban Freneau, *WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective* (LLM thesis, Manchester University, 2001) 22.

³³ *Ibid.*

Other studies that focused on developing countries' participation in the dispute settlement system stated that developing countries' relative participation in the international trade dispute settlement system in complaints against developed countries has declined since the advent of the WTO compared to their relative participation under the less-legalised GATT.³⁴ As Reinhardt has documented, developing countries 'are one-third less likely to file complaints against developed states under the WTO than they were under the post-1989 GATT regime'.³⁵ In contrast, the fraction of cases targeting developing countries has risen dramatically, from 19 to 33 per cent, suggesting that a developing country is up to five times more likely to be subject to a complaint under the WTO.³⁶ Another study by Hoekman and Kostecki confirms that under the WTO, the developing country share in terms of being a defendant rose to 37 per cent compared to only eight per cent of all cases brought during the GATT years.³⁷

In this context, Michalopoulos argues that the broad picture of developing countries' participation hides other less positive features.³⁸ He has shown that over the first three years and four months of operations, the DSU witnessed a three-fold increase in the number of complaints brought against developing countries when compared to the period 1980–1994.³⁹ Further, he notes, the percentage of cases brought by developing countries against others has remained static, replicating the rate set in the last 14 years of the GATT's reign. When taken together, the increase in activity by developing countries in the DSU begins to look less impressive.⁴⁰

One may argue that for countries to be in a defendant position or in a complainant, one depends on the interaction of interests in international trade relations. Further, it can be seen that the reason developing countries are in the defendant position more often times than the complainants' is because other countries found greater interest in targeting certain developing countries in trade disputes than developing countries

³⁴ Busch and Reinhardt, 'Testing International Trade Law', above n 31, 13.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2nd ed, 2002) 394–395.

³⁸ Constantine Michalopoulos, *Developing Countries in the WTO* (2001) 167.

³⁹ Ibid.

⁴⁰ Ibid.

found in initiating any trade disputes. However, developing countries being defendants more than being complainants is not the main point that the studies above are arguing. These studies argue that the impression of an active participation of developing countries in the dispute settlement system of the WTO is hiding behind the fact that, as Michalopoulos states, there has been an increase in disputes targeting developing countries as defendants, not because of more participation of developing and least-developed countries as complainants.

However, the added legal complexity of the WTO dispute settlement system and the level of developing countries' participation in the system are consequences of the problem rather than causes. Examining the effectiveness of the DSU in providing a satisfactory dispute settlement system for developing countries should focus on developing countries' lack of financial, institutional and legal resources necessary to deal effectively with a complex dispute settlement system. This disadvantage is the real reason that issues such as the complexity of the system, high cost or length of the process are considered to contribute to a low level of participation by developing countries.⁴¹ If developing countries had the financial and institutional arrangements to deal with a resource-exhausting process of dispute settlement, and the legal expertise to use the WTO law effectively, then there would be hardly any issue affecting developing countries' participation. Therefore, the system's ability or willingness to account for this disadvantage and deal with it efficiently is the factor to acknowledge in considering the effectiveness of the WTO dispute settlement system in relation to developing countries' participation.

This thesis discusses the problematic issues that developing countries deal with in their participation in the WTO dispute settlement system, and the continuing absence of effective measures to limit the restrictive role of their lack of financial and institutional resources. It reflects on this discussion to argue that the system provides a biased structure against developing countries' interests, and that the dispute settlement system fails to produce equal standing between developing and developed countries,

⁴¹ The effect of developing countries' lack of financial, institutional and legal resources on their participation in the dispute settlement system is discussed in Chapter Three of the thesis.

and instead provides an environment that allows developing countries' weaknesses to affect the efficiency of their participation.

The importance of this study stems from three important considerations. First, it focuses on the DSU, which has often been praised as the 'crown jewel' of the UR agreements for offering greater stability and predictability in the system.⁴² Therefore, this thesis addresses some emerging issues in relation to developing countries' participation in the dispute settlement system under the WTO and the effect of special and differential treatment in the system on this participation.

Second, since the introduction of the DSU, there have been no real changes in the dispute settlement system despite subsequent Ministerial Conferences of the WTO and continuing negotiations on possible reforms. Therefore, this thesis presents a strong case for the need to undertake some changes, and introduces possible solutions to a number of problematic issues, especially in the context of developing countries' participation in the dispute settlement system.

Third, by focusing on the developing countries, this thesis draws attention to the significance that developing countries have in the present world. This importance results from the fact that developing countries represent the majority of representatives in the WTO, and in many other organisations and agreements. Issues concerning developing countries have started to receive more attention from developed countries in recent decades, and that underlines the need for more understanding and recognition of their trade concerns and interests.

1.3. The Methodology of the Thesis and the Definition of 'Developing Countries' Concept

Other than the expressly mentioned list of least-developed countries (LDCs) of the United Nations (UN),⁴³ the definition of developing countries varies depending on the

⁴² H Hauser and Thomas Zimmermann, 'The Challenge of Reforming the WTO Dispute Settlement Understanding' (2003) 38(5) *Review of European Economic Policy* 241, 241.

⁴³ The list is available at <<http://www.un.org/special-rep/ohrlls/ohrlls/allcountries.pdf>> (22 July 2010).

context in which that term is employed. The classification of countries by the World Bank, for example, is based on the gross national income (GNI) per capita, which classifies countries with low-income and middle-income as developing countries and countries with high-income as developed countries.⁴⁴ Conversely, the WTO does not have definitions of developed and developing countries. Members announce for themselves whether they are ‘developed’ or ‘developing’ countries.⁴⁵

As a result, one can imagine the great differences among the countries commonly referred to as developing countries. These great differences are reflected in John Jackson’s description of developing countries:

They include the poorest of the poor nations as well as the so-called newly industrialised countries, they include dictatorships and democracies, state-run economies and free-market economies, and they vary politically from one end of the spectrum to the other. There are nonetheless many issues on which developing countries seem to take a common position and they often refer to themselves as part of the same group.⁴⁶

The self-selection practice is a major loophole in the WTO system, considering that the WTO Committee on Trade and Development that has the statutory right to consider the issue has not been called to act, possibly because it would have to proceed on the consensus basis, leaving Members the possibility of disregarding a Member’s claim of developing country status.⁴⁷ The lack of WTO discipline on the issue has encouraged several countries that are not members of the Group of 77, especially among the emerging economies or economies in transition, to claim repeatedly in their WTO accession negotiations to be entitled to a developing country status, which ultimately allowed China to access the WTO as a socialist developing country.⁴⁸

⁴⁴ For more information, visit the World Bank website <<http://data.worldbank.org/about/country-classifications>> (22 July 2010).

⁴⁵ *Definition of a ‘Developing Country’ in the WTO* (22 July 2010) WTO Website <http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm>.

⁴⁶ Jackson, *International Economic Relations*, above n 3, 1167.

⁴⁷ Hector Smitmans, ‘Unresolved Issues in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)’ in Dencho Georgiev and Kim Van Borch (eds), *Reform and Development of the WTO dispute Settlement System* (2006) 247, 251.

⁴⁸ *Ibid* 252.

The terms of accession negotiations in pursuance of Article XII⁴⁹ of the Marrakesh Agreement⁵⁰ do not deal with the implications that might result from the self-selection practice in relation to procedures such as the invocation of the DSU and the utilisation of the special procedures for developing countries established in the DSU.⁵¹ Consequently, under the current system, newly industrialised developing countries with a considerable market power and share in international trade, such as China, India and Brazil, are subjected to the same special treatment rules in the dispute settlement system applied to small developing countries with clear economic disadvantage and limited market power, such as Sri Lanka or Tanzania. These newly industrialised developing countries are also considered more eligible to those special rules than developed countries like New Zealand despite the economic leverage of the first.

To limit a controversial utilisation of the self-selection practice, a distinguishing procedure could be applied, where the eligibility of WTO Members for the developing country status would be decided on the percentage of Members' share in international trade.⁵² For instance, a Member would have the right to be considered a developing country if its share of total world trade is below 0.1 per cent. Such a procedure would limit the developing country status to Members that satisfy the general impression implied by the status of countries with limited economic resources and market power.⁵³

This thesis recognises the fact that the developing country status as a concept has existed before and regardless of WTO Members' accessions. In this regard, the special treatment rules in the DSU and other covered WTO agreements imply that the developing country concept in the WTO refers to a group of countries that are generally in a less advantageous position in the system than other countries. The

⁴⁹ Article XII of the Marrakesh Agreement covers the accession of states or separate customs territories possessing full autonomy in the conduct of external commercial relations to the Agreement. The decision on accession is taken by the Ministerial Conference of the World Trade Organisation (WTO) on a two-thirds majority basis of the WTO members.

⁵⁰ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, (entered into force 1 January 1995) (Marrakesh Agreement).

⁵¹ Smitmans, above n 47, 252.

⁵² Ibid.

⁵³ Ibid.

thesis draws on this understanding of developing countries' position in analysing their issues in the dispute settlement system, as it focuses on dealing with a concept recognised in the WTO dispute settlement system, rather than eligibility to be included under that concept.

This thesis focuses on developing countries' perspective in relation to Members' participation in the WTO dispute settlement system. In doing so, it examines the provisions of the DSU in general, as well as specific articles addressing developing countries' participation in the system. The thesis also discusses some of the most important issues that affect developing countries' participation in the system, and develops an argument on whether the new system of dispute settlement under the WTO has succeeded to offer the best approach for developing countries to settle their trade disputes, giving them an effective special and differential treatment and a fair opportunity to claim their rights under the WTO agreements. The thesis incorporates possible changes and some relevant proposals presented through WTO negotiations on reforms in the system in an explanatory model of a reformed DSU that reflects many of developing countries' concerns in the dispute settlement system, and helps provide an understanding on future modifications that could be carried on the current DSU.

1.4. The Organisation of the Thesis

The contents of this thesis have been divided into six chapters. The next five chapters will be organised as described below.

Chapter 2 discusses the dispute settlement system under GATT. More precisely, this chapter examines the legal basis provided in the General Agreement for the settlement of international trade disputes, or what is referred to as the 'nullification or impairment' clause. It also addresses the structure and function of the GATT dispute settlement system as created in 1947. It then evaluates the development of the system discussing changes in the procedures and what accompanied them of defects that affected the system's role. Developing countries' participation in the GATT dispute settlement system constitutes an important part in this chapter. It addresses the main

issues that affected developing countries' participation in the system and how the system dealt with these issues. Discussing the defects of the GATT dispute settlement system in relation to developing countries' participation serves the overall argument of the thesis, as it demonstrates that the continuation of many of these defects through the current system supports the argument of bias and dysfunction of the WTO dispute settlement system against developing countries' participation.

Chapter 3 addresses the changes and improvements in the WTO DSU, such as the rule-orientation and strong judicial character, and the impact these changes presented on the new dispute settlement system. This chapter then discusses the situation of developing countries in the WTO system of dispute settlement. This discussion focuses on some of the issues developing countries face throughout the dispute settlement process, which involves the initiation of disputes, the consultation and litigation stages and finally the implementation stage. In this analysis, issues such as developing countries' lack of resources, the complexity of the dispute settlement process and the system's remedies, to mention a few, are discussed in detail to provide an understanding on the circumstances that affect developing countries' participation in the system. This chapter continues the approach followed in Chapter 2 to build an argument that highlights the problematic issues of developing countries' participation in the system, which in turn consolidates the overall argument of the thesis of the existence of an unfair and inefficient dispute settlement system from the perspective of developing countries that is in need of reform.

Chapter 4 addresses the special and differential treatment provided for developing countries under the DSU. This includes an outline of S&D provisions that exist in the consultation stage, the litigation stage and the implementation stage along with the 1966 Decision on special dispute settlement procedures for developing countries. Chapter 4 then provides a critical analysis of the special and differential treatment provisions under the DSU. It discusses the shortcomings of the language or wording of DSU provisions on S&D treatment, and the issues related to the application of these provisions on developing countries. This chapter has a great significance for the thesis' argument because it highlights the inefficiency of procedures provided by the system to limit the effect of the issues discussed in the previous chapters, and their

lack of meaningful impact on the actual restrictive circumstances that limit developing countries' participation.

Chapter 5 discusses the reform aspects of the WTO dispute settlement system. It addresses generally the reviews and reforms that have been taking place since the establishment of the WTO system in relation to dispute settlement. It emphasises the WTO Ministerial Negotiations of the Doha Round in 2001 as a turning point in negotiations regarding the modification and improvement of the WTO dispute settlement system, and divides these negotiations into pre-Doha negotiations and post-Doha negotiations.

Chapter 5 then focuses on reforming and improving the WTO dispute settlement system in relation to developing countries' participation issues. In doing so, it addresses the great role that the dispute settlement remedies play in relation to developing countries' problems, prompting the need to make them the main focus of possible reform. In this regard, this chapter critically discusses the current procedures on trade compensation and suspension of concessions, and highlights the shortcomings of such procedures generally and in relation to developing countries. It also analyses some concepts that have been proposed by a number of Members, such as mandatory trade compensation, monetary compensation, collective retaliation, punitive retaliation and retroactive remedies. Chapter 5 also suggests steps to deal with developing countries' challenges in the WTO dispute settlement system other than involving changes in the system. In this context, it discusses issues such as public-private collaboration in the WTO litigation, cost-effective legal resources and countering developed-countries' bilateral pressure and presents them as possible arrangements that could be developed to facilitate developing countries' participation in the WTO dispute settlement system. Providing alternatives to the current problematic remedies and highlighting the efficiency of some these alternatives in providing a workable system of remedies that suits the circumstances of developing countries support the direction of the thesis' argument. It raises the notion that the system's insistence on the current remedies, despite their proven defects against developing countries, and its hesitance to adopt more appropriate procedures, is a demonstration of the system's dysfunctional biases.

Chapter 6 is based on the recommendations made and conclusions drawn from the overall findings of the thesis. In this context, Chapter 6 uses the problematic issues of developing countries in the system, and the possible changes discussed in the thesis, to introduce an example of a model for a new developing country-friendly DSU. The DSU model in Chapter 6 is not intended to be a proposal of a new comprehensive DSU, it is only meant to serve as an illustration of how some issues of concern to developing countries could be addressed in any future modifications to the current DSU. This model is expected to serve as a guide for trade strategists, policy initiators and ministerial negotiators engaged in augmenting multilateral trade liberalisation under the WTO.

Chapter 2: The Dispute Settlement System under GATT

2.1. Introduction

The GATT dispute settlement procedures evolved from minimal treaty clauses, hampered by the ‘birth defects’ of GATT, into a sophisticated system that has a significant and varied influence on the overall effectiveness of the implementation of the GATT regime. The gradual development of the GATT dispute settlement system has been important in shaping the current WTO dispute settlement system, as many of its procedures were carried over to the new system. It is therefore important for a study that focuses on developing countries’ participation in the WTO dispute settlement system to address the evolution of the GATT dispute settlement system that shaped the current system. Many of the issues that currently relate to developing countries’ participation in the WTO dispute settlement system existed during the GATT years. Therefore, addressing a continuity of over six decades with some of these issues is relevant to the thesis’ overall argument of biases against developing countries in the structure and function of the WTO dispute settlement system and the urgent need for reform.

The need to begin a study dedicated to developing countries in the WTO dispute settlement system with an understanding of the GATT dispute settlement system is reasoned by Bhala as a matter of chronology, as the GATT, which entered into force in 1948, preceded the WTO, which entered into force in 1995.¹ More importantly, the GATT dispute settlement system is the corner stone of the current WTO dispute settlement system.² To proceed to the WTO dispute settlement system without covering the GATT’s ‘seems akin to running before walking’.³

This chapter seeks to provide an understanding on the structure and function of the GATT dispute settlement system as well as its main defects that affected its efficiency

¹ Raj Bhala, *Trade, Development, and Social Justice* (2003) 180.

² Ibid.

³ Ibid.

to show how the WTO dispute settlement system dealt with these defects. It focuses on developing countries' participation in the system and how its structure, mechanism and defects affected this participation.

2.2. The Creation of GATT

Establishing a form of post-war international economic order emerged as a substantial issue during and immediately after World War II (WWII). One of the motivations was the overwhelming concern to avoid a repeat of the circumstances that affected international economic relations during the inter-war period, which included a sharp increase in trade barriers and other import duties.⁴ The need for a new economic order was behind the establishment of the Bretton Woods Conference of 1944, which was devoted to monetary and banking issues. It established the charters of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank). However, there was a need for a comparable institution for trade to complement the monetary institutions.⁵ For developing countries, this need was perceived to be for the developed countries' self-interest in opening new markets for their manufactured goods and securing supplies of raw materials.⁶ Developing countries' distrust towards developed countries was a form of resentment for the colonial era that just started to diminish around that time.⁷

Negotiations began in 1946 to create an International Trade Organization (ITO). The United States (US) suggested multilateral negotiations on tariff reductions to be conducted alongside, but independent of, the ITO negotiations.⁸ The Geneva Conference in 1947 on tariff cuts started an elaborate undertaking in three parts. The first part was to continue the preparation of an institution for the ITO. The Conference dealt in its second part with negotiations for reciprocal tariff reductions under a multilateral agreement, and the drafting of the general clauses of obligations in

⁴ G Lanjouw, *International Trade Institutions* (1995) 2.

⁵ John Jackson, *Restructuring the GATT System* (1990) 10.

⁶ James Scott, 'Developing Countries in the ITO and GATT Negotiations' (Working Paper No 95, Brooks World Poverty Institute, 2009) 10.

⁷ Ibid, 11.

⁸ Raj Bhala, *International Trade Law: Theory and Practice* (2nd ed, 2001) 127.

relation to tariff reductions constituted the third part of the Conference. The latter two parts of the Conference later emerged to constitute the GATT.⁹

The GATT (with 23 contracting parties of which 11 were developing countries) was completed in 1947, before the ITO Charter to which it was to be subordinated. The legal basis for the provisional application of the GATT was the ‘Geneva Final Act’,¹⁰ which also included the ‘Protocol of Provisional Application’, which became the basis for GATT’s application throughout the GATT years. On 30 October 1947, the Contracting Parties approved the GATT on a provisional basis; it was formally called ‘the Protocol of Provisional Application of the General Agreement on Tariffs and Trade’. It entered into force on 1 January 1948.¹¹ Developing countries entered GATT negotiations with inward-oriented development strategies, which implied that there was little to gain from export, and little to lose from excluding imports.¹² As a result, their focus was to achieve an import substitution strategy and a special and differential treatment (SDT) to avoid reciprocal trade commitments.¹³ The GATT excluded many of the products of most export interest to developing countries (namely agriculture and textiles), and failed to address their demand for SDT.¹⁴ The only Article that released them from obligations was Article XVIII on ‘Governmental Assistance to Economic Development and Reconstruction’, which was afforded, alongside developing countries, to countries undergoing post-war reconstruction.¹⁵

In 1948, negotiations among 56 countries, of which 30 were developing countries, on an ITO led to the adoption of the Havana Charter,¹⁶ which was intended to establish the ITO once it entered into force. Initially, developing countries condemned the draft of the Charter claiming that it did not provide enough grounds for development and

⁹ Jackson, *Restructuring the GATT System*, above n 5, 10.

¹⁰ Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, UN Sales No 1947.II/10; 55 UNTS 187 (1947).

¹¹ Bhala, *International Trade Law*, above n 8, 127–128.

¹² Sheila Page, ‘Developing Countries: Victims or Participants, Their Changing Role in International Negotiations’ (Overseas Development Institute, 2003) 4.

¹³ Scott, above n 6, 1–7.

¹⁴ Page, above n , 4–6.

¹⁵ Ibid.

¹⁶ Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organisation (24 March 1948).

that it was drafted to serve the interests of developed countries.¹⁷ The imposition of direct control on foreign trade was deemed necessary by most developing countries for promoting fast and large-scale industrialisation. Therefore, they viewed the idea of tariffs reduction and easing other trade barriers as a step motivated by developed countries to keep them economically dependent.¹⁸ The limited and advisory role of the proposed ITO in economic development, which left the role of building and developing economic infrastructure to the World Bank, ignored the desperate need of developing countries for such assistance.¹⁹ In addition, the Charter disregarded the need of developing countries to obtain a release of their commitments to protect their economies under some circumstances in their economic development policy. In addition, it did not protect their primary commodities from trade-restraining measures in its discipline on intergovernmental commodity agreements, unlike the case of manufactured commodities that were protected by a prohibition on such measures.²⁰ Nonetheless, all participating developing countries, except for Argentina and Poland, approved the Charter.²¹ The two-track strategy stumbled when the US Congress rejected the Charter, which resulted in the failure to establish the ITO.²²

The absence of the ITO created a major gap for the GATT to fill in the post-war structure of international economic cooperation. It was the most eligible institution in the Bretton Woods system to inherit the ITO domain of dealing with international trade issues. It had to develop its role from a tariff reduction agreement to an international institution for trade cooperation, since other Bretton Woods organisations set their aims on handling the world's monetary issues.²³ However, it was the least likely to succeed among the international organisations established in the immediate post-war years. It lacked an institutional framework, had no provision for a secretariat, and had legal ties to an organisation that failed to materialise.²⁴

¹⁷ T S Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (1999) 1–2.

¹⁸ Ibid 20.

¹⁹ Ibid 21.

²⁰ Ibid 22.

²¹ Bhala, *International Trade Law*, above n 8, 127.

²² Ibid

²³ John Jackson, *The World Trading System* (1989) 37.

²⁴ John Jackson, *The Jurisprudence of GATT and the WTO* (2000) 17–18.

2.3. Dispute Settlement in GATT

The 1948 Havana Charter introduced detailed and rigorous dispute settlement procedures, a clear signal that the ITO was going to adopt an adjudicatory approach to dispute settlement.²⁵ This step was complemented with the use of arbitration and the involvement of the International Court of Justice (ICJ or World Court) in questions of interpretation or even the possibility of acting as an appellate body in some circumstances.²⁶ This procedure finds its match in other founding documents of international institutions, such as the UN Charter, which authorises the ICJ to give an advisory opinion on any legal question upon request from the General Assembly or the Security Council.²⁷ Such an adjudicatory approach would have meant more protection and security for developing countries' interests in the system. Weaker parties were more likely to benefit from a rule-oriented dispute settlement system away from power and political considerations, considering that at the time, many of these countries had just gained their independence from colonialism by powerful developed countries that became their trading partners.

However, the situation was different with the dispute settlement system of the GATT. The temporary function intended for the GATT in 1947 until its placement in the institutional setting of the ITO, did not present a need for a detailed dispute settlement system.²⁸ Therefore, Articles XXII and XXIII evolved in GATT practice as the centrepiece of the GATT dispute settlement system.²⁹ This importance comes with the introduction of the 'nullification or impairment' principle in Article XXIII that constitutes the basis of GATT rule enforcement and dispute settlement mechanisms.³⁰

The 'nullification or impairment' principle, which refers to the damage to a country's benefits and expectations from an arranged agreement through another country's change in its trade regime or failure to carry out its obligation under the agreement,

²⁵ Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) vol 11, 33.

²⁶ Rober Hudec, *The GATT Legal System and World Trade Diplomacy* (2nd ed, 1990) 28.

²⁷ Kenneth Dam, *The GATT: Law and International Economic Organisation* (1970) 351.

²⁸ Petersmann, *International Trade Law*, above n 25, 33.

²⁹ Jackson, *Jurisprudence of GATT*, above n 24, 119.

³⁰ Dam, above n 27, 356.

was initially inspired by the attitudes of countries, especially the US, in their pre-war international trade agreements. The purpose of such a principle was to protect the benefits of reciprocal tariff liberalisation from detrimental non-tariff measures, even if they were not prohibited. The drafters of the General Agreement realised that measures that were not regulated by GATT, such as domestic taxes, subsidies and legitimate public policy regulations, could frustrate the intended effect of tariff concessions.³¹ The drafters also believed in the necessity of establishing a jurisdiction that would be able to deal with economic circumstances and unforeseen situations, such as a worldwide monetary crisis or depression, that might arise in which it would no longer be possible for GATT Contracting Parties to maintain their GATT commitments.³²

The ‘nullification or impairment’ clause was developed during the preparatory work of drafting the Havana Charter.³³ It started as a general dispute settlement procedure in a proposal submitted by the US to accompany the Commercial Policy Chapter of the Havana Charter.³⁴ However, it managed to become a dispute settlement procedure applicable to the other Chapters dealing with Employment Policy, Economic Development, Restrictive Business Practices, and Commodity Agreements.³⁵

Moreover, the scope of the ‘nullification or impairment’ clause was extended in the Havana Charter drafting to provide a formal right to a compensatory adjustment based on a third party determination on the merits of a nullification claim. This step by the Havana Charter’s drafters was a clear indication that they wanted the ITO to use the ‘nullification or impairment’ clause as a tool to exercise legal powers similar to those in common law jurisdictions.³⁶ This step would have been important for developing countries in the system because it would have provided them with the security and protection needed during the highly politically charged post-war era.

³¹ Frieder Roessler, ‘The Concept of Nullification and Impairment in the Legal System of the World Trade Organisation’, in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) vol 11, 126.

³² Ibid 126–127.

³³ Hudec, *GATT Legal System*, above n 26, 37.

³⁴ Ibid 37–38.

³⁵ Ibid.

³⁶ Ibid 37.

However, the ‘nullification or impairment’ clause was not the only component that would constitute the intended ITO dispute settlement system. A reference to the intended role of the ICJ as a body of legal interpretation along with the use of arbitration and a detailed set of procedural provisions for dispute settlement, which were part of the institutional framework of the ITO, represented an overall detailed and sophisticated dispute settlement system as a part of the Havana Charter.³⁷

However, the GATT did not adopt the detailed approach for dispute settlement followed in the Havana Charter, probably due to the anticipated existence of the ITO. Its procedural rules were very limited and Article XXII dealing with consultations and Article XXIII addressing ‘nullification or impairment’ were the only dispute settlement rules in GATT, based on the proposed ITO rules.³⁸ In fact, Articles XXII and XXIII of GATT do not even explicitly mention the words ‘dispute settlement’.³⁹ Article XXII merely represents a call for consultations upon a request from any contracting party to deal with any matter affecting the function of GATT.⁴⁰ Article XXII states:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES⁴¹ may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Paragraph 1 of Article XXII simply requires an opportunity for consultation regarding matters that affect the operation of the Agreement to be afforded by each contracting party to other parties. Paragraph 2 of Article XXII gives, at the request of a contracting party, the authority for a joint act of the Contracting Parties to

³⁷ Petersmann, *International Trade Law*, above n 25, 33. See also, Hudec, *GATT Legal System*, above n 26, 28. See also, Jackson, *Restructuring the GATT*, above n 5, 60. See also, David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organisation: Practice and Procedure* (2nd ed, 2004) 7.

³⁸ Palmeter and Mavroidis, above n 37, 7.

³⁹ Petersmann, *International Trade Law*, above n 25, 33.

⁴⁰ Jackson, *Jurisprudence of GATT*, above n 24, 119.

⁴¹ The ‘CONTRACTING PARTIES’ or ‘Contracting Parties’ is a reference to GATT parties when acting together in a joint action, which differentiates it from the ‘contracting parties’ as a reference to states that are parties to GATT.

consult with other parties on unsolved matters from consultations in Paragraph 1 of Article XXII.⁴² Article XXII represents a simple commitment but at the same time a useful one. It rules out future arguments by contracting parties against consultation on pre-maturity grounds, which means the claim of one party is not ready for discussion with other parties.⁴³ This was of a particular importance for developing countries, considering the role these consultations could play in resolving problematic matters, and finding satisfactory solutions without the need to proceed to a dispute settlement process. The limited legal and financial resources of developing countries meant that finding an early satisfactory solution was a preferred outcome. These consultations became a basis for the generation of GATT's dispute settlement process.

Article XXIII is then considered the centrepiece for dispute settlement. Article XXIII provides:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:
 - (a) the failure of another contracting party to carry out its obligations under this Agreement, or
 - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
 - (c) the existence of any other situation,the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organisation in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider

⁴² Palmeter and Mavroidis, above n 37, 7–8.

⁴³ Jackson, *Restructuring the GATT*, above n 5, 62.

that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.⁴⁴ If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Article XXIII as the core of the GATT dispute settlement introduces the ‘nullification or impairment’ of benefits expected under the GATT or the impediment of any of its objectives as the grounds of complaints in the GATT dispute settlement.⁴⁵ Article XXIII also grants power to the Contracting Parties to investigate any matter referred to them, to make recommendations for the concerned contracting parties, and to give a ruling on the matter.⁴⁶ The Article also gives the Contracting Parties the power to give one party, or more, the authorisation to suspend the application of concessions and obligations under the GATT to any other contracting party or parties in serious cases.⁴⁷

Article XXIII, like most other provisions in GATT, lacked the mechanism to implement these rules, a form of the institutional weakness that started with GATT. This situation pushed the procedures of dispute settlement to evolve and develop over years of practice, a character that most GATT procedures have shared.⁴⁸ As a result, procedural problems, such as the lack of timeframes, which meant the lack of time for the various procedural steps, were one of the main obstacles that affected GATT dispute settlement.⁴⁹ As for developing countries, the lack of timeframes meant that their limited financial resources would definitely be exhausted by a long dispute

⁴⁴ Concessions are tariff reduction commitments that the GATT contracting parties have made under the GATT Agreement. The suspension of concessions involves the imposition of tariff surcharges, which requires an authorisation by the Contracting Parties under which the complainant is allowed to impose countermeasures on a discriminatory basis only against the contracting party that failed to implement. This procedure is informally also called ‘retaliation’.

⁴⁵ Jackson, *Restructuring the GATT*, above n 5, 62.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement of Tariffs and Trade* (2005) 1159.

settlement process, not to mention the lost opportunities that would accompany the wait for an outcome from the dispute, which are deemed critical for small and limited economies of developing countries.

In a step that some could consider rather ambiguous to enforce the rules and protect the rights and obligations of the contracting parties, Article XXIII did not consider the ‘breach’ of the GATT’s legal obligations as the basis of complaints.⁵⁰ Article XXIII introduces the ‘nullification or impairment’ of benefits expected directly or indirectly under the GATT as a ground of invoking its process of dispute settlement.⁵¹ The unusual notions of ‘nullification or impairment’ of benefits expected under the GATT, and the impediment of the attainment of any of the GATT’s objectives, are the focus of Article XXIII of the GATT rather than the traditional legal concepts of ‘legality of the acts’ and ‘state responsibility’ for ‘internationally wrongful acts’.⁵² This meant that trade measures that were consistent with the GATT agreement could have still been subjects to disputes under the ‘nullification or impairment’ principle as a result of their effect on other party’s expectations of its trade under the GATT Agreement.⁵³ This situation was of particular concern for developing countries, which at the time were suffering from balance of payment, infant industry and other economic problems. Their measures to deal with these problems could have been targeted under the GATT dispute settlement system despite their consistency with the GATT Agreement through ‘non-violation’ and ‘situation’ complaints, discussed in the next section.

As a result of making the protection of benefits expected by the Contracting Parties the basis of the GATT dispute settlement, instead of the protection of rule integrity of the GATT, the principle of ‘nullification or impairment’ under Article XXIII considers a violation of the GATT by the party’s failure to carry out its obligation under the Agreement as merely one of three bases of jurisdiction.⁵⁴ Article XXIII considers the application of any measure, whether or not it conflicts with the

⁵⁰ Jackson, *Jurisprudence of GATT*, above n 24, 119.

⁵¹ Jackson, *Restructuring the GATT*, above n 5, 62.

⁵² Petersmann, *International Trade Law*, above n 25, 37.

⁵³ Bhala, *Modern GATT Law*, above n 49, 1151–1154.

⁵⁴ Dam, above n 27, 358.

provisions of the GATT as another accepted basis for complaints.⁵⁵ It also considers ‘the existence of any other situation’ as a ground for ‘nullification or impairment’ complaints, adopting an even more ambiguous and wide-ranging approach for GATT jurisdiction.⁵⁶

However, generally, in the context of international economic relations and international trade law, the focus of dispute settlement procedures is the balance of advantage between the concerned parties rather than determining state responsibility for unlawful acts. Therefore, the GATT’s approach of restoring the balance of advantage and concessions between the parties in dispute rather than penalising a breach of the rules is not in contrast with the practice in international economic relations.⁵⁷

In addition, in international economic law, there is a link between an ‘unlawful act’ and an ‘injury’.⁵⁸ The GATT’s practice is explained in paragraph 5 of the Annex to the 1979 Understanding:⁵⁹ ‘contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired’.⁶⁰ The text then continues: ‘there is normally a presumption that a breach of the rules has an adverse effect on other contracting parties and, in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge’.⁶¹ Further, ‘if a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification’.⁶²

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Oliver Long, *Law and its Limitations in the GATT Multilateral Trade System* (1985) 71.

⁵⁸ Ibid.

⁵⁹ *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT BISD, 26th Supplement, 210 (1979).

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

It is clear from the text above that although Article XXIII does not consider a breach of the rules in itself as a sufficient ground for a dispute in the absence of nullification or impairment of the GATT benefits, it still links it with the detriment of other parties' benefits under the GATT. A breach, when linked to nullification or impairment, is sufficient to establish a dispute, whereas a non-violation complaint needs detailed proof by the complainant to justify the existence of nullification or impairment in the absence of a breach of rules.⁶³ However, would have that made a difference to developing countries that were forced into involvement in a complaints procedure regarding the nullification or impairment of their GATT-consistent trade practices? Placing the burden of proof on the complainant would have still meant that developing countries would invest much-needed resources in a dispute settlement process, when their concerned trade practices were GATT-consistent in the first place.

Along with the 'nullification or impairment' grounds, Article XXIII introduces another ground for complaints (though they were thrown together, in accordance with the title of Article XXIII, under the heading of 'nullification or impairment') when 'the attainment of any objective of the Agreement is being impeded'.⁶⁴ Article XXIII made this ground of complaint a result of the same actions that could lead to the 'nullification or impairment' of benefits and 'violation complaints' as a result of 'the failure of another contracting party to carry out its obligations under the Agreement'.⁶⁵ It also made this ground a result of the same action that could lead to 'non-violation complaints' as a result of 'the application by another contracting party of any measure, whether or not it conflicts with the provisions of the Agreement', and 'situation complaints' as a result of 'the existence of any other situation'.⁶⁶

However, in practice, GATT's Contracting Parties have been using only two grounds for complaints under Article XXIII actively, with more than 90 per cent of complaints under Article XXIII being 'violation complaints' over 'nullification or impairment' of GATT benefits, and most of the rest have been 'non-violation complaints' over

⁶³ Long, above n 57, 76.

⁶⁴ Dam, above n 27, 358.

⁶⁵ Petersmann, *International Trade Law*, above n 25, 36–37.

⁶⁶ *Ibid.*

‘nullification or impairment’ of benefits expected under the GATT.⁶⁷ The focus of the contracting parties (including developing countries) on violation complaints is not surprising, considering the easier task of linking nullification or impairment to rule violation than any other ground, and the fact that grounds that relate to ‘other situation[s]’ were merely included as precautionary grounds in response to possible economic conditions in the aftermath of WWII.⁶⁸

The adoption of the ‘nullification or impairment’ principle was not the only controversial feature of Article XXIII under which developing countries’ in particular were affected; the remedies provided under this Article also had similar effects.

2.3.1. Remedies under Article XXIII of GATT

Regardless of the contracting parties’ attitudes towards the GATT dispute settlement system, whether they leaned towards power-oriented approaches (the European Community [EC]),⁶⁹ or towards rule-oriented approaches (the US and developing countries),⁷⁰ the inclusion of remedies in the GATT dispute settlement system was important for the enforcement of its legal rules. Remedies under the GATT dispute settlement system were meant to provide the contracting parties with security and protection for their interests and benefits under the system, and ensure the maintenance of its balance of rights and obligations. The importance of remedies takes a new dimension with developing countries, as they need a tool to protect their interests in the absence of other means, such as political and economic power. Therefore, remedies under the GATT dispute settlement system had a decided influence on developing countries’ participation in the system.

The GATT dispute settlement system consisted of a number of stages, both formal and informal, though not all of the stages would be used in every dispute as a

⁶⁷ Ibid 37.

⁶⁸ Bhala, *Modern GATT Law*, above n 49, 1154.

⁶⁹ Meinhardt Hilf, ‘Settlement of Disputes in International Economic Organisations’ in Ernst-Ulrich Petersmann (ed), *The New GATT Round of Multilateral Trade Negotiations* (1988) vol 5, 290. See also, Marc Maresceau, ‘The GATT in the Case-Law of the European Court of Justice’ in Meinhardt Hilf, Francis Jacobs and Ernst-Ulrich Petersmann (eds), *The European Community and the GATT* (1986) 107.

⁷⁰ Hilf, ‘Settlement of Disputes’, above n 69, 294–295, 297.

settlement could be negotiated at any point.⁷¹ The first stage was the informal bilateral consultations under Article XXII:1 under which the respondent is obligated to ‘sympathetically’ consider the consultation request.⁷² The second stage was the informal multilateral consultations under Article XXII:2 to increase the chances of a solution and place the respondent under pressure to negotiate a solution.⁷³ This stage was followed by more formal bilateral consultations under the dispute settlement procedures of Article XXIII. Then, a panel request made pursuant to Article XXIII:2 by the complainant.⁷⁴ This procedure was followed by panel formation, oral and written submissions, panel deliberations and report, and submission of the report to the GATT Council for adoption.⁷⁵ After these stages, the compliance stage was where the respondent was supposed to comply with the recommendations of the adopted report, which was followed by compensation or retaliation procedures if the respondent failed to comply with the adopted panel report.⁷⁶

Article XXIII of GATT provides for three kinds of remedies. The first is the power of the Contracting Parties to make ‘appropriate recommendations’ for the concerned contracting parties. These recommendations have a non-binding character, and must be consistent with the GATT law and the applicable general international law in order to be considered ‘appropriate’.⁷⁷ In this context, the GATT law conforms to the general principle of international law that the defaulting country takes the responsibility of any breach of an obligation by bearing secondary obligations as a consequence of its wrongful acts.⁷⁸ However, the GATT does not define the legal responsibilities of a contracting party that has breached its obligations.⁷⁹ This makes some remedies in relation to internationally wrongful acts that are recognised under

⁷¹ Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (3rd ed, 2008) 145.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Since 1952, the formation of panels (composed of three to five members depending on the case) has become the usual procedure in examining disputes. Before that, working parties composed of officials of contracting parties were responsible for the procedure.

⁷⁵ Bhala, *International Trade Law: Interdisciplinary Theory*, above n 71, 145–146. The GATT Council consisted of the Contracting Parties acting in a joint action, which was based on consensus decision-making.

⁷⁶ Bhala, *International Trade Law: Interdisciplinary Theory*, above n 71, 146.

⁷⁷ Petersmann, *International Trade Law*, above n 25, 39–40.

⁷⁸ Ibid 40.

⁷⁹ Ibid.

general international law inapplicable in the context of the GATT and WTO law unless that law provides otherwise.⁸⁰

Contracting Parties' recommendations may require the cessation of illegal measures or a justification through the invocation of one of the GATT's safeguard clauses.⁸¹ These actions, which conform to the general principles of international law of performing international treaties in good faith and the withdrawal of illegal measures, have long been named the first objective of the GATT dispute settlement process.⁸²

Another form of reparations that deals with internationally wrongful acts in general international law is 'restitution in kind'. This means demanding the re-establishment of the situation that would have existed in the absence of the illegal act.⁸³ However, the practice in GATT dispute settlement shows that there have only been requests for the cessation or withdrawal of the illegal act.⁸⁴ The reason behind this practice is the fact that it is very difficult to recreate the trade opportunities or to calculate the lost trade volumes.⁸⁵ Recommendations of 'restitution in kind' have been only used in GATT dispute settlement in the field of anti-dumping and countervailing duty law, where GATT practice recommended on some occasions the withdrawal of illegal anti-dumping or countervailing duties as well as their reimbursement.⁸⁶ As will be discussed in Chapters 3 and 5, having prospective remedies is not in the interest of developing countries, as the effect of losses resulting from violating trade practices on their limited economies is greater than that on developed countries' larger and more versatile economies. Therefore, ignoring these losses, even if the violating measure is ceased, would bear a particular negative impact on developing countries.

⁸⁰ Ibid.

⁸¹ 'External financial position' limitations and 'balance of payments' restrictions in Article XII of the GATT Agreement were some of the common safeguards in the system, which permit contracting parties to institute, maintain, or intensify import restrictions.

⁸² Petersmann, *International Trade Law*, above n 25, 40–41.

⁸³ Ibid 42.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

General international law also adopts compensation as another action to be recommended to deal with internationally wrongful acts.⁸⁷ This remedy refers to monetary or other compensatory trade benefits for the complaining party. However, in GATT practice, it was long recognised under GATT law that compensation is voluntary, and the Contracting Parties were not authorised by Article XXIII to make legally binding recommendations on compensation.⁸⁸ Again, as will be discussed in Chapters 3 and 5, the voluntary nature of compensation was not to the advantage of developing countries. Unlike powerful developed countries, developing countries lack resources or economic and political power to push for the cessation of violating measures, whether through formal dispute settlement process or negotiations, which present compensation as a much-needed remedy to limit the negative effects of violating measures on their economies. The introduction of compensation on a voluntary basis reduces the chances of developing countries obtaining such an arrangement and leaves them with a possible continuation of violating measures for considerable periods.

The second remedy that Article XXIII provides is the power of the Contracting Parties to give a legally binding ‘ruling on the matter’. In this context, the Contracting Parties have the power to decide on the interpretation and application of relevant GATT provisions in order to determine how consistent the disputed trade measures are with GATT law. If a violation of GATT law has been found, this remedy would then include the power to determine the legal responsibilities and the secondary obligations of the defaulting contracting party.⁸⁹ This remedy is of particular importance to developing countries because they benefit from a legally binding ruling from a neutral third party. The significance of this comes from the dynamics of relations between strong and weak parties, as the neutral third party ostensibly gives both parties a similar standing based on the rule of the law and regardless of their respective powers.

The last resort that Article XXIII provides to the country invoking the dispute settlement procedure is the possibility of an authorisation by the Contracting Parties to suspend the application of concessions or the obligations under GATT to the

⁸⁷ Ibid 44.

⁸⁸ Ibid.

⁸⁹ Ibid 39.

offending contracting party or parties on a discriminatory basis. One of the principles of general international law, which was codified in Article 60 of the *Vienna Convention on the Law of Treaties*,⁹⁰ entitles other contracting parties in the case of a material breach of a multilateral treaty to suspend, wholly or partly, the application of the treaty to the offending country.⁹¹ However, GATT practice seeks to limit the right of unilateral actions.⁹² Article XXIII excludes the right of unilateral suspension of GATT obligations unless such action was authorised by the Contracting Parties.⁹³ In fact, even in the single case of GATT history that the authorisation was made by the Contracting Parties for the Netherlands to suspend its concessions and obligations to the US in 1952, the authorisation was not aimed at full reciprocity or withdrawal of substantial concessions.⁹⁴ It was limited to what was considered appropriate by the Contracting Parties to achieve the removal of the illegal US restrictions. However, the Netherlands never made full use of the authorised suspension.⁹⁵

The system of sanctions in GATT does not only affect the form of the dispute settlement process, but also affects attitudes towards violation of GATT by the contracting parties.⁹⁶ Although GATT managed to use prohibiting language in its substantive provisions, it failed to introduce illegality as a certain and clear concept when it did not draw its remedy provisions in terms of sanctions.⁹⁷

Instead, the GATT system is a balance of reciprocal rights and obligations. A failure to respect the system's balance of rights and obligations is not regarded under its sanctions system as a violation of the law to be punished, but rather as an event in which the affected party may be granted the approval by the Contracting Parties to have a privilege of suspending reciprocal concessions.⁹⁸ The suspension of concessions to the offending contracting party or parties under the GATT does not necessarily accord any comparable benefits to the injured contracting party, and could

⁹⁰ *The Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UNTS vol 1155, art (60) 331 (entered into force 27 January 1980).

⁹¹ *Ibid.*

⁹² Petersmann, *International Trade Law*, above n 25, 45–46.

⁹³ *Ibid.*

⁹⁴ Hudec, *GATT Legal System*, above n 26, 165–184.

⁹⁵ *Ibid.*

⁹⁶ Dam, above n 27, 352.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

be a mutually welfare-reducing procedure.⁹⁹ This could have more negative consequences on the economies of developing countries in particular as a result of their generally smaller and more limited economies.

The fact that the most the Contracting Parties can do in case of violation of the GATT rules is merely authorise such suspension clearly indicates the limited role accorded to sanctions in Article XXIII to protect the balance of the GATT's rights and obligations and to promote respect for the rules of the General Agreement.¹⁰⁰ This approach contrasts with what has been followed in other international institutions, such as the UN, to promote respect and abidance among Members for their principles. The UN Security Council, for example, has the power to impose sanctions upon Members of the UN if they fail to abide by the rules of the Charter in order to maintain international peace and security, and these sanctions could include the use of force.¹⁰¹ This is notwithstanding, however, that the UN has a unique position in the international context as the ultimate form of cooperation between countries in all fields, which gives it a legal status that no other international organisation body shares.

It must nonetheless be acknowledged that the system of sanctions in the GATT suited and reflected its objectives. The GATT dispute settlement system did not focus on the legality of the contracting parties' actions or on penalising such actions, it only focused on rebalancing the benefits accorded to the contracting parties from the GATT system. Therefore, the suspension of reciprocal concessions seems to serve the objectives of the system in restoring the balance of the system.

In the UN Security Council's case, although the sanctions could be much more punishing and effective in guaranteeing respect and abidance to the principles of the UN Charter, they do work relatively in the same way as the GATT's system of sanctions. Both forms of sanctions are initiated as a result of an action that disturbs the agreed balance of what is deemed acceptable, whether it is the balance of trade concessions and benefits or the balance of an acceptable standard of international

⁹⁹ Ibid 357.

¹⁰⁰ Ibid 352.

¹⁰¹ Ibid. See also, UN Charter, arts 2, 39–51.

peace and security. In addition, both forms of sanctions are used as a pressuring device to restore the disturbed balance, and would cease when the balance is restored.

Article XXII on ‘consultation’ and Article XXIII on the ‘nullification or impairment’ continued to be the only GATT provisions addressing the question of dispute settlement.¹⁰² However, during a period of changes and developments that witnessed signs of the GATT adopting more legalised practices for dispute settlement, and an increasing influence of developing countries in GATT because of their growing membership numbers,¹⁰³ the GATT introduced additions to its rules on dispute settlement. These additions include the 1966 Decision,¹⁰⁴ the 1979 Understanding,¹⁰⁵ the 1982 Declaration,¹⁰⁶ the 1984 Decision¹⁰⁷ and the 1989 Improvements.¹⁰⁸ Developments also evolved through the practice of the GATT dispute settlement system. The fact that the GATT Secretariat started to develop and play a larger role in GATT business further contributed to changes like shifting the responsibility of handling disputes from working parties to panels, and changing panels’ membership from government representatives to individuals acting in their personal capacity. Some of these developments are discussed further later in this chapter.

2.3.2. The Defects of the GATT Dispute Settlement System and Their Effect on the Participation of Developing Countries in the System

In the international context, developing countries were mostly late entrants into a pre-existing international system. As a result, developing countries became ‘rule-takers’ rather than ‘agenda-setters’, which meant that some rules operated in the international setting despite being unfavourable, or even unfair, for the newer entrants of developing countries. The system of weighted voting in the IMF and the World Bank,

¹⁰² Jackson, *Restructuring the GATT*, above n 5, 62

¹⁰³ Petersmann, *International Trade Law*, above n 25, 47.

¹⁰⁴ *The Decision on Procedures under Article XXIII*, GATT BISD, 14th Supplement, 18 (1966).

¹⁰⁵ *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, above n 112.

¹⁰⁶ *Ministerial Declaration of 29 November 1982*, GATT BISD, 29th Supplement, 13 (1982).

¹⁰⁷ *Decision on Dispute Settlement Procedures of 30 November 1984*, GATT BISD, 31st Supplement, 9 (1984).

¹⁰⁸ *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT BISD, 36th Supplement, 61 (1989).

the permanent five Members in the Security Council of the UN, and the global economic management through the G-8 that excludes developing countries are all good examples of how domestic weaknesses of developing countries interacted with their late and limited participation in international cooperation to produce an unfavourable and vulnerable position for developing countries.¹⁰⁹

Under the GATT system, the contracting parties engage in reciprocal trade-offs under which concessions by a contracting party are expected to be offset by the benefits accruing from the concessions of others. Although the process of trade reciprocity was expected to be a difficult task for developing countries, considering their volatile economies and their lack of industrial diversity, creating agreements that improve trade in key goods of developing countries was expected to be an effective tool for development and diversity of developing countries' economies. Therefore, many developing countries chose to become part of the GATT system hoping to reap the benefits of the system for the betterment of their economies.¹¹⁰

However, the weaker economies of developing countries mean that the nullification or impairment of their expected benefits by the action of other parties would have a more damaging effect compared to that on the economies of developed countries. The limited diversity of developing countries' economies means that their international trade is constituted of a very limited number of sectors or products. Hence, trade restrictions on any of these sectors or products could cost a developing country a large portion out of its international trade.¹¹¹

Therefore, it was important for the GATT, as an international legal system, to have credibility and function properly, and this importance took another dimension for developing countries because of their vulnerability in international trade. An essential part of GATT's credibility was to be its ability to provide an efficient enforcement mechanism that allowed developing countries, which lack the economic and political power to unilaterally address GATT violations by others, to have access to a process

¹⁰⁹ Amrita Narlikar, *International Trade and Developing Countries* (2003) 11.

¹¹⁰ Beatrice Chaytor, 'Dispute Settlement under the GATT/WTO: The Experience of Developing Countries', in James Cameron and Karen Campbell (eds), *Dispute Resolution in the WTO* (1998) 250

¹¹¹ Ibid.

where these matters can be resolved.¹¹² An effective dispute settlement system has therefore always been a considerable factor in encouraging the participation of developing countries in the multilateral trading system.¹¹³

Evolving a dispute settlement system that takes into account the various needs of the contracting parties and provides workable solutions for all has always been one of the main difficulties the GATT faced.¹¹⁴ The poor record of developing countries' participation in the GATT dispute settlement system stands as an indication that the system failed to accommodate and integrate all parties. In this regard, it could be argued that the system's failure towards developing countries integration is represented in two forms: first, the dispute settlement mechanism of GATT was biased against the interests of developing countries. Second, the GATT's dispute settlement system failed to efficiently recognise the needs of developing countries in the system and adopt a suitable and effective form of special treatment. These two failures are each addressed below.

2.3.2.1. The Bias of the GATT's Dispute Settlement Mechanism against the Interests of Developing Countries

As discussed, the original intention was for the GATT to be placed within the institutional setting of the ITO. However, the failed efforts to adopt the ITO Charter and introduce an international organisation for trade meant that, under the circumstances, the only way to proceed in the new move towards international trade liberalisation was to transform the role of the GATT from a multilateral tariff concession agreement to become closer to an international institution that could deal with a wide variety of international trade issues.

The emergence of the GATT as an international treaty with the practice of an international organisation resulted in a number of institutional and procedural defects. These defects start with the lack of any provisions for a secretariat or for any

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

subsidiary organs, as the Contracting Parties acting jointly were considered the only body recognised in the General Agreement,¹¹⁵ and end with consultations being the most recognised form of procedure.¹¹⁶

The circumstances that accompanied the establishment of the GATT also affected its dispute settlement system, causing substantive and procedural defects that overshadowed its function and development. Article XXII on ‘consultation’ and Article XXIII on ‘nullification or impairment’, which were regarded to be the central and formal provisions on dispute settlement in the system,¹¹⁷ provided for a system to protect concessions and to seek a consensus on the need to comply with the rules.¹¹⁸ The lack of substantive and procedural details was not in the interest of developing countries in particular. They needed a detailed and well-established dispute settlement system to provide security to their rights as weaker parties in the process. The system’s reliance on negotiations and consensus, and its inability to provide for equal standing between developing and developed countries in the dispute settlement process were the main obstacles creating bias against developing countries in the system.

(a) The GATT dispute settlement system’s reliance on negotiations

The lack of detailed procedures for dispute settlement created a reliance on negotiations. Negotiation represented a major part in the way the GATT conducted business taking into account that most of the GATT decisions came from negotiations among the Contracting Parties when they acted jointly.¹¹⁹ The system’s focus on negotiation was reflected in the procedures that the GATT adopted to settle disputes between its contracting parties.

¹¹⁵ Dam, above n 27, 22.

¹¹⁶ John Jackson, *International Economic Relations* (4th ed., 2002), 256.

¹¹⁷ Jackson, *World Trading System*, above n 23, 94.

¹¹⁸ Ibid.

¹¹⁹ Dam, above n 27, 21–22.

To reach a consensus on a dispute through negotiation was a key aim of the dispute settlement system.¹²⁰ The focus on negotiation was reflected in the two-stage procedure set up in Articles XXII and XXIII.¹²¹ The first stage is bilateral in which parties to the dispute have the opportunity to consult each other and with other contracting parties. The second stage of the procedure, which occurs when the first stage fails to produce a satisfactory solution for the dispute, is multilateral where the matter is referred to the Contracting Parties.¹²²

The fact that parties to the dispute tried to reach, through negotiation, an agreed statement of the facts and the relevant GATT provisions applicable to those facts, made the procedure laid down in Article XXII and XXIII very similar to conciliation.¹²³ This similarity to conciliation, which does not normally lead to a legally binding solution, made the dispute settlement procedure less aligned with the judicial process that binds the parties and seeks the application of the rule-of-law.¹²⁴ Moreover, the focus on negotiation in the system allowed the economic weight of the parties to the dispute to affect the procedure and the outcome of the negotiation process, as negotiation or conciliation can be fair only when it takes place between parties of comparable economic power.¹²⁵

It is therefore clear that the focus on negotiation was one of the forms of bias against developing countries' participation in the GATT dispute settlement system. It is a fact that there is a significant gap between the economic and political power of developing and developed countries. It could also be argued that any process of negotiation would be less likely to be limited to the scope of the matter negotiated; it exceeds it to deal with any issue that could be used as a pressuring device or a bargaining chip to consolidate the position of each party regarding the original negotiated issue. This situation means that in disputes between developing and developed countries under the GATT system, it would have been tempting for the developed countries to use

¹²⁰ Alban Freneau, *WTO Dispute Settlement System and Implementation of Decisions: a Developing Country Perspective* (LLM thesis, Manchester University, 2001) 5.

¹²¹ Ibid.

¹²² Ibid.

¹²³ K Gupta, *GATT and Underdeveloped Countries* (1976) 267.

¹²⁴ Freneau, above n 120, 6–7.

¹²⁵ Abdulqawi Yusuf, *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law* (1982) 74.

their political and economic leverage to enforce their vision of an acceptable resolution for the dispute. Any issue, even if it was not GATT-related such as monetary aid and preferential trade arrangements, could become a pressuring tool against developing countries during the negotiation process.

However, the focus on negotiation in the GATT dispute settlement system had its advantages. It served the objective of the system of restoring the benefits that had been nullified or impaired as soon as possible.¹²⁶ Good and effective negotiations could deliver results without a need to go through other more formal stages of dispute settlement. This shorter timeframe could be of particular importance for developing countries, which have limited resources to endure a long dispute settlement process, and fragile economies that are affected negatively if the situation remains unresolved for a long period. In addition, negotiation in good faith is a likely outcome in many disputes, where the focus would be on finding a suitable arrangement for both parties without using external strength and weaknesses to advance their negotiating positions. Exceeding the scope of the dispute during negotiations could even be beneficial for developing countries, as it could present an opportunity for them to discuss some problematic issues in their international trade that would have not been discussed as extensively anywhere else.

However, negotiating a settlement only serves the objective of the system of a quick restoration in the presence of an effective legal and rule-oriented dispute settlement process that follows. The weakness of GATT litigation, as will be discussed later in this chapter, hardly placed pressure on the negotiating parties to be productive, and decreased the likelihood of negotiation in good faith under which developed countries could pressure weaker negotiating partners with their leverage. Under power-based negotiations, addressing problematic issues of developing countries' international trade would hardly make a difference, as the focus would shift to what pressuring devices every party could present to manipulate the outcome to its benefit.

¹²⁶ Long, above n 57, 71.

(b) Consensus decision-making in the GATT dispute settlement system

The ambiguity of the substantive rules and the lack of procedures of the GATT dispute settlement system urged a series of developments to deal with both procedural and substantive issues.¹²⁷ The development of the GATT dispute settlement system, whether it was through GATT practice or through the outcome of its multilateral rounds and Contracting Parties' decisions, witnessed an improvement in some of the problems that accompanied the beginnings of the GATT. The GATT dispute settlement system, which began as a relatively informal process, gradually developed procedural and substantive legal concepts, and moved to more formal and objective third party panels.¹²⁸ However, some serious defects continued to overshadow the work of the GATT dispute settlement system, and affected the efficiency of its procedures and the perception of the contracting parties on its mechanism and outcomes.

Despite the argument that the historical evolution of the GATT dispute settlement procedures indicated a move away from the negotiation model towards a rule-oriented model,¹²⁹ the culture of negotiation and consensus continued to prevail in many aspects of the GATT dispute settlement procedure.¹³⁰ Consequently, developing countries continued to experience power tactics practiced by developed countries. The most important example of the continuing culture of negotiation and consensus in the GATT comes from the principle of 'positive consensus decision-making', which proved to be the most notorious defect of the GATT dispute settlement mechanism throughout the history of the system.¹³¹

The GATT adopted the form of a majority vote in decisions of the Contracting Parties. However, the practice of the Contracting Parties was to adopt decisions by 'positive consensus' to avoid strict voting.¹³² The principle of consensus had been

¹²⁷ Jackson, *Jurisprudence of GATT*, above n 24, 119–120.

¹²⁸ Jackson, *World Trading System*, above n 23, 98.

¹²⁹ Jackson, *Jurisprudence of GATT*, above n 24, 124.

¹³⁰ Meinhard Hilf, 'Dispute Settlement: Comparative Analysis' in Ernst-Ulrich Petersmann and Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* (1988) 300.

¹³¹ Jackson, *Jurisprudence of GATT*, above n 24, 123.

¹³² *Ibid.*

carried over into the dispute settlement procedure, and despite numerous reforms, the GATT dispute settlement mechanism remained a consensus-based system.¹³³ The Council took decisions based on consensus of all the Contracting Parties at every stage of the procedure, such as the establishment of the panel and term of reference, the selection of panellists, and eventually the adoption of panel rulings.¹³⁴

Adopting decisions in the GATT dispute settlement procedure by consensus increased the chances for ‘blockage’. Such blockage occurred when the disadvantaged party from the dispute settlement procedure or the losing party in the panel report had the ability to block the process or prevent the panel report from coming into force.¹³⁵

The Contracting Parties’ practice of adopting decisions by ‘consensus’ affected developing countries participation in the system. Although it was a general practice applicable to every contracting party at the dispute settlement process, the effect that the ‘consensus’ practice had on developing countries made it a form of system’s bias against their participation. The crucial need to reach consensus in order to adopt a dispute settlement procedure led to extensive negotiations among all parties at all different stages of the procedure.¹³⁶ This situation also resulted in delays in the establishment of panels, delays in the adoption of panel reports and an increasing number of blockages of the adoption of panel reports, especially in the 1980s in relation to sensitive and controversial issues such as anti-dumping and countervailing-duties cases,¹³⁷ and with the increasing political pressures in the UR negotiations.¹³⁸ The 1980s also witnessed a dangerous and increasing trend between the contracting parties to disregard compliance with dispute settlement rulings or ask for a conditional implementation due to the linkage of compliance with adopted panel reports to the conclusion and implementation of the UR Agreements.¹³⁹ These results of the

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ For example: *Canada—Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EC (Canada—Manufacturing Beef CVD)*, SCM/85, (1987). Also, *US—Initiation of Countervailing Duty Investigation into Softwood Lumber Products from Canada (US—Softwood Lumber I)*, GATT BISD, 34th Supplement, 194 (1987).

¹³⁸ Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organisations and Dispute Settlement* (1997) 88–89.

¹³⁹ Ibid 90.

‘consensus’ practice had a significant impact on the fragile economies of developing countries, which would struggle if the delayed or blocked dispute involved restricting measures imposed against one of their limited main sectors, not to mention the pressure on their limited legal and financial resources that would be required to serve a long and resource-exhausting dispute settlement process

The extensive focus on negotiation and consensus for the decision-making process in the GATT dispute settlement system also gave power-oriented tactics a chance to arise.¹⁴⁰ The possibility of an easy blockage of decisions did not only create a weak panel stage that depended on the good will of the parties to keep the process going, but also affected the progress and outcome of the negotiation stage.¹⁴¹ The weak panel stage added pressure on disputing parties to settle their disputes in the consultation stage.¹⁴² This outcome would have been desirable if it had taken place between parties of comparable power. However, the desirable outcome would be quite the opposite if the dispute were between a developed country and a developing country. In this case, power-oriented tactics against the less powerful developing country would be the most probable scenario of procedures in the consultation stage.¹⁴³

The pressure to settle disputes in the consultation stage under the shadow of a weak panel stage pushed the disputing contracting parties to depart deliberately from the GATT rules in order to reach an agreement without going to the panel stage, which could end up blocked and waste time, resources and trade opportunities. The increasingly popular choice to settle disputes in the GATT, even between contracting parties with comparable powers, was through voluntary export restraints or orderly market agreements, which were a deliberate departure from the GATT rule of non-discrimination.¹⁴⁴ The power-oriented negotiations and the gap between developing and developed countries’ economic and political powers make it reasonable to assume that developing countries were more likely to be at the receiving end of the unfavourable arrangement aimed to settle the dispute.

¹⁴⁰ Hilf, ‘Dispute Settlement’, above n 130, 300.

¹⁴¹ Marc Busch and Eric Reinhardt, ‘Developing Countries and the GATT/WTO Dispute Settlement’ (2003) 37(4) *Journal of World Trade* 719, 719–723.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Hilf, ‘Dispute Settlement’, above n 130, 300.

Another linkage between the consensus practice and the increasing number of power-oriented tactics could be seen in the increasing recourse to unilateral trade sanctions, trade attacks and linked counter attacks.¹⁴⁵ The practice of consensus in the GATT dispute settlement system had led to a blockage in the GATT Council against decisions to authorise the suspension of concessions pursuant to Article XXIII. This situation pushed some contracting parties to seek unilateral means to retaliate for their affected trade interests, which undermined dispute settlement rules and the whole GATT system.¹⁴⁶

A blockage of requests for an authorisation to suspend concessions was not essential in order for a country to pursue unilateral trade sanctions. The potential threat of blockage of such requests also represented a reason for some countries to become sceptical of the GATT dispute settlement procedures and seek a unilateral solution to protect their interests.¹⁴⁷ In this regard, the *US Sections 301–310 of the Trade Act of 1974*, which allowed the US to exercise such unilateral actions to protect its interests, may represent the most famous form of unilateral action practiced in international trade.¹⁴⁸ Again, developing countries would be the most vulnerable in a system undermined by unilateral actions because they do not have the resources or the power to counter attack any unilateral action taken by contracting parties that are more powerful.

It is arguable that, despite the negativity the ‘consensus’ practice imposed on the GATT dispute settlement system, and its greater impact on developing countries’ participation, it was a reasonably justified practice. The GATT started with an unfavourable political climate, which was responsible for the collapse of efforts to establish the ITO, and then lived with mixed attitudes towards its function and the limitations on its authority, which continued throughout the history of the system. Therefore, it was important for the dispute settlement system as part of GATT to

¹⁴⁵ Petersmann, *The GATT/WTO Dispute Settlement System*, above n 138, 91.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Jackson, *World Trading System*, above n 23, 104.

acknowledge this shaky ground and obtain the blessings and approval of the Contracting Parties in every decision.

In addition, the GATT system had always struggled with the notion of the lack of legitimacy, being merely an agreement that was supposed to become part of a proper international trade organisation. Hence, its Contracting Parties were the main and most obvious form that added legitimacy to the system. Therefore, regardless of the actual negative impact that the 'consensus' principle had on the dispute settlement system, the intention for this practice could have been to enhance, not diminish, the integrity of the system. When the GATT dispute settlement system required the Contracting Parties' positive consensus to approve decisions, it wanted to add the ultimate form of legitimacy it had.

It could have been a case of wrongful use of the 'consensus' principle that resulted in the negative implications it had on the system rather than the merits of the principle itself. The GATT has a relatively good compliance record, and a limited number of blockages, considering the number of procedures that required positive consensus throughout the GATT years, which shows that if the system was carried out in good faith, the positive consensus practice could have proved beneficial to the integrity of the system rather than detrimental.

However, rules and practices are to be evaluated on their practical value along with their theoretical merits. It has to be remembered that they are not always conducted in good faith, but are meant to be used and manipulated. For the 'consensus' principle, what undermined the dispute settlement process was not only the actual blockage of decisions, but also the mere existence of the possibility of blockage, whether it happened or not. Therefore, good faith played little role in changing the impact that positive consensus had on the GATT dispute settlement system. The bottom line is that regardless of the merits of such practice, it had a detrimental effect on the dispute settlement process in practice and hence even greater impact on developing countries' participation in the system.

(c) The unequal standing between developing and developed countries in the GATT dispute settlement system:

It could be argued that the GATT failed to provide solutions to the unequal standing between developing and developed countries in the dispute settlement system. Other than the political intimidation that developed countries might have exercised over some developing countries, economic considerations played a major role in putting developing countries in a disadvantaged position during the dispute settlement process, or in making them hesitant to provoke developed countries and initiate disputes in the first place.

An initiation of a dispute might have resulted in a reduction of a developing country's benefits under the GSP as a retaliatory action by developed countries. Even developing countries' ability to enforce a successful outcome of a dispute was questionable and rested with the good faith of developed countries. The unequal economic powers between the two sides meant that the ability of developing countries to impose an effective suspension of concessions against developed countries was very limited and had very little impact. The GATT dispute settlement system failed to adopt any procedure that compensated developing countries for their limited retaliatory powers. The system fell short of giving developing countries the protection they needed in the GATT dispute settlement system in order for them to regard it as beneficial.

Another form of the unequal standing between developing and developed countries in the dispute settlement process is represented in the parties' legal and financial resources. The limited legal and technical knowledge about the implications of the GATT dispute settlement procedure had always been a major concern for developing countries.¹⁴⁹ They lacked experienced personnel able to deal with GATT matters,

¹⁴⁹ US International Trade Commission, Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements, 1985. Cited in K. Kufuor, 'International Trade from the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes' (1997) 31(5) *Journal of World Trade* 117, 119.

which pushed them to seek foreign expertise despite their shortage of resources, making their use of the system costly.¹⁵⁰

However, there is a reasonable question of how the GATT dispute settlement system could have dealt with the issue of unequal standing between developing and developed countries in the process. In the international context, there are issues that exist because of a long history of development in the structure of international relations between countries. This development created the difference between developing and developed countries. There are countries with strong political and economic power, and others with no such power. There are countries that are rich in human resources and others that are not; it is how things are in the international context.

As an international system, how could have the GATT dispute settlement system dealt with political intimidation against developing countries that affected their participation in the process against developed counterparts? How could have the system stopped retaliatory countermeasures, such as the termination of financial aid or preferential trade arrangements, against developing countries in order to force them out of disputes or into a detrimental outcome? These political and economic factors fall outside the scope of the GATT system, and it could have been difficult to provide protection for developing countries against them. In addition, there is a question of the country's responsibility in relation to having the legal and technical ability to use the dispute settlement system effectively. Did not developing countries have a responsibility to develop and enhance their legal and technical resources if they really wanted to participate effectively in the system? After all, they had a period that extended for nearly 50 years to adopt a long-term resource-development plan that would able them to produce a well-qualified expertise in the system.

These questions are of course reasonable ones to consider. However, these arguments missed some considerable issues that need to be addressed. The GATT dispute settlement system could not deal with developing countries' issues of political and economic intimidation by developed countries because they were outside the scope of

¹⁵⁰ Ibid.

its jurisdiction, which created obstacles against developing countries' initiation of and progression in disputes. However, the GATT dispute settlement system could have countered these obstacles by providing incentives to encourage developing countries' participation.

For an international system like GATT, there will always be problematic issues that are outside its limits, but that does not mean that they cannot be countered sometimes within its scope. If the GATT dispute settlement system had strengthened the enforcement of its process by reversing the 'consensus' rule to negative consensus, and eased the burden of executing the suspension of concession and added a role to the rest of the Contracting Parties in this execution, it could have had different results.

A strong dispute settlement process with a guaranteed procession of stages and adoption of rulings, and a shared bigger role for all Contracting Parties would have given developing countries the option of weighing the benefits of a certain trade preferential arrangement or financial aid and the benefits nullified or impaired by a certain measure. It would have also given them the option of weighing the costs of losing such an arrangement or aid and the costs of losing some GATT benefits if they decided not to initiate or drop the dispute because of political or economic intimidation. These options were not available to developing countries under the GATT dispute settlement system because the weakness of the process never gave them the certainty to have a final adopted ruling that led to an accepted implementation. The weak dispute settlement process forced some developing countries to consider seriously any action that could affect their relations negatively with other developed countries in the absence of any other more certain options.

In relation to developing countries' responsibility to develop their technical and legal expertise to deal with the GATT and its dispute settlement system, it would be difficult not to agree, especially considering the long period under which the GATT system operated. However, developing countries' ability to develop such expertise varies. While some managed to develop their own expertise, others have struggled to do so. In the case of many least-developed countries and some developing countries, the very limited economic resources and the constant struggle to deal with issues of

balance of payments and mounting debt meant that GATT-expertise development programme had to be assessed against these issues. The government of any least-developed country would think of hundreds of more deserving projects for its resources than such a program.

Regardless of how developing countries dealt with their responsibility to adapt to the GATT and its dispute settlement system, the unequal standing between developing and developed countries in the process was a situation that the GATT had to deal with as an international system interested in accommodating a wide range of parties. The GATT dealt with this situation through providing a form of special treatment for developing countries within its process of dispute settlement.

2.3.2.2. Special Treatment for Developing Countries in the GATT Dispute Settlement System

It was important for developing countries to achieve a balance between the benefits and costs of the GATT dispute settlement system in order to become interested and active participants in the system. The system had to provide its rules and their enforcement in a way that developing countries viewed as sufficient to protect their interests in order for the required benefits to be attained. A form of special and differential treatment was therefore critical for developing countries in order for them to accept the costs that came with active participation in the system.¹⁵¹

When it was first established, the GATT did not recognise developing countries as a separate group different from developed countries in their needs and concerns.¹⁵² At that stage, it was clear to developing countries that some GATT dispute settlement procedures, such as the one-to-one negotiations, implementation of findings, and retaliation were not suitable to be applied to both developing and developed countries on an equal basis. The GATT dispute settlement system's neglect to provide any form of special treatment to developing countries created an atmosphere of a lack of trust in the system by developing countries. This lack of trust was deepened by other issues,

¹⁵¹ Jackson, *International Economic Relations*, above n 116, 1177.

¹⁵² Chaytor, above n 110, 253.

such as procedure blockages and long periods for dispute settlement processes, which led to limited participation and little recourse to the GATT dispute settlement mechanism by developing countries.¹⁵³

In 1961, Uruguay launched a massive complaint¹⁵⁴ on the ground of Article XXIII against 15 developed countries, listing 576 restrictive measures.¹⁵⁵ Robert Hudec describes the purposes of this complaint as follows:

The Uruguayan complaint was showpiece litigation – an effort to dramatise a larger problem by framing it as a lawsuit. The complaint was making two points. One was to draw attention to the commercial barriers facing exports from developing countries and the fact that, whether or not these barriers were legal, the GATT was not working if it could not do better than this. Second, although Uruguay carefully avoided any claim of illegality, the fact that many of the restrictions were obviously illegal would, Uruguay hoped, dramatise the GATT's ineffectiveness in protecting the legal rights of developing countries.¹⁵⁶

The Uruguay complaint, which also showed Uruguay's fear of individually provoking a developed country, was successful in highlighting the commercial barriers to developing countries' exports.¹⁵⁷ However, it failed to achieve any significant result, which convinced Uruguay to take the view that the GATT law was unable to protect developing countries.¹⁵⁸

Although the Uruguay case gave incentives for developing countries to have less participation in the GATT dispute settlement system, developing countries still attempted to improve the system in their favour by introducing formal changes to it. In 1965, Brazil and Uruguay introduced a proposal for amending Article XXIII of the GATT. The aim of the proposal was not the improvement of the GATT dispute settlement system in the broad context. It was one of the first attempts to reform the system in a way that addressed the need of developing countries for some sort of a special treatment as a result of the practical difficulties that developing countries face

¹⁵³ Freneau, above n 120, 8

¹⁵⁴ *Uruguayan recourse to Article XXIII*, GATT BISD, 11th Supplement, 95 (1961).

¹⁵⁵ Freneau, above n 120, 9.

¹⁵⁶ Robert Hudec, *Developing Countries in the GATT Legal System* (1987) 49.

¹⁵⁷ P Kuruvila, 'International Trade, Developing Countries and the GATT/WTO Dispute Settlement Mechanism' (1997) 31(6) *Journal of World Trade* 171, 190.

¹⁵⁸ Hudec, *Developing Countries*, above n 156, 49.

for being subjected to the same rules and procedures as developed countries despite the difference in their capabilities.

Although the proposal was rejected by the Contracting Parties, it led to the adoption of a decision providing special procedures for developing countries under Article XXIII, the 1966 Decision.

(a) The special treatment afforded to developing countries in the 1966 decision

The Decision of 5 April 1966 on Procedures under Article XXIII,¹⁵⁹ applying to disputes between a developing contracting party and a developed contracting party, recognised the damage that the existence of a dispute could cause to the trade and economic development of the developing parties. The Decision was the first step to address developing countries' need for special treatment in the GATT dispute settlement system because of the unequal economic relationship between developed and developing countries.

The 1966 Decision called upon panels to 'take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected contracting parties'.¹⁶⁰ Abandoning the strictly legal approach in dealing with cases involving developing countries, and expanding the scope of consideration to deal with other aspects, such as the economic development of the affected contracting parties and the impact of the disputed measures on them were real improvements for developing countries' participation in the system. This provision offered some kind of special treatment for developing countries in a way that recognised the difference between the impact of a certain measure on a developed country's economy, and the impact of a measure of the same nature on a developing country's trade and economy, with potentially devastating effects on the latter's economic development.

¹⁵⁹ *The Decision on Procedures under Article XXIII*, above n 104.

¹⁶⁰ *Ibid* paragraph 6.

The 1966 Decision also offered developing countries, when consultations failed with their developed counterparts, the option of having recourse to the good offices of the Director-General of the GATT to help achieve a mutually acceptable solution.¹⁶¹ The developing countries' ability to seek assistance from the Director-General introduced the advantage of the intervention of a neutral third party in consultations, which could be very efficient in facilitating and speeding up the process. The intervention of the Director-General and his good offices was also seen to limit the role of power-oriented approaches by developed countries, in their negotiations with the weaker developing countries.

The use of the Director-General's good offices to facilitate a solution in disputes between developing and developed countries could arguably counter many of the problems that developing countries have in the process, especially the consultation stage. One of the main challenges that faced developing countries in the GATT dispute settlement system was the political and economic intimidation practiced against them by their developed counterparts, which was more likely to happen before a dispute to force them not to initiate one, or during consultations to force an unfavourable solution or to abort the dispute. The involvement of the Director-General in the consultation process would be an authority that would limit such practices through a sense of moral responsibility. The intimidation practices were not punishable under the GATT system if they were outside its scope; however, the contracting parties had a responsibility to make the system work, which was the reason behind the relatively good compliance record of its dispute settlement rulings despite the existence of the positive consensus rule. Any contracting party would try its best not to look like it was the one affecting the system's progress with unhealthy practices and that is why the presence of the Director-General authority would make a difference.

The good offices' assistance in reaching a satisfactory solution at the consultation stage could also be regarded as a partial but important measure to limit the effect of developing countries' scarce resources for participating effectively in the process. It is in the interest of developing countries to end the disputed situation as soon as possible

¹⁶¹ Ibid paragraph 1.

because their economies would struggle if the disputed measure affecting a major sector lasted for the duration of a long dispute. In addition, their limited legal and financial resources meant that a short dispute would always be more welcomed than a long and resource-exhausting one. The GATT's exclusive procedure of having an impartial third party serving as a mediator and facilitator of discussions free of charge at their request eased the pressure on resources and allowed for a solution at an early stage of the dispute.

While the Director-General's good offices might have had the potential to limit the direct form of political and economic intimidation during the consultation stage, the GATT dispute settlement system was powerless to limit the practice of deterring developing countries from initiating disputes in the first place. Even during consultations after initiating disputes, other forms of indirect intimidation would have been used against developing countries. Using their legal and financial leverage, developed countries could force developing countries into more stages of a long dispute. Therefore, even in the presence of the Director-General's authority represented by his good offices, consultations under the 1966 Decision continued to depend on good faith to reach an acceptable solution, as had previously been the case.

(b) The special treatment afforded to developing countries from the Tokyo Round (the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance)

The 1970s saw an overhaul and rebuilding of the GATT legal system.¹⁶² Efforts were made during the Tokyo Round negotiations (1973–1979) to improve the dispute settlement procedures. These endeavours led to the establishment of the 'Framework Group Committee', which was given the task of setting up the intended improvements.¹⁶³ However, the strong objection of the EC to any changes in the existing procedures limited the results of the Committee's work.¹⁶⁴ Still, the Tokyo Round negotiations led to a codified, better-structured dispute settlement system in

¹⁶² Petersmann, *International Trade Law*, above n 25, 47.

¹⁶³ Jackson, *Restructuring the GATT*, above n 5, 64.

¹⁶⁴ *Ibid.*

the form of the ‘Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance’ of 28 November 1979.¹⁶⁵

The 1979 Understanding addressed the importance of notification as a procedure to reaffirm the commitments of contracting parties to existing obligations under the General Agreement,¹⁶⁶ and reaffirmed the need to ‘strengthen and improve the effectiveness of consultative procedures employed by contracting parties’.¹⁶⁷ It also gave legal recognition to practices employed by panels in relation to panel membership, functions, and its relationship with the disputing parties as well as other interested contracting parties in the matter.¹⁶⁸

The 1979 Understanding was the second legal recognition of a form of special treatment for developing countries following the 1966 Decision. The 1979 Understanding reaffirmed the availability of the 1966 special rules for developing countries.¹⁶⁹ The 1979 Understanding also introduced a few genuine improvements to consider the unequal economic capabilities between developed and developing countries.

The 1979 Understanding gave legal recognition to the practice of appointing a panellist from developing countries in cases where the dispute was between a developed and a developing country.¹⁷⁰ Such a practice was deemed an improvement since having a panel Member from a developing country would help the panel in achieving more understanding of the developing countries’ circumstances and development interests. This understanding would be attained through the role that the selected panel Member would play in the panel investigations and in the dealings between the panel and the developing countries concerned in the dispute.

¹⁶⁵ *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, above n 59.

¹⁶⁶ *Ibid* paragraphs 2–3.

¹⁶⁷ *Ibid* paragraphs 4–6.

¹⁶⁸ *Ibid* paragraphs 10–22.

¹⁶⁹ *Ibid* paragraph 7.

¹⁷⁰ *Ibid* Annex paragraph 6.

The 1979 Understanding provided for special consideration to developing countries' circumstances as another form of special treatment, in addition to 'a regular and systematic review of the developments in the trading system with regard to matters affecting the interests of developing countries'.¹⁷¹ It provided for this kind of special treatment during consultations,¹⁷² drafting and implementing the panel reports and during surveillance of implementation.¹⁷³ In doing so, it addressed and recognised not only the damage resulting from the disputed measure, but also wider factors such as the economic development of the concerned developing country and the development of the trading system and its impact on the interests of developing countries. Therefore, it is clear that the potential existed for the GATT dispute settlement system to be sensitive to developing countries' needs, as it progressed from a system that did not recognise the developing countries as a separate group when it first started to a system that acknowledges their circumstances in nearly every stage of the process.

However, the fact that this special consideration was not defined by specific procedures other than mere guidance to the panel and the contracting parties to consider developing countries' situation added an ambiguity to this form of special treatment. It is true that the special consideration requirement showed some kind of recognition of and sensitivity to developing countries' circumstances, but this approach could not bring any real changes in developing countries' participation in the dispute settlement system if it was not accompanied by practical solutions to their problems. Judging by the continued dissatisfaction and weak participation of developing countries in the system, it would be reasonable to assume that this form of special treatment lacked the needed practicality to make it effective.

(c) The special treatment afforded to developing countries in the 1982 Declaration and the 1984 Decision

The Ministerial Declaration adopted on 29 November 1982 on Dispute Settlement Procedures¹⁷⁴ and the Decision on Dispute Settlement Procedures of 30 November

¹⁷¹ Ibid paragraph 24.

¹⁷² Ibid paragraph 5.

¹⁷³ Ibid paragraphs 21, 23, 24 and Annex paragraph 3.

¹⁷⁴ Ministerial Declaration of 29 November 1982, above n 106.

1984¹⁷⁵ noted that room was left for further general improvements under the GATT dispute settlement mechanism. They reaffirmed the positive role that the Director-General and his good offices could play in facilitating the consultation between parties and reaching a mutually agreed solution as well as appointing members of panels. The decisions also addressed the responsibility of the Secretariat in assisting the panel in relation to legal, historical, and procedural aspects of the matter being discussed. They also readdressed the function of panels and the Council in relation to the panel's term of reference, the panel's findings, the Council recommendations or rulings, and the implementation aspects.¹⁷⁶ However, developing countries' need for special treatment was not directly addressed by the two decisions as they focused on further general improvements under the GATT dispute settlement mechanism.

(d) The special treatment afforded to developing countries in the 1989 Improvements

The Decision on Improvements to the GATT Dispute Settlement Rules and Procedures adopted on 12 April 1989 constituted an interesting step towards the judicialisation of the procedure that was of certain significance for developing countries. One of the major elements of the 1989 Improvements was the obligation of notification to the GATT Council of all mutually agreed solutions to disputes raised under Articles XXII and XXIII in order to ensure their consistency with GATT.¹⁷⁷ Although it was not intended to provide any kind of special treatment for developing countries, this form of review was seen to offer developing countries a form of security. It limited the impact of power politics practiced by developed countries, which were most likely to produce not only unfavourable outcomes for developing countries, but also results inconsistent with the GATT rules.¹⁷⁸

Moreover, the practice of the Council's review constituted a step towards the judicialisation of the procedure, an outcome that had always been favoured by developing countries as they viewed a judicialised system as more capable and

¹⁷⁵ *Decision on Dispute Settlement Procedures of 30 November 1984*, above n 107.

¹⁷⁶ *Ministerial Declaration of 29 November 1982*, above n 106. See also, *Decision on Dispute Settlement Procedures of 30 November 1984*, above n 107.

¹⁷⁷ *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, above n 108, paragraph B (1).

¹⁷⁸ Kufuor, above n 149, 130.

efficient in providing protection for their interests. This approach would have been in contrast with a negotiation-based system that put developing countries' interests at risk of being threatened and manipulated by power policies practiced against them by developed countries.

Like the 1979 Understanding, the 1989 Improvements also addressed the importance of providing technical assistance to the contracting parties and particularly to developing countries.¹⁷⁹ The technical assistance provided by the GATT Secretariat to developing countries went through a development process just like the rest of the dispute settlement procedures. It was limited to matters dealt with in the 1979 Understanding, and then it expanded in the 1989 Improvements to include additional legal advice and assistance in the dispute settlement process and special training courses on GATT dispute settlement procedures and practices for parties in need of such knowledge. The GATT dispute settlement system provided technical assistance on request as a direct answer to developing countries' lack of legal resources in GATT law and practice. The system tried to enhance developing countries' ability to participate more effectively in the dispute settlement system through both a direct legal advice during the dispute settlement process and developing their legal ability for future disputes.

However, it is important to remember that the detailed form of technical assistance provided in the 1989 Improvements was late in the GATT's life, considering that it started in 1947, and was part of the UR negotiations, which established the WTO and its detailed DSU. Therefore, it would be more appropriate to discuss the Secretariat's technical assistance in the future chapters on the WTO dispute settlement system.

(e) The limited novelty of the GATT special treatment for developing countries

It is arguable that in relation to the special treatment afforded to developing countries, the GATT dispute settlement system failed to offer more than was first achieved with

¹⁷⁹ *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, above n 109, paragraph H (1).

the 1966 Decision. The 1979 Understanding provided for special consideration on the trade coverage of the measures complained of as well as their impact on the economy of the developing countries concerned when the Contracting Parties decided on the appropriate action based on panel reports,¹⁸⁰ and when they decided on any further action based on the circumstances.¹⁸¹ Although the text was more elaborate in Articles 21, 23 and 24, it was merely repetitive of Article 6 of the 1966 Decision, which required the similar form of special consideration.

The 1979 Understanding also merely reaffirmed the role of the Director-General's good offices provided in the 1966 Decision for facilitating consultations between developing and developed countries concerned. In fact, it left the procedure meaningless, as it wasted its exclusivity by universalising its privileges.¹⁸² The 1966 Decision offered exclusively to developing countries the services of the good offices to facilitate their negotiations with developed countries,¹⁸³ but the 1979 Understanding, while affirming that option for developing countries, made the use of the good offices available for all concerned contracting parties to consider in their negotiations to settle disputes.¹⁸⁴

However, the 1979 Understanding managed to add the developing country-oriented systematic review, and the Secretariat's technical assistance for developing countries. The 1989 Improvements again repeated the special consideration requirement provided in Article 6 of the 1966 Decision, and Articles 21 and 23 of the 1979 Understanding. The 1989 Improvements also provided more detailed but similar technical assistance for developing countries as that of the 1979 Understanding.

It is clear that the GATT system recognised some of the problematic issues that developing countries faced in the dispute settlement process. It tried directly or indirectly to tackle these issues and provided certain procedures for that purpose. Issues like political and economic intimidation, financial and legal restraints and

¹⁸⁰ Ibid paragraph 21.

¹⁸¹ Ibid paragraph 23.

¹⁸² Kuruvila, above n 157, 173.

¹⁸³ *The Decision on Procedures under Article XXIII*, above n 104, paragraph 1.

¹⁸⁴ *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, above n 59, paragraph 8.

development considerations were all addressed. However, the special treatment provided by GATT dispute settlement system to developing countries proved generally ineffective in making changes in the circumstances of their participation. Even the 1966 Decision, the most celebrated form of special treatment under the GATT dispute settlement system, was hardly invoked by developing countries.¹⁸⁵

These results suggest that special concessions that could negatively affect the credibility of the dispute settlement system were never the answer for developing countries.¹⁸⁶ They needed legal reforms to the dispute settlement system that would have rules and procedures applicable on both developing and developed countries, but at the same time suitable to the needs and circumstances of developing countries.

2.4. Conclusion

The GATT dispute settlement system worked reasonably well considering the circumstances that surrounded its formation and the deficiencies that affected its function. However, by the beginning of the UR negotiations, there was an implicit agreement on the need for change. It was only reasonable to introduce a more detailed and structured dispute settlement mechanism that would be capable of dealing with the new expanded multilateral trading system under the WTO.

In relation to developing countries, the issue required a more substantial remedy than changing the dispute settlement system to accommodate a new multilateral trading system. The gap between the political and economic power of developing countries and those of their developed counterparts meant that the flaws of the GATT system had a greater impact on developing countries' participation. Such impact is clear in the effect the consensus rule's blockages had on developing countries' limited resources. Even some procedures in the GATT system that had not been viewed as controversial failed to accommodate developing countries' participation in the system. The inappropriateness of the retaliation procedures to be utilised by developing

¹⁸⁵ Good offices under the 1966 Decision were invoked in six instances, and at least in one (involving India and Japan) led to a mutually agreed solution; see, WTO Analytical Index, *Guide to GATT Law and Practice*, vol 2, 765.

¹⁸⁶ Chaytor, above n 110, 258.

countries against their developed counterparts is a good example of this problem. Therefore, for developing countries, the need for change in the dispute settlement system meant a change that would offer them more predictability and security, and be more considerate for their special circumstances in free international trade.

The strong presence of power politics in the process, and the negative impact of the system's flawed rules were viewed, especially by developing countries, as substantial enough not to be carried over to the new system. The next chapter addresses the main reforms that were included in the new dispute settlement system under the WTO and their effects on the system's function and participation of Member countries, especially developing countries.

Chapter 3: The Dispute Settlement System of the WTO and the Participation of Developing Countries

3.1. Introduction

The UR reflected a change in the attitude of developing countries towards participation in multilateral trade negotiations.¹ Far from their passive participation throughout the GATT years, many developing countries played an active role in the UR negotiations, and a large number decided to become Members of the WTO.² This change in attitude was a result of a better integration some developing countries had achieved in the international trading system.³ This integration resulted from the development of more liberalised trade policies, and the growing appreciation of international rules and safeguards to regulate the conduct of international trade and protect trading interests respectively.⁴

The signing of the Marrakesh Agreement on 15 April 1994 represented the end of the UR and the establishment of the WTO,⁵ an institution with legal personality to deal with trade issues among its Members arising from the application of the WTO Agreement and the Annexed Agreements. The Annexed Agreements include the Multilateral Agreement on Trade in Goods,⁶ the General Agreement on Trade in Services (GATS),⁷ TRIPS,⁸ DSU,⁹ and the Trade Policy Review Mechanism,¹⁰ which

¹ Constantine Michalopoulos, 'Developing Countries' participation in the WTO' (Policy Research Working Paper No WPS1906, World Bank, 1998) 2.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, (entered into force 1 January 1995) (Marrakesh Agreement).

⁶ *General Agreement on Tariffs and Trade 1994*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A (GATT 1994).

⁷ *General Agreement on Trade in Services*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B (GATS).

⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C (TRIPS Agreement).

⁹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2 (DSU).

¹⁰ *Trade Policy Review Mechanism*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 3 (TPRM).

are binding on all WTO Members. The Annexed Agreements also include four plurilateral trade agreements (PTAs),¹¹ which are binding on Members who accepted them.

The birth of the WTO did not mean the death of GATT. A new GATT based on the 1947 text as amended and modified through the UR was named ‘GATT 1994’.¹² GATT 1994 is composed of the amended GATT 1947; past protocols and certifications of tariff concessions; GATT accession protocols (minus grandfather clauses); almost all waiver decisions in force as of 1 January 1995; other decisions of the Contracting Parties; six Understandings on GATT Articles negotiated in the UR; and finally, the Marrakesh Protocol of market access concessions in goods.¹³ The Agreement further provided in Article 15 that the WTO would be guided by the ‘decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947’ and their subsidiary bodies.¹⁴

There is no doubt that the WTO legal framework is a major improvement in the international trading system for developing and developed countries alike. It was driven by the notion that trade must serve the interests of all parties, not only the interests of trading giants with dominating market and trade powers. In addition, the new legal framework was based on the belief that free and open trade to all countries under a fair international trading system was crucial in order to achieve an international trading system for the good of all nations.¹⁵ The credibility of these notions is questionable, as there is still a great deal of imbalance between developed countries’ share of trade benefits and that of developing countries in almost every aspect of international trade. However, the WTO framework brought new dimensions to international trade, and extended the scope of trade to new areas, such as services,

¹¹ The Agreements are: Agreement in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and Bovine Meat Agreement.

¹² *General Agreement on Tariffs and Trade 1994*, above n 6.

¹³ Rosine Plank-Brumback, ‘Constructing an Effective Dispute Settlement System: Relevant Experiences in the GATT and WTO’ (the Summit of the Americas, Belo Horizonte, May 1997) 17.

¹⁴ *The Marrakesh Agreement Establishing the WTO*, above n 5, Article 15, paragraph 1.

¹⁵ Jalil Kasto, *The Function and Future of the WTO: International Trade Law between GATT and WTO* (1996) 44.

intellectual property rights, agriculture and the environment, which were perceived as recognition of the new developments of international trade.¹⁶

The fact that the creation of the WTO provided the institutional support for all different trade agreements introduced to date leads to one of the innovative characteristics of the WTO. This characteristic is represented in the 'single agreement approach' in which the WTO integrates about 30 UR Agreements and 200 previous GATT Agreements in one comprehensive legal framework.¹⁷ The WTO legal framework combined the basic rights and obligations of Members and their enforcement with a new legal framework on international trade in goods and services, trade-related investment and intellectual property rights, which introduced the WTO as a multi-function entity. It was introduced to serve as a single comprehensive agreement to provide rules, principles and norms for the conduct of international trade, as a new world trade organisation and as a forum for negotiations.¹⁸

This chapter highlights the changes and improvements in the WTO dispute settlement system as compared to the GATT system, particularly from the perspective of developing countries, and discusses the main obstacles and issues that affect such participation. In doing so, it is appropriate to divide the dispute settlement process into its main stages and discuss each stage separately from a developing country perspective. Addressing the changes and improvements in the WTO dispute settlement system serves in providing a better understanding of this system, and allows for the more focused discussion on developing countries' participation in the system that follows in the chapter. Addressing the obstacles and issues that are still negatively affecting the participation of developing countries in the system consolidates the thesis' overall argument of the system's unsuitability for developing countries' participation and the existence of unbalanced standings in the position of developing and developed country Members. This chapter therefore underlines why reforms to the WTO DSU should be considered if developing countries participation in WTO is to be enhanced.

¹⁶ Ibid 45.

¹⁷ Friedl Weiss, 'WTO Dispute Settlement and the Economic Order of the WTO Member States' in Pitou Dijck and Gerit Faber (eds), *Challenges to the New WTO* (1996) 79.

¹⁸ Ibid 79–80.

3.2. Changes and Improvements in the New WTO DSU

By the mid-1980s, there had been increasing recognition among the GATT Contracting Parties of the need for reform of the GATT dispute settlement system. This tendency towards an improved dispute settlement system was stated clearly in the Punta del Este Declaration, starting the UR negotiations, which read:

To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognising the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.¹⁹

However, the form of the new dispute settlement system was an issue of debate as a result of the different objectives of the Contracting Parties in the new system.²⁰ The EU, Japan and Canada, along with many developing countries, had an objective of limiting the US use of unilateral actions, which were permitted under its federal law.²¹ The US wanted the adoption of a rule-oriented approach in the new system, along with clear timeframes for dispute settlement procedures, and a procedure of cross-retaliation.²² The negotiated outcome in the DSU satisfied most of these desired modifications of and improvements to the GATT system.²³

The move of the WTO to build an effective dispute settlement system in the new DSU ensured continuity in the operation of the dispute settlement rules through the inclusion of Article XXII and XXIII and past practices of GATT 1947. Further, it recognised the need for improvements in the system through the elimination of certain shortcomings and flaws from the existing rules.²⁴ The system provided three ways to achieve such improvement. It sought a single integrated dispute settlement system, a

¹⁹ *Ministerial Declaration on the Uruguay Round*, GATT MIN. DEC. (20 September 1986).

²⁰ Robert Read, 'Trade Dispute Settlement Mechanism: The WTO Dispute Settlement Understanding in the Wake of the GATT' (Working Paper No 12, Lancaster University Management School, 2005) 7.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Weiss, above n 17, 84.

mandatory rule-oriented approach and a strong judicial character, which only meant more predictability and security in the system, especially for developing countries as weaker partners in the dispute settlement process.²⁵ Each of these aspects is addressed in the subsequent sections.

3.2.1. The DSU as a Single Integrated System

The GATT experience with dispute settlement, which in its late stages witnessed the rise of some serious flaws affecting the integrity of the whole GATT system,²⁶ added more significance to the new dispute settlement system and its role in the WTO legal framework.²⁷ This special status of the new dispute settlement system is clearly referred to in Article 2:2 of the WTO Agreement, which states that the ‘Understanding on Rules and Procedures Governing the Settlement of Disputes is an integral part of this Agreement, binding on all members’.²⁸ Article 1:1 of the DSU specifies that it shall apply:

- To disputes brought pursuant to the consultation and the dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding.
- To consultations and the settlement of disputes between members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organisation, and of this Understanding taken in isolation or in combination with any other covered agreement.²⁹

Article 1:1 introduces a radical innovation in the new dispute settlement system. The fact that the DSU applies to disputes concerning all the covered agreements presents the WTO with a unified system of dispute settlement, which was a big improvement towards a codified and rule-oriented system.³⁰ The unified DSU offers a broader jurisdiction and limits the scope for ‘rule or forum shopping’. This is a change from

²⁵ Ibid.

²⁶ As discussed in Chapter Two, page 56, these flaws include: an increase in the number of blockage; a disregard for compliance; and conditional implementation linked to negotiations on the Uruguay Round Agreements.

²⁷ Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organisations and Dispute Settlement* (1997) 177.

²⁸ *The Marrakesh Agreement*, above n 5, Article 2, paragraph 2.

²⁹ *The Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), above n 9, Article 1, paragraph 1.

³⁰ J Collier and V Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999) 96.

the legally fragmented GATT dispute settlement system, where different mechanisms were offered under the general GATT dispute settlement procedures and the special Tokyo Round dispute settlement rules, often causing confusion and added complexity to the process.³¹ All states, including developing countries, profited from this change.

Nonetheless, it is worth pointing out that some multilateral trade agreements in the WTO framework still include special dispute settlement rules and procedures, which prevail in the event of conflict with the DSU. These agreements include the Agreement on the Application of Sanitary and Phytosanitary Measures,³² the Agreement on Textiles and Clothing (ATC),³³ the Agreement on Technical Barriers to Trade,³⁴ the Agreement on Implementation of Article VI of GATT 1994,³⁵ the Agreement on Implementation of Article VII of GATT 1994,³⁶ the Agreement on Subsidies and Countervailing Measures and the GATS.³⁷ Such a situation could mean that the WTO legal framework has managed to replace one problem with another, and that after all, ‘rule shopping’ and ‘forum shopping’ still, to some extent, exist in the new dispute settlement system.³⁸ However, the conflict between general rules of law and specific rules of law is quite common in international law or even in domestic law, where specific rules of law prevail over the general ones in case of conflict.³⁹ The

³¹ Petersmann, *The GATT/WTO Dispute Settlement System*, above n 27, 178.

³² *Agreement on the Application of Sanitary and Phytosanitary Measures*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A.

³³ *Agreement on Textiles and Clothing*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A

³⁴ *Agreement on Technical Barriers to Trade*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A

³⁵ *Agreement on Implementation of Article VI of GATT 1994*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A (Anti-dumping).

³⁶ *Agreement on Implementation of Article VII of GATT 1994*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A (Customs Valuation).

³⁷ *Agreement on Subsidies and Countervailing Measures*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A; and *General Agreement on Trade in Services*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, (GATS) respectively.

³⁸ Petersmann, *The GATT/WTO Dispute Settlement System*, above n 27, 178.

³⁹ See, ‘Fragmentation of International Law: The function and Scope of the *Les Specialis* Rule and the Question of Self-Contained Regimes’ (Paper Presented at the Study Group on Fragmentation, The International Law Commission, UN, 5 May–6 June and 7 July–8 August) 4–7; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) 393–395; Joost Pauwelyn, ‘The Role of Public International Law in the WTO’ (Paper presented at a Workshop organised by Ecologics, Institute for International and European Environmental Policy, Berlin, 9–10 December 2002) 6–7.

WTO law follows the common practice whereby the specific rules on dispute settlement that exist in its agreements prevail over the general rules of the DSU.⁴⁰

Article 2 of the DSU provides the Dispute Settlement Body (DSB) with the authority to administer the dispute settlement process. The DSB has the power to:

Establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorise suspension of concessions and other obligations under the covered agreements.⁴¹

The unified system is a strong indication of the WTO policy to present a rule-oriented approach for its dispute settlement system. This policy was motivated by the GATT dispute settlement system's experience of politically motivated behaviour, especially in the 1980s, where the non-adoption of adverse panel rulings based on economic and political considerations became increasingly common in some anti-dumping disputes between the EC and the US.⁴²

In a sign that the WTO does not want the DSU to be isolated from precedent, the GATT dispute settlement system, and 50 years of development in dispute settlement rules and practices, the WTO requires its Members in Article 3 of the DSU to 'affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein'.⁴³ This move towards a comprehensive dispute settlement system that joins two dispute settlement systems in one meant that past GATT dispute settlement practice, along with procedures previously adopted in 1966,⁴⁴ 1979,⁴⁵ 1982,⁴⁶ 1984⁴⁷ and 1989,⁴⁸ remain relevant for the WTO dispute settlement system.⁴⁹

⁴⁰ *The Dispute Settlement Understanding*, above n 9, Article 1, paragraph 2.

⁴¹ *Ibid* article 2, paragraph 1.

⁴² Weiss, above n 17, 84.

⁴³ *The Dispute Settlement Understanding*, above n 9, Article 3, paragraph 1.

⁴⁴ *The Decision on Procedures under Article XXIII*, GATT BISD, 14th Supplement, 18 (1966).

⁴⁵ *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT BISD, 26 Supplement, 210 (1979).

⁴⁶ *Ministerial Declaration of 29 November 1982*, GATT BISD, 29th Supplement, 13 (1982).

⁴⁷ *Decision on Dispute Settlement Procedures of 30 November 1984*, GATT BISD, 31st Supplement, 9 (1984).

It could be argued that incorporating the principles of Articles XXII and XXIII of GATT 1947 into the dispute settlement system of the WTO means that the system has maintained some principles that proved problematic for developing countries in particular. These principles include the application of prospective remedies and self-enforced retaliation.⁵⁰ Nevertheless, recognising dispute settlement principles and procedures previously adopted under GATT 1947 means that developments adopted in the interest of developing countries are also recognised.⁵¹ Maintaining the special and differential treatment afforded to developing countries in their participation in the dispute settlement system is important, but does not void the need to address the problematic issues inherited from the old system.

3.2.2. The DSU as a Mandatory Rule-oriented System

The question of the nature of the dispute settlement process was a subject of debate from the beginning of GATT to the very end of its history. The debate shifted between whether the dispute settlement process was designed merely as a procedure to assist parties in settling their disputes through engaging in a diplomatic, or what is sometimes called a ‘power-oriented’ approach, or whether it was rule-oriented based on obligations undertaken by parties.⁵² The GATT’s history ultimately demonstrated an evolution towards a rule-oriented approach through some of the practices that evolved. The shift from ‘working parties’ to ‘panels’, the adoption of the ‘*prima facie* nullification or impairment’ as a legal basis to deal with all disputes, the Tokyo Round developments and the practice of the dispute panels were all strong indications of an evolution towards a rule-oriented approach in the GATT dispute settlement system.⁵³ The GATT’s direction towards a rule-oriented approach was potentially beneficial for developing countries in the dispute settlement system, as it was in their interest as

⁴⁸ *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT BISD, 36th Supplement, 61 (1989).

⁴⁹ Plank-Brumback, above n 13, 17. For further information on the decisions of 1966, 1979, 1982, 1984 and 1989 revisit Chapter Two of this thesis.

⁵⁰ These issues were discussed in Chapter Two and will be discussed further in Chapter Five.

⁵¹ They include: the 1966 Decision, the 1979 Understanding, and the 1989 Decision.

⁵² John Jackson, ‘Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects’ in Anne Krueger (ed), *The WTO as an International Organisation* (1998), 168.

⁵³ *Ibid.*

weaker parties in the process that lack economic and political bargaining power to have a rule-focused system. However, the continuity of the positive consensus rule of decision-making in the system ensured the continuing existence of power politics to the detriment of developing countries.

Unlike the murky beginning of GATT that affected its legal structure throughout its history, the WTO went through a very established and studied process of creation, resulting in clear goals for each of its agreements and an established approach towards achieving these goals. This added a form of security and predictability in the system, which was particularly important to developing country Members, as it offered more protection to their interests in the system by adopting a rule-oriented approach that was intended to diminish the effect of power imbalances.

The rule-oriented approach is very clear in the WTO dispute settlement system. The DSU emphasises the intention of the new system to follow a rule-oriented function and to ensure the legal primacy of the WTO dispute settlement system.⁵⁴ The WTO introduces the dispute settlement rules as means to preserve the rights and obligations of Member countries.⁵⁵ Moreover, the WTO presents recourse to the DSU as the only course of action to make a determination on the violation of rules, nullification or impairment of benefits or the impediment of any objective of the agreement, and provides the rules of the Understanding as the applicable legal reference in this determination.⁵⁶ The aim is to achieve an element of security and predictability to the multilateral trading system. It shows a similarity with domestic legal systems, where legal rules are the only source of providing the balance between the rights and obligations of community members, and the only source that disputing parties base their actions on.

Another form of the rule-oriented approach that the WTO adopted in its DSU is the role given to the DSB to act as a judge in producing recommendations or rulings in a way consistent with the rights and obligations of Members provided in the covered

⁵⁴ Petersmann, *The GATT/WTO Dispute Settlement System*, above n 27, 179.

⁵⁵ *The Dispute Settlement Understanding*, above n 9, Article 3, paragraph 2.

⁵⁶ *Ibid*, Article 23, paragraph 1. See also, Martin Davies, Michael Pryles and Jeffery Waincymer, *International Trade Law: Commentary and Materials* (2nd ed, 2004) 776.

agreements.⁵⁷ Further, the DSB is perceived as the supervising authority on all mutually agreed solutions to ensure their consistency with the law, which in this case are the rules of the dispute settlement system.⁵⁸ Presenting the DSB with these roles is another reflection of a domestic court model that the WTO affirms in its setting, where there is a judge to administer the obligatory rules and ensure their application. The domestic court model is particularly important for developing countries because it represents a commitment to a rule-oriented approach, and provides them with the security associated with the complete adherence to the role of law and the presence of a neutral third party to administer this law regardless of power considerations.

3.2.3. The Strong Judicial Character of the DSU

Strengthening the judicial character of the system was essential in order to affirm the rule-oriented approach and the legal supremacy of the new dispute settlement system. The need for a strong and effective dispute settlement stage proved to be of great importance for the whole GATT dispute settlement system, and for developing countries in particular, as they were negatively affected by the weak dispute settlement stage (litigation stage), which impacted their participation in the dispute settlement system, as discussed in Chapter 2. Therefore, the WTO ensured the inclusion of some changes that guaranteed its objective in achieving a strong judicial character in the dispute settlement system. The main changes include the negative consensus rule, the interim review of the panel stage, the appellate review, and the more improved and detailed implementation mechanism.

3.2.3.1. The Negative Consensus Rule

The weak panel stage under GATT, which was disabled by defects such as the ‘positive consensus rule’ that resulted in a potential blockage of rulings and procedures by any party, and the lack of strict timeframes, did not only affect the outcome of the panel stage, but also the outcomes of other stages of the process. The ‘consensus rule’ opened the door for power tactics, in the shadow of a potentially

⁵⁷ *The Dispute Settlement Understanding*, above n 9, Article 3, paragraph 2.

⁵⁸ *Ibid*, Article 3, paragraph 6.

disabled panel stage, in the negotiation stage. It also left the implementation stage hostage to the good will of parties that may sway them from blocking the panel rulings or the implementation procedures.

The DSU drafters recognised the negative effect that the ‘consensus rule’ had on the integrity of the GATT dispute settlement system. Therefore, changing the decision-making mechanism in the DSU was one of the first priorities in building a stronger judicial character. However, the WTO did not abandon the consensus-based approach. It added to the rule a revolutionary twist that affected the entire legal framework of the system in one way or another.⁵⁹ It has adopted in its DSU a negative consensus approach, which means that a consensus is needed in order to halt the proceedings from advancing at any stage of the dispute settlement procedures. The almost impossible practice of reaching a consensus against the establishment of a panel,⁶⁰ the adoption of panel and Appellate Body reports,⁶¹ or the authorisation to suspend concessions⁶² added a sense of practical automatism into the dispute settlement procedures.⁶³

Since the GATT’s previous rule of positive consensus was a major source of frustration to the procedures of dispute settlement,⁶⁴ the automatic transition of the DSU procedures under the new rule of negative consensus presents a major improvement that consolidates and enhances the integrity of the system. Further, it has moved the dispute settlement system a step closer to the desired stronger character of a judicial system in which parties do not have a choice but to respect and abide by the process’ outcome. Other than the fact that the new rule of negative consensus represented a real change in the system to the benefits of all Member countries, it is an important step in the process of rebuilding developing countries’ trust in the dispute settlement system, as the old rule of positive consensus had shaken developing countries’ confidence and negatively affected their participation in the system.⁶⁵

⁵⁹ Alban Freneau, ‘WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective’ (LLM thesis, Manchester University, 2001) 24.

⁶⁰ *The Dispute Settlement Understanding*, above n 9, Article 6:1.

⁶¹ *Ibid*, Articles 16:1, 17:14.

⁶² *Ibid*, Articles 22:6, 22:7.

⁶³ Freneau, above n 59, 24.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

It may be argued that there is a lack of empirical evidence to support the argument that the consensus rule was particularly problematic for developing countries. After all, it was a general rule that applied to all contracting parties, which means that developed countries also were subjected to any of its negative implications. However, it is important to remember that the effect of the consensus rule was indirect. Although it is difficult to prove, it makes sense to link unfavourable settlements against developing countries in the consultation stage to the weak panel stage that existed under the GATT's consensus rule. Other than the fact that they were already suffering from serious imbalances of negotiating power compared to developed countries, the possibility that procedures and outcomes of the dispute settlement stages could be blocked by a dissatisfied party created a weak process. This process deprived developing countries in the consultation stage from the negotiating weight that could have been gained in a strong and effective dispute settlement process. Developing countries' participation in the consultation stage without a market power that supported their negotiation positions or without an effective dispute settlement process to rely on was exposed to power tactics practiced by the negotiating developed countries. As a result, the consultation stage often led to unsatisfactory outcomes for developing countries.

It also makes sense to link the consensus rule to the weak participation of many developing countries in the GATT dispute settlement system. The blockage, or even the potential blockage, of the dispute settlement procedures represented a waste of costs and expertise, two factors that many developing countries generally lacked in a very complicated and costly process. Such waste, or potential waste, forced developing countries to be less attracted to the process and spare their precious resources for other projects where benefits would be more probable.

Therefore, even though the positive consensus rule was a general rule applicable to all contracting parties, it is reasonable to suggest that the circumstances of many developing countries put them under more pressure in the GATT dispute settlement system as a result of its positive consensus rule. From these considerations, it then follows that the automaticity of the procedure that the new negative consensus rule

offers has the potential to give developing countries more weight in the negotiation process, even against developed countries. Moreover, removing one of the key procedural barriers helps to restore confidence in the system and present it as a worthy use of developing countries' much-needed resources.⁶⁶

3.2.3.2. *The Interim Review*

The introduction of the interim review procedure into the panel stage is another indication of a more effective panel stage and achievement of a higher level of procedural justice. The interim review procedure, as introduced in Article 15 of the DSU, provides that:

The panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.⁶⁷

The interim review procedure offers parties to a dispute the chance to discuss issues identified in the interim report before forwarding the final report to the DSB for adoption. The opportunity to discuss certain issues in the interim report affords parties every opportunity to resolve their dispute in a mutually acceptable way.⁶⁸ The importance of this procedure is reflected by the consequences that follow. Presenting a final report that is already circulated and discussed in the interim review stage increases the chances of satisfaction with the outcomes of the panel stage. The increase in parties' satisfaction could convince them not to take their dispute further to the appellate review, and could improve their cooperation in implementing the panel's findings. Such results are effective in reducing the process costs and introducing a good record of compliance among Members, an outcome that most WTO Members would welcome.

⁶⁶ Ibid.

⁶⁷ *The Dispute Settlement Understanding*, above n 9, Article 15, paragraph 2.

⁶⁸ Weiss, above n 17, 85.

This outcome takes its importance to a higher level when developing countries are concerned. As previously discussed, developing countries suffer from a lack of financial and legal resources. Hence, introducing a more satisfying panel report, as a result of the interim review discussions, could lessen the need for an appellate review. Having a settled dispute without the trouble of going through to another stage of dispute settlement presents a desirable outcome for developing countries where they are able to save the extra costs and resources accompanying a longer process of dispute settlement.

In addition, achieving better compliance with the panel rulings in the implementation stage saves the process from being dragged into a long procedure of implementation. As mentioned above, this outcome would be desirable to most Member countries. Moreover, the extra costs that accompany a long process of dispute settlement, and the lost trade opportunities resulting from an extended period of implementation, affect developing countries' markets far more than others do. Hence, a system with a greater likelihood of compliance and a straightforward implementation of rulings and recommendations are of great importance for developing countries.

However, the inclusion of the interim review in the panel stage triggers the question of its practical usefulness to the dispute settlement process. The legalisation of the WTO dispute settlement process, under which panel reports are adopted quasi-automatically without the possibility of blockage, presented the panel's interim review as an additional safeguard against wrong and poorly reasoned panel reports.⁶⁹ It seems, though, that the panel's interim review rarely alters the reports, suggesting a lack of utility, particularly when it is coupled with the presence of the Appellate Body stage in which such reports can be appealed.⁷⁰

As for the review's role in providing the opportunity to reach mutually agreed solutions before or after the final panel report, the record shows an infrequent use of

⁶⁹ Pierre Pescatore, *Handbook of the WTO/GATT Dispute Settlement* (2007) vol 1, 69.

⁷⁰ William Davey, 'The WTO: Looking Forwards' (2006) 9 *Journal of International Economic Law* 3, 22. See also, Valerie Hughes, 'The WTO Dispute Settlement System: A Success Story' in Julio Lacarte and Jaime Granados (eds), *Inter-governmental Trade Dispute Settlement: Multilateral and Regional Approaches* (2004) 103, 116.

the interim review to peruse such solutions. Empirical research suggests that of the 181 disputes started with a consultation request prior to 1 July 2002, 18 cases were settled or dropped after the establishment of the panel.⁷¹ The disputing parties reached mutually agreed solutions in only 10 of the 18 cases.⁷² The number that resulted directly from the interim review is even less.⁷³ Two of the few examples of such cases are the *EC—Trade Description of Scallops*, and the *EC—Butter* where a solution was mutually agreed on between parties after issuance of the interim report.⁷⁴

The infrequent use of the interim review to achieve mutually agreed solutions is hardly surprising considering that the prevailing party has more incentive to have its favourable ruling implemented instead of reaching a solution that may not be favourable.⁷⁵ For the losing party, a mutually agreed solution at the interim review stage under which it would have the opportunity to grant other trade concessions in return of retaining the measure found to be WTO inconsistent in the interim report may be a great incentive.⁷⁶ However, the fact that there is an Appellate Body review, which could reverse the panel's findings, may be a disincentive for such solutions if the party has sufficient confidence in a possible reversal.⁷⁷ Domestic policy reasons might also be a factor of the losing party's preference of a binding adjudication. In this regard, a binding panel report might be a necessary instrument for the losing party's government to justify the implementation of unpopular policy in order to comply with the DSB ruling.⁷⁸

⁷¹ Armin Steinbach, 'The DSU Interim Review: Need for Its Elimination or Extension to the Appellate Body Stage?' (2009) 12(2) *Journal of International Economic Law* 417, 422. Similarly, Busch and Reinhardt find that less than ten per cent of the disputes between 1995 and 1999 ended after the establishment of a panel but prior to the issuance of a panel report, Marc Busch and Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2001) 24 *Fordham International Law Journal* 158, 161.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ *EC—Trade Description of Scallops*, WT/DS7/R, 5 August 1996, unadopted, DSR 1996:I, 89, Notification of Mutually Agreed Solution on 19 July 1996. *EC—Measures Affecting Butter Products*, WT/DS72/R, 24 November 1999, unadopted, notification of Mutually Agreed Solution on 18 November 1999.

⁷⁵ Steinbach, above n 71, 423.

⁷⁶ Ibid.

⁷⁷ Ibid 424.

⁷⁸ Ibid.

Another disincentive for reaching mutually agreed solutions has resulted from the documented failure to keep interim reports confidential, which has been addressed by panels on various occasions.⁷⁹ The purpose of keeping interim reports confidential is to provide the disputing parties with a last chance to settle the dispute after discovering how the issue is going to be resolved by the panel.⁸⁰ Making such reports public may put unnecessary pressure on the parties from various sources such as domestic lobbies and pressure groups, which force them to refrain from pursuing such solutions.⁸¹

3.2.3.3. *The Appellate Review*

The establishment of a standing Appellate Body with the power to review panel reports is an innovation that the WTO offers under its DSU.⁸² The body, which is composed of seven independent experts in which only three serve on any one case in rotation, shall only hear appeals by parties to the dispute and only against legally disputed panel reports.⁸³ The idea of an appellate review is in some ways related to the procedure under the GATT dispute settlement system, whereby panel reports went through the ‘political filter’ of the GATT Council in order for them to be adopted. In the Council, the consensus requirement for adoption in which any contracting party could block the procedure had politically reinforced the legally binding effect of the adopted dispute settlement rulings.⁸⁴ As discussed above, the new WTO dispute settlement system diminished the possibilities of blockages of the panel rulings by introducing the principle of negative consensus creating a system of quasi-automatic adoption of panel reports by the DSB.⁸⁵ Therefore, taking away from parties the right of blocking the panel report, which was not necessarily always practiced as an abuse

⁷⁹ Panel reports, *US—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R and Corr. 1, adopted 10 December 2003, modified by Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R and DSR2003:VIII, 3273, paragraph 9.41; Panel Report, *US—Subsidies on Upland Cotton*, WT/DS267/R and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R, paragraph 6.5.

⁸⁰ Steinbach, above n 71, 424.

⁸¹ Ibid.

⁸² Ibid 86.

⁸³ Ibid.

⁸⁴ Petersmann, *GATT/WTO Settlement System*, above n 27, 186.

⁸⁵ Ibid.

of power but rather as a sign of dissatisfaction with the panel report, presented a need to provide an alternative procedure. The aim of this procedure is to replace the old one and give Members back their right to maximum satisfaction with the rulings forwarded to the DSB for adoption.

This reason, along with the WTO's intention to strengthen the judicial character of the system, was behind the creation of the appellate review stage. The appellate review stage is intended to increase parties' satisfaction with rulings and minimise non-compliance claims of an unfair, erroneous or incomplete ruling with their authority to uphold, modify or reverse the legal findings and conclusions of the panel.⁸⁶

However, the existence of the appellate stage might be viewed negatively because it creates a situation in which losing parties decide to take their disputes to the appellate stage in order to overturn panel findings or to delay their implementation.⁸⁷ This situation of an increased recourse to the appellate stage for the wrong reasons or even for no reason is encouraged by Article 16:4, which grants a 'right to appeal'. The Article does not have any filtering device to exclude disputes with insufficient grounds of appeal from proceeding to the appellate stage. This lack of a filtering device to organise the movement of disputes from the panel stage to the appellate stage represents a departure from a common procedure in some domestic jurisdictions, such as the need to obtain leave to appeal from either level of court in the US, and from international court proceedings, such as the European Court of Human Rights under the 11th Protocol to the European Convention on Human Rights.⁸⁸

Lacking a filtering device in the DSU could tempt losing parties to use the appellate stage as a desperate or lucky attempt to change the adverse panel's findings, or as a tactic to delay their implementation. This situation, which might lead to a regular use of the appellate stage, could have a potential effect of weakening the authority of

⁸⁶ Ibid.

⁸⁷ Weiss, above n 17, 87.

⁸⁸ Petersmann, *GATT/WTO Settlement System*, above n 27, 187. See also, *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (entered into force 1 November 1998).

panel reports.⁸⁹ The appellate stage's review on panel report's law and legal interpretations represents a form of 'quality control', which would push panels to provide a well studied and discussed report.⁹⁰ However, the fact that every panel report is potentially subject to modification or overturning by the Appellate Body might prompt the parties to underestimate its authority and regard it as only one step in a two-step process, making the Appellate Body's decision the final and important one. The record of disputes presented before panels and the Appellate Body from 1996 until 2005 shows that disputes heard by the Appellate Body represented nearly 60 per cent of the total disputes settled in the panel stage during the ten-year period.⁹¹ This percentage is too high taking into account that the Appellate Body's role is limited to dealing with points of law and legal interpretations developed by a panel. This means that a problem regarding the role and function of the Appellate Body is starting to develop, forcing the Body to be used as a tool for dispute settlement tactics and moving it away from the original intention behind its creation.

This situation could also be a problematic issue for developing countries' participation in the system. The appellate review is one form of the strong judicial character adopted in the WTO dispute settlement system, which offers developing country Members more security for their interests in the system. Nonetheless, abusing the appellate review through unnecessary use could create a long and resource-consuming dispute settlement process for developing countries, taking into account their lack of resources, and the significant impact that violating measures could have on their economies if they continued to exist for a long period. It is true that the appellate review is an open process for all disputing Members, and thus could be abused by developing countries as well against their developed counterparts. However, their lack of financial and legal resources makes it in their interests to have a short dispute without unnecessary delays. Moreover, this lack of resources limits their ability to manipulate the appellate review to their advantage.

⁸⁹ Weiss, above n 17, 87.

⁹⁰ Ibid 86.

⁹¹ World Trade Organization, *Statistical Information on Appeals in the WTO* (18 October 2009) WTO Website <http://www.wto.org/english/tratop_e/stats_e.htm>.

3.2.3.4. *Surveillance: Implementation of Rulings and Recommendations*

The dispute settlement system of the WTO supports the idea that the implementation of rulings and recommendations is a reflection of Member States' respect for WTO law and its course of achieving justice. As a result, it was very important for the new system to improve the implementation mechanism and create appropriate means to achieve a successful implementation of rulings and recommendations.⁹² The implementation stage in the WTO DSU is more detailed and improved than in the previous system. It takes into consideration the fact that trade relations require practical solutions based on the running of business; thus, it applies soft measures to carry out the implementation of recommendations in cases where immediate compliance could negatively affect international trade, which is particularly significant for developing countries, as they are more likely to have economic restrictions that affect their implementation efforts than their developed counterparts.⁹³ The DSU also introduced three new additions to the implementation stage: strict time limits, mandatory arbitration and the automatic authorisation of the suspension of concessions.⁹⁴

The move towards strict timeframes in the implementation stage was part of a new strategy in the WTO DSU to provide for tight and precise time limits at every stage of the procedure; a move intended to finally put to an end the failed efforts throughout GATT history to establish efficient time limits.⁹⁵

Mandatory arbitration was also introduced in the implementation stage in cases where immediate implementation was impracticable for the concerned parties, and there was an absence of an approval by the DSB for a period for implementation, and an absence of a mutual agreement between the concerned parties on that period.⁹⁶ However, if the disagreement was on 'the existence or consistency with a covered

⁹² Kasto, above n 15, 60.

⁹³ For example, the 'reasonable period of time' in paragraph 3 of Article 21, and 'compensation' in paragraph 1 of Article 22 are procedures given when immediate compliance is not practical.

⁹⁴ Weiss, above n 17, 87. See also, the *Dispute Settlement Understanding*, above n 9, Articles 21 and 22.

⁹⁵ Freneau, above n 59, 25.

⁹⁶ Weiss, above n 17, 87.

agreement of measures taken to comply with the recommendations and rulings’, then the original panel would rule on the dispute through recourse to dispute settlement procedures.⁹⁷

The automatic authorisation of the suspension of concessions is another form of the automaticity introduced in the WTO DSU. As with the decisions of composing panels and adopting panel reports, the authorisation of the suspension of concessions was subject to the ‘consensus’ rule under the GATT dispute settlement system. This rule required the approval of all contracting parties, including the party against which such authorisation was taken, for the authorisation to be adopted. As explained in Chapter 2, this practice was a major defect in the GATT dispute settlement system that affected the credibility of the whole process.⁹⁸

The situation is different now. Under the DSU, if a Member fails to comply with the settlement’s decision, and fails to provide mutually acceptable compensation for the other party, then the complaining Member may request an authorisation from the DSB for the suspension of concessions. Such an authorisation is subject to the new principle of ‘negative consensus’, which requires all the DSB Members to disapprove the authorisation. As it is practically impossible for all Member parties, including the one requesting the authorisation, to decide against it, such authorisation is regarded as automatic. As mentioned above, the automatic transition in the authorisation for the suspension of concessions, like the case in other DSU procedures under the negative consensus rule, strengthens the judicial character of the system and represents a major improvement that consolidates and enhances the integrity of the system.

Discussing the implementation stage in the WTO DSU raises a related subject with no less significance, which is the legal effect of a panel report.⁹⁹ The subject of the legal effect of a panel report, either by the first level panel or by the appellate body, could prove to be misleading. The question of whether the country subject to a report’s recommendations has an international law obligation to conform its law practice to the recommendations, or whether it has a choice to perform or to compensate has

⁹⁷ *The Dispute Settlement Understanding*, above n 9, Article 21, paragraph 5.

⁹⁸ See Chapter Two, 53–60.

⁹⁹ Jackson, ‘Effective Dispute Settlement Procedures’, above n 52, 169.

already caused some confusion between some Members because of the ambiguity in the term ‘compensation’.¹⁰⁰

A number of clauses in the DSU strongly indicate that there is indeed a legal obligation to perform. Article 22.8 of the DSU states that even in the case where compensation was provided, the matter remains under the DSB surveillance until compliance occurs. Moreover, Article 22.1 of the DSU states, in the context of expressing preference for bringing measures into consistency, that compensation is only a temporary measure. However, it must be noted that in the non-violation cases, there is no obligation to perform, and compensation may be a form of final settlement of the dispute.¹⁰¹ Having said that, expressing that there is no obligation to perform in the non-violation cases means that there is an obligation to perform in the violation cases.¹⁰²

For developing countries, it could be beneficial to have a dispute settlement system in which compensation is an option of final settlement. Compensation could be an attractive outcome for developing countries because it could provide equivalent but more important trade concessions to their economies than the concessions affected by the violating measures. Monetary compensation could also be particularly beneficial for developing countries, as it could enhance their financial resources to the benefit of the affected industry and the economy in general.¹⁰³ Conversely, settling for compensation as the final outcome of a dispute would alter the nature of the WTO adjudicative system, which is built on the determination of trade measures’ inconsistency with WTO law,¹⁰⁴ and would allow the continuation of the inconsistent measures.¹⁰⁵ These issues are discussed in more detail in Chapter 5.

¹⁰⁰ The word appears in the DSU at Article 22. Under GATT practice, compensation always meant trade measures and not any sort of liquid monetary compensation. The ambiguity exists because it probably can also be similarly interpreted under the WTO DSU.

¹⁰¹ *The Dispute Settlement Understanding*, above n 9, Article 26, paragraph 1.

¹⁰² Jackson, ‘Effective Dispute Settlement Procedures’, above n 52, 170.

¹⁰³ *Ibid* 329.

¹⁰⁴ Bryan Mercurio, ‘Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding’ (2009) 8(2) *World Trade Review* 315, 327.

¹⁰⁵ *Ibid* 330.

The DSU has been an important addition to the WTO. Introducing a dispute settlement system that is integrated, mandatory and rule-oriented with a strong judicial character is a significant improvement over the previous system under GATT in which power politics and rule shopping were common practices that affected its integrity and efficiency. Further, the introduction of some new procedures, such as the ‘negative consensus’ rule and the Appellate Body review added considerable predictability and stability to the DSU; two characteristics that were widely claimed to be missing or deficient in the previous system. As indicated, these improvements represent some positive changes to the benefit of all WTO Members, including developing countries. However, the next section, examines in greater detail whether developing countries still face a disadvantageous position in their participation in the system. It will be shown that despite the improvements that have been implemented in the WTO dispute settlement system, developing countries still face some problematic issues that negatively affect their participation in the system.

3.3. Developing Countries in the WTO Dispute Settlement System

Since the establishment of the WTO, the DSU has always been claimed to be the most important pillar of the rules-based system, making it the flagship of the WTO.¹⁰⁶ The existence of a compulsory multilateral dispute settlement system, where all Members have equal access to a process governed by rules rather than economic power is particularly important to developing countries’ access and participation in the system.¹⁰⁷ The role of the WTO dispute settlement system as a central element in providing security and predictability to the multilateral trading system was seen as crucial for encouraging the participation of developing countries.¹⁰⁸ Indeed, many statistics have shown that developing countries’ participation and access to the system have increased.¹⁰⁹ This is a major improvement compared to their recourse to the

¹⁰⁶ C Raghavan, ‘The WTO and its Dispute Settlement System: Tilting the Balance against the South’ (Trade and Development Series No 9, Third World Network, 2000) 1.

¹⁰⁷ *A Handbook on the WTO Dispute Settlement System*, WTO Secretariat Publication, 2004, 109.

¹⁰⁸ Raghavan, above n 106, 1.

¹⁰⁹ Kara Leitner and Simon Lester, ‘WTO Dispute Settlement 1995–2004: A Statistical Analysis’ (2005) 8(1) *Journal of International Economic Law* 231, 234; see also, Young Park and Marion Panizzon, ‘WTO Dispute Settlement 1995–2001: A Statistical Analysis’ (2002) *Journal of International Economic Law* 221, 221–227; see also, Chad Bown, ‘Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes’ (2004) *The World Economy*, 59, 64.

GATT dispute settlement mechanism under GATT 1947 although some statistics explain this increase as being a result of a rise in the number of disputes targeting developing countries as defendants rather than as willing participants.¹¹⁰

The participation of developing countries in the WTO dispute settlement system has been the focus of considerable attention by many parties concerned with the WTO function, both WTO Members¹¹¹ and observers.¹¹² For the WTO, an international organisation responsible for achieving countries' integration into an open multilateral trading system, the level of participation of developing countries is fundamental in the context of reviewing the functioning of the system. It reflects its success in accommodating the diverse membership and the widely varying interests, values, levels of development and priorities of Members.¹¹³

Equally, the WTO dispute settlement system is important to developing countries because it acts as a guarantor of their rights under WTO law. The fact that most developing countries have a negligible or very limited share of global trade does not diminish the importance and relevance of having a fair and effective dispute settlement system. Such a system ensures that practices of international trade do not undermine developing countries' interests as protected by WTO law. Moreover, even though developing countries' individual global trade share is very limited, it must be remembered that the WTO normative framework is not merely about facilitating market access. Ensuring that the available market is accessed appropriately and fairly is also one of the main goals of the WTO framework. Moreover, if the limited share of developing countries' individual global trade, at present, might discourage them

¹¹⁰ Marc Busch and Eric Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement' in Daniel Kennedy and James Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Hudec* (2002) 466–467. See also, Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2nd ed, 2002) 394–395.

¹¹¹ See, for example, *The Doha WTO Ministerial Declaration* [14 November 2001] {WT/MIN [01]/Dec./1; *WTO DSU Review—Compilation of Comments* [WTO Job No. 6645]; Commonwealth Policy Brief prepared by the Economics Affairs Division titled 'The WTO Dispute Settlement Process and the Developing Countries' [2001].

¹¹² See, for example, Mary Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) 35(1) *Journal of World Trade*, 55–98. See also, Henrik Horn and Petros Mavroidis, 'Remedies in the WTO Dispute Settlement System and Developing Country Interests' (April 1999), World Bank.

¹¹³ Asif Qureshi, 'Participation of Developing Countries in the WTO Dispute Settlement System' (2003) 47(2) *Journal of African Law* 174, 174.

from participating in the WTO dispute settlement system, they still have a current interest in having a fair dispute settlement system available when they decide to use it in the future.¹¹⁴

Participation in the WTO dispute settlement system is also important for developing countries because it is an effective tool for shaping the WTO law's interpretation and application over time.¹¹⁵ This tool, arguably, is more effective than the traditional political process of amendments and formal interpretations implemented in shaping WTO law.¹¹⁶ Voting on amendments or interpretations of WTO law through the political process is, in most cases, subject to consensus. Requiring the consent of every WTO Member on formal amendments or interpretations adds the burden of accommodating the diversity of views and differences between all Members. This in turn increases the degree of complexity of the process due to the challenge of meeting or satisfying the wide interests and needs of all the WTO Members.¹¹⁷ Seeking amendments or interpretations of the WTO law through negotiating rounds is not, by any means, less challenging.

The infrequency and complexity of the negotiating rounds make them unattractive to meet the flexibility needed for some changes. In the negotiating rounds, any proposed changes in WTO rules take place in a process of complex tradeoffs between all different countries in which widely varied interests, development agendas and priorities often result in purposefully vague drafted rules. The difficulty of amending or interpreting WTO law through the traditional political processes of consensus voting and negotiating rounds enhances the impact of the WTO jurisprudence, and gives the dispute settlement system a de facto power to interpret and affect the WTO law.¹¹⁸

¹¹⁴ Ibid 175.

¹¹⁵ Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' in Victor Mosoti (ed), 'Towards a Development-Supportive Dispute Settlement System in the WTO' (Resource Paper No 5, International Centre for Trade and Sustainable Development, March 2003) 10.

¹¹⁶ Ibid. See also, The Marrakesh Agreement Establishing the WTO, above n 5, Articles IX:2 and X.

¹¹⁷ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 10.

¹¹⁸ Ibid 10–11.

Moreover, although it is not a formally adopted approach, the past WTO jurisprudence has been a source of law for WTO dispute settlement panels and the Appellate Body to cite and rely on in their legal reasoning, involving more than the judicial resolution for the dispute, and giving the WTO jurisprudence the effect of a common law precedent.¹¹⁹ This effect is clear in the Appellate Body's report in *US—Stainless Steel (Mexico)*,¹²⁰ where it stated in response to the panel's departure from its legal interpretation in *US—Zeroing (EC)*¹²¹ and *US—Zeroing (Japan)*¹²² that it would be incorrect to assume that 'subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB'.¹²³ It further explained that 'dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports',¹²⁴ which are 'often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes'.¹²⁵ Thus, it said, 'the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system'.¹²⁶ The Appellate Body further stated that 'ensuring security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.¹²⁷

The increased importance of the WTO jurisprudence, especially in shaping the WTO law's interpretation and application over time, means that active participants are best positioned to take advantage of the law shaping process to best suit their interests.¹²⁸ Unlike developing countries, the US and the EC are the predominant participants in

¹¹⁹ Ibid 11.

¹²⁰ *US—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Appellate Body Report), (adopted on 20 May 2008, modifying Panel Report).

¹²¹ *US—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (Appellate Body Report, adopted 9 May 2006).

¹²² *US—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Appellate Body Report, adopted 23 January 2007).

¹²³ *US—Final Anti-dumping Measures on Stainless Steel from Mexico*, above n 120, paragraph 158.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid paragraph 160.

¹²⁸ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 11.

the WTO dispute settlement system because of their dominant share of global trade, which increases their chances of being part of disputes as complainants, defendants or third parties. They are also active participants in the system because they recognise the role that they can play defending their interests in shaping the interpretation of WTO rules over time.¹²⁹

Using the WTO law to defend countries' interests in the dispute settlement system is not limited to participation in the litigation stage of the WTO dispute settlement process, but also in participation to achieve a negotiated settlement.¹³⁰ The importance of participation in the negotiation stage is expressed in a study conducted by Busch and Reinhardt in which they note that, 'three-fifths of all formal complaints end prior to a panel ruling, and most of these without a request for a panel even being made'.¹³¹ They also note that, 'around two-thirds of those formal complaints ending prior to a ruling (whether before or after the establishment of a panel) exhibited full or partial concessions by the defendant'.¹³² This could be an incentive for developing countries to be active participants in the negotiation stage because they have the opportunity to achieve satisfactory outcomes without the need to engage in the whole dispute settlement process. A greater participation of developing countries in the dispute settlement system would increase their level of contribution in shaping the WTO law, and increases the credibility of their threat to invoke the WTO law.¹³³ These factors, along with the more predictable and legalised WTO system would work to the advantage of developing countries' active participation in bargaining in the shadow of law at the negotiation stage.

Developing countries' participation in the dispute settlement system is important to the functioning of the WTO and to the maintenance of the balance of their rights and obligations. Hence, it is important to recognise and address the main issues that affect their participation throughout the different stages of the dispute settlement process. The next sections examine these issues in the stages of initiating disputes, consultations, panel and Appellate Body litigation and the implementation of rulings.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Busch & Reinhardt, 'Bargaining in the Shadow', above n 71, 158–159.

¹³² Ibid 162.

¹³³ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 12.

3.3.1. Developing Countries' Issues in the Initiation of Disputes

One of the factors considered in discussing the participation of developing countries in the WTO dispute settlement system is their ability to initiate disputes. The WTO dispute settlement system is an open process to all WTO Members in which any Member with a claim that its market access rights have been violated by another Member can initiate a dispute by requesting bilateral consultations with the violating Member. This stage would lead to the establishment of a formal panel if the matter were not solved by consultation. Further, the WTO dispute settlement system is open to any Member with a substantial interest in the matter of a dispute to participate formally as an interested third party.¹³⁴ In addition, the special treatment provisions in the DSU are designed to recognise developing countries' interests in the dispute settlement process, and to encourage them to initiate more disputes and become more involved in the process. This is a strong indication that any WTO Member is eligible and encouraged, at least theoretically, to participate in formal disputes when its rights have been adversely affected.¹³⁵

However, the levels and indications of developing countries' participation in the WTO dispute settlement system are still a subject of debate. It could be argued that developing countries have been active participants in the dispute settlement system since the establishment of the WTO.¹³⁶ Further, under the WTO dispute settlement system developing countries have been participating frequently as third parties to disputes, which is so valuable in providing them with more experience in dispute settlement proceedings.¹³⁷ Developing countries' participation in the WTO dispute settlement system has been a major improvement over their participation in the GATT dispute settlement system, which was very limited.¹³⁸

¹³⁴ Chad Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19(2) *The World Bank Economic Review* 287, 294.

¹³⁵ Ibid.

¹³⁶ Pescatore, above n 69, 110.

¹³⁷ Ibid.

¹³⁸ Weiss, above n 17, 85. Developing countries were involved in 44 out of 229 cases as complainants (19 per cent), and in 29 of 223 appearances as defendants (13 per cent), cited in Robert Hudec, Daniel Kennedy and Mark Sgarbossa, 'A Statistical Profile of GATT Dispute Settlement Cases: 1948–1989' (1993) 2(1) *Minnesota Journal of Global Trade*.

Conversely, statistical studies conducted by scholars such as Busch, Reinhardt, Hoekman and Kostecki, argue that the idea of active participation by developing countries in the WTO dispute settlement system is inaccurate.¹³⁹ These studies claim that the higher percentage of participation is due to an increase in the number of disputes initiated against developing countries.¹⁴⁰ In fact, these studies argue that developing countries' complaints against developed countries have declined since the establishment of the WTO dispute settlement system.¹⁴¹

These studies further claim that developing countries' participation as complainants has also been overstated.¹⁴² They argue that developing countries on some occasions have been part-complainants in a complaint mainly led by the US or the EC, which is, understandably, not as burdensome as developing countries initiating complaints by themselves.¹⁴³ Even third party participation in which human and financial resources do not constitute as a burdensome requirement as in the case with complainants and respondents has not been an ideal form of participation for developing countries in the system.¹⁴⁴ They fail to defend their interests in the system as third parties.¹⁴⁵ The number of developing countries participating repeatedly in the WTO disputes as third parties is very limited, and many of them have never participated.¹⁴⁶ This position is quite the opposite of developed countries' third party participation, which have been part of most of the WTO disputes.¹⁴⁷

Other studies suggest the notion of an active participation by developing countries in the WTO dispute settlement system masks the under-representation of a large group

¹³⁹ Busch and Reinhardt, 'Testing International Trade Law', above n 110, 466–467. See also, Hoekman and Kostecki, above n 110, 394–395.

¹⁴⁰ Ibid.

¹⁴¹ Busch and Reinhardt, 'Testing International Trade Law', above n 110, 466–467.

¹⁴² Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 14.

¹⁴³ Ibid 14–15.

¹⁴⁴ Gregory Shaffer, 'Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-oriented View' (Paper prepared for WTO at 10: A look at the Appellate Body, Sao Paulo, Brazil, 16–17 May 2005), 10.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 14.

of small developing country Members.¹⁴⁸ Only a handful of developing countries are repeat players who are responsible for developing countries' caseload in the system.¹⁴⁹ Developing countries such as Brazil, India, Mexico, Korea, Thailand, Chile and Argentina are responsible for the majority of disputes brought by developing countries, which excludes the vast majority of developing countries at the WTO.¹⁵⁰

If the WTO dispute settlement system is open for the participation of all Member countries when they find the need for it, why then are developed country Members more involved in the system through all forms of participation than developing countries? What are the factors behind this difference in participation between the two groups? In other words, what influences developing countries' decision not to participate in disputes despite the fact that their rights or interests have been negatively affected by another country's WTO-inconsistent policy?

A country's decision-making process of whether to initiate or participate in a dispute, or to refrain from participating in that dispute, is ambiguous in the sense that it is not influenced by a standard set of elements, where you could predict its decision to participate or not, depending on which element is present in the dispute. A country's decision to participate in a dispute or not could be a result of economic, political or even social factors. The circumstances that shaped the decision could be domestic, and they could be international. The decision could even differ from one country to another despite the same factors and circumstances influencing them. Although factors vary in their degree of significance or relevance in any specific dispute, it is generally the case that a country's decision to initiate or participate in a dispute is influenced by common matters, such as the capacity to absorb litigation costs, the expected benefits of formal participation, and the likelihood of success in a dispute.¹⁵¹

¹⁴⁸ Sanjiva De Silva, 'Overcoming Limits of Law, Money and Politics—Finding A Voice for Small and Vulnerable Economies in the WTO Dispute Settlement Mechanism through Third Party Participation' (Research Paper presented at the Annual Meeting of the Conference of Australian and New Zealand Society of International Law, 27 June 2008) 5.

¹⁴⁹ Eduardo Motta and Mateo Diego-Fernandez, 'If the DSU is "Working Reasonably Well" Why Does Everybody Want to Change it?' in Dencho Georgiev and Kim Borghet (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 296–297.

¹⁵⁰ Ibid.

¹⁵¹ Bown, 'Participation in WTO Dispute Settlement' above n 134, 297.

Studying the factors that might affect countries' decision of whether to participate in the WTO dispute settlement process or not makes it easier to understand and realise the reasons behind the poor participation of developing countries in the dispute settlement system. Before deciding on whether to initiate a dispute as a complainant or participate as an interested third party, developing countries, whose trade has been negatively affected by WTO-inconsistent policies, like any other country, would evaluate their chances of success in the dispute as well as the benefits and costs associated with it. In doing so, they face the reality of their situation, which would most likely obstruct them from going any further in their claim. Below is a discussion on the effect that the capacity to absorb litigation costs might have on developing countries' decision to initiate disputes.

3.3.1.1. Developing Countries' Capacity to Absorb Litigation Costs

With the exception of large developing countries, such as Brazil and India, most developing countries and all of the least-developed countries have, in general, two common characters. First, individually, they are relatively small value, volume and variety exporters. Second, and connected to the first, is a lack of institutional, human and financial resources.¹⁵²

Developing and least-developed countries are generally not active traders. They believe that the less active a country is in trade, the less are the chances of its trade interests and rights being violated by other countries' policies, which in turn makes them less likely to become active litigants in the WTO dispute settlement system.¹⁵³ Developing countries' less frequent use of the system, in turn, represents an incentive for them not to deploy and develop the institutional and human resources necessary to deal with WTO law and dispute settlement.¹⁵⁴

This situation affects developing countries' capacity to absorb litigation costs. Due to developing countries' lack of incentives to develop human capital or the know-how in WTO law, they often find it difficult to find people internally who are appropriately

¹⁵² Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 15.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

trained and capable of investigating and pursuing a complaint.¹⁵⁵ Developing countries' lack of domestic legal capability to handle the dispute settlement process in the WTO on their own, and the complexity of the dispute settlement process leave them with no choice but to hire the highly specialised law firms of major developed countries, whose fees are exorbitant.¹⁵⁶

However, this is not to suggest that there are no capable people in developing countries who possess expertise on WTO law. On the contrary, developing countries have introduced many respected and well-qualified jurists in this field. An examination of the membership of GATT panels and the WTO panels and the subsequent Appellate Bodies shows that many of the Members have been from developing countries.¹⁵⁷ In addition, WTO literature reveals the considerable amount written by experts from developing countries.¹⁵⁸

The legal resources of a country interact with the other resources available. The lack of financial funding affects negatively the availability of legal resources. The existence of sufficient legal resources cannot be measured based on the existence of an expert, or a number of experts, who demonstrate knowledge of WTO law at one stage. It is measured by how the existence of such expertise is developed and continued. Developing countries in general lack the interest or the ability to create programmes that ensure the creation and development of this expertise. Even if they do have such programmes, they do not match the ones that exist in developed countries.

¹⁵⁵ Andrew Guzman and Beth Simmons, 'International Dispute Resolution: Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes' (2005) 34 *Journal of Legal Studies* 557, 566.

¹⁵⁶ Raghavan, above n 106, 1.

¹⁵⁷ For example: Lilia Bantista (Philippines), Georges Abi-Saab (Egypt), Said El-Naggar (Egypt), Florentino Feliciano (Philippines), Luiz Baptista (Brazil), Julio Lacarte-Muro (Uruguay), and Mateo Diego-Fernandez (Mexico).

¹⁵⁸ For example, munir maniruzzaman (Bangladesh), Uche Ewelukwa (Nigeria), Bhagirath Das (India), Rafiqul Islam (Bangladesh) and Asif Qureshi (Pakistan).

Further, the limited financial resources of developing countries force developing countries' experts to juggle multiple tasks on their country's behalf.¹⁵⁹ In this context, it is common to see developing countries' expert officials participate as representatives in the UN and the WTO at the same time.¹⁶⁰ Taking into account the tremendous load of work that the participation in one organisation could impose, adding the participation in the WTO dispute settlement would be very difficult carry out. Even if it were done, it would not be as effective as having experts that are completely and solely available to be involved in dispute settlement, as is the case with developed countries.¹⁶¹

In addition, limited availability of legal expertise also shows from skilled migration. Many developing countries' experts migrate or are offered careers in developed countries, where the salaries are much higher and the incentives are much greater than their home countries, which affects developing countries' reserve of experts in all different fields including international trade and WTO law.¹⁶² An example of that is the high percentage of academic staff who are originally from developing countries at the universities and colleges of developed countries.¹⁶³ These high numbers of imported expertise represent in return a loss for their original countries.

Whether it is a point of argument or not, developing countries' lack of human and legal expertise in the WTO system is evident in the system's recognition of this issue and its attempts to deal with it through the Secretariat technical assistance to developing countries.¹⁶⁴ Therefore, in the context of this thesis, the reference to

¹⁵⁹ Ademola Oyejide, 'Interests and Options of Developing and Least-developed Countries in a New Round of Multilateral Trade Negotiations' (Working Paper No 2, G-24 Discussion Paper Series, United Nations Conference on Trade and Development, 2000) 23–24.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² For example, in the year 2000, six out of ten highly educated migrants living in OECD countries originated from developing countries, see United Nations, *International Migration Facts and Figures*, <http://www.un.org/esa/population/migration/hld/text/migration_factsheet.pdf>.

¹⁶³ For example, in 1997, 82 per cent of 1382 doctoral degree recipient Indian students in all fields in US universities indicated their plans to stay in the US, cited in Binod Khadria, 'Skilled Labor Migration from Developing Countries: Study on India' (International Migration Paper No 49, International Migration Programme, International Labour Office, Geneva, 2002), 17. Also, 29 per cent of scientists and engineers who hold a doctorate and work in research and development in the US are foreign-born, cited in Adela Pellegrino, 'Skilled Labor Migration from Developing Countries: Study on Argentina' (International Migration Paper No 58, International Migration Programme, International Labor Office, Geneva, 2002) 13.

¹⁶⁴ The Dispute Settlement Understanding, above n 9, Article 27.

developing countries lack of human resources and legal expertise does not suggest that this expertise does not exist at all; it means rather that it might exist but other factors restrict its effectiveness and availability. This understanding applies in the thesis in each instance that the lack of developing countries human and legal resources is considered.

To engage as active participants, developing countries need to invest in monitoring trading practices abroad and investigating possible trade violations by other countries.¹⁶⁵ They also need to develop mechanisms to detect violations that affect their rights under WTO law, and to develop proactive strategies to defend these rights and interests.¹⁶⁶ However, keeping an effective representation in the WTO and international markets to monitor possible violations, and contribute in developing proactive strategies, is a very costly process. Not many developing countries can afford to keep up this kind of constant representation abroad, which affects their chances of detecting trade violations against their WTO interests, and in turn affects their chances of initiating disputes.

Moreover, active participation in the WTO dispute settlement process is a result of mature and sophisticated domestic institutions staffed with qualified individuals to deal with trade issues.¹⁶⁷ The cost of developing the infrastructure for these kinds of institutions with all the human and financial resources needed is too high for many developing countries, when they do not have, individually, a substantial share in international trade to make them frequent users of the dispute settlement system in the first place.

Developing countries simply do not see the solution to the high-costs problem of using the dispute settlement system as lying in improving the institutional capacity and developing the internal legal expertise to deal with the WTO trade issues. Their less frequent use of the WTO dispute settlement system, as a result of their limited individual share in international trade, makes the costs of training local expertise to run especially allocated institutions for international trade issues worse than hiring

¹⁶⁵ Guzman and Simmons, above n 155, 566

¹⁶⁶ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 17.

¹⁶⁷ Guzman and Simmons, above n 155, 566.

costly legal counsels abroad. The significant long-term allocation of resources to build an internal legal capacity is not cost-effective for developing countries, when they are not active users of the WTO dispute settlement system.¹⁶⁸

Costs associated with disputes are not only limited to human, institutional and financial resources. They also include political costs. The notion of political costs constitutes a different kind of cost that it is, in a way, not necessary for the participation in disputes itself. Rather, it is more of a consequence that might result from participation in disputes that eventually affects a country's other resources. Political costs are obvious when the complainant, as is the case with many developing countries, is reliant on bilateral assistance from the respondent, or is involved in a preferential trade agreement with the respondent. Developing countries' initiation or participation in disputes, if it negatively affects such important relationships, could lead to very high costs in terms of lost profits and potential opportunities.¹⁶⁹ Therefore, the risk and fear of losing bilateral aid, or worsening relations and affecting a preferential trade agreement, makes it less likely for many developing countries, which are in a relatively weak and dependent position, to participate in cases against stronger respondents as either complainants or third parties.¹⁷⁰

However, it is true that the WTO dispute settlement system offers weaker developing countries the opportunity of coalition building.¹⁷¹ Unlike dispute resolution under bilateral agreements, the DSU allows for significant third party participation under which third parties have a right to be heard, to make written submissions and receive submissions.¹⁷² These procedures offer weak developing countries some form of co-operation and collective action in defending or bringing trade actions.¹⁷³ The presence of a coalition on the side of a weak developing country gives it a chance of gaining resources and expertise and discourages the strong developed country counterparts

¹⁶⁸ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 17.

¹⁶⁹ Bown, 'Participation in WTO Dispute Settlement', above n 134, 302.

¹⁷⁰ Adebukola Eleso, 'WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries' (Working Paper No 1378, The Berkeley Electronic Press, 2006) 4.

¹⁷¹ Peter Drahos, 'The Bilateral Web of Trade Dispute Settlement' (Paper presented at the Workshop on 'WTO Dispute Settlement and Developing Countries: Use, Implications, Strategies, Reforms', Australian National University, 20–21 May 2005) 14.

¹⁷² Ibid 13.

¹⁷³ Ibid.

from using mechanisms of political and economic threat.¹⁷⁴ These coalition possibilities offered under the WTO dispute settlement system would never be found under the exclusivity of bilateral agreements.¹⁷⁵

Developing countries nevertheless still face a complex process of trade litigation with the disadvantage of lacking financial resources and legal expertise.¹⁷⁶ Further, the political or economic threat by their developed countries might be reduced but it would not be removed, as the political and economic leverage of developed countries represents a tempting tool to use against developing countries in order to achieve other benefits.¹⁷⁷ These factors explain why developing countries still have limited participation despite the presence of the coalition building procedure that the DSU offers. Another factor is referred to by the term ‘free riders’, which characterises many developing countries in the dispute settlement system.¹⁷⁸ The free-riding situation happens when a WTO-inconsistent measure negatively affects a group of countries. Developing countries in this group do not participate, waiting for a developed country or a larger developing country affected by the measure to initiate the dispute. If the dispute leads to the removal of the violating measure, the non-participating developing countries gain the benefit of the outcome through the Most Favoured Nation (MFN) principle. If the dispute is unsuccessful, then the developing countries concerned have saved the costs of participation.¹⁷⁹

Along with the costs associated with the participation of developing countries in the dispute settlement process, the likelihood of success in disputes and the achievement of the expected benefits of formal participation are also factors that interact with developing countries’ ability and willingness to participate in the process. These are discussed in the following section.

¹⁷⁴ Ibid 14.

¹⁷⁵ Ibid 15.

¹⁷⁶ Ibid 14.

¹⁷⁷ Ibid.

¹⁷⁸ Bown, ‘Participation in WTO Dispute Settlement’, above n 134, 289–290.

¹⁷⁹ Drahos, above n 171, 15.

3.3.1.2. The Expected Benefits for Developing Countries from Formal Participation

Other than the long-term benefits that might result from formal participation, such as the opportunity of shaping WTO law over time by influencing interpretations of panels and the Appellate Body through more active participation, formal participation in the WTO disputes might result in short-term benefits. These benefits are represented in improved terms of market access or trade liberalisation offered by the respondent's country. In this regard, a successful economic resolution of a dispute is very important in achieving the expected benefits of a dispute.

However, the WTO dispute settlement system has a self-enforcing nature. This means that it is a country's responsibility to monitor its trade and other countries' trade policies, to initiate a dispute when its trade rights under the WTO agreements are violated and to enforce its rights through actual or implicit threats of retaliation against offending trading countries.¹⁸⁰ This situation is believed to present economically powerful countries as more likely to initiate or participate in disputes, where the complainant's credible threat of retaliation would make the respondent country more likely to bring its WTO-inconsistent policies into conformity to avoid retaliation.¹⁸¹ In this context, the complainant's high credibility of a retaliation threat could be a result of the high share the complainant has in the respondent's total exports, where the complainant's market is very important to the respondent's exports in which it could not risk tariff retaliation. The retaliation threat could also be credible when the respondent is reliant on the complainant for bilateral aid. In this case, the explicit, or even implicit, threat of withdrawing bilateral aid would put the respondent in a position where it is more likely to correct its violation and implement its market access commitments in order to maintain the flow of bilateral assistance from the complainant.¹⁸²

¹⁸⁰ Bown, 'Participation in WTO Dispute Settlement', above n 134, 300.

¹⁸¹ Ibid 301.

¹⁸² Ibid.

3.3.1.3. *Developing Countries' Likelihood of Success in Disputes*

Other than the traditional meaning of success for the complainant in a WTO dispute, which means the legal success of a favourable panel or Appellate Body ruling, it is believed that, generally, a dispute is successful for the complainant when the respondent brings into WTO-compliance its trade-violating policies, and the most probable benefit is the market access resulting from the re-implementation of the WTO agreements.¹⁸³ Consequently, the limited international trade of individual developing and least-developed countries may affect their chances of a successful outcome of a dispute and the expected benefits. The self-enforcing nature of the WTO dispute settlement system means that countries have no way of enforcing their rights under the WTO agreements other than through actual or implicit threats of retaliation against offending countries.¹⁸⁴ This means that developing countries might not achieve the successful outcome of a dispute and the expected benefits despite a legal victory on the dispute's merits.¹⁸⁵ The limited international trade share of individual developing countries means that they, as complainants, do not have the retaliatory capacity to force the respondent to comply and increase their access to its market.¹⁸⁶

Any retaliation that comes through the imposition of unilateral trade restrictions by developing countries could have a negative economic outcome for the developing countries themselves.¹⁸⁷ As discussed earlier in this chapter, it is easy to imagine this situation when a developing country, for example, is engaged in a weak-strong relationship with the respondent, such as through an economic or development bilateral arrangement or a preferential trade agreement. In this case, any retaliatory action by the developing country to enforce its legally won case might push the respondent to initiate a retaliatory action of its own outside of the WTO system by the reduction of the bilateral assistance or reductions in the preferential access granted to the developing country.¹⁸⁸

¹⁸³ Ibid 297, 300.

¹⁸⁴ Ibid 300.

¹⁸⁵ Chad Bown and Bernard Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) *Journal of International Economic Law*, 861, 865.

¹⁸⁶ Ibid 866.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

Even in the absence of any aid or preferential trade agreements, the negligible share of individual developing countries in international trade means the effect of any retaliatory trade restrictions of developing countries probably goes unnoticed, especially if the respondent country is an economically powerful developed country. In this situation, winning the case is meaningless with no restored violated rights or improved market access. This possibility represents a huge disincentive for developing countries to spend substantial resources on the WTO dispute settlement process. They believe that the outcome of legally winning a dispute and failing to achieve economically successful results is the same as an outcome where the dispute had never been initiated.¹⁸⁹

It is expected that for a country to initiate a dispute under the WTO dispute settlement system, the expected benefits of a successful outcome must outweigh the costs associated with launching the dispute.¹⁹⁰ However, as mentioned above, most developing countries are small individual traders, with a very limited value, volume and variety of trade. This makes it reasonable to believe that in many potential cases, the expected benefits would not be substantial enough to justify or outweigh the high costs of allocating human, institutional and financial resources for the dispute, and the costs resulting from potential ruined opportunities, as a result of the shaken relations to which a dispute could lead.¹⁹¹

In this context, the *EC—Bananas III* represents a good example of how a successful complaint could be left meaningless as a result of the defendant's practices,¹⁹² depriving the complainant of the expected benefits after a costly and long process of dispute settlement. In *EC—Bananas III*, a dispute initiated by Ecuador, Guatemala, Honduras, Mexico and the US, the panel found in its report on 22 May 1997 that the EC's banana import regime was inconsistent with GATT. The EC appealed the report, which was later upheld by the Appellate Body on 9 September 1997.¹⁹³ The EC requested the establishment of a panel under Article 21.5 of the DSU to determine the

¹⁸⁹ Ibid 865.

¹⁹⁰ Ibid 866–867

¹⁹¹ Ibid

¹⁹² *EC—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27.

¹⁹³ Ibid WT/DS27/AB/R (adopted on 9 September 1997).

inconsistency of its implementation measures, which ruled on 6 May 1999 that the measures taken by the EC in compliance with the recommendations of the DSB were not fully compatible with the EC's WTO obligations.¹⁹⁴ However, on July 2001, the EC declared that it has reached a mutual agreement with the other parties on bananas, which provides for a waiver period that expires on 31 December 2005.¹⁹⁵ On 23 February 2007, Ecuador requested the establishment of a panel under Article 21.5, which found on 7 April 2008 that since 1 January 2006, there was no evidence that the EC had been implementing its obligations, which means that it had failed to implement the recommendations and rulings of the DSB.¹⁹⁶

This dispute shows how the EC has been successfully delaying the implementation of a ruling against it for more than a decade. Such disputes represent an example of a successful complaint without a meaningful benefit, which, in the case of developing countries, could be a substantial deterrence from participating in the process in the first place.

However, the record of the WTO disputes also indicates that many developing countries have not only filed and won disputes, but also achieved concessions and acceptable implementations from large developed countries. Examples of these cases involved Costa Rica against the US in *US—Underwear*,¹⁹⁷ Peru against the EC in *EC—Sardines* and India against the US in *US—Wool Shirts and Blouses*.¹⁹⁸ Other cases, such as *US—Gambling*, involved a small developing country like Antigua threatening the US of cross-retaliation using TRIPs with great success.¹⁹⁹ How did these developing countries achieve a successful outcome of their disputes legally and practically through acceptable implementation considering the argument above of elements that restrict their chances of such outcome? Does not a small developing country's request for an authorisation of retaliation against a large developed country like the one exercised by Antigua against the US show that retaliation can still be used

¹⁹⁴ Ibid Report of the Panel under Article 21.5, WT/DS27/RW/ECU (adopted on 6 May 1999).

¹⁹⁵ Ibid Notification of Mutually Agreed Solution, WT/DS27/58, (Notified on 2 July 2001).

¹⁹⁶ Ibid Report of the Panel under Article 21.5, WT/DS27/RW2/ECU (adopted on 7 April 2008).

¹⁹⁷ *US—Restrictions on Imports of Cottons and Man-made Fibre*, WT/DS24.

¹⁹⁸ *EC—Trade Description of Sardines*, WT/DS231; *US—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33.

¹⁹⁹ *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285.

as an enforcement tool for implementation despite the gap in economic and political power between complainants and respondents?

These developing countries have succeeded in achieving an efficient use of the WTO dispute settlement system against developed counterparts despite their limited retaliatory power. However, the reason for that is not necessarily the efficiency of the WTO implementation procedures, which include the option of retaliation, but rather the normative condemnation that goes along with a legal defeat.²⁰⁰ Defendants try to avoid being found non-compliant in order not to damage their prospects of gaining compliance when they are complainants.²⁰¹

It is also part of a shared responsibility among WTO Members to keep the system working. Therefore, when the US or the EC comply with a ruling in favour of a small developing country, it does so as part of its obligations as WTO Member rather than a precautionary step to avoid possible retaliation by the developing country.²⁰² However, WTO condemnation and the responsibility towards the integrity of the system cannot provide a guarantor of implementation; developing countries cannot depend on these factors in deciding on initiating disputes. The interests or benefits resulting from the respondent's violating measures play a major role in its willingness to comply effectively. The more the benefits of such measures are the less are the chances that a WTO condemnation, Member's compliance responsibility or even retaliation would deter the violating country of continuing the violation. This case is clear in the *EC—Hormones*,²⁰³ where the EC insisted on implementing unsatisfactory measures despite all the pressuring tools mentioned above.²⁰⁴

The *US—Gambling* case,²⁰⁵ in which Antigua was authorised to suspend concessions and cross-retaliate under the TRIPs Agreement against the US, is in fact an example

²⁰⁰ Marc Busch and Eric Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries', (Trade Brief prepared for the Swedish International Development and Cooperation Agency, April 2004) 4.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 and WT/DS48.

²⁰⁴ World Trade Organization, *EC—Measures Concerning Meat and Meat Products (Hormones)* (12 February 2010) WTO Website <http://www.wto.org/english/tratop_e/cases_e/ds26_e.htm>.

²⁰⁵ *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, above n 199.

of how the limited economic power and volume of international trade of developing countries contribute in making the retaliation procedure inefficient against their major developed counterparts. The level of nullification was determined to be US\$21 million annually,²⁰⁶ which means that the level of authorised suspension of concessions may not exceed this amount. In this dispute, even if Antigua employed cross-retaliation effectively using the TRIPs Agreement as the field of the most appropriate retaliation that suits its trade strengths, the authorised level of retaliation is less likely to make an impact on the economy of a country like the US. The cost of this retaliation on the US could be easily outweighed by the satisfaction of domestic interests that are benefiting from the violating situation. In fact, this modest level of annual nullification could be overlooked by Antigua itself if its relations and interests with the US proved to be more important.²⁰⁷

Even when the level of nullification and the authorised retaliation is significant, as was the case with Ecuador in the *Bananas III* dispute,²⁰⁸ under which it was authorised to suspend its concessions against the EC under the GATT, GATTS and TRIPs to the value of US\$201.6 million,²⁰⁹ retaliation was not exercised. In this case, the level of retaliation would have made an impact on the EC's economic equations, and it would have been easier to exercise by Ecuador, considering that the cross-retaliation was divided across three agreements. Yet, as discussed above, it is another example of developing countries' hesitancy to initiate disputes or retaliatory actions against their major developed counterparts.

Developing countries are still reluctant in initiating disputes. The mechanism of the WTO dispute settlement system imposes restrictions on their ability to achieve successful outcomes and trade benefits for their disputes. Moreover, their limited resources and the imbalance between their power and that of developed countries limit the effectiveness of their participation. The following section continues the

²⁰⁶ Ibid WT/DS285/ARB (Decision by the Arbitrator) 78.

²⁰⁷ For commentaries on this case see, Andrea Ewart, 'Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement' (2007) 35 *Syracuse Journal of International Law and Commerce* 27, 53–57. See also, Andrew Cooper, 'Remote in the Eastern Caribbean: The Antigua-US Internet Gambling Case (Caribbean Paper No 4, The Centre of International Governance Innovation, April 2008) 2–20.

²⁰⁸ *EC—Regime for the Importation, Sale and Distribution of Bananas*, above n 192.

²⁰⁹ Ibid WT/DS27/ARB/ECU (Decision by the Arbitrator) 36.

argument of a deficient dispute settlement system in relation to developing countries' participation by focusing on the problematic issues for developing countries in the consultation stage.

3.3.2. Developing Countries' Issues in the Consultation Stage

The dispute settlement system had been moving towards a rule-oriented approach since the establishment of GATT, and intensified with the creation of the WTO. However, arguably, the basic aim of the WTO dispute settlement system is still political.²¹⁰ As a result, the over-riding emphasis of the DSU is on settling disputes, with or without litigation.²¹¹ Hence, the drafters of the DSU wanted to use the flexibility of bilateral consultations as a means to achieve the core objective of dispute settlement by making it a mandatory stage in which parties discuss the dispute issues and try to find a satisfactory solution. The importance of the consultation stage is clear in the Appellate Body Compliance Report in *Mexico—Corn Syrup* in which it stated:

We agree ... on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weakness of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.²¹²

This idea of encouraging consultations between the concerned parties seems to work effectively for the WTO dispute settlement system in achieving its goal, as many of the disputes have not proceeded beyond the consultation stage, primarily because a satisfactory settlement has been reached.²¹³ The high percentage of disputes settled without proceeding beyond consultations to the panel stage, which could be as many

²¹⁰ Busch and Reinhardt, 'Bargaining in the Shadow', above n 71, 158.

²¹¹ *The Dispute Settlement Understanding*, above n 9, Article 3, paragraph 7.

²¹² *Mexico—Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the US, Recourse to Article 21:5 of the DSU*, WT/DS132/AB/RW, 58 (adopted 21 November 2001).

²¹³ Shaffer, 'Weaknesses and Proposed Improvements', above n 144, 14.

as three quarters of the complaints raised according to a WTO World Trade Report,²¹⁴ underlines the important role that the consultation stage plays in the WTO dispute settlement system.²¹⁵

The importance of the consultation stage is not only a result of the high percentage of disputes resolved. The high percentage of settlement logically leads to a high percentage of trade concessions granted to reach settlements,²¹⁶ which consolidates the credibility of the consultation stage as an essential component of the WTO dispute settlement system. This notion is noted in a study by Busch and Reinhardt, which shows that ‘around two thirds of complaints ending prior to a ruling (whether before or after the establishment of a panel), exhibited full or partial concessions by the defendants’.²¹⁷

It is argued that many disputes in the WTO system settle in the consultation stage, and that this ‘early settlement’ offers the greatest likelihood of securing concessions from a defendant. Thus, it is important to examine how developing countries interact with all the elements of the consultation process and how this interaction affects their chances of achieving an ‘early settlement’ for their disputes and enjoying trade concessions from the other parties as a result. Busch and Reinhardt claim that the pattern of an early settlement in the consultation process, where concessions have been offered from defendants, has been less evident in cases involving developing countries.²¹⁸ They claim that developing countries are even missing early settlement itself.²¹⁹ This section discusses the ineffectiveness of the WTO dispute settlement system in recognising developing countries’ inability to push for early settlement, and the system’s deficiency in dealing with issues that affect developing countries in the bargaining process, such as their lack of financial and legal resources and their limited retaliatory power.

²¹⁴ World Trade Organization, *World Trade Report (2003)* (20 February 2010) WTO Website, <http://www.wto.org/English/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf> 173.

²¹⁵ Shaffer, ‘Weaknesses and Proposed Improvements’, above n 144, 14.

²¹⁶ *Ibid* 12.

²¹⁷ Marc Busch and Eric Reinhardt, ‘Developing Countries and the GATT/WTO Dispute Settlement’ (2003) 37(4) *Journal of World Trade* 719, 720.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*.

During the GATT years, developing countries' lack of financial and legal capacity put them in a position where they were less likely to engage in effective bargaining that would lead them to settle early and achieve trade concessions in the consultation process.²²⁰ This position was contemporary with the situation of prevailing power politics in the GATT dispute settlement system, in general, and in the consultation stage, in particular.²²¹ This situation was supported by the system's lack of effective enforcement of rules and certainty of procedures.²²² As discussed in Chapter 2, the reforms during the GATT era that attempted to favour developing countries and promote more effective participation in the dispute settlement system offered more options for developing countries, but did not deal with their issues in the consultation process.²²³ The option of using the Director-General's good offices to assist in consultations did not provide a solution to developing countries' disadvantageous position resulting from the lack of financial and legal capacity in a power-oriented bargaining process.

Now, the WTO DSU has the same tendency as the GATT of ignoring developing countries' inability to push for early settlement.²²⁴ It is true that the DSU presented some major improvements over the GATT dispute settlement system, as discussed earlier in this chapter, offering stricter time limits on proceedings, a single set of procedures for disputes raised and a standing Appellate Body. It is also true that these important reforms exceeded the litigation stage to limit power politics in the bargaining process of the consultation stage, which was a factor during the GATT years in limiting developing countries' chances in achieving early settlements and securing trade concessions.²²⁵

However, the WTO DSU does not provide solutions to counter the other problem that still faces developing countries in the bargaining process, namely the lack of financial and legal resources. The move from a power-oriented to a more rule-oriented system

²²⁰ Ibid 721.

²²¹ Ibid.

²²² Ibid 719–722.

²²³ Ibid 720; for the discussion on the special treatment provided for developing countries under the GATT dispute settlement system see Chapter Two, 65–78.

²²⁴ Ibid.

²²⁵ Ibid 722.

only substituted one problem for another in relation to developing countries' bargaining position in the consultation process. This shift limited the effect of power politics, but increased the pressure on developing countries' capacity to achieve an early settlement.²²⁶

The increased complexity of WTO law as a result of becoming a multi-agreement system, and the more legalised nature of the WTO DSU, has increased the pressure on disputing countries to have sophisticated legal expertise to engage in a very demanding bargaining and consultation process. Further, the rule-oriented reforms of the DSU, such as the automatic establishment of panels, the tight enforcement of terms of reference and the focus on a strict time limit for the dispute settlement procedures, place pressure on the parties to legally mobilise as soon as possible and start their legal preparations for the whole process in the consultation stage.²²⁷ This pressure is further increased in the presence of the negative consensus rule, as it stops Members from delaying or blocking the establishment of panels, and as such, puts more weight on legal preparation in pre-panel bargaining.²²⁸

The WTO dispute settlement system's demand on legal capacity is troubling for many developing countries, which lack the capacity to have large, dedicated and permanent legal and economic staffs, who are expert in WTO law and its dispute settlement system.²²⁹ Developing countries' lack of legal resources necessary to keep up with the demanding consultation process leads to another challenge. It also puts pressure on their financial resources necessary to create such legal capacity in the first instance, and then to mobilise it in a timely manner to meet the demands of the WTO dispute settlement system.²³⁰

²²⁶ Ibid 721–722.

²²⁷ Ibid 721.

²²⁸ Ibid.

²²⁹ Moonhawk Kim, 'Unequal Law: Procedural Costs of WTO Rules on Developing Countries' (Paper presented at the International Relations Workshop, Stanford University, 11 April 2006) 11. See also, Busch and Reinhardt, 'Developing Countries and the GATT/WTO Dispute Settlement', above n 217, 721.

²³⁰ Kim, above n 229, 12. See also, Busch and Reinhardt, 'Developing Countries and the GATT/WTO Dispute Settlement', above n 217, 721.

To understand how legal and financial resources of developing countries, along with their political power, interact with the prospects of early settlement in the consultation stage, it is important to understand why parties reach an early settlement to their dispute in the first place, particularly when they have the chance of obtaining a neutral ruling from a third party.

The explanation of the high probability of concessions negotiated in the consultation stage in advance of a ruling, or what is referred to as ‘early settlement’,²³¹ arguably comes from the uncertainty that disputants have when they begin their bargaining process in the consultation stage.²³² It is uncertain whether the complainant in a dispute will choose to file for dispute settlement, or choose to unilaterally retaliate with a domestic trade measure (for example, Section 301 of the US 1974 Trade Act) without the approval of the WTO,²³³ and whether the complainant is capable of implementing politically costly retaliation.²³⁴ At the same time, it is also uncertain how the defendant views any economic damage resulting from potential unilateral retaliation, or what political repercussions will arise from the condemnation of breaking the trade rules, and whether it is capable of dealing with these potential consequences.²³⁵

Both parties seek to use this uncertainty of action to their own advantage.²³⁶ The complainant’s belief that the defendant is going to concede in the case of an adverse ruling leads it to ask for concessions to its benefit in return for settling the dispute at the consultation stage without proceeding to a panel ruling. At the same time, it is in the defendant’s interest to avoid the WTO condemnation and potential trade

²³¹ Marc Busch and Eric Reinhardt, ‘The Evolution of GATT/WTO Dispute Settlement’ in John Curtis and Dan Ciuriak (eds), *Trade Policy Research* (2003) 145.

²³² Ibid 146.

²³³ Section 301 of the US 1974 Trade Act is the principal statutory authority under which the US may impose trade sanctions against foreign countries that maintain policies and practices that violate the US rights or benefits under trade agreements, or are unreasonable or discriminatory and burden or restrict US trade.

²³⁴ Busch and Reinhardt, ‘Bargaining in the Shadow’, above n 71, 162. See also, Busch and Reinhardt, ‘The Evolution of GATT/WTO Dispute Settlement’, above n 231, 146.

²³⁵ Ibid.

²³⁶ Ibid.

retaliation, which leads it to meet all or part of the complainant's demands, and offer concessions in the consultation process before a ruling is made.²³⁷

This scenario, claimed by Busch and Reinhardt, underlines the force that the pressure of a WTO condemnation has in constraining members' behaviour and pushing them to observe WTO decisions. It also underlines the power tactics retained in the WTO dispute settlement system. It shows how the ability and willingness of a country to implement retaliatory actions can affect the outcome of consultations and the extent of concessions granted to the country able and willing to retaliate.²³⁸ Along with these factors, Busch and Reinhardt claim that the extent of a country's legal capacity affects its chances in the bargaining process, and in securing trade concessions in the consultation stage.²³⁹ As a result, developing countries are always less likely to benefit from opportunities in the consultation stage to secure trade concessions and reach an early settlement to their disputes.²⁴⁰

In the WTO system, despite the prohibition of unilateral retaliation and limiting such action to the course of the DSU, the mere fact that a complainant is capable of such retaliation is enough to pressure the defendant to avoid it and end the dispute by offering trade concessions and reaching an early settlement. However, this pressure device is not available for developing countries to represent a credible threat to defendants to force them to try to reach an early settlement in return of trade concessions. Developing countries generally lack the retaliation power as a result of their small markets and limited trade.²⁴¹ Even if the retaliation is through the WTO dispute settlement channels in which a developing country is authorised to retaliate against a violating Member, the fact that such retaliation is limited to the economic power of that developing country makes the possibility of such a threat ignored or at least not worthy enough to offer trade concessions in the bargaining process.

²³⁷ Ibid.

²³⁸ Busch and Reinhardt, 'Bargaining in the Shadow', above n 71, 162.

²³⁹ Busch and Reinhardt, 'Developing Countries and the GATT/WTO Dispute Settlement', above n 217, 721.

²⁴⁰ Ibid 720.

²⁴¹ Bown and Hoekman, above n 185, 866.

Moreover, the DSB ruling against the violating Member, which has the impact of a WTO condemnation for breaking trade rules, has a very strong moral effect that countries seriously consider for their trade relations and the future function of the WTO dispute settlement system. However, this condemnation generally does not take place until there is an adverse ruling against the erroneous Member. Hence, the complainant has to present a credible threat that it would push the case to completion if the defendant did not offer trade concessions in return for an early settlement in the consultation process.²⁴² Developing countries cannot always present such a credible threat, given the demands on legal expertise and financial costs. Their threat lacks credibility because defendants know that the huge costs accompanying the WTO dispute settlement process are just too much for most developing countries.²⁴³ Therefore, they gamble that the longer the dispute continues, the more burdensome the cost would be on developing countries, which might force them to drop the case all together.²⁴⁴ This situation gives an incentive for obstruction by other Members, and puts developing countries in a weak and negative position in the bargaining process of the consultation stage, depriving them of the benefits of early settlement.²⁴⁵

The effect of developing countries' lack of legal and financial resources, along with political power, on their bargaining position in the consultation stage and on their chances of securing trade concessions and achieve early settlements, is obvious in the practice of the WTO dispute settlement system.

The case between the US and Pakistan on cotton yarn represents one good example²⁴⁶ in which a developing country was left helpless in a difficult situation. Pakistan requested consultations with the US regarding a transitional safeguard measure applied by the US, from 17 March 1999, on combed cotton yarn from Pakistan.²⁴⁷ The US had notified the Textiles Monitoring Body (TMB) on 5 March 1999, in

²⁴² Busch and Reinhardt, 'Developing Countries and the GATT/WTO Dispute Settlement', above n 217, 722.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ *US—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WTO Doc WT/DS192.

²⁴⁷ *Textile Monitoring Body—Report of the Fifty-fourth Meeting*, World Trade Organization, G/TMB/R/53.

accordance with Article 6.10 of the ATC that it had decided to unilaterally impose the restraint, after consultations on the situation had failed to produce a mutually satisfactory solution.²⁴⁸ In April 1999, the TMB examined the US restraint and recommended that it should be cancelled. On 28 May 1999, in accordance with Article 8.10 of the ATC, the US notified the TMB that it considered itself unable to conform to the recommendation issued by the TMB.²⁴⁹ Despite further recommendation of the TMB pursuant to Article 8.10 of the ATC that the US reconsider its decision, the US continued to maintain its unilateral restraint.²⁵⁰ On 3 April 2000, Pakistan requested the establishment of a panel. The panel circulated its report in May 2001, concluding that the US measure was inconsistent with the provisions of Article 6 of the ATC, and recommended the removal of the import restriction.²⁵¹ On 9 July 2001, the US notified its intention to appeal to the Appellate Body. However, on 8 October 2001 the Appellate Body upheld the Panel's conclusion.²⁵² The US implemented the DSB recommendations as from 9 November 2001.²⁵³

Despite the overall result of this dispute being in Pakistan's favour, the dispute has serious implications on the position of developing countries in the consultation stage. Before the dispute proceeded to the litigation stage, the US decided to unilaterally impose restrictions on Pakistan, and then ignored a recommendation by the TMB to remove the measure. After the consultation process failed, the US dragged the dispute through the panel stage and then the appellate stage, delaying the dispute's outcome for two years and eight months (from March 1999 to November 2001). The significant gap between the US's legal and financial resources and political power, and that of Pakistan, arguably provides an answer for the US actions in the dispute.

²⁴⁸ Ibid.

²⁴⁹ *Textile Monitoring Body—Communication by the US*, World Trade Organization, G/TMB/N/346.

²⁵⁰ *Textile Monitoring Body—Report of the Fifty-fourth Meeting*, above n 247, G/TMB/R/53; *Textile Monitoring Body—Report of the Fifty-fifth Meeting*, World Trade Organization, G/TMB/R/55; *Textile Monitoring Body—Report of the Fifty-seventh Meeting*, World Trade Organization, G/TMB/R/57.

²⁵¹ *US—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, above n 246, WT/DS192/R, 127.

²⁵² Ibid WT/DS192/AB/R, 40.

²⁵³ World Trade Organization, *US—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (25 April 2010) WTO Website <http://www.wto.org/english/tratop_e/cases_e/ds192_e.htm>.

Pakistan,²⁵⁴ it could be argued, did not have the legal expertise and financial resources necessary to mobilise an effective bargaining process with the US in the shadow of the complex law of the WTO agreements, and did not have the political weight to use consultations as a pressuring device against the US. This situation effectively permitted the US to unilaterally impose its import restricting measure with no concern for the consequences. Further, Pakistan's lack of effective legal and financial resources and political power, arguably, induced the US to refuse the TMB's recommendation to remove the measure. The US could well have presumed that Pakistan's lack of resources would become more burdensome the further the dispute proceeded, pressuring it to drop the case as a result of the substantial costs, or lose the case as a result of its poor WTO legal expertise. The US could also have presumed that if the burdens of a long dispute did not force Pakistan to drop the case or lose it, a long dispute would give the US some free time benefiting from keeping the measure in place until the final decision on the dispute is made, and that is exactly what happened. The US enjoyed more than two and a half years without Pakistan's textiles and clothing competition, until the decision of the DSB was finally implemented in the late 2001, while Pakistan's damages during the period of the whole process were totally ignored.²⁵⁵ This outcome was reflected in a statement by Pakistan's delegate after winning the case: 'at the end of the day both parties won, Pakistan because it got a decision in its favour and the United States because it was able to keep the quota restraints for almost the entire three-year period, thanks to the duration of the case'.²⁵⁶

The fact that reaching a mutual agreement to settle disputes without the need of having a third party ruling is the preferred outcome in the WTO dispute settlement system introduces the consultation stage as an essential part of the dispute settlement process. This role is consolidated by the fact that most WTO disputes are actually

²⁵⁴ Due to Pakistan's lack of legal expertise in international law, the WTO law forced it to employ the services of a US-based consultancy firm and legal firm during the TMB stage, then employed a Geneva-based legal firm for the DSB dispute. Pakistan struggled to provide the financial resources for the dispute and decided to divide the cost between its Ministry of Commerce's Export Promotion Body and the textiles sector. After the payment of US\$32,175,000 to the consultancy firm, there were not sufficient funds to settle the invoice of US\$28,125,000 of the US-based legal firm. That was only for the TMB stage, before the dispute moved to DSB, cited in Turab Hussain, 'Combed Cotton Yarn Exports of Pakistan to the US: A Dispute Settlement Case', (Working Paper No 05-36, Centre for Management and Economic Research, Lahore University of Management Sciences, 2005) 4–7.

²⁵⁵ For commentaries on this case see: Hussain, above n 254; see also, Ewart, above n 207, 57–61.

²⁵⁶ Hussain, above n 254, 12.

settled in the consultation stage, which increases the chances of achieving the trade concessions that accompany early settlements. However, developing countries have been unable to reap the full benefits of early settlement that the consultation stage offers. The DSU has limited the use of power politics in the consultation stage by its shift towards a more rule-oriented approach. However, developing countries' lack of legal, financial and institutional resources still affect their chances of achieving a positive outcome from possible early settlements, as it affects their ability of conducting effective bargaining with other parties. In addition, the fact that many developing countries are engaged in aid or preferential treatment agreements with developed countries gives a chance for a return of power politics in the consultation stage to the detriment of developing countries. These issues represent a defect in the consultation stage, which needs to be addressed by the WTO in order to encourage developing countries' participation in the system.

3.3.3. Developing Countries' Issues in the Litigation Stage (the Panel and Appellate Body Stages)

The WTO DSU gives the DSB the authority to establish a panel at the request of the complainant when negotiations fail between the disputing parties,²⁵⁷ starting what is generally referred to as 'the litigation stage'. This stage could progress beyond the panel report to the Appellate Body, if any of the disputing parties request a review.²⁵⁸

The litigation stage was the focus for change in the dispute settlement system during the UR, as part of a clear move towards a more adjudicatory and rules-based WTO dispute settlement system. The most important innovations of the DSU are in the litigation stage; namely the negative consensus rule, which eliminated the blockage of the establishment of panels or the adoption of reports, and the Appellate Body review of panel reports, a new stage that consolidates the adjudicatory approach that the WTO DSU decided to follow.²⁵⁹

²⁵⁷ *The Dispute Settlement Understanding*, above n 9, Article 6, paragraph 1.

²⁵⁸ *Ibid* Article 17.

²⁵⁹ Pescatore, above n 69, 15–16.

Developing countries benefit from the existence of a compulsory, adjudicatory and rule-oriented multilateral dispute settlement system, where they stand on an equal footing with developed countries regardless of their differences in economic and political power.²⁶⁰ However, it must still be asked to what extent the more adjudicatory, compulsory and rule-oriented litigation stage lives up to the positive general impression in relation to developing countries' participation. In other words, what is developing countries' evaluation of their experience in the panel and Appellate Body stages? Developing countries still face great hurdles in their use of the panel and the Appellate Body processes. Those hurdles place developing countries in a disadvantageous position where the equal standing between them and developed countries is not achievable despite the positive changes in the system.

As part of the Doha Development Round Negotiations on Improvements and Clarifications of the WTO Dispute Settlement Procedures, the African Group submitted a proposal on 25 September 2002 to the DSB. This proposal outlines some of the issues affecting their participation in particular, and developing countries' participation in general, in the WTO dispute settlement system.²⁶¹ These issues highlighted by the African Group may reflect the general experience of many developing country Members. This experience results from the fact that most developing countries share the traits of small economic power and low trade volume, inadequate legal expertise, limited financial and institutional resources, and the less litigious approach to possible disputes, particularly those against major trading and donor partners.²⁶²

In the proposal, the African Group identified issues of concern that exist in some of the WTO dispute settlement stages, such as the litigation stage and the implementation stage.²⁶³ In relation to the litigation stage, the African Group notes that the system is complicated and expensive, and that the attainment of the development objectives of the WTO Agreement and the achievement of equity in geographical distribution has not been evident in the operation and composition of

²⁶⁰ Ibid 109.

²⁶¹ *Proposal by the African Group*, WTO Doc TN/DS/W/15 (2002).

²⁶² Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9(2) *Journal of International Economic Law* 427, 427.

²⁶³ *Proposal by the African Group*, above n 261.

panels and the Appellate Body.²⁶⁴ The African Group also pointed out that the panels and Appellate Body had their mandate exceeded in several instances and negatively affected the interests and rights of developing country Members protected in the WTO Agreement through their interpretation and application of the provisions.²⁶⁵ The next section discusses these issues, addressing the cost and complexity of the litigation stage, the achievement and attainment of the WTO development objectives, the representation of developing countries in panels and the Appellate Body, and the panels and the Appellate Body's interpretation of the WTO law. This discussion highlights the negative effects of these issues on developing countries' participation in the litigation stage, and their role in limiting an effective utilisation of the process for developing countries. It supports the overall argument of unequal standing between developed and developing countries in the dispute settlement process as a result of substantive and procedural defects that make the process less accommodating to developing countries' participation.

3.3.3.1. The Cost and Legal Complexity of the Litigation Stage

The issue of a complicated and expensive litigation stage in the shadow of limited financial and institutional resources as well as lack of legal expertise is one that developing countries face in every stage of the WTO dispute settlement process, and particularly comes to the fore in the litigation stage.

This issue arises when the panels adopt an approach that focuses on fine details and intense technicality in analysing points of fact and law for the issues in dispute.²⁶⁶ The intensive handling of the issues presented before the panels joins a set of very demanding procedural requirements, such as the intensive process of collecting and analysing information, preparing the case, presenting before the panels and responding to the panel's queries.²⁶⁷

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Bhagirath Das, *The WTO Agreement Deficiencies, Imbalances and Required Changes* (1998) 17.

²⁶⁷ Christina Davis and Sarah Bermeo, 'Who Files? Developing Country Participation in WTO Adjudication' (Paper presented at the conference 'WTO Dispute Settlement and Developing Countries: Use, Implication, Strategies and Reforms, Madison, Wisconsin, 20–21 May 2005) 8.

As discussed above, many, if not most, developing countries do not have sufficient local expertise sufficient to handle disputes of this complexity. Hence, they often employ private law firms from developed countries, causing the rise of another resources problem, namely cost.²⁶⁸ Hiring private law firms might take care of the lack of legal expertise problem, but the fact that such foreign legal counsels charge very high fees makes it an expensive solution that many developing countries cannot afford.²⁶⁹

Some may wonder whether establishing a very complicated, rule-oriented WTO dispute settlement system to enforce the rules of a multi-agreement trading system, and having panels that go through the finest detail of law and fact in their handling of issues is akin to establishing a high-class, restricted-access club. If not, then why is the WTO not providing the means for developing countries to access and participate effectively in the litigation stage without being pressured by their limited legal and financial resources?

To explain the idea of the restricted-access club, we need to revert to earlier discussion. The combination of complicated WTO law and a very technical, detail-focused panel procedure means that developing countries in the shadow of their limited legal resources are overwhelmed by the process. This leaves them with no other option but to turn to the services of expensive, financially exhausting foreign legal councils; otherwise, their chances of finishing the litigation stage as winners are very slim. Conversely, developed countries have the legal expertise to absorb the complexity of WTO law and the legally demanding litigation stage, and their financial resources permit the employment of a private legal counsel to represent them, if they so choose. Such contrast in positions between the two groups raises questions as to the accessibility of the litigation stage in particular, and the whole dispute settlement system in general.

²⁶⁸ Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25 (1) *Development Policy Review* 25, 31.

²⁶⁹ Hansel Pham, 'Developing Countries and the WTO: The Need for More Mediation in the DSU' (2004) 9 *Harvard Negotiation Law Review* 331, 355.

The argument on developing countries' issues with the lack of legal and financial resources at the litigation stage must acknowledge, however, the WTO's efforts and the steps taken in the field of WTO dispute settlement to deal with these issues. The DSU provides in Article 27:2 that

While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

This Article shows the WTO's acknowledgment of developing countries' lack of legal resources to deal effectively with the dispute settlement system. The availability of a well-qualified legal expert from the WTO Secretariat is seen to provide developing countries with a free valuable assistance in their disputes, which consolidates their legal expertise and could substitute the use of costly external legal councils.

In addition, the formation of the Advisory Centre on WTO Law (ACWL), which operates independently from the WTO Secretariat, has greatly alleviated developing countries' problem of lacking financial and legal resources.²⁷⁰ The Centre was established to provide developing countries with the opportunity to obtain legal and technical assistance on a cost-effective basis,²⁷¹ as a result of being based on subsidies from a group of developed countries, and fees from developing country Members in the Centre.²⁷² It can also be used as a tool of skill building of developing countries' expertise through internships and regular seminars for developing countries' officials to complement similar activities that are already in place by the WTO Secretariat.

The heavily subsidised Centre by developed countries' contributions could be argued to be evidence of the commitment by WTO Members to limit the effect of financial and legal resources on developing countries' participation in the system. In fact, the presence of such a Centre, along with a supplementary role of technical assistance by the Secretariat, could be argued to represent a strong case against developing

²⁷⁰ Ibid 356–357.

²⁷¹ Hakan Nordstrom, 'The Cost of WTO Litigation, Legal Aid and Small Claim Procedures', National Board of Trade Stockholm (June 2005); Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 115, 30.

²⁷² Nordstrom, 'The Cost of WTO Litigation', above n 271; Pham, above n 269, 357.

countries' argument of lack of financial and legal resources, or against their claimed need to use expensive external counsels to represent them in their disputes.

This argument is fair to a degree that the presence of such tools help developing countries to limit the effects of their lack of financial and legal resources on their dispute settlement participation, but they do not provide for the ultimate solution for such issues. The notion that developing countries may request the WTO Secretariat to provide them with technical assistance through its legal consultants is hardly effective.²⁷³ The limited number of legal consultants that the Secretariat can offer cannot cope with the large number of developing countries, which constitute a majority of the WTO membership.²⁷⁴

The number of staff employed by the Secretariat stands at 629, but this number is divided into all the different divisions that constitute the Secretariat.²⁷⁵ An examination of the work of the Secretariat divisions shows that the Legal Affairs Division and the Appellate Body Secretariat are the only two divisions to provide the technical assistance outlined in Article 27 of the DSU.²⁷⁶ These two divisions have about 30 staff combined.²⁷⁷ This number could be sufficient to provide the technical assistance needed for developing countries compared to the number of disputes involving them annually. However, the role of these divisions is not limited to providing technical assistance to Member countries including developing countries, but also involves providing legal advice and information to panels, the Appellate Body, the DSB and its Chairperson on the operation of the DSU, and the Director-General.²⁷⁸ It also involves preparing publications relating to the dispute settlement system and providing legal support in respect of accessions.²⁷⁹ Therefore, an effective contribution by the Secretariat in providing technical assistance and legal aid is

²⁷³ Davis and Bermeo, above n 267, 9.

²⁷⁴ Hector Smitmans, 'Unresolved Issues in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes', in Dencho Georgiev and Kim Van Brorcht (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 262.

²⁷⁵ World Trade Organization, *WTO Secretariat, Work of Divisions* (15 February 2010) WTO Website <http://www.wto.org/english/thewto_e/secre_e/div_ehtm>.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

restricted by the workload of the Secretariat, and the limited number of staff specialised in providing such assistance.

In addition, the neutrality required from the Secretariat significantly reduces the scope of assistance provided for developing countries, as these staff members are restricted to basic advice on a narrow range of issues.²⁸⁰ In a dispute between two WTO Members, if the two parties are counselled by the Secretariat, the neutrality requirement prevents the Secretariat from providing legal assistance in the ordinary meaning of the word. Therefore, the legal assistance expected under this requirement does not go beyond discussions in general terms, which is hardly the form of legal assistance needed.²⁸¹

In relation to the ACWL, even though it has been praised by developing countries as an important step to limit the pressure on developing countries from their lack of legal and financial resources,²⁸² the African Group Proposal pointed out that ‘the ACWL should not be considered panacea for all institutional and human capacity constraints of developing countries ... and it does not cover all developing countries’.²⁸³ In fact, despite its membership fees and charges being heavily subsidised and discounted, they are still too high for many least-developed countries, which have more urgent issues needing attention from their limited finances than participation in the WTO dispute settlement process.²⁸⁴ In addition, the small developing countries have not made a noticeable use of the ACWL despite the discounted services, which highlights their reluctance in initiating disputes in the first place.²⁸⁵ However, the ACWL is still credited for filling a gap in the WTO dispute settlement structure by providing efficient legal assistance to disadvantaged developing country Members.²⁸⁶ Further issues of using the WTO Secretariat and the ACWL in providing technical assistance and legal advice are discussed in more detail in Chapter 5.

²⁸⁰ Pham, above n 269, 356.

²⁸¹ Nordstrom, ‘The Cost of WTO Litigation’, above n 271, 1.

²⁸² Pham, above n 269, 356.

²⁸³ *Proposal by the African Group*, above n 261.

²⁸⁴ Smitmans, above n 274, 262.

²⁸⁵ Nordstrom, ‘The Cost of WTO Litigation’, above n 271, 10–11.

²⁸⁶ *Ibid* 11.

Developing countries' lack of legal expertise and financial resources continues to represent an obstacle for their participation in an increasingly demanding and legally complex litigation process. The technical assistance provided by the WTO Secretariat and training courses, along with the services of the ACWL, is contributing towards limiting this disadvantageous position. However, the continuing struggle of many developing countries to cope with the process represents a need for more attention by the WTO and new strategies. Such strategies are proposed in the final chapter of this thesis.

3.3.3.2. The Achievement and Attainment of the WTO Development Objectives in the Litigation Stage

It could be suggested that the WTO dispute settlement system has swung between extremes, from a heavy reliance on power politics and political negotiation to becoming overly legalistic and technical. Complicated WTO law and the strict and highly technical procedures of panels and the Appellate Body do not only put pressure on developing countries' legal expertise and financial resources, but also threaten the development objectives of developing countries.²⁸⁷ Although this subject will be discussed more appropriately in relation to developing countries' special and differential treatment under the WTO dispute settlement system in the next chapter, it is still useful to point to relevant aspects of the dispute settlement system that threaten one of the WTO aims, the achievement and attainment of development objectives.

It has been claimed by developing countries' representatives that panels and the Appellate Body are so legalistic and strict in dealing with the WTO law that they fail to look at or consider the 'more global perspective' and the 'more individualised basis' of disputes.²⁸⁸ This approach underlines the development considerations of developing countries in the context of their WTO obligations, and the problems that might result from this combination of policies.²⁸⁹ It has further been stated that due to the legally strict practice of panels and the Appellate Body the system does not

²⁸⁷ *Proposal by the African Group*, above n 261.

²⁸⁸ Based on an interview with an anonymous developing country delegate in Geneva, Switzerland (31 October 2002), cited in Pham, above n 269, 358.

²⁸⁹ *Ibid.*

differentiate between non-compliance with the WTO rules and a reasoned-non-compliance or in progress-non-compliance.²⁹⁰ This approach contradicts the text of Article 21.2 of the DSU, which states that ‘particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement’.²⁹¹ This Article indicates the possibility of having an individualised perspective for development issues related to developing countries’ disputes with maintaining the integrity of the WTO rule-oriented dispute settlement system.

This strict following of WTO law does not allow developing countries to be incompatible with WTO legal obligations, when that incompatibility may be largely caused by their development process. Nor does it recognise the effort of developing countries to comply with their obligations. Such strict handling ignores the balance that many developing countries struggle to maintain between their development policies and WTO obligations; a process that witnesses some work put towards achieving full compliance with the WTO law but in a slower manner than countries with no problematic development issues.²⁹² The current rigid approach of panels and the Appellate Body ignores the promotion of fairness and equity in the process by applying and enforcing legal rules despite special development circumstances.²⁹³ Such practice disregards the strict economic development principles and policies adopted by developing countries, which many of them could be following due to recommendations of international development bodies such as the IMF.

The African Group’s request in its proposal to show commitment from the panels and the Appellate Body’s practice towards the achievement and attainment of more equity and development was derived from WTO law itself, as these two principles have been part of the WTO objectives since its inception. However, despite the special consideration that the DSU gives to developing countries’ circumstances in a number

²⁹⁰ Ibid.

²⁹¹ The Dispute Settlement Understanding, above n 9, Article 21, paragraph 2.

²⁹² Ibid.

²⁹³ Based on an interview with Ramirez Boettner, Ambassador, Paraguay, in Geneva, Switzerland. (30 October 2002), cited in Pham, above n 269, 358.

of provisions,²⁹⁴ the practice of panels and the Appellate Body has rarely applied these provisions in disputes involving developing countries.²⁹⁵

An example of the practice of panels ignoring or giving little weight to the special development circumstances of developing countries is the *EC-Bed Linen* Dispute.²⁹⁶ In this dispute, India claimed that the EC refused to consider India's special problems and interests as a developing country, and ignored the importance that the bed linen and textile industries represent to the Indian economy. India argued that this refusal was in violation of a provision mandating that 'special regard must be given to the special situation of developing country Members when considering the application of anti-dumping measures'.²⁹⁷ However, the US, which was a third party in the dispute, argued that this provision 'does not require any particular substantive outcome or any specific accommodations to be made on the basis of developing country status'.²⁹⁸ The US also argued that this provision 'does not impose anything other than a procedural obligation to explore possibilities of constructive remedies'.²⁹⁹ The panel agreed that this provision:

Imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.³⁰⁰

The special economic circumstances and problematic development issues of developing countries, along with the achievement and attainment of the WTO development objectives, do not only represent a need for special treatment to be afforded for developing countries throughout the DSU text. They also put a responsibility on panels and the Appellate Body to address and consider the relevant

²⁹⁴ *The Dispute Settlement Understanding*, above n 9, Articles 4.1, 12.11, 21.2, 21.7 and 21.8.

²⁹⁵ Pham, above n 269, 358.

²⁹⁶ *EC—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, WTO Doc, WT/DS141/R.

²⁹⁷ Agreement on Implementation of Article VI of GATT 1994, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A (Anti-dumping), Article 15; *EC-Antidumping Duties on Imports of Cotton-type Bed Linen from India*, above n 296, WT/DS141/R, Annex 1-1, 264.

²⁹⁸ *EC—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, above n 296, WT/DS141, Annex 3, 578.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid* WT/DS14/R 65.

special treatment rules for the benefit of developing countries. Even in the absence of special treatment provisions relevant to a certain dispute, panels and the Appellate Body still have the obligation of considering the special economic circumstances of developing countries in dealing with the various issues relating to a dispute. This practice could well encourage better participation by developing countries in the system, and address the gap that currently exists in development levels between developed and developing countries.

3.3.3.3. Developing Countries' Representation in Panels and in the Appellate Body

As far as the achievement and attainment of development and equity objectives are concerned, many developing countries claim that these objectives are threatened by the very composition of panels and the Appellate Body.³⁰¹ Developing countries believe that the institutional structure of the WTO dispute settlement system favours developed countries by enhancing their ability to influence the selection of panels and especially the Appellate Body.³⁰²

This issue in the Appellate Body membership was underlined in the proposal presented by the African Group in which they argued that the inequity in geographical distribution is an issue of concern for developing countries in general, and African countries in particular.³⁰³ The issue of representation in both panels and the Appellate Body was underlined by the African Group as it represents a large number of developing and least-developed countries, the African continent and the block majority in the WTO membership.³⁰⁴

Even though the African service in the WTO panels and the Appellate Body is still limited, the African representation in the WTO panels and the Appellate Body has been better than their representation in 50 years of GATT. Further, if we extend the

³⁰¹ *Proposal by the African Group*, above n 261.

³⁰² Gillian Reynolds, 'Promoting Imbalance: Dispute Settlement under the WTO' (2006) 7(1) *Stanford Journal of International Relations*, 3; James Smith, 'WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings' (2003) 2(1) *World Trade Review* 65, 82–83; Richard Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98(2) *American Journal of International Law* 247, 264.

³⁰³ *Proposal by the African Group*, above n 261.

³⁰⁴ Mosoti, 'Africa in the First Decade', above n 262, 428.

scope of the sample to include all developing countries in the WTO, then the level of developing countries' representation in panels and the Appellate Body's membership would be higher. A study by William Davey, the first Director of Legal Affairs for the WTO, described the nationalities of the 119 individuals who filled 186 panellist positions at the time.³⁰⁵ He indicated that 73 of the panellists were from developing countries with a percentage of 39 per cent of the total representation.³⁰⁶ In addition, an examination of the current and previous Appellate Bodies reveals that four out of seven of the current Appellate Body Members are from developing countries, and six out of 14 of previous Appellate Body Members were from developing countries as well.³⁰⁷ These percentages reflect a reasonably fair representation of developing countries in WTO's panels and the Appellate Body.

It is true that developing countries' representation is focused on a limited number of developing countries, such as India, Mexico, South Africa, Brazil, Egypt, Uruguay and Thailand.³⁰⁸ In addition, it is true that this sample of developing countries represents a group of either active WTO participants or large economies. Africa, for example, is mainly represented by representatives from its two largest economies, Egypt and South Africa. However, that should not overshadow the total percentage of developing countries' representation in panels and the Appellate Body, taking into account the existing gap in the legal expertise between developing and developed countries, or even between developing countries themselves. The unequal representation in panels and the Appellate Body's membership between small developing countries and other countries should not be ignored because of the first's lack of legal expertise. There is a need to improve developing countries' legal expertise to enable them to participate more effectively in the system, and ultimately create a production ground for potential experienced panel and Appellate Body Members in the future.

³⁰⁵ William Davey, 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?' in Daniel Kennedy and James Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert Hudec* (2002), 500.

³⁰⁶ Ibid.

³⁰⁷ World Trade Organization, *Appellate Body Members*, (16 February 2010) WTO Website <http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm>. Developing countries currently represented in the Appellate Body are: Philippines, Mexico, South Africa and China. Developing countries previously represented in the Appellate Body are: Egypt, Brazil, Philippines, India and Uruguay.

³⁰⁸ Davey, 'Permanent Panel Body for WTO Dispute Settlement', above n 305, 500.

3.3.3.4. *The WTO Panels and the Appellate Body's Interpretation of WTO Law*

Developing countries point to what they consider a major problem in the operation of the litigation process: the panels and the Appellate Body often engage in very substantial interpretations of WTO law in a way that negatively affects the rights and interests of developing countries.³⁰⁹ The African Group has further claimed that the WTO panels and the Appellate Body have exceeded their mandate in interpreting and applying WTO law,³¹⁰ which touches on one of the fundamental principles of WTO jurisprudence—judicial restraint.³¹¹ The principle of judicial restraint has been chosen by the WTO system over judicial activism as a policy governing its international panel system.³¹² This principle is clear in Article 3:2 of the DSU, which states that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The notion of this Article, which could be perceived as a caution to the panels and the Appellate Body to use judicial restraint, is also included in the WTO Charter, which reinforces the need to avoid changing the rights and obligations of Members in the system.³¹³

The WTO panels and the Appellate Body state that they recognise this principle and are bound by it. In *US—Shirts and Blouses*, the Appellate Body acknowledged the limits imposed by the DSU Article 3.2 and explained that panels and the Appellate Body are not to ‘make law’ by clarifying the existing provisions of the WTO Agreement outside the context of a particular dispute’.³¹⁴ Likewise, in *India—Patents*

³⁰⁹ Mohan Kumar, ‘Dispute Settlement System in the WTO: Developing Country Participation and Possible Reform’ in Dencho Georgiev and Kim Van Borgh (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 185.

³¹⁰ *Proposal by the African Group*, above n 261.

³¹¹ Jackson, ‘Designing and Implementing Effective Dispute Settlement Procedures’, above n 52, 172.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *US—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 198, WT/DS33/AB/R (adopted on 23 May 1997) 19.

the panel referred to DSU Articles 3.2 and 19.2 and concluded that its findings must be based on the DSU language, and it ‘simply cannot make a ruling *ex aequo et bono* to address a systemic concern divorced from explicit language of the DSU’.³¹⁵ The Appellate Body has also acknowledged the exclusive authority of the WTO Members in relation to adopting amendments and interpretations of the DSU covered agreements. It stated:

We observe that it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement. Only WTO Members have the authority to amend the DSU or to adopt such interpretations ... Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.³¹⁶

However, the practice of the WTO dispute settlement system shows in many instances that WTO Members have the impression that panels and the Appellate Body have exceeded their mandate in interpreting and applying WTO law.³¹⁷ In *Argentina-Footwear*,³¹⁸ Argentina stated that:

The Appellate Body’s interpretation ... had altered the balance of rights and obligations resulting from the Uruguay Round Agreement. It had gone beyond the political agreement reached in this area during the Uruguay Round negotiations ... in other words, the Appellate Body would seem to be legislating rather than verifying the application of law in the case at hand.³¹⁹

Also in *US—Lead and Bismuth II*,³²⁰ Argentina commented that ‘the interpretation made by the Appellate Body exceeded its authority to establish working procedures for Appellate review’.³²¹ In *Korea—Procurement*,³²² India commented that the Panel

³¹⁵ *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS79/R) (adopted on 22 September 1998) paragraph 7:23.

³¹⁶ *US—Import Measures on Certain Products from the EC* (WT/DS165/AB/R, adopted on 10 January 2001) paragraph 92.

³¹⁷ Terence Stewart, Amy Dwyer and Elizabeth Hein, ‘Proposals for DSU Reform that Address Reform Directly or Indirectly, the Limitations on Panels and the Appellate Body not to Create Rights and Obligations’ in Dencho Georgiev and Kim Borghet (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 331, 331.

³¹⁸ *Argentina—Safeguard Measures on Imports of Footwear* (WT/DS121).

³¹⁹ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/73, 4 February 2000) 7.

³²⁰ *US—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK* (WT/DS138).

³²¹ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/83, 7 July 2000) paragraph 14.

³²² *Korea—Measures Affecting Government Procurement*, (WT/DS163).

‘seemed to have assumed that it had a right to correct errors in the WTO Agreement’.³²³ In *India—Autos*,³²⁴ India stated that ‘the Panel ... had made rulings on matters outside its mandate, beyond the request submitted by the parties and without the required legal and factual basis’.³²⁵ In *India—Quantitative Restrictions*,³²⁶ Malaysia stated that ‘the Appellate Body had gone beyond its jurisdiction ... The Appellate Body had modified significantly the rights and obligations of Members contrary to Article 3:2 of the DSU’.³²⁷ In the *US—Wool Shirts & Blouses*,³²⁸ Costa Rica commented that ‘the observations of the panel and the Appellate Body had diverged from past practice and had modified the balance of rights and obligations which they claimed to be seeking to protect’.³²⁹

The impression of panels and the Appellate Body’s unwarranted scope of interpretation of the WTO law are also shared by the major trading Members. In *US—Wheat Gluten*,³³⁰ the US suggested that ‘panels and the Appellate Body had overstepped their bounds when they had arrogated to themselves the right to censure particular Members for any reason’.³³¹ The US also claimed in the *US—Export Restraints*³³² that ‘the Panel had not limited its analysis to the measures before it. The US believed that Members would find this other portion of the Panel Report-and the remarkable judicial activism it represented-extremely disturbing’,³³³ and that ‘the Panel had not applied or clarified the SCM Agreement. Instead, it had provided an interpretation of the SCM Agreement, a function ... reserved for the Ministerial Conference and the General Council’.³³⁴

³²³ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/84, 24 July 2000) paragraph 69.

³²⁴ *India—Measures Affecting Trade and Investment in the Motor Vehicle Sector* (WT/DS146/175).

³²⁵ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/122, 23 April 2002) paragraph 17.

³²⁶ *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS/90)

³²⁷ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/68 20 October 1999) 22.

³²⁸ *Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 198.

³²⁹ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/33, 25 June 1997) 12.

³³⁰ *US—Definitive Safeguard Measures on Imports of Wheat Gluten from the EC* (WT/DS166).

³³¹ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/97, 27 February 2001) paragraph 5.

³³² *US—Measures Treating Export Restraints as Subsidies* (WT/DS194).

³³³ *DSB Minutes of Meeting held in the Centre William Rappard* (WT/DSB/M/108, 2 October 2001) paragraph 43.

³³⁴ *Ibid* paragraph 49.

These quotations from different Members of the WTO show that panels and the Appellate Body have exceeded their authority on many occasions and engaged in a form of interpretation of the WTO rules that is inconsistent with Articles 3:2 and 19:2 of the DSU. However, it is fair to argue that these comments by Members could be nothing more than a reaction of parties to disputes when the outcome is not in their favour. It could be a tactic to weaken the legitimacy of unfavourable rulings in an effort to justify their resistance to full implementation subsequently, or gain sympathy from domestic pressure groups when these governments seek to implement rulings.

The suggestions by some WTO Members that panels and the Appellate Body are overstepping the mark in their interpretations of the WTO law could also be seen as a misjudgement of the practice of panels and the Appellate Body, when they only follow the customary rules of interpretation of public international law set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* by taking into account the text's context, object and purpose.³³⁵

Even if panels and the Appellate Body are exceeding their authority in the interpretation of WTO law, how is that of concern specifically to developing country Members when clearly the suggestions on panels and the Appellate Body practice are coming from both sides of the spectrum, developed and developing countries? It is clear from the disputes record where panels and the Appellate Body's interpretations are controversial that parties involved were not only developing countries but also developed ones, which questions the sensibility of the argument that such practice is particularly problematic to developing countries.³³⁶

³³⁵ D. Mcrae, 'Comments on Claus—Dieter Ehlermann's Presentation on 'The Role and Record of Dispute Settlement Panels and the Appellate Body of the WTO' (2003) 6(3) *Journal of International Economic Law* 709, 710; Article 31 of the Vienna Convention on the Law of Treaties provides for the general rule of interpretation to be based on the context, object and purpose of the treaty as well as any agreement or instrument in connection with the treaty, any subsequent agreement or practice regarding the interpretation or the application of the treaty, or any relevant rules of international law applicable in relations between the parties. Article 32 of the Convention provides for supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion to confirm the meaning resulting from the application of Article 31, *The Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UNTS vol 1155, art.(60), (entered into force 27 January 1980).

³³⁶ Kevin Dempsey, 'The WTO Dispute Settlement System: A Practicing Lawyer's Perspective' (Paper presented at the Symposium on Legal Issues in the Doha Agenda, Shanghai, China, 19–21 November 2003) 3; Valentina Delich, 'WTO Governance and the Dispute Settlement: An Assessment from Latin American Countries' (2002) Latin American Trade Network, 8.

These arguments are reasonably sound; criticisms of panel and the Appellate Body interpretations could be a dispute-related tactic to undermine the legitimacy of particular rulings, when the interpretations concerned only follow customary rules of international law on legal interpretation. However, when these suggestions of overreaching by panels and the Appellate Body come from Members that were not part of certain disputes but expressing their concerns throughout the course of DSB meetings adopting dispute settlement decisions, then the argument above hardly finds a credible basis. Costa Rica was not a party of any kind (disputing party or third party) in *US—Wool Shirts & Blouses*, nor were Malaysia in *India—Quantitative Restrictions*, Argentina in *US—Lead and Bismuth II* or India in *Korea—Procurement*. However, this did not prevent them from pointing to this issue because they have seen an evident practice of inappropriate interpretations by panels and the Appellate Body.

Moreover, when this issue becomes the central focus of a number of proposals (from developing and developed countries) for reform in the DSU as part of the Doha Round, it is a clear indication that the practice of panels and the Appellate Body in relation to this issue is problematic to the settings of the WTO and dispute settlement system. Reforms such as establishing interim Appellate Body reports and party review, including the power to delete certain problematic parts of the report,³³⁷ are evidence on many Members' stand on the need to regulate the issue of panels and the Appellate Body interpretations.

The argument of the particular disadvantage of developing countries from overreaching interpretations of panels and the Appellate Body is difficult to prove considering that any unwarranted interpretation might impose disadvantageous implications on developed countries as well. Therefore, it is reasonable to link such an argument with the issue of developing countries' limited legal expertise. The overreaching panel and Appellate Body's interpretation adds another dimension to the legal submissions presented by the disputing parties. The fact that the panel or the Appellate Body might add new rights or obligations as a result of their interpretations makes the burden heavier on the disputing parties to take into account such outcomes

³³⁷ Joint Proposal of Chile and the US, DSB Minutes of Meeting (TN/DS/M/7, 26 June 2003).

and cover all expected and unexpected aspects of the dispute. Such unnecessarily added legal complexity would have a special effect on developing country Members. Their legal expertise in WTO law is by no means comparable with that of developed countries. Their limited legal expertise would make them struggle to keep up with added complexity of the process in a way that would put them in a more disadvantageous position than that of developed countries. Therefore, despite the suggestion that overreaching panel and the Appellate Body's interpretations have a negative effect on both developing and developed countries, the added complexity resulting from such interpretations accompanied by the limited legal expertise of developing countries mean that their impact on developing countries' participation is much greater than that on developed countries.

The Appellate Body has, on many occasions, either ignored the text of the WTO law and imposed its own views of the proper functioning of the system, or relied heavily on the text and ignored the factors of the sensible functioning of the system.³³⁸ The Appellate Body's decision that it itself could receive *amicus curiae* briefs is an example of a negligible, if not non-existent textual basis and self-imposed views of the proper functioning of the system.³³⁹ This point is addressed immediately below.

(a) The Appellate Body's acceptance of amicus curiae briefs

Amicus curiae is defined in Black's Law Dictionary as 'a person who is not a party to a law suit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter'.³⁴⁰ It is also defined as 'counsel who assists the court by putting arguments in support of an interest that might not be adequately represented by the parties to the proceedings or by arguing on behalf of a party who is otherwise unrepresented'.³⁴¹ It can be said from these definitions that the main purpose of *amicus curiae* briefs is representing the interests of non-disputing parties. However, they can also be used to provide additional information, endorsing or supplementing parties' submissions.

³³⁸ Ibid 711.

³³⁹ Ibid.

³⁴⁰ B. Garner (ed), *Black's Law Dictionary*, (8th ed, 2004) 93.

³⁴¹ E. Martin (ed), *A Dictionary of Law*, (5th ed, 2002) 25.

In the WTO context, the issue of *amicus curiae* briefs is problematic in the sense that there are no rules in the WTO Agreements or in the DSU's working procedures of panels and the Appellate Body that deal with this issue, which adds controversy to the *ad hoc* treatment of this issue by panels and the Appellate Body in their interpretation of WTO Agreements.

The controversy surrounds the interpretation of Article 13 of the DSU, which entitles panels to 'seek information and technical advice from any individual or body which it deems appropriate', and to 'seek information from any relevant source and consult experts to obtain their opinion on certain aspects of the matter'. Does the panel's 'right to seek information' mean that it has to be pro-active and request the information it needs in reaching a decision? Alternatively, does it mean that it has the authority to consider information provided before it despite that information not being requested?

The Appellate Body's interpretation of this issue was first introduced in the *Shrimp/Turtle* dispute,³⁴² where it established the right of panels to accept unsolicited *amicus curiae* briefs,³⁴³ This was reaffirmed in the *Carbon Steel* dispute,³⁴⁴ where the Appellate Body granted itself alongside the panels the authority to accept *amicus curiae* briefs.

In the *Shrimp/Turtle* dispute, the Appellate Body reversed the panel's interpretation of Article 13 of the DSU, which had found that 'accepting non-requested information from non-governmental sources would be ... incompatible with the provisions of the DSU as currently applied'.³⁴⁵ Instead, its interpretation of Article 13 of the DSU was that:

³⁴² *US—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (15 May 1998); Report of the Appellate Body, WT/DS58/AB/R (12 October 1998)

³⁴³ *Ibid* paragraph 104.

³⁴⁴ *US—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, above n 320, Report of the Panel, WT/DS138/R (23 December 1999); Report of the Appellate Body, WT/DS138/AB/R (10 May 2000).

³⁴⁵ *US—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, above n 341, WT/DS58/R (15 May 1998) paragraph 7.8.

In the present context, authority to *seek* information is not properly equated with a prohibition on accepting information which has been submitted without been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.³⁴⁶

In the *Carbon Steel* dispute, the Appellate Body received two *amicus curiae* briefs from non-governmental organisations (NGOs) representing the US steel industry. When considering the matter the Appellate Body stated that ‘as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal’.³⁴⁷

In the legal context, the Appellate Body interpretation of the WTO agreements in relation to its authority to accept *amicus curiae* briefs is questionable, considering that Article 13 of the DSU only gives panels the right to ‘seek information and technical advice from any individual or body’. There are no provisions that grant the Appellate Body the same authority.³⁴⁸ The Appellate Body’s use of Article 17:9 of the DSU to argue for its broad authority to adopt procedural rules is not a sufficient justification for such authority because this provision does not grant the Appellate Body an unconditional authority.³⁴⁹ Its authority in relation to setting up its working procedures is restricted by consultation and notification requirements with the DSB and the Director-General.³⁵⁰

Further, the Appellate Body’s acceptance of *amicus curiae* briefs at the Appellate stage undermines the rights of WTO Members that are expressly protected under Article 3:2 of the DSU.³⁵¹ The participation of third parties in the Appellate stage is not allowed, and any submissions to the Appellate Body by third parties are restricted by the notification and the substantial interest requirements addressed in Article 17:4.

³⁴⁶ Ibid Report of the Appellate Body, WT/DS58/AB/R (12 October 1998), paragraph 104.

³⁴⁷ *US—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, above n 320, Report of the Appellate Body, WT/DS138/AB/R (10 May 2000) paragraph 39.

³⁴⁸ Christina Knahr, *Participation of Non-state Actors in the Dispute Settlement of the WTO: Benefit or Burden?* (2007) 69.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

Granting the same treatment to non-Member bodies undermines a right that otherwise accrues from being a WTO Member.

However, it is fair to point out that in the case of *amicus curiae* briefs, and based on the Appellate Body interpretation, the Appellate Body has the right to accept or reject such submissions, whereas with third parties, their submissions are guaranteed to be heard pursuant to Articles 9:2 and 17:4 of the DSU. This distinction highlights the privilege from being a WTO Member and confirms this particular right of the WTO Members.

In relation to the absence of an equivalent provision to Article 13 of the DSU to give the Appellate Body a similar authority, such an argument could be used in both ways.³⁵² The absence of a provision that regulates the Appellate Body's authority to 'seek information' means that there is no provision to deny such authority.³⁵³ This interpretation was even used by the Appellate Body itself to justify its self-appointed authority to accept *amicus curiae* briefs in the *Carbon Steel* dispute.³⁵⁴ The question remains that if the intention was for the Appellate Body to have such authority, would it not be logical to express this intention in the same way as conducted with panels? It could be argued that the authorisation was not expressed, it is reasonable to assume that such authority would be an integral part of its functions anyway as a body of judicial type, which must always have the authority to consider a variety of sources in reaching its decision.³⁵⁵ The issue remains unsettled.

Apart from the legal implications of accepting *amicus curiae* briefs, the systemic considerations of such practice in relation to developing countries' participation are worth discussing. The acceptance of *amicus curiae* briefs in the WTO dispute settlement proceedings is part of a wider move to allow more openness in the system for non-state entities. The argument behind this move is based on a need to enhance

³⁵² Ibid 70.

³⁵³ Ibid.

³⁵⁴ *US—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, above n 320, Report of the Appellate Body, WT/DS138/AB/R (10 May 2000) paragraph 39.

³⁵⁵ Knahr, above n 348, 70

public support for the WTO by making it more accessible.³⁵⁶ The outburst of public anger during the Ministerial Conference in Seattle reflected a view that the WTO is inconsiderate of the need of the public,³⁵⁷ and criticises it for not being sufficiently legitimate.³⁵⁸ Therefore, providing more openness in the system could contribute to a better understanding about how the WTO truly works, and so enhance public confidence.³⁵⁹ Further, the increased cooperation between the WTO and civil society could enhance its public legitimacy.³⁶⁰

The argument for the encouragement of non-state submissions suggests that the participation of non-state entities through amicus briefs would increase the information available to panels and the Appellate Body, and thereby lead to better-informed and higher quality decisions.³⁶¹ This suggestion is supported by the fact that some non-state entities possess expertise in particular areas that disputing parties do not have, which broadens the information base that could be used in making the decision.³⁶²

The idea on which the argument is based is reasonable as it goes to the increased openness of the system in enhancing public acceptance and understanding of the WTO. Still, the suggestion of the WTO lack of legitimacy as a result of its lack of cooperation with the civil society is worth arguing. The WTO derives its legitimacy from its Members, as it is described as ‘a shared effort by the sovereign Members of the WTO to make continued political independence meaningful within the context of increased economic interdependence’.³⁶³ Therefore, the increased participation of

³⁵⁶ Ibid 46.

³⁵⁷ J Lacarte, ‘Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective’ (2004) 7 *Journal of International Economic Law* 683, 685.

³⁵⁸ J Dunoff, ‘The Misguided Debate over NGO Participation at the WTO’ (1998) 1 *Journal of International Economic Law* 433, 435.

³⁵⁹ Ernst-Ulrich Petersmann, ‘Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO’ (2004) 7 *Journal of International Economic Law* 585, 603.

³⁶⁰ Knahr, above n 348, 49.

³⁶¹ Ibid 48.

³⁶² Ibid.

³⁶³ J Bacchus, ‘A Few Thoughts on Legitimacy, Democracy and the WTO’, (2004) 7 *Journal of International Economic Law* 667, 669.

non-state-entities in the WTO system would enhance the state-based legitimacy of the WTO, but it is not a condition to establish its legitimacy.³⁶⁴

In relation to the implications of accepting *amicus curiae* briefs on developing countries' participation, it is important to consider NGOs as a source of many, if not most, possible *amicus curiae* submissions. It is reasonable to assume that NGOs must have sufficient financial and structural resources to be able to participate at the international level in an organisation such as the WTO.³⁶⁵ It is also reasonable to assume that there are significant gaps between the resources of all different NGOs that exist at the international level, whether these differences are financial, legal or political.³⁶⁶ Developing countries might have the impression that most of the NGOs that have influential power and the necessary resources are located in developed countries.³⁶⁷ This impression leads to their concern that the participation of such NGOs would be more likely to support and enhance the power and influence of developed countries in the dispute settlement process, which would increase the imbalance that already exists in the participation of developed and developing countries in the system.³⁶⁸

It could be suggested that there are powerful and influential NGOs that are based in developing countries and are equipped to exercise the same form of participation as that of NGOs from developed countries.³⁶⁹ Practice even shows that in some instances, there was cooperation between NGOs from developed countries and NGOs from developing countries to serve a particular issue.³⁷⁰ An example of that is the cooperation between NGOs from India and the Philippines and NGOs from the US in submitting *amicus curiae* briefs in the *Shrimp/Turtle* dispute.³⁷¹ The practice also shows that the international NGOs, whether from developed or developing countries,

³⁶⁴ Knahr, above n 348, 50.

³⁶⁵ Ibid 55.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ M. Matsushita 'Transparency, *Amicus curiae* Briefs and Third Party Rights' (2004) 5 *Journal of World Investment and Trade* 329, 331.

³⁷¹ Ibid.

frequently act to the advantage of developing countries' interests and to the improvement of their position in the international trading system.³⁷²

However, this suggestion ignores the fact the NGOs located in a particular country or region are more likely to be affected by the circumstances of that country/region. Factors like government support and financial incentives play a major role in determining the scope of activities these NGOs are able to undertake. Even social and political considerations, such as freedom of speech, access to and cooperation with hosting governments, are elements that contribute to the role of NGOs. It could be argued that these factors are more likely to be more developed and institutionalised in developed countries than in developing countries. Therefore, even if some NGOs located in developing countries are equipped legally and financially to participate in the WTO, there are still constraints that restrict such participation compared to NGOs located in developed countries.

It is also important to remember that NGOs are mainly subject-driven organisations, which means that their main interest is to serve a particular subject of interest whether this interest is directed against developed or developing countries.³⁷³ This contradicts the idea of a favourable alliance between NGOs and developed countries. The submission of *amicus curiae* briefs from a subject-driven entity could be interpreted as evidence of the neutrality of these submissions, which counters the argument that NGOs located in developed countries are likely to support the position of these countries. However, the fact that the legal resources of developed countries are more equipped to counter arguments presented against their interest by NGOs' submissions than developing countries makes the difference in the imbalance that *amicus curiae* briefs increase in the positions of developing and developed countries during the WTO dispute settlement process.

The discussion above in relation to developing countries' participation at the litigation stage of the WTO dispute settlement system shows the problematic issues that could arise as a result of the process' legal complexity and high cost. It also indicates the

³⁷² Knahr, above n 348, 56.

³⁷³ Bown and Hoekman, above n 185, 884.

negative implications that some practices of panels and the Appellate body could have on developing countries' participation, whether through their insensitivity to developing countries' development issues or their unwarranted scope of interpretation. The African proposal identified these issues correctly as a source of concern for developing countries in the system. Even though their reference to under-representation of developing countries in the membership of panels and the Appellate Body is debatable, it is still valid when considering the representation of small developing country and African Members, and serves as a call for improvement. These issues consolidate the argument of structural, procedural and substantive bias at the litigation stage, which is only part of the overall inequality in the dispute settlement system.

3.3.4. Developing Countries' Issues in the Implementation Stage

It is recognised that the remedies provided by the GATT legal system were limited.³⁷⁴ A legal violation simply entitled the complaining party to a general recommendation calling upon the defendant party to comply with its obligations. The process could drag on for years due to the absence of a time limit in the order to comply. If the defendant failed to comply, any request for an authorised retaliation by the complainant was threatened by a possible veto by the defendant due to consensus requirements. In addition, except in some anti-dumping and countervailing duties (AD/CVD) disputes, there was no compensation for the damage caused by violating measures, as the only remedy available was forward-looking and focused on securing compliance in the future.³⁷⁵

By comparison, the WTO rules of implementation were considered a step forward towards ensuring the adjudicative nature of the WTO dispute settlement mechanism, making it more appealing to developing countries, especially as it suggested a limitation on the power politics that were commonly used in GATT. This new focus

³⁷⁴ Robert Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (2000) 376.

³⁷⁵ Ibid.

on providing more adjudicative rules of implementation is clear in the system's interest in precise timeframes and more surveillance.³⁷⁶

Nonetheless, WTO Members' dedication to the WTO legal system is still limited, as reflected in the reformed remedies that have been adopted. While the WTO dispute settlement mechanism has established a procedure for setting a time limit for compliance, the main remedy is still a general recommendation requesting the defendant to comply.³⁷⁷ Retaliation is then the ultimate remedy for non-compliance, a procedure that is no longer threatened by defendants' veto power, but is subject to additional time-consuming procedures to confirm non-compliance and the amount and nature of the retaliation.³⁷⁸ WTO implementation remedies are also still future-driven, focusing on achieving compliance, and ignoring compensation for past damages no matter how long the compliance process takes.³⁷⁹

Developed country Members of the WTO desire to maintain a limited nature of the WTO legal remedies, as most of these countries are frequent users of the system as both complainants and defendants. As a result, their interest may not necessarily be in creating the strongest legal system, compared to developing countries that are less active users of the dispute settlement process. It is more in the interest of developed countries to have a legal system that is most helpful in enforcing their trade agreement rights as complainants, while at the same time giving them a degree of freedom to deal with adverse rulings against their violating practices. In other words, the repeat users of the WTO dispute settlement system, which are more likely to be developed countries, see the optimal remedy package as 'the one that works against others but not so well against themselves'.³⁸⁰

It could be suggested, as a result, that although implementation follows to some extent a judicial model, it still relies on the willingness of the respondent to comply, which works against developing countries that often have no other means to pressure their

³⁷⁶ Freneau, above n 59, 35.

³⁷⁷ Hudec, 'Broadening the Scope of Remedies', above n 374, 376.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Ibid 377.

rights and interests other than through WTO rulings.³⁸¹ Therefore, the overall positive record of implementation in the WTO could be merely a result of the good faith of its Members.³⁸² This good faith is driven by Members' interest to see the system function effectively, especially for Members that are active users of the system.³⁸³ However, good faith is a variable that cannot be relied upon. Therefore, when a Member actually fails to implement a ruling, the nature and structure of the WTO remedies for non-compliance with the DSB rulings and recommendations become the focus in determining how effective the WTO is in enforcing its law.³⁸⁴

The WTO dispute settlement record indicates that WTO rulings are often implemented, which induces some to insist that the implementation procedures are functioning in an effective manner.³⁸⁵ However, some well-publicised disputes that have led to formal non-compliance action, such as the *EC—Bananas III*,³⁸⁶ *EC—Beef Hormones*,³⁸⁷ *Australia—Salmon*,³⁸⁸ *Australia—Automotive Leather II*,³⁸⁹ *Brazil—Aircraft*³⁹⁰ and *Canada—Aircraft*,³⁹¹ have substantially undermined that view and raise questions about the adequacy of the current implementation rules and procedures.³⁹²

In any dispute, if a panel or the Appellate Body finds a Member's trade policy not to be in conformity with WTO rules and the Member's obligations, the panel or the

³⁸¹ Freneau, above n 59, 35.

³⁸² Busch and Reinhardt, 'The WTO Dispute Settlement Mechanism', above n 200, 4.

³⁸³ Ibid.

³⁸⁴ William Davey, 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions' (Illinois Public Law Research Paper No 05-16, The University of Illinois College of Law, 2005) 11.

³⁸⁵ Carolyn Gleason and Pamela Walther, 'The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform' (1999) 31(3) *Law and Policy in International Business* 709, 710.

³⁸⁶ *EC—Regime for the Importation, Sale and Distribution of Bananas*, above n 192, WT/DS27/R (18 August 1997) and WT/DS27/AB/R (9 September 1997).

³⁸⁷ *EC—Measures Concerning Meat and Meat Products (Hormones)*, above n 203, WT/DS26/R (18 August 1997), WT/DS48/R (18 August 1997), WT/DS26/AB/R (16 January 1998) and WT/DS48/AB/R (16 January 1998).

³⁸⁸ *Australia—Measures Affecting Importation of Salmon*, WTO Docs, WT/DS18/R (12 June 1998) and WT/DS18/AB/R (20 October 1998).

³⁸⁹ *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WTO Doc, WT/DS126/R (25 May 1999).

³⁹⁰ *Brazil—Export Financing Programme for Aircraft*, WTO Docs, WT/DS46/R (14 April 1999), WT/DS46/AB/R (2 August 1999), and WT/DS46/13 (26 November 1999).

³⁹¹ *Canada—Measures Affecting the Export of Civilian Aircraft*, WTO Docs, WT/DS70/R (14 April 1999), WT/DS70/AB/R (2 August 1999) and WT/DS70/9 (23 November 1999).

³⁹² Gleason and Walther, above n 385, 710–711.

Appellate Body issues its ruling calling upon the Member to comply. This ruling is automatically adopted by the DSB unless there is a consensus between Members against it. The DSB then allows for a 'reasonable period of time' for the violating Member to bring its policy into conformity with WTO standards.³⁹³ If the policy is not changed, consultations between the disputing Members should begin before that time expires, with a view to establishing mutually acceptable compensation. If no satisfactory agreement is reached within 20 days after expiry of the 'reasonable period of time', the complainant can request authorisation from the WTO DSB to 'suspend concessions', that is, to retaliate.³⁹⁴ Unless there is a consensus not to, the DSB will grant that authority.³⁹⁵ If the respondent objects to the amount of retaliation proposed by the complainant, the matter is referred to an Arbitrator for a decision within 60 days after expiry of the 'reasonable period of time'. The task of the Arbitrator (where possible the original panel that ruled on the WTO inconsistency in the first place) is to decide whether the level of retaliation proposed is 'equivalent' to the level of damage (nullification or impairment). That decision by the Arbitrator is final. The DSB will accept the decision and grant authorisation for retaliation again, unless there is a consensus otherwise.³⁹⁶

The implementation procedures outlined in the DSU raise some issues that affect developing countries' participation. To address these issues, implementation procedures are considered in three stages: the order to comply, the reasonable period of implementation and retaliation for non-compliance. It is argued here that some of the substantive and procedural context of the implementation process is negatively affecting developing countries' prospects of achieving a successful outcome to their disputes.

3.3.4.1. The Order to Comply

Article 19 of the WTO DSU authorises the panel or the Appellate Body, if it concludes that a measure is inconsistent with the legal obligation in question, to issue

³⁹³ The Dispute Settlement Understanding, above n 9, Article 21, paragraph 3.

³⁹⁴ Ibid Article 22, paragraph 2.

³⁹⁵ Ibid paragraph 6.

³⁹⁶ Ibid paragraph 7.

a ‘recommendation’ to ‘bring the measure into conformity’. Article 19 also authorises panels and the Appellate Body to ‘suggest’ specific ways in which the concerned Member could implement the recommendation. The ‘recommendation’ in Article 19 is the primary remedy for a violation of legal obligations, and, despite the soft indications, the word ‘recommendation’ is traditionally understood in GATT/WTO jurisprudence as a legally binding order.³⁹⁷

Since the GATT years, panels and the Appellate Bodies have been reluctant to exceed the practice of issuing a ‘recommendation to bring the measure into conformity’ by making specific suggestions on how to implement the recommendation.³⁹⁸ This reluctance is evident in a number of panels and Appellate Body rulings. In *US DRAMS*,³⁹⁹ the Panel declined to make any suggestions on the ground that there was a range of possible ways through which the US could appropriately implement the Panel’s recommendation. In *US—Hot Rolled Steel*, the Panel declined to make specific suggestions, considering that the modalities of the implementation of its recommendations were for the US to determine.⁴⁰⁰ In *US—Line Pipe*, the Panel declined to suggest specific ways of implementation, stating that there might be other ways in which the US could implement its recommendations.⁴⁰¹ In *US—Steel Plate*, the Panel acknowledged that it was ‘free to suggest ways in which we believe the [defendant] could appropriately implement our recommendation’ but decided not to do so in that case.⁴⁰² In *EC—Sardines*, the Panel declined to make suggestions stating that the authority under Article 19.1 was a discretionary one.⁴⁰³

The practice of not interfering with the country’s means of implementation came from the assumption in many GATT decisions that the defendant country is free to choose among legally valid means to bring its violating trade policy into conformity.⁴⁰⁴ It was also supported by the practical utility of allowing Members to find the type of

³⁹⁷ Hudec, ‘Broadening the Scope of Remedies’, above n 374, 377.

³⁹⁸ Freneau, above n 59, 36.

³⁹⁹ *US—Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, 151.

⁴⁰⁰ *US—Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan*, WT/DS184/R, 81.

⁴⁰¹ *US—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, 138.

⁴⁰² *US—Anti-dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, 40.

⁴⁰³ *EC—Trade Description of Sardines*, above n 198, WT/DS231/R, 90.

⁴⁰⁴ Hudec, ‘Broadening the Scope of Remedies’, above n 374, 378.

correcting measures that best suit their economic and political circumstances.⁴⁰⁵ In addition, issuing a binding order to implement one of several forms of compliance could induce the defendant to object to the implementation on the ground that such practice amounts to creating an additional obligation never agreed to. Such direct and specific orders of implementation could further raise issues of political sensitivity, such as interference with a Member country's sovereignty.⁴⁰⁶ Finally, the broad interpretation of the second sentence of Article 19, stating that the panel or Appellate Body can suggest specific ways of implementation, is that the panel or the Appellate Body can 'suggest' which of the implementation options is preferable, but that suggestion would not be binding.⁴⁰⁷

However, in some disputes, panels have sometimes ruled that the defect in the existing measure cannot be remedied by further proceedings, and that compliance requires the entire proceedings to be rendered ineffective. The reasoning for such rulings has been that it is acceptable to call for specific remedial action, when such specific action is required in order to comply with the obligation in question.⁴⁰⁸ In *US—Offset Act (Byrd Amendment)*, the Panel found it 'difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the ... measure'.⁴⁰⁹ Therefore, it suggested that the US repeal the WTO-inconsistent measures.⁴¹⁰ In *Argentina-Poultry Anti-Dumping Duties*, the Panel '[could] not perceive how Argentina could properly implement [the] recommendation without revoking the anti-dumping measure at issue in this dispute'.⁴¹¹ Accordingly, the Panel suggested that Argentina repeal the anti-dumping measures concerned.

In other cases, panels and the Appellate Body showed more willingness to issue suggestions that were more specific than repealing the inconsistent measures. In *US—Lead and Bismuth II*, the Panel suggested that the US 'takes all appropriate steps, including a revision of its administrative practices, to prevent the aforementioned

⁴⁰⁵ Ibid.

⁴⁰⁶ Freneau, above n 59, 36.

⁴⁰⁷ Hudec, 'Broadening the Scope of Remedies', above n 374, 378.

⁴⁰⁸ Ibid.

⁴⁰⁹ *US—Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment)*, WT/DS/217/R and WT/DS234/R, 337.

⁴¹⁰ Ibid.

⁴¹¹ *Argentina—Definitive Anti-dumping Duties on Poultry from Brazil*, WT/DS/241/R, 100.

violation ... from arising in the future'.⁴¹² Another example shows suggestions that are even more detailed in *EC—Bananas III*. In this dispute, the Panel suggested that:

First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preferences may be necessary unless the need for a waiver is obviated, for example by the creation of a free-trade area consistent with Article XXIV of GATT.

Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.

Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports.⁴¹³

The issue of whether panels can adjudicate remedial issues or not, or whether any specific remedial order they make is to be considered a formal (binding) recommendation or a (non-binding) suggestion is very important in structuring the implementation process. It is, in this author's opinion, able to influence the efficiency of the enforcement of the panels and the Appellate Body rulings substantially.

It could be argued that the interpretation of the words of Article 19 of the DSU and the general GATT/WTO jurisprudence support the view that the WTO dispute settlement system can only adjudicate the legality of a country's conduct that has actually occurred. As a result, a panel cannot adjudicate whether a particular action is an acceptable compliance measure until the defendant country has presented specific measures as a form of compliance. It is true that it would be difficult to ignore such an argument, especially when it is supported by a general policy of not deciding legal issues before they actually arise and examining the full context of a matter. In addition, the fact that most of the larger Member countries of the WTO considerably

⁴¹² *US—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, above n 320, WT/DS138/R, 47.

⁴¹³ *EC—Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 by Ecuador (Report by the Panel)*, WT/DS27/RW/ECU, 96.

support this approach adds more weight to its enforceability.⁴¹⁴ Therefore, panels and their Secretariat advisors normally seek to avoid making their ruling any more intrusive than necessary. For developing countries, having the freedom to choose implementation measures is particularly important as it enables them to decide the most appropriate method of implementation that suits their fragile economies when they are involved in disputes as defendants, but this freedom might work against them when complainants, as will be discussed.

However, regardless of the practicality and the political appropriateness of the present WTO practice of limiting the panel's ruling to the 'bring the measure into compliance' recommendation, allowing panels to order the defendant to apply certain remedial measures would certainly deter defendants from delaying implementation with incomplete measures.⁴¹⁵ This in return would produce more enforcement pressure to achieve more effective implementation, which would be for the benefit of developing countries as the weaker party in any dispute settlement process.⁴¹⁶ This possibility is in fact the very reason for defendant countries' resistance to these kinds of suggestions, and their preference for less precise recommendations. Vague and general recommendations allow defendants to claim compliance for inadequate measures, which enable them to delay the implementation process by forcing the complainant to seek full implementation through additional time-consuming procedures.⁴¹⁷

A delayed and lengthy implementation process, as a result of inadequate compliance measures by the defendant on one side, and employing additional measures by the complainant to ensure full compliance on the other side, has negative effects for developing countries in particular. Their limited institutional, human and financial resources make it a significant task for them to find, allocate and sustain resources sufficient to start a complaint and progress through its first stages, not to mention a long dispute that is obstructed by implementation delays.

⁴¹⁴ Ibid 380–381.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

Moreover, in most developing countries, domestic industries do not have the economic power and stability that enable them to survive long period of losses or deprived profits as a result of being involved in a long dispute and a delayed implementation by the defendant. Thus, it would not be surprising in a scenario involving a developing country as a complainant and a developed country as a defendant to discover that the developed country has used its greater bargaining leverage in negotiating a preferable outcome to serve its interests.⁴¹⁸ It does so by bullying the complainant developing country into accepting less-than-adequate measures through its continuing resistance to all additional efforts by the developing country for full implementation. In doing so, it benefits from the developing country's limited resources and the negative effect of delayed disputes on its economy.⁴¹⁹

This scenario is hardly imaginable when a developed country is the complainant. In that case, such ambiguity of the recommendation is not threatening to its interests, where it can use the same power imbalance of the first scenario to insist that the defendant developing country apply the recommendation in good faith. These two different scenarios of possible interaction between developing and developed countries in the implementation stage suggest that a system of ambiguous legal remedies tends to offer unequal pressures for enforcement for developed and developing countries.⁴²⁰

Again, the *EC—Bananas III* dispute provides a good example of how defendants could delay the implementation process through inadequate measures and time-consuming procedures.⁴²¹ In this dispute, which was discussed earlier in this chapter, the EC indicated its intention to fully implement the DSB recommendations that found its banana import regime inconsistent with its WTO obligations. During the reasonable period for implementation, the EC indicated that it was in the process of revising its legislation to make it consistent with the DSB recommendations, which

⁴¹⁸ Shaffer, 'Weaknesses and Proposed Improvements', above n 144, 20–21.

⁴¹⁹ Hudec, 'Broadening the Scope of Remedies', above n 374, 381.

⁴²⁰ Ibid 381–382.

⁴²¹ *EC—Regime for the Importation, Sale and Distribution of Bananas*, above n 192, WT/DS27/R (18 August 1997) and WT/DS27/AB/R (9 September 1997).

led, on 18 August 1998, to consultations with the complainants for the resolution of the disagreement over the WTO-consistency of measures introduced by the EC.⁴²²

On 25 November 1998, the EC indicated its intention to adopt a new regulation to implement the recommendations of the DSB.⁴²³ Then, on 19 November 1999, the EC informed the DSB of a new reform on the banana regime, which envisaged a two-stage process. It would start as a tariff rate quota system for several years, and then it would be replaced by a tariff only system no later than 1 January 2006.⁴²⁴ The EC managed to push for its transitional measures to be implemented after consultations with the complainants. However, a ruling by a panel under Article 21.5 of the DSU found in 7 April 2008 that the EC had failed to implement the recommendations and rulings of the DSB.⁴²⁵

This dispute shows how easily the EC delayed the implementation of the DSB recommendations through a series of inadequate compliance measures, giving it the chance to continue its WTO-inconsistent regime of banana importation for more than a decade.

The misuse of the DSB's rulings, which are usually restricted to an order to comply that gives defendant Members the opportunity to choose their own appropriate measures of implementation, negatively affects the dispute settlement process. A delayed and lengthy implementation process is a result of this misuse, which could have negative effects on the integrity of the process in general and on the economies of developing countries in particular. In the presence of those effects, the notion of remedies for past damages is appropriately positioned to be addressed in the next section as a possible counter measure for such negative practices.

⁴²² Ibid WT/DS27/17.

⁴²³ Ibid WT/DS27/17/Add. 1–3.

⁴²⁴ Ibid WT/DS27/51/Add. 5.

⁴²⁵ Ibid WT/DS27/RW2/ECU, 224.

3.3.4.2. Remedies for Past Damages

As noted above, the dispute settlement remedies continued throughout the GATT years, along with being a general recommendation calling upon the respondent party to comply with recommendations, were forward-looking, focusing on securing compliance in the future.⁴²⁶ Other than a series of GATT panel decisions between 1985 and 1995 involving AD/CVD in which refunds of duties imposed or monetary compensation were ordered specifically by panels,⁴²⁷ the dispute settlement practice was to focus on future corrections regardless of the past damages that resulted from the violating measures.⁴²⁸ The issue of monetary compensation has always been subject to resistance and opposition by developed countries, as well as reluctance by panels and the Appellate Body.⁴²⁹ Most of the panel decisions ordering refunds and monetary compensation in the AD/CVD cases were blocked entirely by defendants, with at least part of the objection to adoption being the remedy order.⁴³⁰ Under the WTO dispute settlement system, when the issue of AD/CVD refunds came up in the *Guatemala Cement* dispute,⁴³¹ the panel refrained itself from expressing a legal opinion on whether refunds were required in AD/CVD disputes.⁴³²

During the GATT years, the argument against proposals for monetary compensation for past damages, which was adopted mainly by developing countries,⁴³³ was based on the idea that money damages in the GATT dispute settlement system were simply not possible.⁴³⁴ This stand of denying monetary compensation for past harms was

⁴²⁶ Hudec, 'Broadening the Scope of Remedies', above n 374, 382.

⁴²⁷ These cases include: *New Zealand—Imports of Electrical Transformers from Finland*, GATT BISD, 32nd Supp, 55–70 (1986); also, *US—Countervailing Duties on Fresh Chilled and Frozen Pork from Canada*, GATT BISD, 32nd Supp, 55–70 (1992); also, *US—Measures Affecting Imports of Seafood Lumber from Canada*, GATT BISD, 40th Supp, 358–517 (1995); also, *US—Antidumping Duties on Grey Portland Cement Clinker from Mexico*, GATT Doc ADP/82 (7 July 1992) (panel report not adopted) and *Canada—Countervailing Duty on Boneless Manufacturing Beef*, GATT Doc SCM/85 (13 October 1987, panel report not adopted).

⁴²⁸ Hudec, 'Broadening the Scope of Remedies', above n 374, 382.

⁴²⁹ Ibid 384–385.

⁴³⁰ Ibid.

⁴³¹ *Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R and WT/DS60/AB/R.

⁴³² Ibid 168.

⁴³³ The main proposals are set out in *Proposals for Amendments to the General Agreement*, GATT Doc COM.TD/F/W.1, (27 April 1965) and *Proposals for Amendments to the General Agreement*, GATT Doc COM.TD/F/W.4, (11 October 1965).

⁴³⁴ Hudec, 'Broadening the Scope of Remedies', above n 374, 383.

claimed as a reflection of developed countries' view that GATT law was of a lower status than domestic law, where taxes and charges imposed in violation of national law are refundable.⁴³⁵ The reason for this view was that governments did not want GATT legal obligations to have such direct effect.⁴³⁶ They wanted to view GATT as simply a diplomatic instrument, with a primary function was to set aside past conduct and aid in resolving trade disputes in a consensual way while focusing on forward-looking remedies.⁴³⁷

The view against allowing GATT law to have a more direct legal effect through monetary compensation for past damages seemed to continue after the UR negotiations. This was when the US Congress adopted a statutory provision, in the 1994 legislation implementing the UR agreements, that AD/CVD or Safeguards duties already paid in 'liquidated' entries would not be refunded even though the GATT illegal duties could be revoked for all 'unliquidated' entries.⁴³⁸ This approach leaves open the issue of the WTO's ability to issue refund remedies for past damages, but is now even more complicated, as the WTO panels' ability to adjudicate and issue remedial orders is still questionable in the first place.

The current practice of having future-looking remedies might suit the political balances of the WTO system, and give developed country Members the 'optimal remedy package' mentioned before.⁴³⁹ However, when it comes to developing countries, the illegal trade restrictions cause serious harm to developing countries' economies.⁴⁴⁰ This harmful impact is far more than the impact of similar restrictions on other countries' trade, as a result of the already fragile economy of developing countries and the sensitivity of their development process to such illegal trade restrictions.⁴⁴¹ Therefore, refusing to give developing countries the entitlement to

⁴³⁵ Ibid.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Section 129 of the Uruguay Round Agreement Act, 108 Stat. 4836, 19 U.S.C. 3501, 3538 (1994) provides partial authority to revoke AD/CVD and Safeguards measures in order to comply with WTO panel rulings, which is an advance over a prior law, but subsection (c) (1) limits the effect of such revocations to 'unliquidated' entries that enter or are withdrawn from warehouse on or after the date of the order revoking the measure.

⁴³⁹ Hudec, 'Broadening the Scope of Remedies', above n 374, 377.

⁴⁴⁰ Ibid 383.

⁴⁴¹ Ibid.

collect retroactive damages in the form of monetary compensation and focus only on prospective remedies would give respondents the incentive to drag out legal cases.⁴⁴² In doing this, respondents could close their markets off to developing countries for years without incurring any consequence, which adversely affects developing countries with lower trading stakes and limited legal and financial resources.⁴⁴³

The perversity of this incentive has been shown in the textile sector, where even though the US has lost a series of textile safeguards cases, such as those brought by Costa Rica and Pakistan, it nevertheless had closed its market from developing country imports for almost three years without any consequence.⁴⁴⁴ In *US—Transitional Safeguard Action on Combed Cotton Yarn from Pakistan*, it was on 5 March 1999 that the US notified the TMB that it had decided to unilaterally impose a transitional safeguard measure on combed cotton yarn from Pakistan.⁴⁴⁵ After a recommendation by the TMB that the US restraint should be eliminated, and rulings by the panel and the Appellate Body with the same recommendations, it was only on 8 November 2001 when the US implemented the DSB recommendations.⁴⁴⁶ In that case, given the nature of WTO remedies, Pakistan's victory was merely symbolic.

Making developing countries entitled to collect retroactive damages in the form of monetary compensation is preferable to discourage prolonging their disputes. It should be recognised that the longer the dispute, the more damage accrues and as such, more monetary compensation should be paid. Retroactive monetary compensation was also one of the points suggested in the African Group Proposal mentioned earlier to stop trade injuries from being unsatisfactorily compensated in a way that does not reflect the interests of developing countries.⁴⁴⁷ In this context, retroactive monetary compensation may be seen as compensating the economic

⁴⁴² Shaffer, 'Weaknesses and Proposed Improvements', above n 144, 21.

⁴⁴³ Ibid.

⁴⁴⁴ *US—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, above n 197, WT/DS24/AB/R, (10 February 1997). See also, *US—Transitional Safeguard Action on Combed Cotton Yarn from Pakistan*, above n 246, WT/DS192/AB/R (5 November 2001).

⁴⁴⁵ *Textile Monitoring Body—Report of the Fifty-fourth Meeting*, above n 247.

⁴⁴⁶ World Trade Organization, *US—Transitional Safeguard Action on Combed Cotton Yarn from Pakistan* (15 February 2010) WTO Website <http://www.wto.org/english/tratop_e/cases_e/ds192_e.htm>.

⁴⁴⁷ Proposal by the African Group, above n 261.

development programmes of developing countries, rather than private interests,⁴⁴⁸ and further provides an incentive for developing countries to participate in WTO litigation.⁴⁴⁹

An analysis of the introduction of retroactive and monetary remedies will be discussed further in Chapter 5 of this thesis as part of a discussion on the suggested reforms on the WTO dispute settlement system.

3.3.4.3. The Follow-up to Recommendations

Another one of the main defects of the GATT dispute settlement mechanism was its lack of any follow-up procedure for approved legal rulings other than having open-ended timeframes for implementation.⁴⁵⁰ It was an issue of concern for developing countries, in particular, that the enforcement of rulings was left to the persistence of the complainant. It was expected that the complainant would put pressure on the respondent, place the implementation issue on the agenda of the GATT Council, make demands for compliance, seek support from other countries for its implementation demands, and finally threaten retaliation. Each initiative by the complainant was often regarded as premature, unnecessary and unfriendly.⁴⁵¹ This was an issue of concern for developing countries, which could not afford risking their relations with their larger counterparts due to the political and economic considerations that govern these relations.⁴⁵² Therefore, the new automatic steps contained in the WTO procedure came as a major improvement from the previous system.⁴⁵³ The WTO procedure established a deadline for compliance, and a surveillance mechanism during the implementation period. It also introduced a provision for an automatic authorisation for retaliation if compliance was not achieved by the deadline. However, the WTO implementation procedures are not always on the good side. The surveillance and enforcement mechanisms during and after the implementation period arguably give rise to a number of defects that particularly affect developing countries. In fact,

⁴⁴⁸ Hudec, 'Broadening the Scope of Remedies', above n 374, 383.

⁴⁴⁹ Shaffer, 'Weaknesses and Proposed Improvements', above n 144, 22.

⁴⁵⁰ Gleason and Walther, above n 385, 712.

⁴⁵¹ Hudec, 'Broadening the Scope of Remedies', above n 374, 394.

⁴⁵² Ibid.

⁴⁵³ Ibid.

implementation remedies, such as trade compensation and retaliation have been the focus of many developing countries' proposals, as will be discussed in Chapters 5 and 6, highlighting them as the most problematic issue affecting developing countries' participation. These procedures are discussed below.

(a) The 'reasonable period of time' for the implementation of the DSB recommendations

Article 21 of the DSU emphasises 'prompt compliance' by the losing party, and describes this kind of compliance as 'essential in order to ensure effective resolution of disputes to the benefit of all Members'. However, Article 21 also recognises the respondent's need for a 'reasonable period of time' to implement the rulings. This period can be set either earlier by a proposed time from the losing party that is subject to the DSB approval, by a mutual agreement between the parties concerned within 45 days after the date of adoption of the recommendations and ruling, or by binding arbitration within 90 days after the date of adopting the recommendations and ruling.⁴⁵⁴ Article 21 adds that in such arbitration, 'the reasonable period of time to implement recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report, but it may be shorter or longer, depending upon the particular circumstances'.⁴⁵⁵ As discussed below, the 'reasonable period of time' raises a number of problematic issues resulting from its length when established, the efficiency of surveillance arrangements utilised during its implementation and questionable benefits from possible compensation agreement at the end.

(i) The establishment of the implementation period

In the early disputes of the WTO dispute settlement system, such as *Japan—Taxes on Alcohol*,⁴⁵⁶ *EC—Bananas*,⁴⁵⁷ and *EC—Beef Hormones*,⁴⁵⁸ arbitrators uniformly

⁴⁵⁴ *The Dispute Settlement Understanding*, above n 9, Article 21:3.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Japan—Taxes on Alcoholic Beverages—Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Docs, WT/DS8/15, WT/DS10/15 and WT/DS11/13 (14 February 1997).

⁴⁵⁷ *EC—Regime for the Importation, Sale, and Distribution of Bananas—Arbitration under Article 21.3 (c)*, WTO Doc, WT/DS27/15 (7 January 1998).

established 15-month periods as reasonable period awards. This direction generated a concern, particularly among developing countries, that losing parties were automatically entitled to a compliance period of 15 months.⁴⁵⁹ Such concerns were on the ground that an automatic 15 months reasonable period of implementation is contrary to the ‘prompt compliance’ standard of Article 21 of the DSU.⁴⁶⁰ In addition, it is an unfair and unnecessary extension of the dispute settlement process, especially when considering the legal and financial limitations of developing countries.⁴⁶¹

More recently, the arbitral awards and the agreements they have influenced have helped eliminate this concern as they have started to follow a trend towards shorter periods.⁴⁶² In *Canada—Patent Term*,⁴⁶³ the Arbitrator decided on 10 months as a reasonable period, citing the reasoning used by another arbitrator to justify short periods of reasonable period. The Arbitrator stated ‘it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest period possible within the legal system of the Member* to implement the recommendations and rulings of the DSB.’⁴⁶⁴ In *Japan—DRAMS*, the arbitrator ruled for the reasonable period to be eight months and two weeks. He stated:

I recall the requirement for promptness under Article 21.3, and the imperative to implement in the shortest time possible in the light of a Member's legal system. Previous arbitrators have explained that, compared to the other types of action generally taken to implement, such as legislative action or administrative rule-making, administrative action should be less time-consuming, and may not require the full 15-month guideline mentioned in Article 21.3(c).⁴⁶⁵

However, the 15-month reasonable period continues to constitute a guideline that is referred to in the DSU, keeping the possibility of long periods of implementation alive

⁴⁵⁸ *EC—Measures Concerning Meat and Meat Products (Hormones)—Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Docs, WT/DS26/15 and WT/DS48/13 (29 May 1998).

⁴⁵⁹ Gleason and Walther, above n 385, 713.

⁴⁶⁰ Ibid 714.

⁴⁶¹ Ibid.

⁴⁶² Ibid 715–716.

⁴⁶³ *Canada—Term of Patent Protection, Award of the Arbitrator under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001.

⁴⁶⁴ *EC—Measures Concerning Meat and Meat Products (Hormones)*, above n 203, *Award of the Arbitrator under Article 21.3(c) of the DSU*, WT/DS26/15 and WT/DS48/13, 29 May 1998, paragraph 26.

⁴⁶⁵ *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea, Award of the Arbitrator under Article 21.3(c) of the DSU*, WT/DS336, 5 May 2008, paragraph 47.

to the detriment of developing countries, especially with the absence of retroactive compensation after long and resource-exhausting disputes.⁴⁶⁶

(ii) Surveillance during the implementation period

Article 21 of the DSU states that the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months of establishing the reasonable period of time, and shall remain on the DSB agenda until the issue is resolved. During this period, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

The ‘surveillance’ stage during the reasonable period of implementation imposes on the losing Member only a few interim requirements, which undermines the efficiency of the surveillance process.⁴⁶⁷ Along with the ultimate requirement of achieving full compliance, the concerned Member is required to comply with only one intervening obligation, which is providing a ‘status report’ at regular intervals, beginning six months into the reasonable period. The fact that the Member is not required to identify specific measures to implement or remove, nor is it required to present a specific schedule of implementation, allows the ‘status report’ to be as specific or vague as the concerned Member decides.⁴⁶⁸ In addition, even though the losing Member could consult closely with the winning Member during that period to ensure that the implementation period is applied in good faith, there is no obligation in the DSU for such consultations.⁴⁶⁹

The lack of surveillance obligations at this time might well lead the losing Member to use the designated period merely as a tool for enjoying additional time to apply the illegal measures.⁴⁷⁰ This issue would be of a major concern for developing countries. The potential length of the ‘reasonable period of implementation’, which could be up

⁴⁶⁶ Gleason and Walther, above n 385, 716.

⁴⁶⁷ Ibid.

⁴⁶⁸ Yang Guohua, Bryan Mercurio and Li Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (2005) 245.

⁴⁶⁹ Gleason and Walther, above n 385, 716.

⁴⁷⁰ Ibid.

to 15 months, and the absence of retroactive measures of compensation in the WTO system, mean that a dispute could have a devastating effect on a developing country's economy if the period of implementation was only used to make the dispute last longer. The extended duration of the dispute places even more pressure on the already exhausted resources of the developing country. It increases the uncompensated economic losses at least until the end of the potentially long period of implementation. Not acting in good faith in this period also leaves developing countries in a critical situation considering their limited chances in threatening, executing, and achieving a successful retaliation, the primary remedy available to deal with such situations.

In this regard, perhaps the conduct of the EC in two of the disputes brought against it best illustrates the permissiveness of the current rules in this area. In *EC—Bananas III*,⁴⁷¹ the EC, although stating its intentions to implement the recommendation and ruling, refused to be specific about its implementation plans, and showed, repeatedly, a reluctance to correct the violations identified in the report.⁴⁷² After long delays, the EC issued a new banana proposal in which the discrimination of the original regime continued in an obvious way.⁴⁷³ The EC insisted that no substantive changes could be made to that proposal despite repeated representations by the complaining parties that the new proposal would not constitute compliance.⁴⁷⁴ During this period, the EC 'status report' to the DSB did not provide more than that significant progress in negotiations was being made towards implementation.⁴⁷⁵

Also, in *EC—Beef Hormones*,⁴⁷⁶ it was enough for the EC to state in its first status report to the DSB that it had decided to launch a number of scientific studies 'with a view to assessing the implications thereof for the Community's import prohibition', without even mentioning any possibility of removing its measures.⁴⁷⁷ The EC's

⁴⁷¹ *EC—Regime for the Importation, Sale, and Distribution of Bananas*, above n 192.

⁴⁷² *Ibid* WT/DS27/17, WT/DS27/17/Add. 1-3, WT/DS27/51, WT/DS27/51/Add. 1-25, WT/DS27/96 and WT/DS27/96/Add.1-11 (status reports by the EC); see also, Gleason and Walther, above n 385, 716-717.

⁴⁷³ *Ibid* WT/DS27/17/Add.3 and WT/DS27/51/Add.25; see also, Gleason and Walther, above n 385, 716-717.

⁴⁷⁴ *Ibid* WT/DS27/40; see also, Gleason and Walther, above n 385, 716-717.

⁴⁷⁵ *Ibid* WT/DS27/51/Add. 1-24 and WT/DS27/96/Add. 1-10; see also, Gleason and Walther, above n 385, 716-717.

⁴⁷⁶ *EC—Measures Concerning Meat and Meat Products (Hormones)*, above n 203.

⁴⁷⁷ *Ibid* WT/DS26/17 and WT/DS48/15; see also, Gleason and Walther, above n 384, 717.

subsequent status reports continued to note that the scientific studies were still underway.⁴⁷⁸ At the end of the reasonable period of implementation, the EC finally stated that it was not in a position to remove its measures and would continue its scientific studies and assess their results ‘to consider what steps may be necessary’.⁴⁷⁹

From these non-compliance cases, it is clear that the losing party is left free to manipulate the reasonable period of implementation to its benefit under the limited form of surveillance that the DSB is currently conducting or even entitled to conduct.⁴⁸⁰

What value does DSB surveillance then have? Is there any practical significance of the diplomatic pressure exerted at DSB meetings? The surveillance practiced by the DSB during the reasonable period provides theoretically and practically a good form of surveillance, but like many other provisions of the DSU, it is reliant on the good faith of the responding Member rather than the efficiency of the procedure itself. This could be particularly detrimental for developing countries, as non-compliance or long implementation means a continuing existence of violating measures against their limited economies or a long resource-exhausting implementation process.

The current surveillance procedure during the reasonable period gives the impression that the responding Member will start implementing the recommendations and rulings of the DSB as soon as the implementation period starts. Accordingly, by the time of the DSB meeting on the implementation issue after six months of establishing the reasonable period, the respondent would have a detailed and precise status report of the measures taken to comply to date. However, this scenario is not always the case. Using the reasonable period as a tool to keep the violating measure for an extended period is also possible, after manipulating the status reports requirement by providing ones that are lacking in detail and precision.

Any Member could observe that the responding Member is not taking adequate steps to comply, and that the DSB should request it to fulfil its obligations within the time

⁴⁷⁸ Ibid WT/DS26/17/Add. 1-3 and WT/DS48/Add. 1-3.

⁴⁷⁹ Ibid WT/DS26/17/Add. 4 and WT/DS48/Add. 4.

⁴⁸⁰ Gleason and Walther, above n 385, 717.

foreseen. However, this action could be convincingly countered by the argument that the responding Member was given a period of time for implementation, and it is its right to use the full length of this period, and the practice in the WTO disputes shows that the compliance measures adopted by the respondent during the reasonable period of time are usually judged after the expiry rather than during this period. This practice reflects the fact that other than being subjected to objections from certain Members, the responding party does not have an obligation under the DSU to fully implement the rulings and recommendations of the DSB before the expiry of the reasonable period.

The argument of Members' pressure at the DSB meetings as a possible tool to influence the respondent to produce adequate status reports and progressing implementation is reasonable. In fact, the political consequences and the joint condemnation of parties or Members has been an effective tool for enforcement since the GATT years.⁴⁸¹ Back then, despite the power of the losing party to block the rulings, it did not do so partly because of the responsibility of the GATT Contracting Parties to keep the system working.⁴⁸² Actions seen to affect this direction negatively were condemned by the Contracting Parties adding joint pressure on the respondent.

Even under the WTO dispute settlement system, where respondents have no control over procedures, the way the Member is perceived by the WTO membership still has an effect on the Member's actions.⁴⁸³ Therefore, it is important for a Member to demonstrate their responsibility towards the WTO system by showing their respect to the DSB rulings and their commitment to full implementation.⁴⁸⁴

However, the record of some WTO disputes shows that the Member is more likely to ignore the condemnation and pressure of Members if the concerned violating measures are of high interest to that Member. In this case, the benefits of keeping the violating measure for a longer period, which could involve abusing the implementation period, outweigh the costs that might result from such political

⁴⁸¹ Hudec, 'Broadening the Scope of Remedies', above n 374, 400.

⁴⁸² Ibid.

⁴⁸³ Busch and Reinhardt, 'The WTO Dispute Settlement Mechanism', above n 200, 4.

⁴⁸⁴ Ibid.

pressure. This disregard is also more likely to happen when the respondent is a major developed country, as it may have the economic and political weight to face joint political pressure or condemnation.

Perhaps the *EC—Bananas III* and the *EC—Beef Hormones* provide good examples on how the respondent is willing to bear the pressure of WTO membership in order to keep the benefits of the violating measures. In the *Bananas* case, the dispute started with a request for consultation in 1996 and paused in 2001 with a mutually agreed solution on the implementation of the DSB rulings, only to start again in 2008 in relation to the WTO-consistency of the compliance measures adopted by the EC.⁴⁸⁵ In *EC—Hormones*, the EC dragged the dispute from 1996 until it was subjected to retaliation by the US and Canada in 1999, and still has not complied fully with the DSB rulings, as another round of negotiations between the disputing parties started on December 2008 on implementation issues.⁴⁸⁶

These two cases just show the length that some Members go to keep advantageous measures or delay full implementation, which diminishes any role diplomacy or political pressure could play under such circumstances.

(iii) The compensation agreement during the implementation period

Article 22 of the DSU states that the concerned Member:

Shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.

The fragility and the limited diversity of many export industries in developing countries means that violations of the WTO would have a more burdensome effect on developing countries than their developed counterparts. However, a cost-benefit analysis counting the cost of allocating the limited institutional, legal and financial resources available, and the expected benefit from outcomes under the current dispute

⁴⁸⁵ World Trade Organization, *EC—Regime for the Importation, Sale and Distribution of Bananas* (16 February 2010) WTO Website <http://www.wto.org/english/tratop_e/cases_e/ds27_e.htm>.

⁴⁸⁶ World Trade Organization, *EC—Measures Concerning Meat and Meat Products (Hormones)* (16 February 2010) WTO Website <http://www.wto.org/english/tratop_e/cases_e/ds26_e.htm>.

settlement system, may deter developing countries from commencing a dispute.⁴⁸⁷ Hence, under these circumstances, obtaining compensation becomes of paramount importance for developing countries, as it allows cost-benefit issues to be limited and encourages active participation in the system.⁴⁸⁸

The compensation procedure in Article 22 is an available remedy if the respondent has not implemented the ruling within a reasonable period, but is only voluntary as it depends on a mutual agreement between the concerned parties. In the absence of retroactive compensation in the WTO system for past damages, the system should at least introduce a form of compulsory compensation. This alternative is supported by the fact that parties rarely reach an agreement with regard to compensation,⁴⁸⁹ as a result of leaving the option for compensation to rest on the willingness of the respondent.⁴⁹⁰

In this regard, an effective and efficient mechanism for compensation could represent a successful alternative to retaliation, and would suit developing countries with their lack of economic and political power better than retaliation.⁴⁹¹ Further, it would be worthwhile to encourage the use of compensation since it is less trade-restrictive in nature than retaliation.⁴⁹² In economic terms, compensation is simply trade liberalisation in the sense that it is most likely to come in the form of temporary reductions of the respondent's import barriers on certain products. These reductions must be consistent with existing WTO agreements, which means that they would be offered based on the MFN principle. This situation is claimed to boost the economic welfare in the complainant country, in the respondent country, and even in third parties that export the same products subject to tariff reductions, which makes the system as a whole better off economically.⁴⁹³

⁴⁸⁷ Freneau, above n 59, 42.

⁴⁸⁸ Ibid.

⁴⁸⁹ Eleso Adebukola, 'WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries' (Working Paper No 1378, The Berkeley Electronic Press, 2006) 13; Y Fukunaga, 'Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations' (2006) *Journal of International Economic Law* 383, 412.

⁴⁹⁰ Freneau, above n 59, 43.

⁴⁹¹ Ibid 42.

⁴⁹² Fukunaga, above n 489, 412.

⁴⁹³ Kym Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1(2) *World Trade Review* 123, 126.

Conversely, it could be argued that compulsory compensation would not be a practical option in the WTO dispute settlement system on the ground that securing compliance with compulsory compensation by the concerned country is questionable. Despite the fact that the MFN feature would provide greater openness, which would improve the economic welfare of all concerned Members including the respondent, the political economy of trade policy suggests that the political leadership of the respondent Member would lose from such unilateral reform. Such a loss is a result of domestic considerations, and commonly explains the presence of import barriers in the first place.⁴⁹⁴ The possible strong opposition of some domestic producers against compensation, which is more likely to be ordered in the form of tariff reductions in certain sectors that affect those producers, makes it almost impossible for the government of the Member concerned to obtain an agreement on compensation from those producers.⁴⁹⁵ The doubts over the practicality of compulsory compensation also come from the idea that the complainant would more likely have no means to force the Member concerned to provide the compensation.⁴⁹⁶ This situation would reintroduce retaliation as the ultimate remedy for the failure to compensate, resulting in a situation not much different than it is at present.⁴⁹⁷

However, this argument ignores the fact that the current settings of international economic and trade relations provide WTO Members with pressuring practices to be exercised outside the scope of the WTO in a way that affects the implementation of Members' obligations within the WTO. In this regard, a WTO Member with the desire to protect a strategic economic relationship with another WTO Member, if there is the possibility of counter-damaging practices by the complainant outside the WTO jurisdiction, might be motivated to comply with a compulsory compensation order in a WTO dispute. It might even force its implementation on its domestic producers if the stakes of its strategic relations with the complaining party were at risk. Even in the case of complainant developing countries, it is true that they are more likely to lack such equally balanced strategic relations with developed countries,

⁴⁹⁴ Ibid.

⁴⁹⁵ Fukunaga, above n 489, 412.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

and do not have the power to pressure Members concerned to implement compulsory compensation. However, the introduction of compulsory compensation along with a form of collective retaliation to follow, if the concerned Member fails to comply, could effectively deal with developing countries' lack of pressuring power for implementation.

The arguments against introducing compulsory compensation include that compulsory compensation may distort the effective interactions between the parties seeking to solve a dispute, especially as not every complaining party seeks compensation.⁴⁹⁸ Having compulsory compensation awarded automatically, or even at the request of the complaining party, might discourage the efforts of the complaining party from engaging in interactions with the Member concerned to reach a flexible solution to the dispute and implement the DSB recommendations.⁴⁹⁹ This argument should not be accepted because it disregards the fact that securing compensation from the Member concerned is more likely to be the preferable outcome for most developing countries. For these countries, it would be a valuable incentive in their cost-benefit analysis of their future disputes. In addition, compulsory compensation could serve as a pressuring device on respondents to provide an acceptable and timely implementation of the DSB recommendations, as it would be for their benefit, in most cases, to end a domestically opposed compensation by complying with what the DSB initially recommended.

(b) Retaliation

Under Article 22 of the WTO dispute settlement system, the complainant has automatic power to retaliate if the respondent country fails to comply with the DSB recommendation within the reasonable period of implementation. This power is subject to a third party review of the extent of the retaliation, the appropriateness of the economic sector retaliated against, and where the question of non-compliance itself is disputed.⁵⁰⁰ In this regard, under Article 22.3 of the DSU, retaliation, which is imposed in the form of suspension of trade concessions, should be applied with

⁴⁹⁸ Ibid 413.

⁴⁹⁹ Ibid.

⁵⁰⁰ Hudec, 'Broadening the Scope of Remedies', above n 374, 386.

respect to the same sector as that in which the panel or the Appellate Body has found a violation. If suspension of concessions to the same sector is not practicable or effective, it should be applied to another sector under the same agreement. However, if the first two options are not practicable or effective, the suspension of concessions should be applied to another covered agreement. In addition, the extent of retaliation must be equivalent to the level of the nullification or impairment resulting from the violating measure.⁵⁰¹ Although the procedure of retaliation under the WTO's DSU is more detailed than the GATT's, it fell short from addressing developing countries' issues in utilising such procedure. These issues are addressed below.

(i) The option of retaliation for developing countries

The legal theory of WTO retaliation rests on the concept of reciprocity. Reciprocity in this context means that the legal obligations of the WTO are imposed in exchange for the obligations of the other parties, which creates a balance of rights and obligations. The gain from the rights is paid for by the cost of the obligations. This balance is interpreted from a mercantilist viewpoint as a balance between economic gain from exports and economic loss from imports.⁵⁰² Hence, a WTO-inconsistent trade restriction creates an economic imbalance, depriving the exporting country of exports and benefiting the importing country by reducing its imports.⁵⁰³ Therefore, it is rational to restore the interrupted balance of economic gains and losses. This happens by allowing the affected country to obtain substantially equivalent trade opportunities in compensation, and giving it the right to seek the removal of such a measure by introducing retaliation as an incentive to comply.⁵⁰⁴

However, the fact that retaliation, like compensation payable in the WTO system, is a forward-looking temporary procedure, which is to be removed after correcting the legal violation, restricts restoring the balance of rights and obligations or economic gains and losses to the future economic relations.⁵⁰⁵ This approach ignores interrupted economic balance caused by the economic losses of the affected country because of

⁵⁰¹ *The Dispute Settlement Understanding*, above n 9, Article 22, paragraph 4.

⁵⁰² Hudec, 'Broadening the Scope of Remedies', above n 374, 387.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.* 388.

the violating measure.⁵⁰⁶ Analysing the option of retaliation in economic terms shows that retaliation, which more likely involves raising trade barriers by the aggrieved country against the violating country, does not really benefit the aggrieved country. On the contrary, it harms its economy as a result of the lost trade opportunities resulting from retaliation.⁵⁰⁷

Another suggested aim for retaliation (whether threatened or actual) is to give the offending country an incentive to comply.⁵⁰⁸ As previously discussed, retaliation is prospective, which could, like the case with prospective compensation, provide an incentive to delay the process of complying with WTO rules.⁵⁰⁹ An example of that is a country seeking a long period of implementation and then forcing the complainant to go through the procedures of Article 21.5 of the DSU by applying insufficient compliance measures.⁵¹⁰

If the action followed by the complainant exceeded the threat of retaliation to an actual retaliation, there is a concern that the retaliation would become a long-term solution.⁵¹¹ This could happen as a result of the current DSU remedy that requires the level of retaliation to be equivalent to the level of nullification or impairment.⁵¹² The fact that the level of retaliation cannot exceed the level of nullification or impairment suggests that the offending country is not to be penalised for its non-implementation.⁵¹³ It is true that it could be argued that the aim of retaliation is not to penalise the offending country but to put the pressure on it to end the violating measure. However, the idea of not penalising the offending country for its violating measure by introducing a higher amount of retaliation than the level of nullification or impairment might, as previously mentioned, introduce retaliation as a long-term solution for the offending country, especially if the disputed measure was of a

⁵⁰⁶ Smitmans, above n 274, 255.

⁵⁰⁷ Ali Asim, 'Non-compliance and Ultimate Remedies under the WTO Dispute Settlement System' (2003) 14 *Journal of Public International Affairs* 13; Ibid.

⁵⁰⁸ Davey, 'Implementation in WTO Dispute Settlement', above n 384, 12.

⁵⁰⁹ Jacques Bourgeois, 'Sanctions and Countermeasures: Do the Remedies Make Sense?' in Dencho Georgiev and Kim Van Broright (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 42.

⁵¹⁰ Ibid.

⁵¹¹ Davey, 'Implementation in WTO Dispute Settlement', above n 384, 13.

⁵¹² Ibid.

⁵¹³ Ibid.

strategic importance to that country's economy, or backed by substantial domestic support.

These views might reflect a defect in the current WTO dispute settlement system that affects all WTO Member countries. However, these suggested defects have a special detrimental effect for developing countries. The fact that retaliation is a prospective remedy with a potentially detrimental effect on the economy of the retaliating country itself represents disincentive for developing countries' participation in the dispute settlement system in the first place. The existence of prospective retaliation does not only deprive them of much-needed compensation for losses resulting from when the violating measure first started, but also forces them to bear additional costs.⁵¹⁴ These additional costs are a result of the temptation for offending countries to delay the implementation process and benefit longer from illegal restrictions without consequences or threat of retaliation for past damages.⁵¹⁵

The limited institutional, legal and financial resources of most developing countries make retaliation that ignores their damages since the establishment of the violating measure an unattractive outcome. It is less deserving of allocating precious resources that are desperately needed elsewhere in the developing economy. In addition, developing countries are less likely to be able to afford waiting for the long-term benefits of retaliation that involves increased export opportunities. In the short-term, retaliation is argued to be an option where both parties bear economic losses resulting from lost trade opportunities, and that is a costly option for developing countries with their fragile, limited and less diversified economies.⁵¹⁶

The suggestion that economic damages would be associated with retaliation for both the retaliating country and the respondent increases concerns for developing countries over transforming the option of retaliation, when executed, into a long-term option. This suggestion argues that the negative effect on the respondent's economy would be in the form of lost export to the retaliating country because of the suspension of concessions. Meanwhile, despite the impression that the retaliating country would

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Anderson, above n 493, 129.

gain from raising its import barriers, which would raise its national income, the suspension of concessions might have negative effects in welfare terms.⁵¹⁷

In this regard, countries with small domestic markets and higher barriers to trade would be expected to lose more in welfare terms from a withdrawal of concessions than other countries with larger domestic markets and lower trade barriers, since the effect on the consumption affected by the withdrawal would be more valuable.⁵¹⁸ This means that developing countries, which are more likely to share the characters of small domestic markets and higher trade barriers, would view the retaliation option as a tool with a detrimental effect on their interests. Many developing countries simply cannot afford more damages other than those already suffered as a result of the violating measure, especially if retaliation was transformed into a long-term solution for the offending country.

This issue leads to the next key problem that faces developing countries under the WTO DSU in their use of the retaliation option: the capacity to retaliate. It could be argued that compliance in the WTO dispute settlement system is still dependant on power relationships, given that self-enforcing bilateral retaliation is the ultimate means of compensation in the system, which is conducted only by the complainant.⁵¹⁹ Therefore, to compensate for the defendant's refusal to abide by its obligations, the complainant must have the capacity to make bilateral retaliatory threats that are effective in achieving compensation.⁵²⁰ The threat and effectiveness of retaliation depend on the existence, level and quality of trade between the countries involved in a dispute.⁵²¹

In this context, some argue, like the case in the African Group Proposal, that the current WTO dispute settlement system is biased against developing countries.⁵²² They argue that the system does not recognise their lack of retaliation power as a result of their, generally, small markets and limited volume, value and variety of

⁵¹⁷ Horn and Mavroidis, above n 112, 19.

⁵¹⁸ Ibid.

⁵¹⁹ Bowen, above n 109, 61.

⁵²⁰ Ibid; Freneau, above n 59, 40.

⁵²¹ Ibid.

⁵²² *Proposal by the African Group*, above n 261.

trade.⁵²³ The issue of developing countries' lack of retaliation power is most recognisable in a dispute involving a developing country as a retaliating country and a developed country as a respondent. In this case, a developing country's retaliation is more likely not to have an impact on, or represent a serious threat to, a developed country's economy, whose losses from retaliation are likely to be very low, which would have little influence on a respondent developed country's behaviour.⁵²⁴

In addition, as previously discussed in this chapter, in the current settings of international relations retaliation under the WTO system could be countered by retaliatory practices outside the scope of the WTO.⁵²⁵ In this regard, many developing countries are dependent on aid arrangements and preferential trade agreements provided by developed countries. Any WTO-authorised retaliation by developing countries against their developed partners might jeopardise these arrangements, a consequence that many developing countries cannot afford.⁵²⁶ This situation adds another limitation on their ability to threaten or execute retaliation in the WTO system.⁵²⁷ Such limitations mean that winning a WTO dispute for developing countries is more likely to be meaningless if the developed country respondent decides not to implement its outcomes, and developing countries are left with retaliation as the ultimate remedy for such non-compliance.

The implementation of panels and the Appellate Body's rulings has come a long way since the GATT years. Clear timeframes for every stage of the procedure, more detailed mechanism of implementation, and most significantly, the automatism of the process are all factors that created a well-established implementation stage under the WTO dispute settlement system. However, as discussed above, some issues still particularly affect developing countries participation at this stage, and most of these issues existed under the GATT dispute settlement system and continue to be part of the process under the WTO. It is in the interest of the WTO dispute settlement system

⁵²³ Bown and Hoekman, above n 185, 866.

⁵²⁴ Uche Ewelukwa, 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System: Politics, Process, Outcomes and Prospects' (2005) University of Arkansas School of Law, 37.

⁵²⁵ Fabien Besson and Racem Mehdi, 'Is WTO Dispute Settlement System Biased against Developing Countries? An Empirical Analysis' (Paper presented at the International Conference on Policy Modelling, Paris, France, 30 June–2 July 2004) 11.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

to achieve the satisfaction of all its Member countries and accommodate their different needs, and part of this responsibility dictates that the system deals with developing countries' issues under the dispute settlement process.

3.4. Conclusion

The WTO was a major improvement from the GATT trading system, which struggled, especially in its early stages, to introduce itself as an organisation in the shadow of its lack of administrative, secretarial or institutional arrangements. The WTO extended the scope of international trade, which witnessed the introduction of the modified GATT 1947, in the form of GATT 1994, as part of a complicated, multi-function and extended trading system. In addition, the WTO introduced the complete package of an international organisation enjoying international legal personality and capacity to be accorded by Members for the exercise of its functions.

In relation to dispute settlement, the WTO introduced changes that were accredited in providing security and predictability to the multilateral trading system. The WTO dispute settlement system reversed the positive consensus rule to have a negative consensus procedure, which added a form of automatism to dispute settlement procedures. It also introduced the panel's interim stage and the Appellate Body's stage to achieve the highest quality of rulings and recommendations and to increase the disputing Members' satisfaction of the disputes' outcome. These changes accompany a more detailed dispute settlement mechanism that is governed by strict timeframes. The rule-oriented dispute settlement system of the WTO aims of providing all Members of an equal access to a dispute settlement process where political and economic power considerations are limited, which is particularly important for the participation of developing countries.

However, there are certain issues in the WTO dispute settlement system that still negatively affect developing countries' participation in the process. Such concerns limit their ability to initiate disputes in order to protect their trading interests and rights, and to engage in competent and effective consultations to achieve early

settlements. They also affect their ability to benefit from the idea of neutral third party rulings, and to achieve a beneficial and successful outcome for their disputes.

The small percentage of international trade for individual developing countries has created a situation in which they consider that there is no need to allocate the legal and institutional resources needed for the dispute settlement process, as it is unlikely they will be repeat users of the system. Developing countries' limited legal and institutional capacity alongside their lack of financial resources needed for the dispute settlement process make them question the benefits of initiating disputes. This reluctance intensifies if the dispute is to target developed countries, where such action could jeopardise aid or preferential trade agreements between them, a risk that many developing countries cannot afford. This cycle could be ended if various detrimental aspects of the dispute settlement system could be reformed. These reforms will be explored in Chapter 5.

There are difficulties facing developing countries at each stage of the dispute settlement process. In the consultation stage, the idea of an effective bargaining process that is more likely to restore the complainant's rights in return for an early settlement to the dispute, is more likely to be out of reach when the dispute involves a developing and a developed country. In this situation, the fact that developing countries suffer from limited legal, institutional and financial resources does not only affect their bargaining skills and their ability to use and manipulate WTO law, but also affects their ability to put pressure on the other party to offer concessions. Developing countries are more likely to fail in presenting a credible threat that they have the capacity to engage in a long dispute and enforce its outcome at the end. This situation places developing countries in a disadvantageous position in the consultation stage, which deprives them from the anticipated benefits of early settlements.

In the panel and Appellate Body stages, developing countries' limited legal expertise is under more pressure as a result of the strict application of the complex WTO law. In addition, the panels and Appellate Body's excessive interpretations and lack of consideration for special development circumstances, are all issues of concern for developing countries.

At the end of the process, the implementation stage starts with an order to comply with the DSB recommendations in a future-focused approach that ignores all the past damages resulting from the violating measure. Then, the procedure gives the offending country a reasonable period for the implementation of the DSB recommendations in which a minimum form of surveillance is exercised. The ultimate remedy introduced by the DSU in case of non-compliance is a self-enforcement remedy in which the complainant suspends trade concessions given to the defendant. This form of self-enforcement is meaningless in disputes involving developing and developed countries, as the effect of any retaliation exercised by the first is most likely to have a minimal effect on the developed country's economy.

Despite the special treatment afforded to developing countries in some of the DSU provisions, there is still a general lack of acknowledgement for developing countries circumstances in many remedies and procedures provided by the system. In addition to the substantive aspects, the practice of panels and the Appellate Body have failed on many occasions to address developing countries' special situation, even in the presence of special treatment requirements. These issues, along with developing countries' general lack of legal, financial and institutional resources, have contributed to creating the current gap in the level of participation between developing and developed countries in the WTO dispute settlement system.

The fact that there have been no productive reviews on the issues affecting developing countries' participation after 16 years of the system's operation contributes towards strengthening the argument of this thesis of a biased WTO dispute settlement system against developing countries. Developing countries continue to face negative consequences as a result of substantive and procedural shortcomings in the WTO dispute settlement system, which fail to address and deal relevantly with their participation issues of real concern. Their interests and economic position must be acknowledged and accounted for within the WTO dispute settlement procedures if any significant improvements are to be achieved.

The next chapter discusses the special and differential treatment afforded to developing countries under the DSU, and examines its efficiency as an answer for developing countries' problematic participation issues under the dispute settlement system.

Chapter 4: Implications of the DSU Provisions on Special and Differential Treatment for Developing Countries

4.1. Introduction

Economic development has always been an important part of the GATT/WTO system as one of the main goals to be achieved through international trade. The objective of ‘raising standards of living’ was recognised in the preamble to GATT 1947. The preamble to the Marrakech Agreement establishing the WTO in 1994 expanded this concept, recognising the ‘need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development’.¹

The notion of ‘special and differential treatment’ (S&D) for developing countries has been a central component to the recognition of development needs in the GATT/WTO system.² Despite the case against S&D treatment, the case for it has always been more justifiable.³ In the case against, it could be argued that the S&D treatment may result in the permanent exclusion of some countries from the WTO obligations.⁴ It could further be argued that protectionism and non-reciprocity are not likely to result in economic development but rather deprive developing countries from obtaining significant concessions on products of interest to them from developed countries. This happens by failing to participate in the exchange of reciprocal reductions in trade barriers.⁵ However, the fact that developing countries are intrinsically disadvantaged in their participation in international trade makes it necessary for any multilateral trading system involving them and developed countries to take into account this

¹ *Marrakech Agreement Establishing the WTO*, opened for signature 15 April 1994, (entered into force 1 January 1995) (Marrakesh Agreement), Preamble; Andrew Mitchell, ‘A Legal Principle of Special and Differential Treatment for WTO Disputes’ (2006) 5(3) *World Trade Review* 445, 445.

² Mitchell, above n 1, 446.

³ Uche Ewelukwa, ‘Special and Differential Treatment in International Trade Law: A Concept in Search of Content’ (2003) 79(4) *North Dakota Law Review* 831, 863–864.

⁴ Ibid.

⁵ Ibid.

weakness in specifying their rights and obligations.⁶ The gap between the economic capacities and level of development of different countries in international trade means that trade policies suitable for sustainable development in developing countries are different from those in developed countries.⁷ Hence, the policy disciplines of any multilateral trading system applying to its Members should differentiate between developing and developed economies.⁸

This logic presents S&D treatment in the WTO system as a very crucial tool in order for the multilateral trading system to accommodate all of the different participants.⁹ Developing countries lack the institutional structures and capacities needed to integrate successfully. This disadvantage along with other resource constraints such as human and financial shortfalls, require technical, financial and other forms of assistance to supplement domestic resources and establish or strengthen domestic institutions.¹⁰

The GATT system adopted the notion that developing countries needed radically different treatment from those accorded to developed countries, and followed the infant-industry argument that denoted a right for both preferential access for developing countries' exports and a protection for their infant industries through import substitution policies.¹¹

The WTO system marked a departure from the GATT traditional approach to S&D treatment. The WTO system introduces the principle of 'single undertaking', which requires both developed and developing countries to adhere to nearly the same sets of rules and obligations.¹² The WTO introduces a shift from development concerns to implementation concerns under which developing countries implemented their

⁶ Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the WTO' (Policy Research Working Paper No 2388, World Bank, Washington, DC, 2000) 15.

⁷ Ibid.

⁸ Ibid.

⁹ Ewelukwa, above n 3, 863–864.

¹⁰ Ibid.

¹¹ Ibid 851. See also, Kiichiro Fukasaku, 'Special and Differential Treatment for Developing Countries: Does it Help Those Who Help Themselves' (Working paper No 197, World Institute for Development Economic Research, 2000) 7–8.

¹² Fukasaku, above n 11, 7.

commitments. It also limits the non-reciprocity principle as an idea of special treatment. These changes come along with a restriction on the ability of developing countries to adopt policies in support of their national industrial development objectives that conflict with the new agenda of the multilateral trading system.¹³

Despite the strong sense of non-discrimination running through the WTO agreements, the belief that the trade needs of developing countries are substantially different from those of developed countries maintains a degree of differential yet favourable treatment for developing countries through a number of S&D provisions throughout the WTO agreements.¹⁴ According to a report by the WTO Committee on Trade and Development, WTO agreements introduce about 145 S&D provisions.¹⁵ The S&D provisions fall into six broad categories:

1. Provisions that are aimed at increasing trade opportunities for developing country Members;
2. Provisions that require WTO Members to safeguard the interest of developing country Members;
3. Provisions that allow developing country Members some flexibility of commitments;
4. Provisions that allow for transitional periods;
5. Provisions that provide for technical assistance to developing country Members; and
6. Provisions that relate specifically to least-developed country Members.¹⁶

This chapter examines the S&D treatment provided for developing countries under the DSU. It provides a critical analysis of the role S&D treatment provisions have played in dealing with developing countries' issues in the dispute settlement system, and the limitations that affect their application. The analysis examines issues in relation to the provisions' language or choice of words, and their application in WTO disputes, which addresses the issues of panels and the Appellate Body's interpretations of such provisions and the attitude of developed countries counterparts towards them. This

¹³ Ewelukwa, above n 3, 851.

¹⁴ Mitchell, above n 1, 446.

¹⁵ *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc, WT/COMTD/W/77 (25 October 2000, Note by the Secretariat) 3.

¹⁶ *Ibid.*

chapter on the S&D treatment for developing countries under the DSU is appropriately positioned to follow the discussion of the previous chapter on the problematic issues that affect the participation of developing countries throughout the dispute settlement process. It discusses the form under which the DSU has reacted to and dealt with developing countries' participation issues, considering that many of them, such as the lack of legal and financial resources, have existed in the GATT system and continued under the WTO. The chapter also connects well with the following Chapter 5, which deals with possible reforms in the WTO dispute settlement system, as it provides a ground for these reforms to find solutions for issues not addressed entirely or efficiently under the current form of S&D treatment for developing countries. Analysing the shortcomings of the S&D treatment provisions of the DSU supports the thesis' argument of imbalances in the position of developing and developed countries in their participation in the dispute settlement system, and the bias in the system's structure and mechanism against developing countries' utilisation of such system, which requires reform.

4.2. S&D Treatment for Developing Countries under the DSU: An Overview

As part of the WTO commitment to provide S&D treatment for developing countries, and like most of the WTO agreements, the DSU contains a number of S&D provisions that apply to developing countries either automatically or at their request during the process of dispute settlement. Some of these provisions were carried over from the GATT, such as the 1966 Decision; the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance; the 1982 Declaration; and the 1989 Improvements. All were discussed previously in Chapter 2. Others are a result of the UR negotiations that ended with the establishment of the WTO. These provisions include Articles 3.12 (choice of procedure), 4.10 (consultations), 8.10 (composition of panels), 12.10 (time periods), 12.11 (panel reports), 21.2 (implementation), 21.7 (implementation), 21.8 (implementation), 24 (treatment of least-developed countries) and 27.2 (technical assistance).

The S&D treatment provisions addressed above indicate the DSU recognition of the special needs and limitations of developing and least-developed country Members in their participation in the WTO dispute settlement system. This recognition represents a great improvement in the form the GATT/WTO multilateral trading system accommodates these countries within its systemic order, considering that no such recognition was provided in any form when the GATT system was established. Nonetheless, S&D treatment provisions under the DSU must have practical utilisation in their structure and application to be deemed effective in serving their purpose of providing differential and favourable treatment for developing and least-developed countries in their participation in the dispute settlement system. The next section critically assesses these S&D treatment provisions in the DSU, and particularly highlights the practical limitations that restrict their role towards developing and least-developed country Members.

4.3. Critical Analysis of S&D Treatment for Developing Countries under the DSU

The DSU provisions on special and differential treatment for developing countries share a feature of acknowledging the different position of developing countries in the dispute settlement system of the WTO compared to their developed counterparts.¹⁷ However, to what extent have these provisions succeeded in providing special treatment for developing countries that effectively deals with their issues and needs in the system?

The frequent submissions by developing and least-developed countries to the WTO Dispute Settlement Body (DSB), calling for reviews and proposing reforms for the DSU, suggest that there are shortcomings in the dispute settlement system, which disadvantage developing countries.¹⁸ Part of these shortcomings exists in the very provisions that are intended to provide differential and more favourable treatment for developing countries in the dispute settlement process.

¹⁷ Henrik Horn and Petros Mavroidis, 'Remedies in the WTO Dispute Settlement System and Developing Country Interests' (Report commissioned by the World Bank, 1999) 27.

¹⁸ Ibid.

Developing countries' use of most of the provisions on S&D treatment in the DSU seems to be challenged by the language of these provisions, which is rather general and vague. This defect allows in turn for unfavourable interpretations by panels, arbitrators, and the Appellate Body, as well as restrictive attitudes by developed country counterparts on the use of such provisions. These issues are discussed below.

4.3.1. S&D Treatment in the DSU Procedure

Many of the DSU provisions on special treatment for developing countries in the dispute settlement system either lack specificity as to how they should be applied, or fail to deliver the positive effects intended for developing countries.¹⁹ They fail the test question of 'who is entitled to get what from whom, when and how', which makes their application difficult and increases the chances of inappropriate invocation by the parties or wrongful interpretation by the judiciary.²⁰ To understand this statement, it is necessary to analyse each of these provisions in the context of DSU procedures.

4.3.1.1. Choice of Procedure: DSU or the 1966 Decision (Article 3.12)

Article 3.12 of the DSU provides developing countries with the option of using the Decision of 1966 on special dispute settlement procedures for developing countries if they have a complaint against a developed country. The 1966 provisions may be used in place of DSU Article 4 on consultations, Article 5 on good offices, conciliation and mediation, Article 6 on establishment of panels and Article 12 on panel procedures.

Chapter 2 of this thesis provided a discussion on the role of the 1966 Decision as a tool of providing S&D treatment for developing countries. This section now examines the 1966 Decision as an alternative to the DSU provisions outlined above.

¹⁹ Ewelukwa, above n 3, 858.

²⁰ Amin Alavi, 'On the (Non-)Effectiveness of the WTO Special and Differential Treatments in the Dispute Settlement Process' 41(2) *Journal of World Trade* (2007) 319, 320.

The 1966 Decision has been invoked in disputes such as *EC—Bananas (Colombia)*,²¹ and *EC—Bananas (Panama)*,²² in which the use of the Director-General's Good Offices helped achieve a mutual agreement between the parties concerned in December 2009.²³ However, the 1966 Decision has rarely been used by developing country Members.²⁴ Developing countries' rare use of the 1966 Decision is explained on the WTO webpage to be due to developing countries' preference to have more time to prepare their submissions.²⁵ This explanation is understandable, as shorter timeframes would not be a viable option for developing countries, considering the complexity of the legal preparation of the dispute settlement process, and the limited legal expertise developing countries have in WTO law and jurisprudence.²⁶ Other explanations for developing countries' reluctance to use the 1966 Decision is that they do not view the favourable treatment provided by the Decision as much different from or more favourable than the treatment provided by the DSU provisions.²⁷ The basis of these explanations is clear when comparing the 1966 Decision with the DSU provisions it substitutes.

While the DSU offers to developing countries the 1966 Decision as an alternative to the consultation procedure of Article 4 of the DSU, it does not present a substantive alternative to Article 4.²⁸ It simply addresses the steps to be taken 'if consultations between a less-developed contracting party and a developed contracting party in regards to any matter falling under Paragraph 1 of Article XXIII do not lead to a

²¹ *EC—Regime for the Importation of Bananas (Colombia)*, WT/DS361/2.

²² *EC—Regime for the Importation of Bananas (Panama)*, WT/DS364/2.

²³ *EC—Regime for the Importation of Bananas*, (Report by the Director-General on the use of his Good Offices pursuant to Article 3.12 of the DSU), WT/DS361/2 and WT/DS364/2.

²⁴ Peter Bossche, 'Dispute Settlement of the World Trade Organisation' (paper prepared at the request of the United Nations Conference on Trade and Development, 2003) 41. See also, Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the WTO: A Case for a Small Claims Procedure: A Preliminary Analysis' (ICTSD Dispute Settlement and Legal Aspects of International Trade Issue No 2, International Centre for Trade and Sustainable Development, Geneva, Switzerland) 2007, 19; see also, Matthew Dune, 'Redefining Power Orientation: A Reassessment of Jackson's Paradigm in Light of Asymmetries of Power, Negotiation and Compliance in the GATT/WTO Dispute Settlement System' 34 *Law & Policy in International Business* (2002) 277, 295–296.

²⁵ *Developing Countries in the WTO Dispute Settlement: Special and Differential Treatment* (1 May 2010) WTO Website

<http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm>.

²⁶ Nordstrom and Shaffer, above n 24, 19–20.

²⁷ Bossche, 'Dispute Settlement', above n 24, 41.

²⁸ Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (2002) 748.

satisfactory settlement’.²⁹ It also has no provisions governing the course and conduct of consultation, which makes the only difference the more elaborate contents of Article 4 of the DSU.³⁰

By contrast, the 1966 Decision is more elaborate than Article 5 of the DSU in regards to good offices, conciliation or mediation.³¹ The more detailed 1966 Decision presents a clear difference from the procedures in the DSU in this regard.³² Article 5 of the DSU requires the agreement of both parties in order for the good offices to be employed, and this mutual agreement must continue after the establishment of good offices throughout the whole stage. However, the 1966 Decision allows the complaining developing country, after consultations have failed to resolve the dispute, to unilaterally refer the matter to the Director-General to use his good offices with a view to facilitating a solution even over the opposition of the developed country respondent. The 1966 Decision also differs from the DSU procedures by requiring the parties, at the request of the Director-General, to furnish all relevant information. The requirement of such information could be a useful strategy for developing country complaints during consultations if relevant information concerning developed country programmes were difficult to obtain.³³

In relation to the establishment of panels, the 1966 Decision is different from the procedure in Article 6 of the DSU in allowing for the panel to be established more quickly.³⁴ It provides that after two months of consultations, the Director-General shall, at the request of either party, bring the matter to the attention of the contracting parties or the GATT Council and submit a report.³⁵ A panel shall be appointed ‘forthwith’, rather than at the meeting of the DSB following the meeting at which the request first appears on the agenda,³⁶ as is normally the case under the DSU. This shortcut that the 1966 Decision offers in establishing panels could be beneficial for

²⁹ *The Decision on Procedures under Article XXIII*, GATT BISD, 14th Supplement, 18 (1966), Article 1. See also, David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organisation: Practice and Procedure* (2nd ed, 2004) 172.

³⁰ Palmeter and Mavroidis, above 29, 172. See also, Waincymer, above n 28, 748.

³¹ *The Decision on Procedures under Article XXIII* GATT, above n 29, Articles 1–3.

³² Palmeter and Mavroidis, above n 29, 173.

³³ Waincymer, above n 28, 749.

³⁴ *Ibid.*

³⁵ *The Decision on Procedures under Article XXIII* GATT, above n 29, Article 4.

³⁶ *Ibid* Article 5.

developing countries that find it in their interest to save time otherwise spent on procedural technicalities, keeping in mind their limited resources.

The 1966 Decision has a problem with appointment in that panel members must be appointed in consultation with, and with the approval of, the members concerned.³⁷ This requirement does not have the flexibility in the composition of panels addressed in Article 8 of the DSU, where the Director-General has the authority to appoint a panel if the concerned parties failed to mutually approve the appointment of a panel.

In relation to the panel procedures, the 1966 Decision has a similar recognition to that addressed in Article 12 of the DSU as to the special circumstances of some country Members. The 1966 Decision provides that the panel ‘shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected contracting parties’ in conducting its examination of the dispute.³⁸ Article 12.11 of the DSU states that:

Where one or more of the parties is a developing country member, the panel’s report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country members that form part of the covered agreements which have been raised by the developing country member in the course of the dispute settlement procedures.³⁹

However, Article 12.11 of the DSU may be construed as more affirmative in serving the purpose of recognising developing countries’ special needs and circumstances. The requirement of an explicit indication in the panel report as to the form of special treatment that was accorded to the developing country concerned is clearer and more precise than the requirement under the 1966 Decision. In this regard, the 1966 Decision vaguely requires the panel to take into account the circumstances of concerned parties, and the impact of the violating measure on their trade and economic development. In addition, despite the fact that the 1966 Decision is considered directed towards providing special treatment for developing countries, its

³⁷ Waincymer, above n 28, 749.

³⁸ *The Decision on Procedures under Article XXIII GATT*, above n 29, Article 6.

³⁹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 1 April 1994, Marrakech Agreement Establishing the WTO, Annex 2 (DSU), Article 12.11.

choice of wording leaves Article 6 vague compared to Article 12.11 of the DSU. The 1966 Decision refers to ‘the affected contracting parties’ instead of referring to ‘the affected developing country contracting parties’, when addressing its requirement from panels to take into account the impact of the violating measure on trade and economic development. However, the DSU specifically addresses developing countries in Article 12.11, which makes it more affirmative in serving its purpose of providing special treatment exclusively to developing countries.

The main difference between the 1966 Decision and Article 12 of the DSU of the DSU in relation to panel procedures is that the 1966 Decision provides a shorter timeframe for submission of panel findings.⁴⁰ It provides that the panel should submit its findings and recommendations within 60 days from the date of referral, instead of the six to nine months deadline provided under Article 12 of the DSU. As a result of this sharp contrast between the two timeframes, Article 3 of the DSU relaxes the requirement of the 1966 Decision by permitting the extension of the 60-day timeframe with the agreement of the complaining party if a panel considers the time insufficient.

Providing the 1966 Decision as an alternative procedure for developing countries in disputes against developed counterparts is commendable in the sense that it represents recognition of developing countries’ special disadvantageous position in the dispute settlement process, and the role the decision can play in providing S&D treatment for developing countries, which was discussed in Chapter 2. However, as discussed above, the little difference between some of its provisions and the ones provided under the DSU could contribute to developing countries’ lack of enthusiasm in using the 1966 Decision. Further, despite the fact that shorter timeframes could be beneficial for developing countries in order to avoid long and resource-exhausting dispute settlement process, the legal complexity of the process and developing countries’ lack of legal resources could force developing country Members to abandon these shortcuts and follow the normal procedure of the process in order to have a sufficient period to prepare for their legal arguments. These factors have led the WTO itself to admit that the 1966 Decision has not lived up to its expectations, which brings into consideration the need to deal with developing countries’ lack of

⁴⁰ Palmeter and Mavroidis, above n 29, 173.

legal and financial resources in a form that would enable them in the future to be capable of utilising their resources effectively that makes them confident in using available shorter timeframes to their benefit.

4.3.1.2. Consultations (Article 4.10)

In relation to the special treatment provided for developing countries during consultations, Article 4.10 of the DSU reads, ‘during consultations Members should give special attention to the particular problems and interests of developing country Members.’⁴¹ The elements of ‘special attention’ required to the ‘particular problems and interests’ of developing countries during consultations are not specified in this provision. This lack of specificity makes it difficult to assess the level of compliance by WTO Members with this provision. The generality of this provision could expose it to the manipulation of WTO Members during consultations with developing country Members, resulting in depriving the developing countries concerned of the positive effects intended for them under this provision.⁴²

4.3.1.3. Composition of Panels (Article 8.10)

The DSU provides for special treatment to developing country Members special in relation to the composition of panels, Article 8.10 of the DSU reads as follows:

When a dispute is between a developing country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member.⁴³

It could be argued that the purpose of this provision is about building the confidence of developing countries in the system.⁴⁴ In addition, this provision might carry a legal benefit for developing countries.⁴⁵ In this context, it could be argued that despite the

⁴¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 4.10.

⁴² The South Centre, ‘Issues Regarding the Review of the WTO Dispute Settlement Mechanism’ (Working Paper No 1, Trade-related Agenda, Development and Equity, the South Centre, 1999) 19.

⁴³ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 8.10.

⁴⁴ Victor Mosoti, ‘Does Africa Need the WTO Dispute Settlement System?’ in Victor Mosoti (ed), ‘Towards a Development-supportive Dispute Settlement System in the WTO’ (Working Paper No 5, International Centre for Trade and Sustainable Development, 2003) 83.

⁴⁵ *Ibid.*

rule-oriented approach followed in the system, the developing country panellist might use his or her intimate knowledge about the situation of the developing country concerned to influence the dispute's outcome in the favour of that country.⁴⁶ This could be done by influencing the interpretation of facts in a more realistic manner that understands the circumstances of the developing country concerned, hence benefiting it legally rather than merely building its confidence in the system.⁴⁷

However, the fact that panel members are required to stay impartial throughout the whole process of dispute settlement ostensibly makes the origin of a panel member irrelevant. An impartial panellist from a developing country has to deliver what he or she sees as the right outcome whether it was for or against the developing country concerned. Moreover, if we are to consider any positive role a developing country panellist might play within the limits of the impartiality requirement, such as a development-sensitive interpretation of facts, then we need not ignore the role of the other panel members.

There is little attention paid to the fact that when one panel member is from a developing country, there is a likelihood that the other two panel members will be from developed countries.⁴⁸ This is clear in disputes such as *Indonesia—Automobile*,⁴⁹ *US—Gasoline*,⁵⁰ *Argentina-Footwear*,⁵¹ *US—Shirts and Blouses*,⁵² *India—Patents*,⁵³

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Louise Poywing, 'Special and Differential Treatment Provisions under the Dispute Settlement Understanding of the WTO: Are Developing and Least-developed Countries Benefiting?' (2005) 27(9) *Centre for Energy Petroleum and Mineral Law and Policy (CEPMLP) Annual Review*, 4.

⁴⁹ *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/7, WT/DS55/7, WT/DS64/5, WT/DS54/8, WT/DS55/8, WT/DS59/7 and WT/DS64/6 (Constitution of the panel established at the request of Japan and the EC), the panellists of this dispute were: Mohamed Abdul-Fattah (Egypt), David Walker (New Zealand) and Ole Lundby (Norway).

⁵⁰ *US—Standards for Reformulated and Conventional Gasoline*, WT/DS2/3 (Constitution of the panel established at the request of Venezuela), the panellists of this dispute were: Joseph Wong (China), Crawford Falconer (New Zealand) and Kim Intonen (Finland).

⁵¹ *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/4 (Constitution of the panel established at the request of the EC), the panellists of this dispute were: John McNab (Canada), Claudia Orozco (Colombia) and Laurence Wiedmer (Switzerland).

⁵² *US—Restrictions Affecting the Imports of Woven Wool Shirts and Blouses*, WT/DS33/2 (Constitution of the panel established at the request of India), the panellists of this dispute were: Jacques Bourgeois (Belgium), Robert Arnott (Australia) and Wilhelm Meier (Switzerland).

⁵³ *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/5 (Constitution of the panel established at the request of the US), the panellists of this dispute were: Thomas Cottier (Switzerland), Douglas Chester (Australia) and Yanyong Phuangrach (Thailand).

EC—Poultry,⁵⁴ *Argentina—Textiles*,⁵⁵ *US—DRAMS*,⁵⁶ and *Mexico—HFCS*.⁵⁷ In this situation, the argument that a developing country panellist might legally influence the dispute's outcome to the benefit of the developing country concerned by using his or her intimate knowledge of the country's circumstances in interpreting the facts is rebutted by its own logic. If we are to follow the logic behind this argument, then the other two panel members, who are likely to be from developed countries would be affected by their knowledge of the circumstances in developed countries' markets when they study or interpret the facts of the dispute, which would be to the disadvantage of the developing country concerned. All these considerations raise doubts over the practical benefit of such special treatment under this Article.

4.3.1.4. Time Periods (Article 12.10)

The extensions of time periods are another form under which the DSU provides developing country Members with special treatment. In this context, Article 12.10 of the DSU reads as follows:

In the context of consultations involving a measure by a developing country Member, the parties may agree to extend the periods established in paragraph 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.⁵⁸

⁵⁴ *EC—Measures Affecting Importation of Certain Poultry Products*, WT/DS69/3 (Constitution of the panel established at the request of Brazil), the panellists of this dispute were: Wilhelm Meier (Switzerland), Peter May (Australia) and Magda Shahin (Egypt).

⁵⁵ *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel, other Items*, WT/DS56/6 (Constitution of the panel established at the request of the US), the panellists of this dispute were: Heather Forton (Canada), Peter May (Australia) and Peter Palecka (Czech Republic).

⁵⁶ *US—Countervailing Duty Investigation on DRAMS*, WT/DS296/3 (Constitution of the panel established at the request of Korea) the panellists of this dispute were: John Adank (New Zealand), Michael Mulgrew (Australia) and Hardeep Puri (India).

⁵⁷ *Mexico—Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the US—Recourse to Article 21.5 of the DSU by the US*, WT/DS132/7 (Constitution of the panel established at the request of the US), the panellists of this dispute were: Christer Manhusen (Sweden), Gerald Salembier (Canada) and Paul O'Conner (Australia).

⁵⁸ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 12.10.

The extension of the period provided for consultations, and the request from panels to allow a sufficient time for developing countries concerned to prepare and present their argument are time extensions that are needed by developing countries. Their limited human, financial and institutional capacities mean that developing countries need longer than their developed counterparts do to utilise their resources to engage in effective negotiations, or to prepare and present their case before panels. However, the language of provision 12.10 suggests that the option of extending the period provided for negotiations is not mandatory.⁵⁹ It is available only when the parties agree.

It is in the interest of developing countries to achieve an early settlement to the dispute at the consultation stage. An early settlement that satisfies their trade interests would save developing countries' much-needed financial and human resources that otherwise would be exhausted by a long dispute settlement process. Leaving the possibility of maximising the chance of a beneficial early settlement for developing countries through extended negotiations subject to the approval of all parties concerned, or subject to a decision by the Chairperson of the DSB, is hardly suggesting special treatment for developing countries. Any disagreement between the parties on the extension of the consultation period, or any disapproval by the Chairperson of the DSB of that extension, means that the developing country concerned could miss a possible beneficial early settlement. Such an outcome would be easily avoided if an extension of the consultation period were granted at the request of the developing country concerned.

An example of how leaving the extension of the consultation period subject to the disputing parties' agreement or a decision by the Chairperson of the DSB could be detrimental to developing countries' chances in achieving a beneficial early settlement is clear in *India—Quantitative Restrictions*.⁶⁰ In this dispute, India requested from the panel, pursuant to Article 12.10 of the DSU, a sufficient period to prepare and present its argumentation, and determined that five weeks would be needed for this purpose,

⁵⁹ Poywing, above n 48, 5.

⁶⁰ *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R.

as a result of administrative reorganisation taking place in India.⁶¹ The US opposed the granting of additional time to India, citing the very strict deadlines imposed by the WTO rules that have to be respected, and questioning India's need for such time.⁶² The panel recognised India's position as a developing country, and its administrative reorganisation taking place, but granted it an additional time of only ten days.⁶³

Despite the fact that this example is more relevant to the second half of Article 12.10 of the DSU, which is concerned with providing additional time for defendant developing country Members to prepare and present their argumentation, rather than the extension of the consultation period provided in the first half of the Article, it still serves the argument above. The case demonstrates that any extension of the consultation period could not always have the parties' agreement, and complainants, especially developed countries, could oppose such extensions if they see that they have the leverage in pushing the dispute to the panel stage, whether the leverage was financial, legal or just case-related. Moreover, despite the fact that the Chairperson of the DSB has the authority to decide on such extensions in the absence of the parties' agreement, the case above demonstrates that the opposition of the complainant to the extension could influence the Chairperson's decision for such extension by reducing the extension period or placing any other restriction on the conduct of the consulting parties.

Another shortcoming of Article 12.10 is the restriction of the possibility of an extension for the consultation period to disputes where the developing country involved is a defendant. As mentioned above, it is of interest to the developing country to reach an early settlement at the consultation stage, and avoid exhausting its much-needed resources in the dispute settlement process, whether it is a defendant or a complainant. Limiting the possibility of extensions of the consultation period to disputes where the developing country is a defendant deprives the complainant developing country from the benefit of maximising its chances of a beneficial early settlement through an extended period of consultations. This situation could put the complaining developing country in a position where it chooses either to accept a

⁶¹ Ibid paragraph 5.8.

⁶² Ibid paragraph 5.9.

⁶³ Ibid paragraph 5.10.

disadvantageous early settlement reached within the original consultation period, or to bear the pressure on its limited human and financial resources and proceed to a long, complicated and expensive process of litigation. This situation could even push the complaining developing country to drop the case altogether if the legal and financial costs of continuing the dispute settlement process were beyond its legal and financial capacity, a trait that most least-developed countries and some developing countries share.

These shortcomings could be avoided if the chance to extend the consultation period was available to any developing country involved in a dispute, whether it was a complainant or defendant. Giving a developing country, whether it was a defendant or a complainant, a better chance of achieving a beneficial early settlement at its request, is a reasonable form of special treatment, keeping in mind the resource-demanding dispute settlement process, and the limited resources of most developing countries.

4.3.1.5. Panel Reports (Article 12.11)

In relation to the special treatment provided to developing countries with regard to panel reports, Article 12.11 of the DSU reads as follows:

Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.⁶⁴

Article 12.11 is another example of the ambiguity that surrounds some of the DSU provisions on special treatment for developing countries. The language of the Article is vague in the sense that although it requires the panel to take into account the relevant provisions of special treatment, if requested to do so by the developing country concerned, it is silent on how the panel ought to take these provisions into account.⁶⁵ In this context, Article 12.11 does not require panels to apply these relevant

⁶⁴ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 12.11.

⁶⁵ Poywing, above n 48, 5.

provisions on special treatment.⁶⁶ This vague and loose requirement in Article 12.11 could make panels comply through forms of compliance that were not intended when drafting the Article as a tool of providing special treatment for developing countries. The superficial manner in which panels could fulfil this requirement is obvious as illustrated in *Mexico-Telecommunications*,⁶⁷ where the Panel simply stated:

Pursuant to Article 12.11 of the DSU, it has taken into account in its findings GATS provisions on differential and more-favourable treatment for developing country Members. In particular, the panel has examined Mexico's argument that commitments of such Members have to be interpreted in the light of Article IV of the GATS, paragraph 5 of the preamble to the GATS, and paragraph 5(g) of the Annex on Telecommunications.⁶⁸

In this case, the panel acknowledged the requirement of Article 12.11 of the DSU of taking into account the relevant provisions of S&D treatment for developing countries. However, under the vague requirement of this Article, the panel only stated that it took into account the relevant GATS provisions on differential and favourable treatment for developing countries, which were raised in Mexico's argument because of its position as a developing country.⁶⁹ The panel failed to indicate how its recognition of these provisions was translated in its final recommendations, or the effect the presence of these provisions had on the process of its handling to Mexico's arguments. In this dispute, acknowledging the differential and favourable provisions raised by Mexico was considered satisfactory to achieve compliance with Article 12.11.

Moreover, Article 12.11 requires the developing country involved to raise the relevant provisions on special treatment for developing countries in order for the panel to consider these provisions. It is understood that offering this procedure as a matter of choice for developing countries arises from the fact that not every developing country wishes to use the provisions of special treatment in the context of their disputes. However, for many developing countries and most least-developed countries, the issue goes beyond having the choice of raising these provisions or not, to having the

⁶⁶ Ibid.

⁶⁷ *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R.

⁶⁸ Ibid paragraph 8.3.

⁶⁹ Yang Guohua, Brian Mercurio and Li Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (2005) 159.

knowledge about whether they can raise or are even eligible for these provisions. The fact that the WTO system is a multi-agreement package that covers a diverse number of trade areas makes the WTO law complex and legally challenging to all WTO Members. This complexity is likely to have a more substantial effect on developing and least-developed countries as a result of their limited legal, financial and institutional capacities.

In any dispute, a country, whether it is a complainant or a defendant, needs to gather information on the dispute, to recognise all relevant provisions of the WTO law that relate to the dispute, and to use the information and relevant provisions in a way that benefits its position in the dispute. These essential duties require substantial legal expertise in international trade and WTO law to absorb the complexity of the system, sophisticated institutional resources to utilise the required legal expertise and keep in pace with the multi-task process, and finally the financial capacity to support all that mentioned above. The very limited legal, financial and institutional resources of many developing countries and most least-developed countries mean that they struggle in performing any of these duties required in a dispute, including recognising their eligibility for the relevant special treatment provisions provided for developing countries throughout WTO agreements. Article 12.11 ignores this issue and chooses to leave panels' recognition of any relevant special treatment provisions subject to the request of the developing country concerned, which could leave it in the future struggling to make use of such provision. This issue is illustrated in *Turkey—Rice*,⁷⁰ where the panel stated pursuant to Article 12.11 of the DSU that:

In the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require particular consideration, nor do we find these specialised provisions relevant for the resolution of the specific matter brought before this Panel.⁷¹

In this dispute, Turkey failed to raise any provisions on S&D treatment for developing countries. Whether its decision not to raise such provisions was intentional or simply as a result of a lack of expertise in utilising such provisions, the Panel's attitude demonstrated a tendency to dismiss such provisions. This attitude would have not

⁷⁰ *Turkey—Measures Affecting the Importation of Rice*, WT/DS334/R.

⁷¹ *Ibid* paragraph 7.304.

been satisfactory if there was an automatic obligation for the panel to address, consider, and utilise all relevant provisions on S&D treatment for developing countries. An automatic recognition by the panel of such provisions in the WTO law would guarantee all developing and least-developed country Members a chance to secure any opportunities to use the relevant provisions on special treatment for their benefit.

4.3.1.6. Implementation (Articles 21.2, 21.7 and 21.8)

The implementation stage is probably one of the stages where developing countries are more vulnerable. They lack the political and economic power to enforce rulings when complainants, and face pressuring economic and political issues that affect their ability to implement rulings when defendants. This is probably why the DSU addressed the special treatment provided to developing countries with regard to the implementation of panel's recommendations in more than one occasion in Article 21. In this regard, Article 21.2 of the DSU reads as, 'particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement'.⁷²

Article 21.2, like Article 4.10, is of a rather 'hortatory' character.⁷³ Its use of the verb 'should' indicates a desirable but not mandatory requirement. This character is clear in *EC—Bed Linen*⁷⁴, where the Panel stated:

Turning first to the text of Article 21.2, we find nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word 'should' must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of 'shall'.⁷⁵

⁷² *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 21.2.

⁷³ The South Centre, above n 42, 21.

⁷⁴ *EC—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, Recourse to Article 21.5 of the DSU by India, WT/DS141/RW.

⁷⁵ *Ibid* paragraph 6.267.

The Panel added that ‘in light of this, we cannot agree with India’s conclusion that Article 21.2 imposes some obligation to act’.⁷⁶ This ruling by the panel sets an important example of the practical insignificance of Article 21.2 of the DSU. The Article is useless, as it does not impose any obligatory requirement to do any particular act in relation to matters affecting the interests of developing countries in the dispute.

Other than its hortatory character, Article 21.2 fails to specify how the ‘particular attention’ is to be paid in order to satisfy the requirement of the provision,⁷⁷ which makes it difficult to assess the level of compliance.⁷⁸ In addition, it is not clear to whom it is directed in the first place. It is vague as to whether it is the responsibility of the party implementing the DSB rulings to pay particular attention to interests of developing countries concerned in the course of the implementation process, or the responsibility of an organ of the dispute settlement mechanism that is concerned and deals with the implementation or the surveillance, such as the panel, or the DSB.⁷⁹

The vagueness and generality of Article 21.2 is documented in a number of disputes. In *Indonesia—Autos*,⁸⁰ the panel stated that ‘the language of this provision (Article 21.2) is rather general and does not provide a great deal of guidance’.⁸¹ In the *US—Gambling*,⁸² the Panel stated that ‘it is not clear whether the word “matters” in Article 21.2 has the same meaning as elsewhere in the DSU, or whether it refers simply to the subject matter covered by Article 21’.⁸³ In Indonesia’s case, the Arbitrator was specific in stating the form the ‘particular attention’ was provided by awarding Indonesia, pursuant to Article 21.2 of the DSU, an additional period of six months over and above the six-month period of the reasonable period of time for the

⁷⁶ Ibid paragraph 6.268.

⁷⁷ Alban Freneau, ‘WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective’ (LLM Thesis, University of Manchester, 2001) 37.

⁷⁸ The South Centre, above n 42, 21.

⁷⁹ Alban Freneau, above n 77, 37.

⁸⁰ *Indonesia—Certain Measures Affecting the Automobile Industry, Recourse to Arbitration under Article 21.3(c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13 and WT/DS64/12.

⁸¹ Ibid paragraph 24.

⁸² *US—Measures Affecting the Cross-border Supply of Gambling and Betting Services, Recourse to Arbitration under Article 21.3(c) of the DSU*, WT/DS285/13.

⁸³ Ibid paragraph 60.

implementation of the recommendations and rulings of the DSB.⁸⁴ However, in other cases, the hortatory, general and vague text of Article 21.2 was a reason for the panels to disregard the Article altogether. In *EC—Chicken Cuts*,⁸⁵ the Arbitrator stated:

Brazil has shown to my satisfaction that Brazil's interests are indeed affected by the measures of the EC that are the subject of this dispute. Furthermore, Brazil is correct that Article 21.2, on its face, makes no distinction in cases where developing country Members are complaining rather than implementing Members in a particular dispute. However, as I have already observed, my determination of the reasonable period of time results from my understanding of the shortest period of time possible in the Community legal order for implementing the proposed Commission Regulation amending Additional Note 7 to heading 02.10. Having arrived at the shortest period of time possible, I consider that the reasonable period of time for implementation is not additionally affected by the fact that Brazil, as a complaining Member in this dispute, is a developing country.⁸⁶

In *US—Sunset Reviews*,⁸⁷ the Arbitrator stated:

For my determination of the reasonable period of time, Argentina requests me to use as 'context' the fact that Argentina is a developing country Member. Having regard to the implementation process involved in this dispute, I consider that, beyond the fundamental requirement that the implementation process should be completed in the shortest period possible within the legal and administrative system of the US, the 'reasonable period of time' for implementation is not affected by the fact that Argentina, as the complaining Member, is a developing country.⁸⁸

In these two disputes, there was a clear link between the length of the reasonable period for the implementation of the DSB recommendations and the interests of the developing countries concerned, as the longer the period is, the more negative effect the violating measure is going to have on their economies. Both developing countries in this dispute also explicitly pointed to their position as developing countries, which deserve particular attention to their interests affected by the concerned measures. The fact that the Arbitrator in both cases chose to base the determination of the reasonable period for implementation solely on the circumstances of legal and administrative system of the defendant developed country, ignoring any effect from the developing

⁸⁴ *Indonesia—Certain Measures Affecting the Automobile Industry*, above n 80, paragraph 24.

⁸⁵ *EC—Customs Classification of Frozen Boneless Chicken Cuts, Recourse to Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13 and WT/DS286/15.

⁸⁶ *Ibid* paragraph 82.

⁸⁷ *US—Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina, Recourse to Arbitration under Article 21.3(c) of the DSU*, WT/DS268/12.

⁸⁸ *Ibid* paragraph 52.

country situation is again a demonstration of a complete lack of practical utility of Article 21.2.

Even the explicit and specific Arbitrator's recognition and application of Article 21.2 in *Indonesia—Autos* mentioned above,⁸⁹ under which it granted an extension of six months on top of the reasonable period, was downplayed by the panel in *EC—Bed Linen*,⁹⁰ where the panel stated commenting on the Arbitrator's decision:

In our view, the Arbitrator's decision reflected one appropriate consideration of the instruction in Article 21.2. However, that is different from a conclusion that Article 21.2 establishes a binding obligation on Members to do, or not do, particular things in the context of their efforts to comply with a DSB ruling in a dispute that affects the interests of a developing country. There may be any number of ways in which the policy set forth in Article 21.2 might be effectuated. However, nothing in that provision obliges any Member actually to effectuate that general policy, or to do so in any particular way in any particular case.⁹¹

These disputes demonstrate the weakness and practical insignificance of Article 21.2. It is general, vague, and does not have a mandatory affect in the dispute settlement system, which makes it a target for misinterpretation and disregard by the disputing parties and the DSB representative alike. On the same subject, Articles 21.7 and 21.8 of the DSU read respectively as follows:

If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.⁹²

If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.⁹³

Articles 21.7 and 21.8 are similar to Article 21.2 in acknowledging the interests and circumstances of developing countries in the implementation process. In dealing with a matter related to the implementation measures raised by a developing country, the

⁸⁹ *Indonesia—Certain Measures Affecting the Automobile Industry*, above n 80.

⁹⁰ *EC—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, above n 74.

⁹¹ *Ibid* paragraph 6.269.

⁹² *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 21.7.

⁹³ *Ibid* Article 21.8.

DSB is not only required to consider further measures that are appropriate to the circumstances of the developing country, Article 21.8 goes a step further by explicitly requiring the DSB to consider the impact of the complained about measures on the whole economy of the developing country rather than simply the concerned area of trade.

The importance of Paragraphs 7 and 8 of Article 21 seems to be in their recognition of some issues that might affect developing countries' economies at the implementation stage.⁹⁴ A disagreement on the existence or inconsistency with a covered agreement of measures taken to comply with the DSB recommendations during the implementation period could put more pressure on the economy of the developing country concerned; adding to the pressure that has already resulted from the original violating measures. This extra pressure comes from expected delays in the implementation process that includes a possible resort to the original panel to decide on the disagreement, which consumes the limited resources of the developing country concerned. In addition, the extra pressure is represented by the continuing existence of the original violating measures, which means a continuing pressure on the economy of that developing country. Obliging the DSB to consider further appropriate action that acknowledges the interests of the developing country concerned and the circumstances of its economy, when dealing with a situation of absent, incomplete or inconsistent measures of implementation raised by a developing country, is an important privilege for developing countries, taking into account the detrimental impact that such situations have on their economies.

However, Paragraphs 7 and 8 of Article 21 give another example of the lack of specification that some DSU provisions on special treatment for developing countries share. Paragraphs 7 and 8 of Article 21 do not regulate the form of the 'further action' the DSB is required to consider, which makes it difficult to assess DSB compliance with such requirement. The broadness of the requirement for further action, in practice, could even leave the developing country concerned in the implementation process without the special treatment intended, despite the application of paragraphs 7 and 8 of Article 21. The DSB could satisfy the 'further action' requirement, for

⁹⁴ Alban Freneau, above n 77, 38.

example, by only adding a bit more time to its routine discussions, or adding one or two more hortatory statements that addresses the situation of the developing country concerned, when the interests of that country are affected in the course of a requested implementation, without in practice changing the situation in favour of that developing country.⁹⁵ This lack of specification resulted in a disagreement on what may be a form of further action required in *US—Sunset Reviews*,⁹⁶ when Argentina requested the Panel to make specific suggestions pursuant to Article 19.1 of the DSU on how the US was to implement the recommendation,⁹⁷ and considered such a suggestion as a form of compliance with Article 21.7 of the DSU.⁹⁸ Making suggestions on the form of implementation is not a common practice in the dispute settlement system, which prompted the panel to refuse Argentina’s request in a decision that was upheld by the Appellate Body, ruling it out as a form of compliance with Article 21.7.⁹⁹

The example above demonstrates how the generality and ambiguity of Articles 21.7 and 21.8 could make any action as a possible form of the ‘further action’ requirement. In the case above, this requirement was manipulated by the developing country concerned to achieve an outcome beneficial to their interests. However, the Articles’ tendency to be a possible subject of manipulation could be used against the interests of developing countries in other cases.

4.3.1.7. *Treatment of Least-developed Countries (Article 24)*

As a result of the more volatile position of least-developed countries in the dispute settlement process, the DSU exclusively provides them with additional special procedures along with other special treatment offered to developing countries. In this regard, Article 24 of the DSU reads as follows:

- 1) At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-

⁹⁵ Horn and Mavroidis, above n 17, 27.

⁹⁶ *US—Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina, Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW.

⁹⁷ Ibid paragraph 104.

⁹⁸ Ibid WT/DS268/AB/RW paragraph 65.

⁹⁹ Ibid WT/DS268/RW paragraph 104, WT/DS268/AB/RW 83.

developed country Member. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorisation to suspend the application of concessions or other obligations pursuant to these procedures.¹⁰⁰

2) In Dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.¹⁰¹

Although Article 24.1 is targeting exclusively the interests of the least-developed country Members, it is still similar to the other Articles discussed above in requiring a particular consideration to be given to the special circumstances of the countries concerned. However, Article 24.1 sets an important distinction to the trend followed by other Articles on special treatment for developing countries. The Article's precise mention of whom is required to carry out its requirements, and the form in which the requirement is to be carried in order to achieve compliance represent a departure from the trend of usually vague and imprecise wording of such provisions.

Other than the fact that Article 24.1 provides an exclusive form of favourable treatment for least-developed countries, its clarity is surely of legal significance too. It is clear in Article 24.1 as to who is required to implement its obligation and the mechanism as to how this requirement is to be implemented, which makes it much easier for least-developed countries involved in disputes to use this Article to their benefit. It saves them from dealing with the legal complexity, potentially unfavourable panel and the Appellate Body's interpretations, and potential legal objections by other Members as to how a provision is to be applied. This outcome is surely for the benefit of least-developed country Members, taking into account their very limited legal expertise to tackle any of these challenges mentioned above.

¹⁰⁰ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 24.1.

¹⁰¹ *Ibid* Article 24.2.

Article 24.2 is another Article that provides a form of special treatment exclusively for least-developed country Members in the system. In this context, it is almost identical to the relevant provisions of the 1966 Decision,¹⁰² which is available to any developing country Member to use during the dispute settlement process. The only difference between Article 24.2 and the relevant provisions of the 1966 Decision is that Article 24.2 adds the Chairperson of the DSB as an additional source of ‘good offices’, and abolishes the requirement of a ‘prompt furnishment of all relevant information’ by the parties concerned at the request of the Director-General. To have these changes as the main apparent difference distinguishing a provision that exclusively provides a special treatment for least-developed countries from a provision that apparently provides the same special treatment to all developing countries in the system means that these two differences must have benefits that suit the situation of least-developed country Members in one way or another.

To add the Chairperson of the DSB as another source of providing good offices for least-developed country Members, alongside the Director-General, is a step to enhance the confidence of least-developed countries in the system, and encourage their more active participation in it. However, it is not clear if there is any difference between the role of the Director-General and the role of the Chairperson of the DSB in providing good offices for consultations involving least-developed country Members. Further, it is not clear how adding the Chairperson of the DSB as a second source of good offices is considered of a substantial benefit for least-developed countries, when they could request the same treatment from the Director-General, without any complications, in a treatment provided for all developing and least-developed country Members. Therefore, introducing a second source of good offices exclusively for least-developed country Members to be presented by the Chairperson of the DSB as a tool to enhance their confidence in the system is less likely to change the perception they have about the process, especially when it adds little to a treatment provided for all developing country Members.

¹⁰² *The Decision on Procedures under Article XXIII*, above n 29.

The second difference between Article 24.2, which is exclusively provided for least-developed country Members, and the relevant provisions of the 1966 Decision, which is provided to all developing and least-developed country Members, is that Article 24.2, unlike the 1966 Decision, does not require parties to promptly furnish all relevant information, at the request of the Director-General or the Chairperson of the DSB, during the process of utilising the good offices. It could be argued that the requirement of a prompt furnishment of all relevant information during the process of using the good offices, which was addressed in the 1966 Decision, would be a heavy burden on the very limited resources of least-developed country Members. This burden, in a way, would contradict the purpose of such special treatment, which is represented in providing assistance to least-developed country Members in the dispute settlement process.

However, the absence of such a requirement in Article 24.2 means that the least-developed country concerned would miss an opportunity to obtain information from the other party that would not be otherwise obtained during the normal stage of consultation. This relevant information, which could be obtained through the requirement of the 1966 Decision, would be of a major significance to least-developed country Members, where the very limited human, institutional and financial resources could make investigating, gathering and analysing such information highly inefficient. Even though other parties to a dispute would also benefit from such a requirement, as they would obtain relevant information from the least-developed country involved, the effect of this requirement would be much greater to the interest of the least-developed country concerned, keeping in mind the greater resources that the other parties have to investigate, gather and analyse relevant information more effectively.

However, there is a way to provide least-developed country Members with the benefit of employing the requirement of a prompt furnishment of all relevant information, without putting pressure on their resources as a result of fulfilling such a requirement. It would be appropriate to add the requirement of the 1966 Decision to Article 24.2, but only apply it on the other parties involved, exempting the least-developed country concerned from its implementation. This change would keep the exclusivity intended for least-developed countries in Article 24.2, and provide them, at the same time, with

the benefits of the requirement of the 1966 Decision, while saving their resources from any pressure resulting from its implementation.

Bangladesh is still the only least-developed country Member that has participated as either complainant or defendant in the WTO dispute settlement system. Bangladesh's participation was when it filed a dispute against India in *India—Batteries*,¹⁰³ which was settled by a mutually agreed solution.¹⁰⁴ The fact that this dispute was settled restricted any possible application of Article 24, as the scope of the Article was not reflected by the dispute or its outcome. Other than this case, there was an application of Article 24.1 in *US—Upland Cotton*,¹⁰⁵ where the Panel gave Chad, pursuant to Article 24.1 of the DSU, particular consideration to its special situation as a least-developed country, which enabled it as a third party to the dispute to make a detailed written submission, an oral statement at the Panel's meeting with the third parties, and detailed legal arguments of its view on the dispute.¹⁰⁶ However, the partial involvement of Chad as a least-developed country third party meant that the partial application of Article 24.1 did not again capture the scope intended for Article 24, which is more relevant to least-developed countries' participation as defendants and complainants.

The lack of practical application of Article 24, as a result of least-developed countries' near absent participation in the system makes it difficult to evaluate the operation of Article 24, and explore any flaws in its wording that allow it to be used contrary to its intended aim and against the interests of least-developed countries. Nonetheless, on a *prima facie* basis, Article 24.1, as discussed above, differs from other S&D treatment provisions in the DSU in that it offers more obligatory and specific language. It provides for particular attention to be afforded to least-developed country Members at all stages of dispute settlement, and specifies such attention by obliging Members to show restraint in raising claims against least-developed country Members, and in seeking compensation or retaliation in case nullification or retaliation is found. However, the application of such restraint is questionable. The

¹⁰³ *India—Anti-dumping Measures on Batteries from Bangladesh*, WT/DS306.

¹⁰⁴ *Ibid* G/ADP/D52/2, G/669/Add. 1, WT/DS306/3.

¹⁰⁵ *US—Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW.

¹⁰⁶ *Ibid* paragraph 8.29.

WTO dispute settlement system is open for all Members to counter violations to their rights regardless to who the offender is. In this context, it is unlikely that a legally sound claim would be overturned by the DSB based on the least-developed country situation of the respondent. The WTO Member could simply indicate that it has exercised restraint in raising the dispute or seeking compensation or retaliation, but the nature of the violation is detrimental to its trading interests that the claim or the retaliation request has to be raised. Based on the legal framework of the DSU, the panel is obligated to consider violation claims, and grant the right for certain remedies such as retaliation unless it is agreed by all Members not to do so, which leaves the restraint requirement in Article 24.1 nothing more than a sympathetic consideration that is useless if a complaining Member decides to proceed in a dispute against a least-developed country

4.3.1.8. Technical Assistance (Article 27.2)

In addition to providing special and differential treatment to developing countries in particular situations of the dispute settlement process, the DSU offers a form of special treatment that could be applied at any stage of the dispute settlement process. Article 27.2 of the DSU addresses the need to provide legal advice and assistance to developing countries additional to that provided to all country Members in the course of dispute settlement. In this regard, Article 27.2 of the DSU reads as follows:

While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member in a manner ensuring the continued impartiality of the Secretariat.¹⁰⁷

Other than the usual assistance provided by the Secretariat to all WTO Members in the dispute settlement process, Article 27.2's requirement for the WTO Secretariat to provide additional legal advice and assistance to developing countries in their disputes is considered an important and much-needed form of special and differential

¹⁰⁷ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, above n 39, Article 27.2.

treatment.¹⁰⁸ This additional legal assistance is intended to limit the effect of two major obstacles in developing countries' utilisation of the dispute settlement process; their lack of efficient legal expertise, and the high cost of the process that many developing countries cannot afford.¹⁰⁹

However, the technical assistance provided by the Secretariat is both quantitatively and qualitatively inadequate, taking into account the growing number of developing country Members in the WTO and the number of disputes where developing countries are implicated.¹¹⁰ Article 27.2 also requires the Secretariat to ensure a continued impartiality throughout the whole process of providing technical assistance to developing countries. This requirement puts a constraint on the Secretariat's effort to provide the legal assistance to developing country Members in the best manner to achieve a favourable adjudication.¹¹¹ Indeed, the sense behind the impartiality requirement is questionable, where, on one hand, the Secretariat is required to provide additional legal and technical assistance as a form of favourable treatment for developing countries, but, on the other hand, is required to remain objective.¹¹²

The situation of quantitatively and qualitatively inadequate technical assistance by the Secretariat leaves developing countries looking for other arrangements to fulfil their needs. This leads developing countries to hire private legal counsels at considerable financial cost, which puts pressure on their limited financial resources.¹¹³

Article 27.2 also limits the technical assistance provided by the Secretariat for developing countries to the period or action after submitting their dispute to the

¹⁰⁸ The South Centre, above n 42, 23.

¹⁰⁹ Ibid.

¹¹⁰ Christina Davis and Sarah Bermeo, 'Who Files? Developing Country Participation in WTO Adjudication', (Paper presented at the conference 'WTO dispute Settlement and Developing Countries: Use, Implication, Strategies and Reforms, Madison, Wisconsin, May 20–21, 2005) 8; Horn and Mavroidis, above n 17, 27.

¹¹¹ Gillian Triggs, 'Dispute Settlement under the WTO: Implications for Developing Countries' (2003) 2(15) *Bond Law Review* 68; Hakan Nordstorm, 'The cost of WTO Litigation, Legal Aid and Small Claim Procedures', 2005 (Paper presented at the International Conference on WTO Dispute Settlement and Developing Countries: Use, Implications, Strategies and Reform, Madison, Wisconsin, May 20–21) 1.

¹¹² Horn and Mavroidis, above n 17, 28.

¹¹³ The South Centre, above n 42, 23.

dispute settlement mechanism.¹¹⁴ Article 27.2 ignores the fact that actions taken before formally submitting a dispute, such as analysing inconsistent measures and choosing winnable cases, could be, in practice, as important, and legally challenging, as the legal analyses and argumentation exercised during the dispute settlement period.¹¹⁵ As much as developing countries need the legal and technical assistance from the Secretariat during the dispute settlement period, they also need it for their pre-dispute legal practices, which require the same levels of institutional, legal and financial resources as needed for dispute settlement procedures. Ignoring this need for pre-dispute technical assistance by the Secretariat would limit the chances of developing countries initiating disputes and acting as complainants,¹¹⁶ an outcome that conflicts with the WTO's aim of achieving a better participation of developing countries in the dispute settlement system.

It could be argued that technical assistance provided for developing countries prior to disputes is regulated under Article 27.3 of the DSU, which provides for special training courses on dispute settlement procedures and practices to be conducted for interested Members, especially developing and least-developed countries. In this regard, the WTO conducts Geneva-based courses for Members' government officials that aim to provide better understanding of the WTO dispute settlement rules and procedures through a combination of lectures and interactive exercises.¹¹⁷ It also conducts regional seminars for capital-based officials, which could attract a large audience based in the regions and interested in the same subject matter.¹¹⁸ These seminars, which cover a number of topics including dispute settlement, provide a range of expertise from basic explanations to more advanced levels of training.¹¹⁹ In addition, the WTO encourages Member countries to submit requests for 'National Technical Assistance Activities', which aim in providing regional assistance in

¹¹⁴ Davis and Bermeo, above n 110, 9; Horn and Mavroidis, above n 17, 28.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ World Trade Organization, *WTO Thematic Courses on Dispute Settlement* (25 March 2010) WTO Website <http://www.wto.org/english/tratop_e/devel_e/train_e/activity_sheets_2010_e/tc10-2_e.doc>.

¹¹⁸ World Trade Organization, *Trade-Related Technical Assistance/Regional Seminars* (25 March 2010) WTO Website <http://www.wto.org/english/tratop_e/devel_e/train_e/reg_seminars_e.htm>.

¹¹⁹ Ibid.

relation to specific issues that cannot be adequately covered by regional seminars as a result of their depth or terms of priority.¹²⁰

Other than the direct interaction between WTO Secretariat and Members' representatives, the WTO has established 'Reference Centres' in ministries or regional organisations.¹²¹ Under this programme, beneficiary countries are provided with regular, updated and direct links to the WTO headquarters in Geneva, where any relevant information on the WTO can be accessed.¹²² The WTO also provides the 'e-learning programme', which utilises information technology and the internet as a complement and an alternative to traditional training programmes by offering interactive courses and online access to training material, as well as self-training modules on specific WTO Agreements and issues.¹²³

This effort by the WTO and its Secretariat in providing technical assistance to WTO Members that require such assistance is commendable, and it shows the WTO's commitment to the issue, but is it enough to provide developing and least-developed countries with the legal expertise necessary to participate in the dispute settlement process efficiently?

The WTO is a multi-agreement system that covers a wide range of trade issues. As a result of the dispute settlement system being the ultimate authority to settle disputes in relation to the entire WTO covered Agreements, an extensive knowledge of these Agreements and all related issues to their application is necessary if the dispute settlement system is to be utilised efficiently. Despite the fact that WTO technical assistance courses provide a valuable source of information for Members interested in expanding their WTO-related knowledge, many of these courses are based in Geneva. This is problematic because a considerable number of developing and least-developed country Members do not even have permanent representation in Geneva, which

¹²⁰ World Trade Organization, *Trade-Related Technical Assistance/National Technical Assistance Activities* (25 March 2010) WTO Website

<http://www.wto.org/english/tratop_e/devel_e/train_e/nat_techassistance_e.htm>.

¹²¹ World Trade Organization, *The WTO Reference Centre Programme* (25 March 2010) WTO Website

<http://www.wto.org/english/tratop_e/devel_e/train_e/refcen_prog_e.pdf>.

¹²² Ibid.

¹²³ World Trade Organization, *Trade-related Technical Assistance/E-Learning Programme* (25 March 2010) WTO Website <http://www.wto.org/english/tratop_e/devel_e/train_e/elearning_e.htm>.

restricts their participation in such courses. Further, it is questionable that a limited number of courses or seminars that are directed to a potentially large audience of Members' officials would be sufficient to build a considerable legal expertise in every WTO-related area of expertise, considering that for some countries, especially the least-developed, such courses and seminars are the main source of information that they rely on in building their legal expertise with no other sources to supplement or consolidate the knowledge obtained from these seminars. In addition, regional seminars and National Technical Assistance Activities could place pressure on the Secretariat's financial and human resources, which has prompted the WTO to ask Members to indicate any support already offered by other agencies before requesting National Technical Assistance Activities in order for the Secretariat to direct its resources to other Members that have not received such support.¹²⁴

In relation to the Reference Centres Programme, it has become increasingly complex to manage, as it struggles with a continuing need to maintaining, servicing and updating equipment in the absence of adequate qualified staff to operate the programme due to human resource constraints.¹²⁵ The online-based training is not guaranteed to attract the interest of officials based in their regions, and even if it does, it is not sufficient to build a comprehensive expertise in WTO law and its dispute settlement system.

While Article 27.2 of the DSU provides for additional legal advice and technical assistance to developing countries during disputes, Article 27.3 deals with building their legal expertise in WTO law and its dispute settlement system to enable them to be more informed and prepared in future disputes. The language of Article 27 has the theoretical potential to be an effective tool to counter developing and least-developed countries' lack of legal expertise in WTO law and its dispute settlement system. However, the practical considerations of its implementation restrict the effect it could have in this regard. The impartiality requirement of the Secretariat's role in assisting developing countries in their disputes limits the contents or benefits of such

¹²⁴ World Trade Organization, *Biennial Technical Assistance and Training Plan 2010–2011/Requests for National TA Activities* (26 March 2010) WTO Website

<http://www.wto.org/english/tratop_e/devel_e/train_e/national_request_form_e.doc>.

¹²⁵ World Trade Organization, *The Reference Centres Programme/A New Strategy* (26 March 2010) WTO Website <http://www.wto.org/english/tratop_e/devel_e/train_e/rc_strategy_e.doc>.

assistance, and the Secretariat is holding training courses for interested countries in Geneva at the same time when most of least-developed country Members do not even have permanent representatives in Geneva. The regional seminars of the Secretariat are subject to its financial and human resources' constraints, and they are unlikely to provide expertise sufficient to tackle comprehensive and multi-agreement related disputes, nor compete with the legal expertise of developed countries in this regard.

The language of S&D treatment provisions is of a great importance in determining the efficiency of such provisions. Vague and general terms could be used against the interests of developing countries by panels and counterparts alike in limiting the scope of application of S&D treatment provisions, and the hortatory character of many of these provisions could play a role against the overall application of such provisions to the detriment of developing countries. Even developing countries could be discouraged by these limitations from raising or using such provisions in the first place if they considered that using them would not make a great difference to their position in a dispute or to its outcome.

4.3.2. The Substantive Application of S&D Treatment in the DSU

In disputes involving the S&D framework in the WTO agreements, the focus has been on the interpretation of the S&D provisions involved.¹²⁶ The disputes addressed above indicate that the general, hortatory, and vague language of S&D provisions of the DSU has affected the interpretation of panels, arbitrators and the Appellate Body of these provisions, restricting their scope of application or the impact of their intended purpose, and influenced developed country counterparts to adopt a restrictive attitude towards such application. This situation has contributed to the lack of force in the application of the WTO provisions on special and differential treatment for developing countries.¹²⁷

¹²⁶ Asif Qureshi, 'Participation of Developing Countries in the WTO Dispute Settlement System' (2003) 47(2) *Journal of African Law* 174, 189.

¹²⁷ Louise Poywing, above n 48, 6.

4.3.2.1. *The Interpretation of S&D Provisions*

The effect of S&D provisions of the DSU in providing differential and favourable treatment for developing countries is further diminished by a trend with panels and the Appellate Body to engage in substantial interpretation that in some circumstances, as discussed in Chapter 3, alter the scope of legal provisions.

The contribution of panel's interpretation to the lack of force in S&D provisions is explained by Wei Hu as follows:

Apart from all these systemic problems, a major new problem is emerging in the operation of the panel and appeal process. The panels and the Appellate Body very often engage in very substantial interpretations of the WTO Agreements. By coincidence, it has so happened that in a large number of cases, these interpretations have increased the obligations which are mostly those of developing countries and enhanced the rights which are mostly exercised by the developed countries.¹²⁸

This opinion is supported by a statement from the African Group Proposal as part of the Doha Round Negotiations on the DSU, which reads as follows:

The panels and the Appellate Body have come up with 'surprises' in their interpretation and application of WTO provisions, in some cases totally unexpected and unintended in the negotiation of the provisions. This has affected the rights and obligations, and expectations of the Members.¹²⁹

The trend of adopting an approach of substantial interpretations of provisions of WTO Agreements has also been reflected in the interpretation of S&D provisions. This approach restricts the scope in which developing countries are to benefit from the special treatment provided to them by S&D provisions. This practice involves, in some disputes, ignoring the title, substance and purpose of S&D provisions, and employing certain terms in the provisions' text to deprive developing countries from the special treatment provided. An example of this practice is clear in *EC—Bed Linen*,¹³⁰ when India argued that Article 15 of the Anti-Dumping Agreement imposed a specific obligation to 'explore Possibilities' of S&D treatment for developing countries. Article 15 reads as follows:

¹²⁸ Wei Hu, 'The Reconstruction of a Retaliation System under WTO' (2003) 9(2) *International Trade Law Review* 31, 33.

¹²⁹ *Proposal by the African Group*, WTO Doc TN/DS/W/15 (2002) 5.

¹³⁰ *European Communities—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, above n 74.

It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interest of developing country Members.¹³¹

The panel, however, held:

We consider next the term ‘explore’, which is defined, *inter alia*, as ‘investigate; examine scrutinise’ ... In our view, while the exact parameters of the term are difficult to establish, the concept of ‘explore’ clearly does not imply any particular outcome. We recall that Article 15 does not require that ‘constructive remedies’ must be explored, but rather that the ‘possibilities’ of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the ‘exploration’ of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.¹³²

The example above shows that there is no automatic right to S&D treatment in the WTO dispute settlement system or even a presumption in favour of developing countries when they invoke such provisions.¹³³ This leaves, in many cases, S&D provisions of no assistance to developing countries, but merely as meaningless expressions that have no force or effect.¹³⁴

The issue of panel and the Appellate Body interpretations has been discussed in the previous chapter. However, it is relevant here to revisit the principle of judicial restraint, which is one of the fundamental principles of WTO jurisprudence. This principle is clear in Article 3.2 of the DSU, which reads as follows:

¹³¹ *Agreement on the Implementation of Article VI of GATT 1994*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A (Anti-dumping), Article 15.

¹³² *European Communities—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, above n 74, paragraph 6.233.

¹³³ Louise Poywing, above n 48, 10.

¹³⁴ *Ibid.*

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements

Article 3.2 of the DSU indicates how prevalent the notion of restraining changes in the rights and obligations of Members is in the system.¹³⁵ Further, as S&D provisions are subject to the customary rules of interpretation of public international law, panels' approach of restrictive interpretation of S&D provisions is contrary to Article 31 of the Vienna Convention on the Law of Treaties of 1969, which requires that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.¹³⁶ It is also contrary to Article 32 of the Convention, which reads as follows:

Resource may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.¹³⁷

The shortcoming of panels' restrictive interpretations for S&D provisions, if tested in terms of Articles 31 and 32 of the Vienna Convention, is that these interpretations ignores or pay little attention to the purpose and object of the S&D provisions. It is clear that the special treatment is intended to deal with certain difficulties that counter developing countries in their implementation of WTO rules. The restrictive interpretations of panels also fail to acknowledge that the preparatory work of the WTO agreements during the UR in which providing special and differential treatment for developing countries throughout all different agreements was an integral part of developing countries' consent to participate in the Round in the first place. The preparatory work of the WTO agreements, alongside the object and purpose of S&D

¹³⁵ John Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects' in Anne Krueger (ed), *The WTO as an International Organisation* (1998) 172.

¹³⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UNTS 1155, 331 (entered into force 27 January 1980).

¹³⁷ *Ibid.*

provisions, suggest that interpretations of S&D provisions are required to expand as much as possible the scope of their application to the benefit of developing countries, and any approach of interpretation that suggests otherwise is regarded contrary to the applicable public international law as well as Article 3.2 of the WTO DSU.

The restrictive interpretation of S&D treatment provisions is not always, however, due to the DSB judiciary practices, it could be a result of the invoking developing country's own action.¹³⁸ This could happen when the invoked provision is not applicable to the situation, or when the invoked S&D treatment provision is not supported by sufficient information.¹³⁹

In a number of disputes, the developing countries simply invoked the wrong provisions, such as the case with Mexico in *Mexico—Taxes on Soft Drinks*,¹⁴⁰ in relation to Article 12.11 of the DSU, India in *India—Quantitative Restrictions*,¹⁴¹ and Mexico in *US—Anti-Dumping measures on OCTG*,¹⁴² regarding Article 21.2 of the DSU.

In *Argentina-Hides and Leather*,¹⁴³ Argentina invoked Article 21.2 of the DSU in Arbitration procedures on the length of the reasonable period for the implementation of DSB recommendations, addressing the link between its position as a developing country and the length of the reasonable period needed for implementation.¹⁴⁴ The Arbitrator, nevertheless, dismissed Argentina's use of Article 21.2, stating that 'Argentina has not been very specific about how its interests as a developing country Member actually bear upon the duration of the "reasonable period of time" needed to put into legal effect an appropriate amendatory *Resolution General*'.¹⁴⁵

¹³⁸ Alavi, above n 20, 341.

¹³⁹ Ibid.

¹⁴⁰ *Mexico—Tax Measures on Soft Drinks and other Beverages*, WT/DS308.

¹⁴¹ *India—Quantitative Restrictions on Imports of Agricultural, Textiles, and Industrial Products*, above n 60.

¹⁴² *US—Anti-dumping Measures on Oil Country Tubular Goods from Mexico*, WT/DS282.

¹⁴³ *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Arbitration under Article 21.3 (C) of the DSU*, WT/DS155/10.

¹⁴⁴ Ibid paragraphs 50–51.

¹⁴⁵ Ibid paragraph 51.

Developing countries' deficiencies in choosing the appropriate S&D treatment provisions to invoke, or in providing sufficient information to support their claim of special treatment under such provisions returns at the end of the day to the language of these provisions. The invoked provisions themselves do not clearly indicate the facts, information and evidence that are sufficient and necessary to justify their application, when they can be applied or what can be expected, which makes the provisions difficult to use in a legal process, and unclear on the context of their application or the information to accompany them.¹⁴⁶

This form of S&D treatment provisions, which is also in many instances non-binding and non-automatic, puts developing country Members in a position where they are not able to submit sufficient and necessary information.¹⁴⁷ This situation in return makes it difficult for panels, arbitrators or the Appellate Body to assess such information, which pushes them to define some criteria on an *ad hoc* basis, leading to unclear and insufficient reasoning, and putting S&D treatment provisions in a position where they are effective in cases and ineffective in others.¹⁴⁸ Such a position is clear, for example, in number of disputes in relation to Article 21.2 of the DSU. In *Indonesia—Autos*,¹⁴⁹ Indonesia's arguments and documentations were considered sufficient by the Arbitrator to be awarded an additional period to comply with the rulings.¹⁵⁰ Whereas, in *Chile—Alcoholic Beverages*,¹⁵¹ and in *Argentina-Hides and Leather*,¹⁵² Chile and Argentina's arguments and information provided were not considered sufficient to grant additional time for compliance despite being similar to Indonesia's arguments of being a developing country with special needs.

The language under which S&D treatment provisions are introduced is the key to the effectiveness of such provisions. A clear, mandatory, automatic, and specific language leaves less room for substantial interpretations by the judiciary of the DSB, makes it

¹⁴⁶ Alavi, above n 20, 343.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ *Indonesia—Certain Measures Affecting the Automobile Industry, Arbitration under Article 21.3 (c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13 and WT/DS64/12.

¹⁵⁰ Ibid paragraph 24.

¹⁵¹ *Chile—Taxes on Alcoholic Beverages, Arbitration under Article 21.3 (c) of the DSU*, WT/DS87/15 and WT/DS110/14, paragraph 45.

¹⁵² *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, above n 143, paragraph 51.

easier for developing country Members to identify the appropriate and applicable provisions, and provides a clearer guide on the requirements needed to invoke certain provisions.

4.3.2.2. Developed Countries' Restrictive Attitude against the S&D Provisions

There has been a general trend on the part of developed country Members involved to argue for limiting the scope of the S&D provisions, whereas the developing country Members involved have had to argue for a liberal interpretation, often emphasising the preamble and the objects and purposes of the relevant agreements.¹⁵³ In relation to the burden of proof, developing countries have argued that the burden of proving that the developing country Member is not entitled to the benefit of the S&D provision is on the complaining Member.¹⁵⁴

This is evident in a number of disputes, such as in *India—Quantitative Restrictions*,¹⁵⁵ in which developing countries had to argue for a full recognition of S&D provisions, and a liberal interpretation of their scope. These arguments have been countered by arguments of developed country Members to disregard these provisions or restrict their scope in a way that negatively affects the interests of developing countries involved, and is contrary to the aim and purpose of the S&D provisions. In the dispute above, India's argument to be granted sufficient time to prepare and present its argumentations as a developing country pursuant to Article 12.10 of the DSU was opposed by the US, which argued for the use of Article 12.10 to be dropped in that case in favour of keeping the strict timeframes under the DSU.¹⁵⁶ Even though this opposition did not deter the panel in granting India additional time of preparation, it influenced its decision, which resulted in a much shorter period than India requested.¹⁵⁷

¹⁵³ Qureshi, above n 126, 189.

¹⁵⁴ Ibid 190.

¹⁵⁵ *India—Quantitative Restrictions on Imports of Agriculture, Textiles and Industrial Products*, above n 60.

¹⁵⁶ Ibid paragraphs 5.8–5.9.

¹⁵⁷ Ibid paragraph 5.10.

The fact that developing countries' use of S&D provisions is more likely to face resistance from their developed country counterparts to restrict the scope of their application, and, in some cases, is subject to unfavourable interpretations by panels and the Appellate Body creates another problematic issue in the participation of developing countries in the WTO dispute settlement system. This situation requires developing countries to provide more legal argumentation to counter the restrictive practices used by developed country counterparts and panels on the scope of S&D provisions raised, and to argue for a favourable interpretation and application of these provisions to the benefit of developing countries. The extra legal complexity in the process puts more pressure on developing countries' limited legal expertise, which in turn results in insufficient or incomplete arguments to achieve the optimum application of S&D provisions that developing countries seek.

This outcome could leave developing countries deprived of the beneficial treatment provided to them by S&D provisions despite their efforts to use such treatment. It could also discourage developing countries from invoking such provisions in future disputes, as they realise that they do not have enough legal expertise to argue against their developed country counterparts, panels and the Appellate Body for their right and eligibility for the special treatment offered exclusively to them in S&D provisions.

In this context, the attitudes of developed country Members and panels in adopting restrictive arguments and interpretations, respectively, to the scope of S&D provisions raised in disputes by developing countries is contrary to the declared aims and goals of the WTO system. Clear in the Marrakech Agreement, establishing the WTO, is the system's recognition of the different situation of developing and least-developed country Members, and its recognition of the need for positive efforts by all parties to enhance developing countries' position in the system and maximise their interests in achieving growth in international trade that is consistent with the needs of their economic development.¹⁵⁸ It is also clear in the purpose and language of most S&D provisions that they were intended to provide special and differential treatment to developing countries with regard to some obligations in the system, and to argue

¹⁵⁸ *The Marrakesh Agreement Establishing the WTO*, Preamble (1994).

against that is akin to arguing against their existence as part of a rule-oriented and single integrated system.

It is reasonably justified that developed countries adopt all necessary legal arguments to support their position in all different disputes, and argue for an outcome to the best of their interests. However, when these arguments target S&D provisions, and become widely used among developed countries against such provisions, then these countries target the main reason behind S&D provisions, which is the vulnerability of developing and least-developed countries in the international trading system. When this vulnerability is targeted by developed countries through their restrictive arguments against the scope of application of S&D provisions, then it is not hard to understand the reason behind the limited participation of developing countries in the WTO dispute settlement system.

The restricted application of the S&D treatment provisions for developing countries in the WTO dispute settlement system is a result of a deficient vagueness and generality in the form the provisions were drafted, a restrictive approach, in some instances, in panels and the Appellate Body interpretations of such provisions, and a resisting attitude in developed countries position towards the application of such provisions. The existence of all these restrictions on the application of S&D treatment provisions from all these different directions raise the question of how serious the WTO is in providing favourable treatment for developing countries in the dispute settlement system, especially with the continuing absence of rules that deal with their real participation issues that they expressed in a number of occasions.

4.3.3. The Ongoing need for Reform for S&D Treatment in the DSU

Other than the defects in the language or the wording of the S&D provisions in the DSU that affect their substantive value for developing countries, the substance of DSU provisions on special treatment leads to an interesting question as to how innovative were the UR drafters in creating the DSU provisions on special treatment for developing countries.

It is true that the DSU includes some important improvements and innovations that ensure developing country Members a better position in the system. However, the novelty of most of the special treatment provisions granted to developing countries in the DSU must be questioned.¹⁵⁹ In this context, many, if not most, of the DSU provisions on special treatment for developing countries are only reiterative of the 1966 procedures and the 1979 Understanding.¹⁶⁰ Despite the fact that the DSU follows, to some extent, a more detailed approach, the substance only reflects what already existed in the two previous sets of procedures that granted developing countries special treatment. To support this argument, it is useful to outline the similar provisions of special treatment for developing countries in the DSU, the 1979 Understanding and the 1966 Decision.

The requirement of Article 8.10 of the DSU that at least one panellist shall be appointed from a developing country in disputes between a developed and a developing country Members, was included in Paragraph 6(ii) of the 1979 Understanding's Annex. The requirement of Article 12.11 of the DSU of recognition by the panel of the special circumstances of developing countries, and recognition of the relevant special treatment provided for them, is very similar to Paragraph 6 of the 1966 Decision. In Articles 21.2 and 21.7 of the DSU, the requirement of special attention to the interests of developing countries during surveillance of implementation was part of the 1979 Understanding in Paragraph 23 as well as the 1966 Decision in Paragraph 10. In Article 21.8 of the DSU, the requirement of considering the impact of the measures complained of on the economy of developing countries even uses the same phrase used in paragraph 21 of the 1979 Understanding. Finally, the requirement of technical assistance from the Secretariat to be provided to developing countries in their disputes, which is outlined in Article 27 of the DSU shares the same substance as of Paragraph 25 of the 1979 Understanding.

The WTO DSU includes past GATT practices, along with procedures previously adopted in the Decisions, Understandings and Declarations of 1966,¹⁶¹ 1979,¹⁶²

¹⁵⁹ Alban Freneau, above n 77, 29.

¹⁶⁰ Ibid. See also, *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT BISD, 26th Supplement, 210 (1979).

¹⁶¹ The Decision of 5 April 1966 on procedures under Article XXIII, above n 29.

1982¹⁶³ and 1989¹⁶⁴, as part of a move in the UR to establish a comprehensive WTO dispute settlement system that is not isolated from 50 years of development during the GATT years of dispute settlement. Therefore, it should not be an issue to find previous GATT provisions on special treatment for developing countries in the dispute settlement process represented in the WTO DSU. However, the issue here is that these previous provisions represent the substance of most of the DSU provisions on special treatment for developing countries in the WTO dispute settlement system.

This shows that the DSU hardly introduces new forms of special treatment for developing countries other than what it collected from previous procedures and improvements introduced throughout GATT history. The lack of innovation in the WTO DSU does not make sense, taking into account that the special treatment procedures introduced for developing countries throughout GATT dispute settlement history failed to address or deal with the real issues of concern for developing countries in the dispute settlement. They also failed to encourage them for better participation in the system. Therefore, it is not a surprise that failure continues to characterise the provisions of special treatment for developing countries in the DSU as they fall short from addressing or dealing with the issues of main concern for developing countries in the system.

Developing countries' dissatisfaction with the current special treatment provisions in the DSU is clear in the African Group's Proposal of 2002, which is part of the Doha Round negotiations on the DSU. The Proposal reads as follows:

The DSU provides for special and differential treatment. However, this treatment is largely in terms of a few additional or less days in the time frames for the proceedings, the use of the good offices of the Director-General, and assistance by the WTO Secretariat. This approach has not fully or coherently addressed the core difficulties developing country Members face in seeking to use the dispute settlement. The difficulties relate to lack or

¹⁶² *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, above n 160.

¹⁶³ *Ministerial Declaration of 29 November 1982* (BISD 29S/9), section on 'Dispute Settlement Procedures' (BISD 29S/13).

¹⁶⁴ *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT BISD, 36th Supplement, 61 (1989).

shortage of human and financial resources, and little practical flexibility in selection of sectors for trade retaliation.¹⁶⁵

In this context, the issues of developing countries' lack of human and financial resources, and the little practicability of the current retaliation mechanism, as the only procedure of enforcement available for developing countries, are considered the two main issues that have an effect on their participation in nearly every stage of the process.

As discussed in Chapter 3, the lack of legal and financial resources in developing countries affects their bargaining position at the consultation stage, as they do not have the necessary human or legal expertise to use the WTO law effectively to strengthen their bargaining position, or the financial resources to threaten a long dispute settlement process in case consultations did not achieve a beneficial outcome for them. The effect of developing countries' lack of legal and financial resources continues through the litigation stage, where a complex WTO law and highly technical panel procedures, along with a potentially long process, leave developing countries struggling to cope. Finally, at the implementation stage, the potentially long period of implementation of the DSB rulings leaves substantial negative economic pressure on their limited and already exhausted financial resources.

Developing countries' lack of legal and financial resources causes them to question the use of initiating disputes in the first place. This is largely due to the DSU retaliation system, which is based on self-enforcement in which the retaliating country has to use its economic power and share in international trade with the concerned country in order to enforce the required implementation. This question of relevancy comes as developing countries weigh all the costs involved in disputes and the probable exhaustion of their legal and financial resources against the benefit of achieving an outcome that is practically unenforceable, as a result of the significant gap between the economic power and share in international trade of developing and developed countries.

¹⁶⁵ *Proposal by the African Group*, above n 129, 4.

An examination of the DSU provisions on special treatment for developing countries shows that these provisions fail to address these two issues of concern for developing countries. Other than a few additional or less days in the proceedings' timeframes, the use of the Director-General's good offices and assistance by the Secretariat, developing countries' lack of legal and financial resources and their inability to effectively utilise the retaliation system are not addressed.¹⁶⁶

This situation points again to the lack of innovation in the DSU in addition to its insensitivity to the issues of main concern for developing countries. The development of the GATT dispute settlement system failed or chose not to deal with the fact of developing countries' lack of resources and inability to retaliate. This direction continued through to the WTO DSU despite clear and persistent attempts and proposals from developing countries to deal with these issues during the UR. In this context, it is relevant to address some of these proposals and communications received from participants in the Negotiating Group on Dispute Settlement during the UR to show how widely the problems were shared among developing countries.

In a proposal from Nicaragua for additional provisions on differential and more favourable treatment,¹⁶⁷ it proposed that:

- In the case of a matter raised by a less-developed contracting party, the recommendations of the Contracting Parties may include measures of compensation for injury caused if the circumstances are serious enough to justify such measures.¹⁶⁸
- In the event that a recommendation of the Contracting Parties is not implemented within the prescribed period, the Contracting Parties shall consider what measures, further to suspension of concessions by the party affected, should be taken to resolve the matter. In case of a matter raised by a less-developed contracting party, those measures may be of a collective nature.¹⁶⁹

¹⁶⁶ Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25 (1) *Development Policy Review* 25, 33; Uche Ewelukwa, 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System: Politics, Process, Outcomes and Prospects' (2005) University of Arkansas School of Law, 44.

¹⁶⁷ *Communication from Nicaragua*, Negotiating Group on Dispute Settlement, Uruguay Round, GATT Doc, MTN.GNG/NG13/W/15 (6 November 1987).

¹⁶⁸ *Ibid* 8.

¹⁶⁹ *Ibid* 9.

In a proposal from Korea,¹⁷⁰ it was suggested that:

At the request of a less-developed contracting party which has only limited retaliatory power vis-à-vis major trading partners, panel reports may include an appropriate recommendation on the amount of compensation due in case the main panel findings are not implemented by a developed contracting party within such time-limit.¹⁷¹

Peru, in emphasising the need for a form of a preferential treatment and an improved dispute settlement machinery, proposed that ‘this improved machinery should provide for special measures to make up for the limited retaliatory capacity of developing countries vis-à-vis major trading partners, in view of their lesser weight in international trade’.¹⁷² In a proposal presented by Mexico,¹⁷³ it suggested that:

- Bearing in mind the lack of economic, material and human resources of developing contracting parties, it would be desirable that in addition to the technical assistance currently available there should be established specialized legal assistance for problems and provisions relating to differential and more favourable treatment for developing countries.¹⁷⁴

- When a developed contracting party cannot immediately comply with the recommendations of a panel in a dispute in which the affected party is a developing contracting party, the interim solution adopted should be based as far as possible on the compensation sought by the developing contracting party. Furthermore, such compensation should be calculated retroactively from the time when the measure that is the subject of the dispute began to be applied.¹⁷⁵

These proposals, highlighting developing countries’ lack of resources and inability to utilise retaliation against their developed counterparts, indicate that these issues had been of main concern for developing countries throughout GATT history and its years of developments. The unwillingness of the system, which is controlled by the major trading countries in the world, to recognise and deal with these issues also contributed to ignoring developing countries’ proposals during the UR to accommodate these issues and provide a more effective form of preferential treatment in the DSU that provides solutions to issues of real concern for developing countries in the system.

¹⁷⁰ *Communication from Korea*, Negotiating Group on Dispute Settlement, Uruguay Round, GATT Doc, MTN.GNG/NG13/W/19 (20 November 1987).

¹⁷¹ *Ibid* 6.

¹⁷² *Communication from Peru*, Negotiating Group on Dispute Settlement, Uruguay Round, GATT Doc, MTN.GNG/NG13/W/23 (3 March 1988) 4.

¹⁷³ *Communication from Mexico*, Negotiating Group on Dispute Settlement, Uruguay Round, GATT Doc, MTN.GNG/NG13/W/26 (23 June 1988).

¹⁷⁴ *Ibid* 7.

¹⁷⁵ *Ibid* 8.

The fact that the DSU dedicates a number of provisions to address developing countries' position as Members of special needs in the WTO dispute settlement process consolidates its role as a multilateral system of dispute settlement that accommodates the needs of all Members regardless to their size or economic power. However, the important point to consider here is not the existence of such provisions; it is the relevance of these provisions to developing countries' participation, and their effectiveness in dealing with their problematic participation issues.

Other than a collection of mostly previous practices and arrangements that developed throughout the GATT years, and proved to be of a little significance for developing countries' issues considering the various proposals and suggestions during the UR, the DSU failed to establish innovative rules that deal with issues of real concern for developing countries. Issues resulted from developing countries' lack of legal and financial resources, such as their limited ability to engage in an equal bargaining process during the consultation stage, manage long and resource-exhausting litigation stage under complex rules and highly technical procedures, and enforce the dispute's outcome through a self-enforcement mechanism of retaliation, are all still lacking adequate recognition by the WTO.

4.4. Conclusion

Introducing special and differential treatment for developing countries and LDCs was one of the policies that evolved and developed throughout the history of GATT. This policy was introduced because of the gap between the economic power and share in international trade of developed countries and that of developing and least-developed countries in the multilateral trading system.¹⁷⁶ This special treatment involved forms such as the preferential access and protection of infant industries, and the non-reciprocity principle in trade commitment between developed and developing countries.

¹⁷⁶ Uche Ewelukwa, above n 3.

The principle of S&D treatment was carried over to the WTO trading system. The new system restricts some forms of special treatment followed during the GATT years, such as the non-reciprocal trade commitments,¹⁷⁷ but introduced a comprehensive set of S&D provisions that include provisions aimed at increasing trade opportunities and safeguarding the interests of developing countries; provisions that allow flexibility of commitments and transitional time periods; provisions on technical assistance to developing countries; and provisions that relate exclusively to least-developed country Members.

Special and differential treatment takes, to some extent, a different form in the DSU than in the other agreements of the WTO multilateral trading system.¹⁷⁸ The DSU offers developing countries a form of special and differential treatment in nearly every stage of the dispute settlement process in the form of longer or shorter time limits, additional or privileged procedures and technical assistance.¹⁷⁹ These procedures are intended to limit the effect of the weakness in developing countries' position in the dispute settlement system and build their confidence in the system.

However, most, if not all, S&D provisions in the DSU are so riddled with vagueness and inefficiency in their expressions that most of them either struggle to be implemented in accordance with their intended aims, or are infrequently invoked by developing countries in a sign of deficiency.¹⁸⁰ The defects in the DSU S&D provisions are not only limited to their language or choice of wording; the substance of the DSU S&D provisions also contributes to the state of deficiency describing these provisions. S&D provisions in the DSU ignore the issues of real concern to developing countries, and the issues that have been the real reason behind the limited participation of developing and least-developed countries in the dispute settlement system since the GATT years.

Issues such as the limited human and financial resources of developing countries and their inability to utilise the retaliation system against the more developed and

¹⁷⁷ Ibid 851.

¹⁷⁸ *A Handbook on the WTO Dispute Settlement System*, WTO Secretariat Publication (2004) 111.

¹⁷⁹ Ibid.

¹⁸⁰ Asif Qureshi, *International Economic Law* (1999) 311–312.

economically powerful counterparts are absent from the content of the DSU S&D provisions despite their widely recognised effects on developing countries' participation, and the various proposals and communications from developing countries to address these issues during the UR Negotiations. Instead, S&D provisions focus on issues of less significance to developing countries' participation, such as flexible timeframes, enhanced consultation and conciliation process through the good offices, and a form of assistance by the WTO Secretariat, which is questionable in its relevancy.

In addition to the defects of the S&D provisions the DSU, developing countries face another challenge in their use of such provisions. The application of the WTO S&D provisions in the dispute settlement process is challenged by restrictive arguments of the developed countries involved in the dispute, and, in some instances, restrictive interpretations by panels and the Appellate Body on the scope or the applicability of these provisions.

The current situation of weak and vague S&D provisions in the DSU, along with a restrictive approach against their full application practiced by developed countries involved in disputes against developing countries, and by panels and the Appellate Body, all contribute to the fact that most of the S&D provisions in the DSU are rarely used or raised by developing countries.¹⁸¹ This lack of interest among developing countries towards S&D provisions in the DSU may be a result of developing countries' belief that their use, in their current state, would not make a meaningful difference to the outcome. This lack of interest may also be a result of developing countries lack of the extra legal and financial resources needed to face possible restrictive arguments and interpretations that are more likely to produce a longer and more complicated dispute settlement process, which prompts developing countries to drop the S&D provision option altogether.

¹⁸¹ A classification provided by the World Trade Law Network introduces WTO disputes linked to Articles of the WTO Agreements addressed in these disputes. This classification illustrates the limited number of disputes under which DSU provisions on S&D treatment have been addressed. It also shows a similar pattern with similar provisions under other Agreements, such as Article 15 of the Agreement on Anti-dumping, and Article 27 of the Agreement on Subsidies and Countervailing Measures. For information, visit *WTO Case Law Index, World Trade Law Network* (20 April 2010) <<http://www.worldtradelaw.net.simsrad.net.ocs.mq.edu.au/dsc/wtoindex.htm#scm27>>.

The rare use of S&D provisions in the WTO dispute settlement system by developing countries, despite their constant reference to the difficulties facing their participation, is a clear indication that these provisions are missing the issues of main concern to developing countries that affect their participation in the system.

Chapter 5: Reforms in the WTO Dispute Settlement System

5.1. Introduction

It could be argued that developing countries have benefited from the UR reforms on the WTO dispute settlement system. The more detailed, rule-oriented and single integrated dispute settlement system has given developing countries the security and predictability they were missing under the GATT dispute settlement system, where power politics and flawed procedures were adding pressure to their resource problems and development considerations.

Developing countries, however, as discussed in Chapters 3 and 4, still face a number of challenges and problematic issues that negatively affect their participation in nearly every stage of the WTO dispute settlement process. Even the special and differential treatment provided for developing countries throughout the DSU to deal with some of the disadvantages they face in the dispute settlement process has not succeeded in addressing or dealing with the real problematic issues developing countries have in the system. Many of the S&D provisions are rarely or never used by developing countries, not to mention the limited approach followed in their application by both developed country counterparts and in panels and the AB interpretations.

These problematic issues that affect developing countries in the system exist along with a number of issues that the rest of the WTO Members feel are worth addressing and dealing with in order to maintain the efficiency of the DSU in the WTO system. This situation has opened the door for negotiations on the improvement of the WTO dispute settlement system. However, these discussions for reform have thus far failed to reach a conclusion after missing several deadlines.

This chapter addresses these negotiations, and divides them based on the progress achieved into pre- and post-Doha negotiations, as a result of the Doha Round being considered a crucial point in WTO negotiations. The chapter provides a critical analysis of some concepts that were addressed in various proposals, which are of

particular importance to developing country Members' participation. In this regard, there is a focus in this chapter on issues that are still the subject of consideration by the WTO membership, such as mandatory compensation, monetary compensation, collective retaliation, and the introduction of retroactivity into compensation and retaliation. In doing so, the chapter revisits the main defects of the current system of remedies, and analyses the advantages of each of these proposed procedures in dealing with such defects, and any possible criticism to which they might be subject. The chapter also provides ideas that could be incorporated into the DSU to enhance the special and differential treatment provided for developing countries. It identifies developing countries' lack of financial resources and legal expertise as the main two areas that need attention in this regard. The chapter then discusses some areas that could be improved independently to enhance the participation of developing countries in view of the possibility that reforms on issues of particular interest to developing countries are never carried out. These areas include improving collaboration with the public-private sectors, searching for new resources of cost-effective legal expertise and improving the existing ones, and developing methods to counter developed countries' bilateral pressure. Chapter 5 reflects an appropriate transition of thoughts from the previous chapters, as it reflects on the problematic issues of developing countries' participation discussed in Chapter 3 and the inefficiency of the S&D treatment analysed in Chapter 4, by providing reforms that could be beneficial in addressing such issues. It also serves as an introductory explanation for some of the proposals adopted in Chapter 6's model of a possible DSU. In this regard, the arguments used in Chapter 5 provide an understanding as to possible considerations behind the inclusion or exclusion of some of the ideas in relation to the DSU model in Chapter 6.

5.2. The Pre-Doha Negotiations

Negotiations to review the DSU began in 1997 in the DSB under a Ministerial Decision that called for a full review of the DSU to be completed by 1 January 1999, and for a decision as to 'whether to continue, modify or terminate such dispute

settlement rules and procedures’.¹ These negotiations failed to achieve a result by 1 January, and despite an extension of the deadline until July 1999 and attempts to introduce the outcomes of the review negotiations at the Seattle Ministerial Conference in December 1999,² the DSU review fell into an inconclusive limbo, and the situation was worsened with the failure of the Seattle Ministerial Conference.³ Negotiations during the pre-Doha period were mainly characterised by two directions. The first direction ran between developed countries, mainly the US and the EC, whereas the other was between developed and developing countries.⁴

Negotiations between developed countries reflected the tension and rivalry between the US and the EC, which arose from a number of disputes that occurred before and during the negotiations.⁵ They circled around the US’ efforts to strengthen the enforcement quality of the system to help its position as a net complainant that had won a number of high profile cases, such as *EC-Hormones*⁶ and *EC-Bananas*⁷, in which the EC tried to delay the implementation of rulings.⁸ The focus of the US on strengthening enforcement was translated into different proposals on the ‘sequencing issue’ that arose for the first time in *EC-Bananas* over ambiguities in Articles 21.5 and 22 of the DSU.⁹ These ambiguities circulated around the question of whether a review of the implementation measures undertaken by a defendant must be conducted first by a compliance panel before a complainant may seek authorisation for retaliation on the grounds of the defendant’s alleged non-compliance.¹⁰ In this context, the US opposed the idea of sequencing and proposed immediate retaliation,

¹ Heinz Hauser and Thomas Zimmermann, ‘The Challenge of Reforming the WTO Dispute Settlement Understanding’ (2003) 38(5) *INTERECONOMICS—Review of European Economic Policy* 241, 241.

² World Trade Organization, *Seattle 99—The Third WTO Ministerial Conference* (17 May 2010) WTO Website <http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm>.

³ Hauser and Zimmermann, above n 1, 241.

⁴ Thomas Zimmermann, ‘WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation’ (2005) 60(1) *Aussenwirtschaft* 27, 41.

⁵ *Ibid.*

⁶ *EC—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26 (August 1997).

⁷ *EC—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27 (May 1997).

⁸ Zimmermann, above n 4, 41.

⁹ *Ibid.*

¹⁰ *Ibid.*

whereas the EC pushed in favour of keeping the compliance panel procedure as a prerequisite to seeking an authorisation to retaliate.¹¹

The US attempted to further increase the enforcement power of the WTO dispute settlement system by proposing ‘carousel retaliation’, which refers to periodic modifications and rotation of the list of products that are subject to the suspension of concessions in order to maximise the impact of the sanctions. The EC in return sought a prohibition of carousel retaliation in the DSU review of 1998/1999.¹²

The other direction of negotiations, which was between developed and developing countries was of a different nature. The focus was on the issues of transparency and the acceptance of *amicus curiae* briefs.¹³ In relation to transparency, the US proposed to make parties’ submissions to panels and the Appellate Body public, and make the meetings of panels and the Appellate Body available for public observance. However, concerns about the effect that public pressure might have on the outcome of disputes led developing countries in particular to oppose increased transparency.¹⁴ They argued that further imbalances between developed and developing countries could be created because of the former taking advantage of open hearings, making them ‘trials by media’.¹⁵

The issue of the acceptance of *amicus curiae* briefs, which surfaced in the *US—Shrimp* dispute,¹⁶ when the Appellate Body decided that the panel had the authority to accept these briefs (an authority that was subsequently confirmed in further disputes),¹⁷ was rejected by developing countries during the course of negotiations.¹⁸ This rejection was based on the intergovernmental basis of the WTO, and the concerns over potentially increasing interference from NGOs.¹⁹ Developing countries’ rejection of the *amicus curiae* briefs issue was made clear in proposals presented

¹¹ Ibid 41–42.

¹² Ibid 42.

¹³ Ibid.

¹⁴ Ibid 42–43.

¹⁵ David Evans and C. Pereira, ‘DSU Review: A View from the Inside’, in Bruce Wilson and Rufus Yerma (eds), *Key Issues in WTO Dispute Settlement: First Ten Years* (2005) 251, 262.

¹⁶ *US—Import Prohibition of Shrimp and Shrimp Products*, WTO Doc WT/DS58 (May 1998).

¹⁷ Ibid WT/DS58/AB/R, paragraph 104; an example of these disputes is *US—Carbon Steel*.

¹⁸ Evans and Pereira, above n 15, 262.

¹⁹ Ibid.

separately by the African Group and India that would explicitly prohibit panels and the Appellate Body from accepting and considering unsolicited information and advice.²⁰

Attempts to move the DSU forward in 2000 and early 2001 proved to be unsuccessful. It was only at the Doha Ministerial Conference in that the Ministerial Declaration recommitted Members to negotiate improvements and clarifications of the DSU.²¹

5.3. The Post-Doha Negotiations

The Doha Ministerial Declaration renewed the WTO commitment to concluding a review of the DSU through further negotiations between Members. It states that ‘the negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003’.²²

5.3.1. The US and the EC Proposals

The post-Doha negotiations witnessed a change in the US stance on sequencing. After the US lost the dispute in *US-Foreign Sales Corporations*,²³ its inability to implement the ruling in a timely and WTO-consistent manner weakened the US’ negotiation position on the issue and forced it to agree with the EC on sequencing for that particular case.²⁴

However, the US developed a new proposal to strengthen flexibility and Member control in the WTO dispute settlement. The proposal, which was influenced by the series of defeats in US trade remedy disputes, called for the deletion of portions of

²⁰ Peter Bossche, ‘The Doha Development Round Negotiations on the Dispute Settlement Understanding’ (Paper presented at the WTO Conference on New Agendas in the 21st Century, Taipei, 28–29 November 2003) 22. See also, *Proposal by the African Group*, WTO Doc TN/DS/W/15 (2002) and *Proposal by India*, WTO Doc TN/DS/W/18 (2002).

²¹ Hauser and Zimmermann, above n 1, 242.

²² *The Doha Ministerial Declaration*, WTO Doc WT/MIN (01)/DEC/1 (Adopted on 14 November 2001).

²³ *US—Tax Treatment for ‘Foreign Sales Corporations’*, WTO Doc WT/DS108 (Adopted 14 March 2006).

²⁴ Zimmermann, above n 4, 43.

panel or Appellate Body reports by agreement of the parties of the dispute, and to allow for partial adoption of such reports.²⁵ The proposal also called for ‘some form of additional guidance to WTO adjudicative bodies’.²⁶ However, this proposal was received with scepticism by other Members, especially developing countries, as they argued that deleting parts of panel or Appellate Body reports would weaken the adjudicative nature of the WTO bodies, and would increase political control over the dispute settlement process, which would ultimately benefit the interests of powerful developed countries.²⁷

A proposal came from the EC calling for the establishment of a permanent panel body to replace the current procedure of appointing panellists on an *ad hoc* basis, where they practice their tasks on a part-time basis and in addition to their ordinary duties.²⁸ The aim behind this proposal was the EC’s hope that establishing a permanent panel body would lead to a professionalisation of the panel process, and help overcome problems with the selection of panellists.²⁹ However, this proposal was opposed by the argument that a permanent panel body could be more ‘ideological’ and might engage in law making. Further, the current procedure, which relies heavily on government officials who are familiar with the constraints faced by governments, seemed to be satisfactory to most countries.³⁰

The EC also submitted a proposal for a remand mechanism under which any party could request within 10 days after the adoption of the Appellate Body Report the DSB to remand to the original panel those issues on which the Appellate Body could not rule.³¹ The remand issue arose from the fact that the Appellate Body could only address issues of law, not issues of fact. This situation made the Appellate Body unable in some cases to complete the legal analysis in relation to a particular issue as a result of insufficient factual findings by the panel, or uncontested facts on the panel record, which leaves starting an entirely new case, including consultations and a full

²⁵ Hauser and Zimmermann, above n 1, 242.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Evans and Pereira, above n 15, 259.

²⁹ Ibid.

³⁰ Hauser and Zimmermann, above n 1, 242.

³¹ *Communication from the European Communities*, WTO Doc TN/DS/W/38 (2003).

panel and appellate process, as the only option currently available to deal with such an issue.³² The US and the EC were not the only active participants in these negotiations, developing country Members presented a number of proposals that covered a range of issues, which are discussed below.

5.3.2. Developing Countries' Proposals

Developing countries' proposals covered a variety of grounds and different orientations. Some of these proposals suggested changes in the consultation stage. The LDC Group's proposal suggested the possibility of holding consultations in the capital of the least-developed country Member, rather than Geneva, in disputes involving least-developed country Members.³³ Further, Jamaica, Costa Rica and Chinese Taipei all submitted proposals to facilitate the ability of Members to join consultations between other Members.³⁴ In addition, the African Group proposed the introduction of a requirement to notify measures withdrawn in the course of consultation and to compensate the injury caused by such measures.³⁵

In relation to the panel and the Appellate Body stages, Costa Rica and the African Group proposed a significant extension of the rights of third parties in panel proceedings.³⁶ In addition, Mexico proposed an interim relief procedure in case the concerned measure in a dispute is causing or threatening to cause harm that would be difficult to repair.³⁷ Other proposals, such as the African Group Proposal, sought the introduction of more political elements into the system, and relaxing the strictness of law as a means to address their development circumstances.³⁸ In addition, Chile and the US jointly proposed to introduce interim review in the appellate review proceedings.³⁹

³² Evans and Pereira, above n 15, 260.

³³ Bossche, 'Doha Development', above n 20, 19.

³⁴ *Communication from Jamaica*, WTO Doc TN/DS/W/21 (2002); *Communication from the Separate Customs Territory of Taiwan, Penghu, Kimmen and Mastu*, WTO Doc TN/DS/W/25 (2002); *Communication from Costa Rica*, WTO Doc TN/DS/W/12 (2002).

³⁵ *Proposal by the African Group*, above n 20.

³⁶ *Communication from Costa Rica*, above n 34; *Proposal by the African Group*, above n 20.

³⁷ *Proposal by Mexico*, WTO Doc TN/DS/W/23 (2002).

³⁸ Zimmermann, above n 4, 47.

³⁹ *Textual Contribution by Chile and the United States*, WTO Doc TN/DS/W/52, (2003).

In relation to the implementation stage, some proposals sought to strengthen enforcement and the role of law in the current system to address some enforcement problems that developing countries have been dealing with, such as the current retaliation and the prospective remedies systems.⁴⁰ In this context, the problems caused by the lack of retaliatory power of many developing countries, such as those experienced by Ecuador in *EC-Bananas*, prompted a proposal submitted by the African Group to introduce collective retaliation,⁴¹ where all WTO Members would be authorised to suspend concessions against a non-complying Member.⁴² The African Group also called for the introduction of monetary compensation, which is to be paid continually until the withdrawal of the violating measures.⁴³ Other developing countries' proposals were for the retroactive calculation of the level of nullification and impairment,⁴⁴ for allowing Members to transfer the right to suspend concessions or other obligations to other Members,⁴⁵ for introducing a fast-track panel procedure,⁴⁶ and for calculating increased levels of nullification or impairment⁴⁷

In addition, other proposals were submitted with a clear intention of facilitating the use of the dispute settlement system by developing country Members, such as the proposal by China to make it possible for panels and the Appellate Body to award, upon request, an amount for litigation costs, and to introduce quantitative limitation on the number of complaints per year that countries could bring against a particular developing country.⁴⁸ Further, there was the proposal by the African Group to establish a 'WTO Fund on Dispute Settlement' to facilitate the effective utilisation of the WTO dispute settlement system by developing and least-developed country Members.

⁴⁰ Zimmermann, above n 4, 47.

⁴¹ *Proposal by the African Group*, above n 20.

⁴² Zimmermann, above n 4, 47.

⁴³ *Ibid.*

⁴⁴ *Proposal by Mexico*, above n 36.

⁴⁵ *Ibid.*

⁴⁶ *Proposal by Brazil*, WTO Doc TN/DS/W/45 (2003).

⁴⁷ *Proposal by Ecuador*, WTO Docs TN/DS/W/9 (2002) and TN/DS/W/33 (2003).

⁴⁸ *Proposal by China*, WTO Docs TN/DS/W/29 (2003) and TN/DS/W/57 (2003).

5.3.3. The Failure to Conclude a DSU Review

By the deadline of the negotiations at the end of May 2003, 42 specific proposals were submitted by Members, covering virtually all provisions of the DSU.⁴⁹ Many of these proposals were incorporated into the ‘Chairman’s text’ of 28 May 2003, which was named after the Chairman of negotiations Peter Balas and was meant to serve as a basis for an agreement.⁵⁰ However, the Balas text did not include many proposals on controversial issues due to the absence of a sufficiently high level of support.⁵¹ These proposals covered issues on accelerated procedures for certain disputes; improved panel selection procedures; increased control by Members on the panel and the Appellate Body reports; clarification of the treatment of *amicus curiae* briefs; and modified procedures for retaliation, including collective retaliation or enhanced surveillance of retaliation.⁵² By contrast, the text contained proposals that cover less controversial issues, such as enhancing third party rights; introducing an interim review at the appeal stage; clarifying and improving the sequence of procedures at the implementation stage, enhancing notification requirements for mutually agreed solutions; and strengthening special and differential treatment for developing countries at various stages of the proceedings.⁵³

Despite the integration of issues into the Balas text, some Members felt that there were serious omissions in it, and preferred to continue negotiations to address the missing issues.⁵⁴ The deadline for the completion of negotiations that had been set for the end of May 2003 was finally missed, and Members agreed to extend the deadline for the review until the end of May 2004.⁵⁵ However, the failure of the Cancun Ministerial Conference in September 2003 affected the momentum of the overall negotiations under the Doha mandate, which also affected DSU review negotiations.⁵⁶ The May 2004 deadline was missed again, which led to another extension by the

⁴⁹ Hauser and Zimmermann, above n 1, 242.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² *The DSB, Special Session, Report by the Chairman, Peter Balas, to the Trade Negotiations Committee*, TN/DS/9.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Zimmermann, above n 4, 48.

⁵⁶ Ibid.

General Council in the context of the ‘July Package’ on 1 August 2004 without setting a new deadline.⁵⁷ The negotiations are still ongoing.

There are many explanations used to justify the failure to conclude the DSU review despite the fact that it started more than ten years ago and was reinforced by the Doha Agenda. However, there appears to be five main factors that have contributed to creating obstacles for the review.

The first factor is the consensus requirement.⁵⁸ The fact that there currently 153 Members of the WTO with different interests and a variety of volume and value of international trade makes the consensus requirement a high hurdle for any change to the DSU. This problem has even a greater impact in the context of the current DSU review, where negotiators are trying to reap an early harvest outside the larger context of the Doha negotiations and thus within a narrow area of negotiations.⁵⁹

Secondly, Members’ experience with the system, along with a number of key decisions of the adjudicative bodies, has created solid views on specific aspects of the system that have become increasingly difficult to change.⁶⁰ These views touch on issues such as transparency, *amicus curiae* briefs, carousel retaliation and collective retaliation, which happen to be some of the more contentious issues that are currently under negotiations.⁶¹

Thirdly, proposals that have been submitted so far reveal controversy surrounding the overall direction of the DSU. While some Members indicated in their proposals their preference of continuing adjudication and rule-orientation in the system, others showed interest in relaxing the system to be more negotiatory and diplomatic.⁶² These two different ideologies lie at the heart of differences between the two groups and

⁵⁷ Ibid.

⁵⁸ Ibid 49.

⁵⁹ Ibid.

⁶⁰ Garcia Bercero and P. Garzotti, ‘DSU Reform: What are the Understanding Issues?’ in Dencho Georgiev and Kim Borghet (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 123, 128; Zimmermann, above n 4, 49.

⁶¹ Ibid.

⁶² Ibid.

make the review more difficult especially in the presence of the consensus requirement for any changes to pass.

Fourthly, the WTO dispute settlement system is constantly in use. This means that negotiating positions are subject to a continuous change as Members gather experience as a result of new cases and reports.⁶³ This fluctuation in Members' negotiating positions could have a huge impact on any progress of negotiations achieved on a particular issue, which could lead any disagreement on the issue concerned to an agreement and then disagreement again, depending upon the changing circumstances and experiences of the negotiating Members.

Finally, despite the criticism of some problematic issues that affect the DSU, there seems to be a general sense of satisfaction with the system, which seems to be a good enough reason for many Members not to rush changes.⁶⁴

5.4. Critical Analysis of Some Proposed Reforms of Particular Interest for Developing Countries

There is no doubt that when it comes to addressing the issues presented in developing countries' proposals on DSU reforms, dispute settlement remedies generally stand out as the most problematic issue affecting developing countries' participation.⁶⁵ WTO remedies do not seem to be designed to be useful to developing countries, especially the weaker economies.⁶⁶ It is still debatable as to whether the objective of WTO remedies should be to achieve compliance or to restore imbalanced trade

⁶³ Ibid.

⁶⁴ Bercero and Garzotti, above n 60, 129; Zimmermann, above n 4, 49.

⁶⁵ Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' in Victor Mosoti (ed), 'Towards a Development-supportive Dispute Settlement System in the WTO' (Resource Paper No 5, International Centre for Trade and Sustainable Development, March 2003) 37; William Davey, 'Evaluating WTO Dispute Settlement: What Results Have Been Achieved through Consultations and Implementation of Panel Reports' (Research Paper No 05-19, Illinois Public Law and Legal Theory Research Papers Series, 30 November 2005) 29.

⁶⁶ Joel Trachtman, 'The WTO Cathedral' (2007) 43 *Stanford Journal of International Law* 127, 161.

concessions.⁶⁷ It could be argued that the WTO adopted a change paradigm from rebalancing to trade sanction when it succeeded the GATT, which supports the idea of having the achievement of compliance as the purpose of WTO remedies.⁶⁸ Conversely, the political reality at the WTO reflects a desire among Members not only to have a set of legal rules but also to maintain the balance of negotiated concessions, which supports the notion of providing WTO remedies as a tool to restore such balance.⁶⁹ Non-violation and situation complaints that focus on the balance of negotiated concessions rather than inconsistent measures are a clear indication of the rebalancing role of WTO remedies.⁷⁰ Nonetheless, whether the purpose of WTO remedies is inducing compliance or a rebalancing of concessions, it is doubtful that they have succeeded in achieving either purpose when developing countries are concerned, as will be discussed later on in this chapter.

Introducing reforms to the DSU, in general, and its remedies, in particular, could be countered by the argument that the DSU and its remedies have performed reasonably well in providing security and predictability to WTO Members and their individual traders.⁷¹ A focus on assisting developing countries in enforcing their rights through the dispute settlement system by introducing more appropriate remedies for their participation might also have considerable risks to the system. The WTO dispute settlement system is already uniquely strong in an international law context.⁷² Therefore, arguments to introduce stronger remedies or greater quasi-judicial powers are ignoring that the system is pushing the limits already for an international organisation, which makes the concept of reaching an agreement between all WTO Members on such reforms less likely to be achievable.⁷³ The argument against reforming the DSU remedies also suggests that remedies are only part of the factors

⁶⁷ Pei-Kan Yang, 'Some Thoughts on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in the WTO Dispute Settlement' (2008) 3 *Asian Journal of WTO and International Health Law and Policy* 423, 438–439.

⁶⁸ Ibid 439.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Chi Carmody, 'Remedies and Conformity under the WTO Agreement' (2002) *Journal of International Economic Law* 307, 309.

⁷² Sanjiva De Silva, 'Overcoming Limits of Law, Money and Politics—Finding a Voice for Small and Vulnerable Economies in the WTO Dispute Settlement Mechanism through Third Party Participation' (Conference Paper Presented at the Australian and New Zealand Society of International Law, 27 June 2009) 2.

⁷³ Ibid.

that affect compliance and conformity with WTO obligations, as factors, such as sovereignty and conflicting interests, play a role in the decision of conformity.⁷⁴ Hence, these considerations reflect a need to appreciate DSU remedies in their current context.⁷⁵

However, this argument ignores the concept of legitimacy of an international organisation like the WTO, which is closely related to its Membership. The structure, objectives, and progress of international organisations are generally determined by Members' attitudes towards an international organisation.⁷⁶ Such attitudes might even influence the continuity of such organisation, as was the case with the ITO failure. This is similar in the WTO context, where the satisfaction of its Members could be a main factor that influences its legitimacy within itself or before the public.⁷⁷ To be branded as an organisation that is biased in favour of its more powerful developed countries against the weaker developing countries would hardly serve both satisfaction and legitimacy. The argument that the dispute settlement system is currently at the maximum level of enforceability for an international quasi-judicial system, and that any more pressure on the system could reach a breaking point, where the risk of abandoning the system altogether could become a potential threat, could actually be countered by the same logic. Continuing and increasing levels of dissatisfaction among a specific group of Members as a result of ongoing oversight of some substantial issues that affect their interests in the system, could reach a similar breaking point, and a similar abandonment of the system. In addition, the strength of the current dispute settlement system, which places it in a unique position as an international system, was never thought to be achievable in the past. Therefore, there is always room to push more boundaries, and considerable outcomes could be reached through multilateral negotiations.

The next section adds on previous discussion in Chapter 3 on DSU remedies to provide further understanding on the need for their reform, and builds on arguments against the current remedies of the DSU, trade retaliation and trade compensation.

⁷⁴ Carmody, above n 71, 309.

⁷⁵ Ibid.

⁷⁶ J Bacchus, 'A Few Thoughts on Legitimacy, Democracy and the WTO' (2004) 7 *Journal of International Economic Law* 667, 669.

⁷⁷ Ibid.

The following section then turns to issues of possible reform to enhance developing countries' participation through the availability of these improved remedies.

5.4.1. Trade Retaliation

One of the main criticisms of the current system of trade retaliation is the economic inefficiency for both the retaliating country and the target of such a remedy.⁷⁸ Other than the fact that the violating country faces higher tariff rates as a result of the suspension of concessions by the retaliating country, which puts pressure on the exporters concerned, customers in the retaliating country—the importing country—would have to deal with the higher cost or even inaccessibility of the products subject to retaliation or with less efficient and probably more expensive substitute products from other exporting countries.⁷⁹ The counter-productivity of trade retaliation is particularly troublesome for developing country Members.⁸⁰ Small developing countries are more likely to be dependent upon one large developed country for a significant percentage of their total trade of both consumer goods and necessary imports.⁸¹ The implementation of trade retaliation cuts off the already limited developing countries' markets from access to foreign goods or limits their accessibility with the additional costs resulting from the retaliatory suspension of concessions, all to the detriment of developing countries' consumers.⁸²

Trade retaliation also amounts to trade contraction, which makes it incongruous to the aims and objectives of the WTO.⁸³ The WTO trading system is based on promoting growth, development and poverty reduction through the expansion of liberalised trade, which makes the introduction of retaliation as a tool of imposing higher trade

⁷⁸ Bryan Mercurio, 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding' (2009) 8(2) *World Trade Review* 315, 318.

⁷⁹ Ibid; see also, Marco Bronckers and Naboth Broek, 'Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement' in Dencho Georgiev and Kim Borghet (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 43, 45.

⁸⁰ Bronckers and Broek, above n 79, 45.

⁸¹ Mercurio, above n 78, 318.

⁸² Bronckers and Broek, above n 79, 46.

⁸³ Ibid 45; also, Mercurio, above n 78, 319.

barriers and reducing trade between the parties concerned, contrary to the very trade liberalising principles for which the WTO system stands.⁸⁴

Another criticism often made against trade retaliation is that it offers no relief to those actually damaged, but instead damages the innocent.⁸⁵ In other terms, the imposition of retaliatory measures does not necessarily offer any benefits to the industry negatively affected by the violating measures, and, in most instances, it is another sector that bears no relationship to the industry subject to the dispute that suffers from the retaliatory action.⁸⁶ This is clear in disputes, such as *EC—Hormones*,⁸⁷ when the US retaliated on confectionaries, flowers, vegetables, etc., as a result of a ban on hormone-treated beef from the US, which forced the EC producers of these retaliated against sectors to bear the cost of higher tariffs, while other sectors benefitted from the ban. The same situation is evident in *EC—Bananas*,⁸⁸ when the US retaliated against the EC decision to discriminate in favour of certain banana growing countries to the detriment of the US industry, by imposing retaliatory measures against sweet biscuits and cheese from the EC.

This issue could even have greater impact on small developing countries. Small markets and limited international trade means that the violating measures could target one of the only competitive industries in the country, resulting in major losses to trade of the developing country concerned and great pressure on its economy, while the retaliatory measures could offer benefits to other industries that are not as competitive or economically sensitive as the one facing violating restrictions.⁸⁹ In fact, when developing countries are concerned, the option of trade retaliation as a tool of inducing compliance is not structured to be utilised efficiently in the first place. As discussed above, the negative effect that retaliation imposes on developing countries is greater than that on developed countries, which makes any threat of retaliation by developing countries against their developed counterparts lack credibility.⁹⁰ This lack

⁸⁴ Ibid.

⁸⁵ Bronckers and Broek, above n 79, 45.

⁸⁶ Eleso Adelbukola, 'WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries' (Working Paper No 1378, Bepress Legal Series, 18 May 2006) 15.

⁸⁷ *EC—Measures Concerning Meat and Meat Products (Hormones)*, above n 6.

⁸⁸ *EC—Regime for the Importation, Sale and Distribution of Banana*, above n 7.

⁸⁹ Mercurio, above n 78, 320.

⁹⁰ Rafiqul Islam, *International Trade Law of the WTO* (2006) 449.

of credibility restricts the role of trade retaliation as a compliance-inducing tool, and gives the offending country no reason to withdraw its violating measures.⁹¹ Even if the developing country decides to retaliate, along with the negative consequences discussed above that would affect its economy, the small market and limited international trade share make it unlikely that trade retaliation would create retaliatory pressure on the non-complying WTO Member, especially when the violator is a developed country with a large market and considerable share in international trade, and simply has minimal trading relations with the developing country concerned.⁹² This situation was recognised by the Arbitrator's ruling on Ecuador's request for retaliation in *EC—Bananas*, when it was stated that:

Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorised by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined.⁹³

This ruling affirms the unsuitability of the current retaliation procedure, and the need of developing country Members for new forms of remedies that acknowledge their limitations in the system.

5.4.2. Trade Compensation

Trade compensation involves increased concessions and market access to the complainant, which are offered by the non-complying Member temporarily when implementation is not achieved during the reasonable period.

This remedy might have an advantage over the option of trade retaliation in that it increases liberalisation and economic welfare in the complaining country, as it offers lower tariff rates on certain imported products, which reflects on lower prices and greater access to consumers in the importing retaliating country.⁹⁴ In relation to the

⁹¹ Ibid.

⁹² Jacques Bourgeois, 'Sanctions and Countermeasures: Do the Remedies Make Sense?' in Dencho Georgiev and Kim Borghet (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 41; Adebukola, above n 86, 15; also, Bronckers and Broek, above n 79, 46.

⁹³ *EC—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the EC under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, paragraph 177.

⁹⁴ Mercurio, above n 78, 324.

violating country, the increased concessions might result in lost revenue that would normally be generated by existing tariffs, but increasing the concessions would more likely result in more active trade to the benefit of its exporters concerned.⁹⁵ This advantage of increased trade liberalisation and economic welfare would also affect other WTO Members because trade compensation must be offered in accordance with the Most Favoured Nation (MFN) principle to all WTO Members.⁹⁶

Trade compensation could also provide an element of equity to developing countries as a more practical and beneficial option to retaliation.⁹⁷ As discussed above, trade retaliation would have greater negative impact on developing countries' economies and consumers, while trade compensation might offer them more liberalised trade of less cost to the benefit of their importers and consumers.⁹⁸ Offering trade compensation to developing countries could also provide an attractive alternative, especially as they lack sufficient retaliation power against their larger counterparts.⁹⁹

However, trade compensation is a theoretical remedy, which means that its voluntary legal status leaves it subject to the willingness of the violating country to offer to the winner, and an agreement between these parties on the scope and implementation of such an arrangement.¹⁰⁰ Reaching an agreement could prove difficult in the sense of finding products on which compensation can be offered and that are of interest for the complainant. In this regard, the compensation agreement could result in political ramifications if the compensation provided was not of interest to the affected industry, especially when it holds sufficient economic and political weight to pressure its government, which makes the compensation deal difficult to sustain.¹⁰¹

The voluntary nature of trade compensation could also mean that the losing party that refused to remove the inconsistent measure would further refuse to offer acceptable terms of compensation or the arrangement altogether, which is particularly

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Bercero and Garzotti, above n 60, 144.

⁹⁸ Bronckers and Broek, above n 79, 45.

⁹⁹ Bercero and Garzotti, above n 60, 144.

¹⁰⁰ Bronckers and Boek above n 79, 45; also, Adebukola, above n 86, 13.

¹⁰¹ Bercero and Garzotti, above n 60, 143.

detrimental to developing country Members that have limited ability in utilising effective retaliation.¹⁰² Trade compensation could also be an expensive option.¹⁰³ Article 22 of the DSU requires the compensation agreement to comply with the covered agreements, which include the MFN rule. Under this rule, compensatory increases in concessions must be offered to all WTO Members.¹⁰⁴ This would be a costly arrangement to the violating country offering compensation that deprives it from the high revenues that would have been generated from the usual tariff rate.¹⁰⁵ It would also bear a sense of unfairness on the country affected by the violating measure, as its efforts to initiate a dispute and secure a positive ruling by the DSB and a favourable compensatory treatment by the violating country are wasted when ultimately all WTO Members are able to share the same compensatory favourable treatment with it.¹⁰⁶

These factors contribute to the fact that trade retaliation has been the preferred remedy over trade compensation despite the harmful impact on the economic welfare of all parties concerned.¹⁰⁷ Other than the idea of sharing the benefits of increased trade concessions with other country Members, which could end up benefiting the exporters of these countries more than the ones in the country granted compensatory measures if they were more efficient exporters, trade compensation, unlike trade retaliation, fails to offer control to the complaining country.¹⁰⁸ Under trade retaliation, the complainant retains control over both the level of the suspension of concessions as well as the targeted products, while trade compensation hands over control to the violating country, which can unilaterally end the trade compensation if it believes that it has complied with the ruling of the DSB or decides not to offer compensation any longer.¹⁰⁹

¹⁰² Adebukola, above n 86, 13.

¹⁰³ Bercero and Garzotti, above n 60, 143.

¹⁰⁴ Steve Charnovitz, 'Rethinking WTO Trade Sanctions', in Petros Mavroidis and Alan Skyes (eds), *The WTO and International Trade Law/Dispute Settlement* (2005) 247, 286.

¹⁰⁵ Bercero and Garzotti, above n 60, 143; also, Adebukola, above n 86, 13.

¹⁰⁶ Adebukola, above n 86, 13.

¹⁰⁷ Mercurio, above n 78, 325.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

5.4.3. Possible Reforms of the Current DSU Remedies from a Developing Country Perspective

As discussed earlier, there has been a large number of proposals that have addressed numerous issues in the DSU and areas of reform. The DSU remedies have been the focus of many developing countries' proposals as a problematic issue in need of change. The next section analyses some of the more publicised and discussed concepts that have been addressed in some of these proposals. They could be considered controversial, unpractical or difficult to promote for the approval of all WTO Members, but they are also appealing to many developing countries, as they represent possible solutions to their problems under the current system. Therefore, it is worthwhile to address issues that include collective retaliation, punitive retaliation, mandatory trade compensation, monetary compensation, retroactive remedies, and the special treatment of developing countries.

5.4.3.1. *Collective Retaliation*

The idea of collective retaliation is based on the argument that the current retaliation system is impractical for smaller developing countries.¹¹⁰ Retaliation, or a threat of retaliation, by developing countries, which are more likely to have small and less diversified markets, would not represent a noticeable impact on developed countries' large markets, while it is almost guaranteed to have a huge impact if practiced by a developed country against a developing one.¹¹¹ Trade retaliation under these circumstances leaves developing countries with a moral victory in the dispute but a useless remedy to enforce it.

The introduction of collective retaliation, as a special treatment rule for developing countries or as a general rule in the system to replace the current procedure, would authorise all or a number of Member countries to deny market access to the violating

¹¹⁰ Robert Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (2000) 392.

¹¹¹ Rafiqul Islam, *International Trade Law of the WTO* (2006), 449.

country.¹¹² This form of retaliation would see the amount of authorised retaliation divided among the participating Members according to the size of their markets. Even though the amount of collective retaliation would be equivalent to the amount otherwise authorised to the retaliation-seeking country, the strong sense of condemnation coming from collective retaliation would present a pressuring device to enforce compliance. Collective retaliation would put developing countries in a better position to use retaliation, or the threat of it, against larger developed countries, knowing that one would not be bearing the full burden. In this context, collective retaliation would also limit the negative impact on developing countries' economies that is normally carried along with retaliation, as there would be other countries to share the economic loss resulting from retaliation on the retaliating country.

Collective retaliation would also serve to ease the political tension that is more likely to accompany retaliation. It is no secret that most developing countries worry about the economic and political consequences resulting from any retaliatory action they take against developed countries, considering the various preferential trade agreements and economic aid arrangements that govern their relations. Hence, employing collective retaliation would create a feeling similar to community support, which would increase the isolation of the violating country and make it more hesitant in using counter-retaliatory actions against developing countries.

However, there is a concern that collective retaliation might result in a negative impact on the legitimacy of the WTO dispute settlement system.¹¹³ This concern comes from the idea that trade retaliation should only be used as a last resort when all other compliance-inducing measures are exhausted, considering the negative impact trade retaliation imposes on the economic welfare of all parties concerned.¹¹⁴ Therefore, it would not be appropriate to expand the scope of trade retaliation to include all WTO Members, as it would result in greater scale trade restrictions that threaten the trade liberalisation principles for which the WTO trading system stands.¹¹⁵ Another form of limited collective retaliation might be more appropriate

¹¹² Hudec, 'Broadening the Scope of Remedies', above n 110, 393.

¹¹³ Bercero and Garzotti, above n 60, 144.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

under this argument, where a WTO Member negatively affected by an illegal measure, but not party to the original dispute, would be allowed a direct recourse to arbitration on the level of retaliation, provided that a request for authorisation of retaliation has been made by the original complaining Member.¹¹⁶ The logic behind this option is allowing Members affected by the violating measure to be part of the authorised retaliation without the waste of dispute settlement resources resulting from the current procedure of requiring the initiation of a new panel to rule against the already condemned measure.¹¹⁷ Further, this form of limited collective retaliation would partially offer the compliance-inducing pressure resulting from collective retaliation's multiple retaliating Members, and would limit the negative effect a full scale collective retaliation would have on trade liberalisation of the WTO trading system.

Allowing affected Members to join arbitration on the level of retaliation without a determination from a panel on the existence of nullification or impairment on their trade seems, however, contradictory to the legitimacy argument mentioned earlier. Nullification or impairment is not 'one size fits all'. Even though a panel could find that a certain measure violated WTO law and caused nullification or impairment to the original complainant, it does not mean that a similar link could be established between such a measure and damages caused to other country Members. Assuming such link based on the illegality ruled by the panel in relation to one country is a clear example of undermining the legitimacy of the WTO dispute settlement system. Under a legitimate and sound dispute settlement system, any requests of retaliation should be based on a panel ruling establishing the illegality of the measure and linking it to the nullification or impairment of a certain country.

In addition, such form of restricted collective retaliation could potentially involve a large number of Members, which contradicts the argument that it would have much less negative economic impact on the trading system than the traditional form of collective retaliation. Conversely, collective retaliation would not rely on the variable pressuring effect that would depend on the number of retaliating country Members

¹¹⁶ Ibid.

¹¹⁷ Ibid.

claiming to be affected by the measure. It would always have the pressure generated by all WTO Members, which would have better chances of inducing compliance that would in turn lead to shortening the period of retaliation and decreasing the negative effects that would otherwise last longer under ineffective retaliation.

The application of collective retaliation raises the notion of punitivity under which the level of retaliation authorised for violating measures would be higher than the equivalence of nullification or impairment and shared by all WTO Members. Introducing punitive collective retaliation would improve the enforcement of the implementation process, as it would put more pressure on the offending country not to transform retaliation into a long-term solution by making the offending country's losses greater than gains from applying the violating measure.¹¹⁸ This approach would be of particular interest for developing countries, as the idea that their retaliation would be shared by other Members that impose greater retaliatory measures than otherwise authorised under the equivalence principle, would add more power to their threat of retaliation, which is otherwise diminished by the limitation of the market size and economic power.¹¹⁹

Nonetheless, it could be argued that the ultimate purpose of retaliation is the right to maintain the balance of reciprocity in WTO obligations.¹²⁰ Such balance requires that the retaliatory withdrawal of obligations in response to the violating measure is to be equal to the amount of the benefits lost.¹²¹ This justification is reasonable, considering that the maintenance of the balance of benefits and obligations of the system is the reason behind establishing the dispute settlement process in the first place. When the compliance-inducing effect is concerned, collective retaliation that is equivalent in value to the determined nullification or impairment resulting from the violating measure would be more likely to have the required impact to achieve compliance. The collective action, which also serves as a joint condemnation, would be likely to put the needed pressure on the offending country to comply, while not placing the

¹¹⁸ Hudec, 'Broadening the Scope of Remedies', above n 110, 391.

¹¹⁹ Ibid.

¹²⁰ Robert Hudec, 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective', in Bernard Hoekman, A Mattoo and P English (eds), *Development, Trade and the WTO: A Handbook* (2002) 86.

¹²¹ Ibid.

complainant under the burden of retaliation, which would be vital for developing countries in their decision to utilise the retaliation remedy.

5.4.3.2. Mandatory Trade Compensation

The idea behind mandatory compensation is that the complaining Member that has prevailed in a dispute and is faced with non-compliance could indicate the sectors in which the non-complying Member should offer compensation for as long as it does not comply with the DSB ruling.¹²² Under this idea, the DSB would choose the sector in which the non-complying Member should offer compensation, or decide from a pre-established list of sectors that Members nominate to be subject of trade compensation if they fail to comply with a DSB ruling in future disputes.¹²³

Mandatory trade compensation would represent itself as a real alternative to trade retaliation, as it would not be controlled by the non-complying Member's willingness to offer it.¹²⁴ This situation means that Members would have a greater chance in utilising a remedy that encourages more trade liberalisation rather than trade contraction under retaliation, which would be of particular importance for developing countries, considering their need for such incentives into their economies and their lack of resources to initiate and maintain effective retaliation.¹²⁵

However, it could be argued that the enforceability of mandatory compensation could challenge the introduction of such a remedy.¹²⁶ The fact that tariff schedules and all other commitments are a result of much consultation with business and careful balancing of all competing interests, and that trade compensation, by its very nature, is generally likely to harm innocent industries in the non-compliant Member, casts doubt over the political suitability of such a remedy.¹²⁷ The considerations of economic welfare and sovereignty aspects make it doubtful that a WTO Member

¹²² Bronckers and Broek, above n 79, 50.

¹²³ Mercurio, above n 78, 325.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid 326.

¹²⁷ Ibid

would accept that any part of its trade regime could be changed unilaterally, if only temporarily, by another WTO Member.¹²⁸

In addition, when introducing mandatory compensation, there is always the risk that the Member not complying with the obligation of applying the DSB ruling does not comply with the obligation of offering trade compensation either, especially when pressured by domestic industries that are set to suffer from such procedure.¹²⁹ Therefore, the introduction of mandatory trade compensation would still depend upon the good faith compliance of the Member concerned, which means that in the absence of an effective enforcement mechanism, the obligation to offer trade compensation would hardly change the voluntary nature of compensation as a procedure controlled and offered by the offending country Member.¹³⁰

The introduction of mandatory trade compensation under which the DSB, through panel and Appellate Body reports, recommends compensatory sectors would fundamentally alter the adjudicative nature of WTO tribunals.¹³¹ The practice of panels and the Appellate Body has been limited to adjudication on the consistency of the measures concerned. Mandatory trade compensation would require panels and the Appellate Body to exceed the limits of their adjudication to prescribe remedies, which might again be viewed by Members concerned as an intrusion into their trade policy determinations.¹³² Such intrusion might transform into a sovereignty issue that affects attitudes towards the DSU concerning its legitimacy.¹³³

The introduction of mandatory compensation means that the main shortcomings of the current voluntary system would continue and intensify because of the mandatory requirement.¹³⁴ Mandatory trade compensation would continue the failure of the current procedure to offer any guarantees of relief to the aggrieved industry or reduce

¹²⁸ Bronckers and Broek, above n 79, 50.

¹²⁹ Ibid.

¹³⁰ Mercurio, above n 78, 326.

¹³¹ Ibid.

¹³² Ibid 326–327.

¹³³ Ibid.

¹³⁴ Ibid 327.

the possibility of harming innocent sectors in the exporting non-complying Member.¹³⁵

The mandatory requirement would consolidate the benefits of trade compensation of encouraging more trade liberalisation that is consistent with the aims and objectives of the WTO multilateral trading system, which would be a desired alternative to trade restrictions and negative impact on economic welfare that characterise trade retaliation. However, the considerations discussed above make the idea of introducing mandatory trade compensation unpersuasive, as it fails to improve significantly upon trade retaliation, considering that it does not represent a great change in the current settings of the voluntary trade compensation. Control over the power of offering such compensation would be retained by the non-complying Member, whether it was in response to an obligation or to a voluntary option. The ineffectiveness of trade compensation, whether voluntary or mandatory, raises the issue of monetary compensation as an alternative solution.

5.4.3.3. Monetary Compensation

Monetary compensation requires the non-complying Member to provide financial benefit either to the complaining Member's government or to one or more of its industries or sectors.¹³⁶ It shares the traditional form of trade compensation of not being trade restrictive, as it does not disturb trade balance through additional concessions or suspension of equivalent concessions, but merely involves paying a sum of money and normal trading activities continue.¹³⁷ It is true that the continuing violation is a disruption itself to the balance of trade, but monetary compensation restricts such disruption by not adding new ones, and this particular disruption remains whichever remedy is applied until the removal of the violating measure.¹³⁸

¹³⁵ Ibid.

¹³⁶ Ibid 329.

¹³⁷ Ibid; also, Adebukola, above n 86, 40; Bronckers and Broek, above n 79, 53.

¹³⁸ Adebukola, above n 86, 40.

Monetary compensation can also be described as ‘fair’, as it exercises an appropriate apportioning of benefits and burden.¹³⁹ Unlike the current remedies of trade retaliation and trade compensation, monetary compensation increases the chances of providing relief to the aggrieved sector while diminishing the possibility of hurting innocent parties.¹⁴⁰ In other words, there is no situation of a sector deriving the benefits when it does not have anything to do with the violation in the first place as per the current system of trade compensation; or a sector that is not the subject of the dispute bearing the burden as in the current form of trade retaliation.¹⁴¹ Under monetary compensation, it is the burden of the violating Member’s government to provide such compensation to be distributed by the complaining Member’s government to the affected industries or appropriately related interests.¹⁴²

The introduction of monetary compensation is likely to have a compliance-inducing effect, as the prospect of facing a substantial amount of money continuously payable until the violation is removed might force the non-complying Member to remove the measure concerned to avoid further payments that it might not be able to afford or could not pay for political reasons.¹⁴³

Finally, such form of compensation would likely be an attractive alternative for developing countries that lack the resources and power to effectively retaliate against larger Members, and need more than others for relief from the negative impact the violating measure is causing to their economic welfare.¹⁴⁴ In fact, the entire idea of monetary compensation is to provide an alternative for developing countries to make better and more effective use of the dispute settlement system, especially when they have cited the inadequacy of remedies as one of the factors contributing to their lack of participation.¹⁴⁵

¹³⁹ Ibid; also, Mercurio, above n 78, 329; Bronckers and Broek, above n 79, 53–54.

¹⁴⁰ Ibid.

¹⁴¹ Adebukola, above n 86, 40.

¹⁴² Ibid; also, Mercurio, above n 78, 329.

¹⁴³ Ibid.

¹⁴⁴ Adebukola, above n 86, 18; also, Mercurio, above n 78, 329.

¹⁴⁵ Adebukola, above n 86, 39.

However, the idea of introducing monetary compensation is not free from potential problems. There are concerns relating to the practicality of such a measure and the modalities of its application.¹⁴⁶ One of these concerns is enforceability. Similar to the idea of mandatory compensation, monetary compensation would rely upon the willingness of the non-complying Member's government to provide such compensation.¹⁴⁷ Whether it would be a mandatory measure or voluntary, the violating Member would retain control over the measure, leaving the complaining Member, in case the violator refuses to provide it, with no alternative but going back to trade retaliation where it has the advantage of holding control over the process.¹⁴⁸ The WTO dispute settlement system does not have a compliance-inducing mechanism, which is the reason retaliation is the preferred remedy over compensation in the first place.¹⁴⁹ Therefore, it could be argued that mandatory compensation would unlikely be a practical alternative in the absence of an additional enforcement mechanism that is not dependent upon the cooperation of the non-complying Member.¹⁵⁰

To add a form of security, a system could be established where each Member posts a bond of a given amount as part of its Membership commitments.¹⁵¹ These bonds would be managed by an account outside the control of Members, and would be calculated in a similar manner as the one followed for Membership contributions, which would be determined according to each Member's share of international trade.¹⁵² In case the system of monetary compensation is set as a special treatment alternative for a group of beneficiaries, such as developing countries, such a group would not be required to post such bonds.¹⁵³ If the amount determined as monetary compensation exceeds the amount placed as a bond, the amount outstanding could be added to the contribution of the Member concerned.¹⁵⁴ After all, in case this suggestion is viewed as impractical, it is reasonable to say that there is a possibility of

¹⁴⁶ Ibid 32.

¹⁴⁷ Yang, above n 67, 440.

¹⁴⁸ Adebukola, above n 86, 35.

¹⁴⁹ Ibid.

¹⁵⁰ Mercurio, above n 78, 329.

¹⁵¹ Adebukola, above n 86, 35.

¹⁵² Ibid 36.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

non-compliance with monetary compensation as there is a possibility for compliance. The introduction of a monetary compensation system would not provide less enforceability than the current system of trade compensation, as the control over the measure is also retained by the violating Member. The only difference would be the attractive alternative monetary compensation represents for developing countries compared to their possible benefits under trade compensation. A system of monetary compensation would not increase the risks of non-compliance in the system more than the risks currently exist in the system, as the failure to provide monetary compensation would lead to the current system of trade retaliation, which is the current procedure concerning trade compensation.¹⁵⁵

It could also be argued that the compliance-inducing effect of monetary compensation is questionable. The current trade compensation and trade retaliation system provides an incentive for affected sectors and interest groups to pressure their recalcitrant governments to withdraw the violating measures in order to end the negative impact these remedies impose on them.¹⁵⁶ This domestic pressure can be an effective tool in inducing compliance unless it is countered by stronger domestic support.¹⁵⁷ In that case, domestic political considerations may influence the government to refuse compliance and keep the WTO-inconsistent measures.¹⁵⁸ Monetary compensation would less likely cause the same political pressure or affect a similar scope of interest groups.¹⁵⁹ The fact that monetary compensation would be paid by the government budget represents scattered interests that would unlikely target a specific group or industry, which unlike retaliation and trade compensation, would fail to generate the required domestic pressure to induce compliance.¹⁶⁰

However, it must be remembered that the budget is one of the main political concerns in most political systems, as it constitutes one of the main standards under which a government is judged domestically.¹⁶¹ Even though budgetary monetary

¹⁵⁵ Bronckers and Broek, above n 79, 60.

¹⁵⁶ Ibid 62; also, Yang, above n 67, 439.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Bronckers and Broek, above n 79, 62.

compensation might not affect a certain sector or interest group in the domestic economy, a deficit in the budget or a substantial budgetary burden that resulted from WTO monetary compensation could be a subject for a fierce domestic debate and criticism and could generate overall pressure from the public that might induce the monetary compensation paying government to comply and remove the WTO-inconsistent measure.

Another concern regarding the application of monetary compensation relates to the argument that such a remedy would allow the continuation of the WTO-inconsistent measure, conflicting with Articles 3 and 22 of the DSU.¹⁶² In this regard, it could be argued that monetary compensation would allow non-complying Members to buy their way out of their obligation by providing monetary compensation, instead of removing the violation.¹⁶³ Even though the non-complying Member would still have to comply by removing the inconsistent measure, the option of paying monetary compensation might be viewed as a more attractive alternative because of economic and political considerations.¹⁶⁴ In this context, such a remedy would create a division within WTO Members, as richer developed countries would more likely be able to provide compensation at the expense of the integrity of their obligations, and developing countries' limited chances of having such alternative to buy out their obligations.¹⁶⁵

However, the argument behind this concern ignores the fact that the removal of the WTO-inconsistent measure will always be the primary remedy and the legal obligation that would not be obviated by the payment of monetary compensation, which would be only temporary until the removal of the violating measure.¹⁶⁶ Therefore, there is no reason to assume that monetary compensation would be any different to trade retaliation and compensation as a tool to induce compliance, or to consider this measure as a buy-out of the violating Member's obligations imposed by the DSB. At the end of the day, monetary compensation would not substitute trade

¹⁶² Mercurio, above n 78, 330.

¹⁶³ Ibid 334; also Adebukola, above n 86, 37; Yang, above n 67, 441; Bonckers and Broek, above n 79, 62.

¹⁶⁴ Mercurio, above n 78, 334.

¹⁶⁵ Ibid 334; also Adebukola, above n 86, 37; Yang, above n 67, 441.

¹⁶⁶ Yang, above n 67, 442; Adebukola, above n 86, 38.

compensation or retaliation, but would be an alternative remedy under which either one could be chosen if deemed better in inducing compliance and in line with particular interests and circumstances of the dispute.¹⁶⁷

As for the argument that monetary compensation would create division within the system, allowing developed Members to buy-off their obligation of compliance temporarily while developing Members struggle with their monetary ability to offer such a procedure, it again ignores the aim of monetary compensation. As discussed above, the objective of introducing this remedy would not be to encourage Members to buy-off their obligations, but induce them to comply and to provide the complaining Member with an alternative to the current procedures. Therefore, the argument should not have focused on developing countries' ability to buy-off their obligation, rather it could be reframed as to developing countries' capacity to afford such a procedure as an obligation when respondents. In this case, the argument would be even less credible, as it would ignore the fact that such situation already exists under the current system, as developing countries lack the economic power to utilise trade retaliation efficiently, or to offer trade compensation on a MFN basis. However, as the aim of monetary compensation is the enhancement of the current system, suggesting ways to deal with developing countries' restricted ability to offer monetary compensation serves such aim.

In this context, it could be suggested to offer the option of receiving monetary compensation as a special treatment procedure provided for developing countries under which they would be exempted from providing monetary compensation to developed countries but allowed to receive it.¹⁶⁸ Such a suggestion could be resisted by developed countries that might refuse the idea of introducing monetary compensation as a special treatment procedure for developing countries, especially the idea of offering such a procedure to all developing Members, as some of the largest and richest developing countries do not need such treatment. The idea of introducing monetary compensation in the WTO dispute settlement system could be challenging, but still it would be worth considering and processing under relevant negotiations

¹⁶⁷ Yang, above n 67, 442.

¹⁶⁸ Bonckers and Broek, above n 79, 65.

regarding the reform of the dispute settlement system. As for the idea of categorising developing country Members for providing special treatment, it is reasonable to question the current practice of self-selection under which Members declare themselves as developing or developed countries. However, the categorisation of developing countries is not a prerequisite for such a procedure, as similar special treatment provisions provided for developing country Members under the self-selection practice as currently exists in the DSU and other WTO Agreements.

The application of monetary compensation could also face the concept of applying the MFN principle, which is guaranteed application of trade compensation by Article 22.1 of the DSU, which provides that compensation is to be consistent with the covered agreements. Adherence to the MFN principle would put the offending country in a position where it has to offer monetary compensation on a MFN basis to all Members. While such extension can be achieved with trade compensation in the form of reduced tariff rates, providing it with monetary compensation could be both extremely expensive and difficult to administer.¹⁶⁹ Offering monetary compensation without extending it to the rest of WTO Members would violate the MFN principle and diminish the rights of Members other than the complainant.¹⁷⁰

This argument is unconvincing because monetary compensation cannot be characterised as an advantage, privilege, favour or immunity that would confer an advantage on one country to the detriment of all others within the usual MFN meaning.¹⁷¹ Rather, monetary compensation would be paid to repair the injury the violating government caused through a WTO-inconsistent measure.¹⁷² In addition, the idea of possible resistance by WTO Members against discriminatory monetary compensation that is not provided on a MFN basis has been downplayed by some commentators. Shadikhodjaev and Park pointed to *US—Copyright* under which the

¹⁶⁹ Mercurio, above n 78, 332.

¹⁷⁰ Bernard O'Connor and Margareta Djordjevic, 'Practical Aspects of Monetary Compensation: The *US—Copyright Case*' (2005) 8 *Journal of International Economic Law* 127, 133–135.

¹⁷¹ Arwel Davies, 'Reviewing Dispute Settlement at the WTO: A Time to Reconsider the Role/s of Compensation?' (2006) 5 *World Trade Review* 31, 44–45; Bronckers and Broek, above n 79, 64; Adebukola, above n 80, 39.

¹⁷² Ibid.

US offered compensation only to the EU as an example to support this view.¹⁷³ They concluded that since Australia was the only Member to insist that compensatory arrangements be applied on a non-discriminatory basis, ‘it obviously shows that the overwhelming majority of WTO Members have not seen any problem with, or at least have not been opposed to, the allegedly discriminatory nature of the monetary payment provided’.¹⁷⁴

Moreover, doubts could be cast on the role monetary compensations play in providing relief to the aggrieved industry.¹⁷⁵ Such doubts arise from the issue of re-distribution of monetary compensation by the complaining Member’s government after receiving it from the non-complying Member’s government.¹⁷⁶ The application of monetary compensation would have no guarantee that the aggrieved industry would receive such payment. It would be under its government control the responsibility of distribution, which might see it retaining the payments for other purposes such as economic development programmes or other government projects, benefiting interests of sectors or industries other than the one affected.¹⁷⁷

However, the form under which the received monetary compensation is to be distributed could be seen as part of the Member’s sovereignty.¹⁷⁸ After all, it would be reasonable to think that even if the payments do not reach the affected industry, monetary compensation would still achieve its main objectives of creating a pressure to comply and not acting as a restraint on trade.¹⁷⁹ However, that would place it under the same criticism facing the current trade retaliation and compensation of not benefiting the aggrieved parties necessarily. Therefore, a distribution mechanism could be framed to ensure that affected parties are compensated, while giving the government a certain degree of freedom that respects its sovereignty.¹⁸⁰ Even in the absence of such a possible mechanism, domestic pressure will always be a factor in

¹⁷³ Sherzod Shadikhodjaev and Nohyoung Park, ‘Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility’ (2007) 41 *Journal of Trade Law* 1237, 1255.

¹⁷⁴ Ibid.

¹⁷⁵ Adebukola, above n 86, 39; Yang, above n 67, 444–445.

¹⁷⁶ Ibid.

¹⁷⁷ Yang, above n 67, 445.

¹⁷⁸ Adebukola, above n 86, 39; Bronckers and Broek, above n 79, 60–61; Yang, above n 67, 445.

¹⁷⁹ Bronckers and Broek, above n 79, 61.

¹⁸⁰ Yang, above n 67, 445.

the way governments make their decisions. There is a strong possibility that a decision by the government that received monetary compensation to retain the payment or distribute it in forms that would not relieve the industry concerned would be faced by resistance and pressure by that industry, which could also exceed it to include related interest groups. Such pressure and interest regarding the destination of the payment could become much stronger to include a wider domestic interest, if the industry concerned is of substantial value to the local economy. This situation could pressure the government to re-locate the destination for the payment or refrain from taking the decision of wrong distribution in the first place.

Another issue that relates to the process of distribution is the possibility of considering the complaining government's action of distributing the received monetary compensation to the affected industry as a form of illegal subsidy under the Agreement on Subsidies and Countervailing Measures (SCM), which would be inconsistent with WTO law.¹⁸¹ However, this argument ignores one essential condition for the existence of a subsidy under the SCM, providing a benefit to the private party. Monetary payments are paid to compensate for and only up to the level of the damages affecting the industry concerned.¹⁸² The fact that the aggrieved party would not receive any payments that exceeds its level of damages voids any concept of beneficiary treatment against the SCM.¹⁸³

Dismissing the proposal of monetary compensation as unpractical on the ground that it would never be accepted by all WTO Members ignores the history of the WTO itself, when few would have believed during the GATT years that a compulsory and integrated dispute settlement system would ever be accepted as part of the WTO agreements' single package.¹⁸⁴ More focused and increased efforts by developing countries towards adopting a procedure on monetary compensation would not only generate more interest in the subject, but also place more pressure on other Members to address and deal with the issue.¹⁸⁵ The notion of monetary compensation should also be beneficial for WTO developed country Members, considering the relief such a

¹⁸¹ Bronckers and Broek, above n 79, 64; Mercurio, above n 78, 333.

¹⁸² Bronckers and Broek, above n 79, 64.

¹⁸³ Ibid.

¹⁸⁴ Ibid 66.

¹⁸⁵ Ibid.

procedure would provide to sections of their industries and consumers who were victims of retaliatory sanctions and unfair trade compensation procedures.¹⁸⁶

5.4.3.4. Retroactivity

The concept of retroactivity in the context of WTO dispute settlement system reflects the inclusion of past damages that affected the complaining Member as a result of a WTO-inconsistent measure when calculating nullification or impairment, which is contrary to the current practice of prospective remedies that focus on forward-looking evaluation. Despite the controversy surrounding this concept within the WTO under which it could be regarded as a considerable burden on Members' obligations in the dispute settlement system, it could be of benefit to the utilisation and effectiveness of its remedies.

Retroactive determination and application of nullification or impairment could cover a period as early, for example, as the date of establishment of the panel, the date of request of consultations or the date the measure was imposed. As a result, it would not be in the interest of the violating Member to delay the proceedings deliberately, as the benefits obtained by the inconsistent measure would be more likely to be offset by the amount of losses resulting from retroactive compensation or suspension of concessions.¹⁸⁷

In the context of trade compensation and a possible monetary compensation, adding the retroactive element to the remedy would work to readdress the damages that have affected the complaining Member and its industry concerned by providing reparation for the past harms, which would be more advantageous than the current prospective system of remedies.¹⁸⁸

A system of retroactive application would even work well to counter some criticism against a possible application of monetary compensation. As discussed above, some

¹⁸⁶ Ibid.

¹⁸⁷ William Davey, 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions', (Illinois Public Law Research Paper No 05-16, The University of Illinois College of Law, 2005) 14.

¹⁸⁸ Bronckers and Broek, above n 79, 67.

of the main arguments against the concept of monetary compensation have focused on the possibility that such system would allow the continuation of the violating measure. Monetary compensation could become an attractive alternative to the non-complying Member over the removal of the violating measure as a result of political or economic considerations. This leads to the idea that monetary compensation would allow rich Members to buy-off their obligations to the detriment of the dispute settlement system's integrity. Other arguments pointed to a possible lack of compliance-inducing effect in a system of monetary compensation, arguing that a monetary payment that would come out of the compensating government's budget would fail to trigger sufficient interest or pressure domestically to withdraw the measure, as the payments would be less likely to affect a particular sector or interest group.

Introducing retroactivity along with monetary compensation would give little incentive for the non-complying Member to drag the process, knowing that an extended dispute would mean much more increased nullification or impairment under a retroactive compensation agreement than otherwise calculated under the current prospective remedy.¹⁸⁹ Redressing past damages under a retroactive remedy would also serve as a deterrent to potential violators not to adopt WTO-inconsistent measures, and a more accurate compensatory measure to the injury suffered by the private party by providing reparation for the period when the injury actually occurred.¹⁹⁰ All these factors are of particular benefits for developing Members, as they lack the financial and legal resources to utilise a long dispute settlement process effectively, and are more sensitive to uncompensated losses in their economies.

However, there is a concern that introducing retroactivity along with a system of monetary compensation could trigger substantial financial liabilities out of the WTO dispute settlement.¹⁹¹ The unpredictability of the monetary liability, in turn, could push Members to exit the WTO or deter them from accepting new commitments, or could be a factor in non-Member countries' decision not to join the WTO.¹⁹² This concern is valid, but can be addressed without abandoning the idea of retroactive

¹⁸⁹ Ibid; Yang, above n 67, 440.

¹⁹⁰ Ibid.

¹⁹¹ Yang, above n 67, 443; Bronckers and Broek, above n 79, 67.

¹⁹² Ibid.

monetary compensation. One suggestion is to cap the damages that can be awarded in the dispute settlement to a certain amount.¹⁹³ This suggestion would keep predictability in the system, limits the financial liability to a considerable but acceptable amount to Members, and serves the objective of providing an incentive against non-compliance. Another suggestion that would be likely to achieve the same results is the monetary compensation where retroactivity would be limited to a certain period, such as the end of the reasonable period or the date of initiating the consultation process, perhaps depending on the seriousness of the violation.¹⁹⁴

Either way, introducing retroactivity to a possible system of monetary compensation could accompany a requirement from the complainant to bear the burden of providing the causal link between the damage and the illegal measure, and demonstrate sufficient evidence to support that the measure constituted violation from the date claimed by the complainant.¹⁹⁵ In relation to the non-complying Member, a type of ‘good faith’ test could be introduced under which it would have the possibility to argue that the measure was adopted in good faith or that the damage claimed was unforeseeable, which might allow it a reduced scope of retroactivity.¹⁹⁶

Similar to the situation with trade and monetary compensation, introducing retroactivity to trade retaliation would provide an incentive for the violating country to implement the DSB recommendations effectively to avoid retaliation against its international trade that would cover nullification or impairment over a potentially long period.¹⁹⁷ It would also represent an incentive for developing countries to participate more actively in the WTO dispute settlement system, as it would be more likely to limit the possibility of making developing countries’ limited resources subject to a long and exhausting implementation process.¹⁹⁸

However, the idea that retaliation carries a negative impact on the retaliating Member as well as the Member retaliated against would represent an obstacle for considering

¹⁹³ Yang, above n 67, 443.

¹⁹⁴ Bronckers and Broek, above n 79, 67.

¹⁹⁵ Ibid; Yang, above n 67, 443.

¹⁹⁶ Bronckers and Broek, above n 79, 68; Yang, above n 67, 443.

¹⁹⁷ Davey, ‘Implementation in WTO Dispute Settlement’, above n 187, 14.

¹⁹⁸ Ibid.

retroactive retaliation as a suitable procedure for developing countries. The introduction of retroactive retaliation would lead to higher restrictions on the retaliating Member's market because of the increased nullification or impairment calculated from the violating measure, which would increase the negative impact on both countries. If retroactive retaliation is to be introduced into the system as a general rule applicable to both developing and developed country Members, an argument could arise in relation to the unbearable effect a retroactive retaliation would have on developing countries when respondents, as they would struggle to cover trade losses that date back over a long period.

However, an argument like this would ignore that the political and economic weakness of developing countries would make it more in their interest to end their disputes in the shortest time possible, through either consultations or an implementation of the DSB recommendations. Nonetheless, introducing retroactive retaliation as a special treatment procedure for developing countries would probably be more appropriate, as they are the disadvantaged party from the current form of prospective retaliation, which seems to be working reasonably well for developed countries. Introducing retroactive retaliation as a special treatment procedure would put more weight to disputes brought by developing countries, as developed Members would have more at stake to lose than they would have under the current procedure.

The recognition of retroactive remedies is a politically sensitive step in the WTO that could require certain introductory and supplementary measures, such as adding a form of gradual introduction of the procedure into the system or limitations to its scope of application.¹⁹⁹ However introduced, the overall advantages of strengthening the implementation process, and providing a fair remedy that is more accurate in calculating the actual damage resulting from the violation, represent retroactive retaliation as a rational change to the current system of remedies.

¹⁹⁹ Bonckers and Boek, above n 79, 68.

5.4.3.5. Developing Countries' Special and Differential Treatment

The classification of developing countries is likely to be a thorny issue in any negotiations in relation to reforms on S&D treatment in the DSU.²⁰⁰ The controversy surrounding this issue comes from the self-selection approach adopted by countries in determining whether they are developed or developing countries, which could witness addressing development issues in DSU negotiations with a view to applying the same rules to China as to Vanuatu, while establishing more forms of favourable treatment for India than for New Zealand.²⁰¹

Nonetheless, facilitating greater access and encouraging better participation for developing countries would have a positive impact on a dispute settlement system that may be considered by many to be biased in favour of large developed country Members.²⁰² A system that addresses and deals with the needs and participation issues of all its Members, especially the weakest, is likely to achieve a higher level of satisfaction within its Membership and other external interests, which would increase its legitimacy and improve its international standing.²⁰³

However, there is an important factor to consider when offering support to developing countries through S&D treatment in a procedural agreement such as the DSU. The quasi-judicial nature of the DSU would present an excessively pro-development approach that is full of exceptions as a risk that might affect the legitimacy and efficiency of the dispute settlement system.²⁰⁴ Therefore, it is important to focus on providing S&D treatment that would facilitate the access and participation of developing countries rather than providing a system that is riddled with waivers to comply with WTO obligations.²⁰⁵ Two of the main areas under which special treatment could be provided to improve developing countries' use of the system without affecting its efficiency are lack of resources and insufficient WTO expertise.

²⁰⁰ Bercero and Garzotti, above n 60, 145.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid 146.

²⁰⁵ Ibid.

(a) Litigation costs and developing countries' lack of resources

As discussed in Chapter 3, the dispute settlement process could carry a great financial burden on developing countries' resources. This burden could reach a level where the idea of not initiating a dispute despite an existing violating measure could become a more economically viable option than going through an expensive and resources-exhausting dispute settlement process, especially when the implementation of a possible favourable ruling is not guaranteed in the first place.

To address this issue, a procedure could be introduced to allow a developing country that wins a dispute against a developed country to recover its litigation costs.²⁰⁶ While this rule is implemented in many national legal systems, the general rule in international dispute settlement mechanisms requires each party to bear its own costs, though some international tribunals, such as the ICJ,²⁰⁷ allow the court to allocate costs differently.²⁰⁸ In the WTO context, applying the procedure would grant panels and the Appellate Body such authority.

It could be argued that the main objective of WTO dispute settlement system is the prompt resolution of disputes, which would make the possibility to relieving part of the financial burden of developing countries a detraction from the main objective.²⁰⁹ However, it is unclear as to how this relief would be a detraction from the system's main objective of prompt resolution, considering that a prompt compliance by the respondent should be expected regardless of what is required in the ruling. Such a procedure would provide an incentive for developing countries to chase their interests and protect their rights in the system against possible violating measures, knowing that, if successful, their litigation costs would be recovered by the more financially capable developed countries. Even if developing countries find it challenging to provide all the financial resources necessary to conclude a dispute efficiently, they would know that such hardship is only temporary until the implementation of costs.

²⁰⁶ Ibid 148.

²⁰⁷ Article 64 of the ICJ states: 'Unless otherwise decided by the Court, each party shall bear its own costs'.

²⁰⁸ Bercero and Garzotti, above n 60, 148.

²⁰⁹ Ibid.

However, facing the concept of leaving the existing system of remedies as it currently is, with no procedures to suit the economically and politically weaker position of developing countries, might lead back to the compliance issue and developing countries' lack of ability to enforce a ruling where their litigation costs are to be recovered. In fact, the possibility that a developed country Member would refuse compliance under a system of repayable litigation costs is likely to be higher than the possibility of non-compliance under the current system, as the implementation burden on the responding country would be greater. Therefore, it is difficult to imagine the practicality of a reform of this kind without being part of a complete reforms package that would address all aspects of developing countries' participation in the dispute settlement process that could particularly include more efficient remedies that are appropriate to the participation of developing countries.

Another form to address developing countries' lack of financial resources could be through the establishment of a dispute settlement fund, which would cover the litigation costs of developing countries.²¹⁰ Such a concept would avoid the non-compliance issue raised under the previous idea, as the costs would not require the respondent's willingness to repay such costs, rather, they would be provided by a fund allocated specifically for that purpose. However, such a procedure might lead to an increase in futile litigation that would place more pressure on the system and risk the emergence of 'fake disputes' where political considerations would be the motivating factor behind disputes instead of WTO-related legal issues.²¹¹

This possible result could be avoided by introducing some form of limitation into the fund concept by making it, for example, available to Members that need it the most, such as least-developed countries, to cover part of the costs or to developing countries if they win the dispute.²¹² Restricting the fund's beneficiaries to a group of least-developed countries would ensure that the fund is only used for its purpose. However, many developing country Members are not classified as least-developed countries that are struggling to meet the financial pressure of the dispute settlement process. Restricting the scope of the fund to least-developed countries would deprive those

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

developing country Members from much-needed assistance in genuine, WTO-related legal disputes. Therefore, it might be more appropriate to determine the fund's application, or its scope, by panels and the Appellate Body on a case-by-case basis, depending on the developing country Member concerned.

However, a concern might arise in relation to the effect a procedure that is based on a case-by-case may have on the predictability of the system. Developing countries that initiate disputes would have no guarantees that they are going to be ruled eligible by panels or the Appellate Body for a fund repayment of their litigation costs. This unpredictability might deter developing country Members from initiating disputes out of fear of the possibility that their costs might not be refunded at the end. This concern could be addressed by an early determination of panels or the Appellate Body that the developing country concerned is eligible in that particular dispute to the fund's benefits. In addition, if the concern over predictability is focused on the possibility of not refunding the litigation costs of some developing countries after they initiated the dispute, the current procedure offers them a guarantee of not receiving such refund. At least the proposed procedure would offer a chance that the current system fails to offer.

The application of the limitation concept on the amount of financial payments paid from the fund to recover litigation costs, though it would make it more appealing for developed Members during reforms negotiations, it might fail in easing the financial pressure on developing countries' participation. Despite the fact that any financial contribution to recover part of litigation costs would be welcome by developing Members, the remaining part of unrecovered costs might still be considered a significant financial burden on least-developed countries and some developing countries. Therefore, the idea mentioned above of limiting the beneficiaries receiving a full repayment from the fund might be more appropriate in this regard.

However, this does not mean that applying the limitation concept on the amount paid to recover litigation costs could not be useful in relation to the previous idea of having the litigation costs recovered by a developed country that lost the dispute against a developing country. A ruling that requires the repayment of litigation costs might

have a greater chance of compliance when the developed Member knows that it is only required to pay part of the costs.

The idea of a fund that recovers developing countries' costs if they win the case might, however, be a better solution. It offers the incentive for developing countries that rightly and strongly believe that their rights and interests have been negatively affected by a WTO-inconsistent measure to utilise the dispute settlement process, knowing that they have a good chance of winning the case and recovering the costs. At the same time, it would discourage any abuse of the procedure by countries of less genuine intentions, as their chances of winning would not be as strong, which would force them to bear the dispute's costs.

(b) Insufficient expertise

The financial difficulties facing developing countries in their participation in the dispute settlement system is partly related to their lack of sufficient WTO legal expertise. Developing Members lack domestic resources of highly qualified legal experts due to a range of factors, such as their preference for the private sector or skilled migration to wealthier countries.²¹³ This situation forces developing Members that wish to participate in the dispute settlement system to hire private law firms, which come with a very expensive price tag that would put pressure on the financial resources of the developing countries concerned. Therefore, addressing the issue of developing countries' lack of sufficient WTO legal expertise would lead to partially limiting the financial burden during the dispute settlement process. In this context, it is important to increase WTO commitment to support capacity building in relation to its legal policy in developing countries, and introduce programmes of more focused training of legal officers in developing countries.²¹⁴ It is also important to improve and increase the legal assistance provided by the Secretariat in the pre-dispute stages.²¹⁵

²¹³ Discussed in Chapter Three, when analysing the lack of legal expertise as a factor for developing countries' limitation in initiating disputes.

²¹⁴ Bercero and Garzotti, above n 60, 149.

²¹⁵ Ibid.

As discussed earlier in Chapter 3, the impartiality requirement in the Secretariat's technical assistance to developing countries is restrictive compared to the role of legal counsel that they need in their disputes. Therefore, the idea of establishing a roster of legal experts who would be funded by the WTO and from which developing Members would select experts to assist them in dispute settlement proceedings, might be a reasonable option to consider.²¹⁶ However, this procedure might create the same concept of indiscriminate free access, noted when referring to the establishment of a litigation fund, which might be misused to bring disputes for reasons other than WTO-related matters, and increase the pressure on the dispute settlement system.²¹⁷ Hence, here again, a form of limitation would be appropriate to restrict this possibility.

Restricting the application of the procedure to a group of Members, such as least-developed countries and low-income developing countries, or making it subject to a maximum of hours could be possible forms for such limitation.²¹⁸ Although, a restriction on the hours of service offered could lead to the same inadequacy criticism directed against the Secretariat's legal assistance role in the presence of the impartiality requirement. This restriction could see the legal expert forced to withdraw his or her service in the middle of the dispute settlement process as a result of consuming all hours allowed for the subsidised service, which would leave the developing country involved with no other option but to resort to private law firms in a situation that would take the problem of insufficient expertise back to square one. The restriction on the hours of service provided could also force the expert to rush such service in order to cover as much as possible of the proceedings, making the quality of the technical assistance provided questionable. Therefore, any form of limitation on the assistance provided for developing Members must be appropriate and consistent with the objective of proposing such measures in the first place, which is the better participation of developing country Members in the dispute settlement system.

²¹⁶ Ibid 149–150.

²¹⁷ Ibid 150.

²¹⁸ Ibid.

The concepts discussed above, whether they relate to compensation, retaliation or special treatment are of great importance to developing countries. Their application might have some elements that need to be defined, adjusted or regulated, but the basis of some of these concepts could provide the solution for many problems that negatively affect developing countries' participation in the system. Therefore, any process of reforming the DSU has an obligation to genuinely address the possibility of utilising some of these concepts, or at least certain elements, in order to deal with the unsuitability of the current remedy procedures to developing countries' participation. The next section discusses possible steps that could be established or developed outside the scope of DSU reforms to enhance developing countries' participation in the absence of a desired outcome from such reforms in relation to developing country Members.

5.4.4. Suggested Reforms to Deal with Developing Countries' Issues Outside the Scope of DSU Reforms

Even though developing countries vary significantly in the size of their economies, development levels and their share in international trade, the primary challenges they face in their participation in the WTO dispute settlement system generally fall into two broad categories. These challenges either result from the structure and substance of the DSU and the mechanism of the dispute settlement process, or directly from the circumstances of developing countries. In this regard, the modification of the dispute settlement rules is not the only key issue that should be addressed in limiting the systemic biases affecting the participation of developing countries in the WTO dispute settlement system.

Directing and assisting developing countries to adapt to the system is another, equally important, issue in this field.²¹⁹ In this context, developing countries face three primary issues that affect their adaptation to the WTO dispute settlement system that have already been highlighted in this thesis. First, developing countries lack legal expertise in WTO law. Second, they lack the financial resources necessary for active participation in the system, including that needed in most cases for hiring external legal counsels. Finally, developing countries fear economic and political pressure and the consequences resulting from filing any dispute against major developed countries, which undermines their ability to bring WTO claims.²²⁰

However, there are some strategies that developing countries could develop to offset these structural biases under the WTO's legalised system. To develop these strategies, developing countries need collaboration with other parties involved in international trade and international agendas.²²¹

5.4.4.1. The Need for Public-private Collaboration in WTO Litigation

Before examining how the public-private partnership could improve developing countries' participation in the WTO dispute settlement system, it is useful to examine how this partnership has worked for the US and the EC participation in the system. In the US and EC the private sector works with the governmental administration to pursue and defend issues of mutual interest, and develop a litigation agenda before the WTO.²²²

In this process, the private sector tries to convince its government, after undertaking the necessary pre-litigation legal and economic research, of the economic benefits and legal merits to pursuing a case.²²³ In doing so, the private sector seeks the engagement of its government through the access provisions provided under relevant domestic statutes, such as Section 301–310 of the US Trade Act of 1974 and the Trade Barrier

²¹⁹ Ibid 26.

²²⁰ Ibid.

²²¹ Ibid.

²²² Chad Bown and Bernard Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) *Journal of International Economic Law* 861, 869.

²²³ Ibid.

regulation in the EC, under which domestic industries can require their government to raise potential market access concerns.²²⁴ If the government is willing to pursue the case at the WTO, the private sector utilises its resources, which include attorneys and consultants to assist in the preparation of legal briefs and economic evidence to be used in the WTO dispute settlement process.²²⁵

The US and the EC's engagement of the private sector serves two important stages of the dispute settlement process, the pre-litigation stage, through the use of their resources to perceive injuries to the trading interests and identifying the responsible parties behind the injuries caused, and the litigation stage, through their assistance in preparing legal briefs and providing economic evidence.²²⁶

In contrast to the situation in the US and the EC, most developing countries lack this kind of partnership between public and private sectors, which leaves their governments struggling at the resource-demanding pre-litigation research, and the legally complicated litigation stage, which are most likely to be conducted by inadequate legal and financial utilities.²²⁷

If compared to the situation in the US and the EC, it could be argued that the public-private partnerships in developing countries face barriers that do not exist in developed countries, and could prevent this model from being able to develop.²²⁸ In this context, the fact that the exporting industries of the private sector are less concentrated with a small value of low-margin exports makes it more difficult for them to organise a collective action to pressure their domestic government to take up their case before the WTO.²²⁹ Further, even if the exporting industries managed to organise the collective action necessary, it is more likely that the legal and institutional structures of many developing countries lack the access routes provided

²²⁴ Ibid.

²²⁵ Ibid 870.

²²⁶ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 27.

²²⁷ Ibid 27–28.

²²⁸ Bown and Hoekman, above n 222, 870.

²²⁹ Ibid.

in developed countries that allow private sector claims to be addressed before domestic governments and taken up to the WTO dispute settlement system.²³⁰

Finally, it could be argued that the generally small value and volume exporters in the private sector of many developing countries lack the resources necessary for a successful input into the public-private partnership model.²³¹ The private sector in developing countries is less likely to meet the financial and legal needs expected from the private sector in such a partnership. As mentioned above, an effective input from the private sector includes its assistance in monitoring trade and information gathering and analysis in the pre-litigation stage, and its assistance in shaping legal briefs and providing economic evidences during the litigation stage. These two roles are demanding both legally and financially and the private sector in many developing countries is simply not structured, organised or capable enough to provide such input at this stage.

However, developing countries need to start somewhere. The barriers mentioned above could be addressed and dealt with effectively if developing countries decided to adopt the public-private partnership model. Developing countries could develop within their legal and institutional system the legal routes or access points that allow and encourage the private sector to channel its WTO-related concerns and interests into the relevant body of government. However, building these routes is not only limited to creating the legal and institutional structure for such a model; developing countries need to develop more routinised relations with the private sector through periodical meetings and discussions in relation to their interests and concerns in international trade.

It is understood that the degree of concentration and organisation of exporting industries in the private sector of developing countries is still less than what is needed to represent a pressuring device on their government to adopt their concerns and trade claims. However, forming an alliance between all the exporting industries of a developing countries' private sector would be more likely to produce the pressure

²³⁰ Ibid 871.

²³¹ Ibid 871–872.

needed, especially when this pressure is channelled through newly established legal and institutional routes for such claims.

The public-private partnership in developing countries is achievable, and it would be a step in the right direction towards a better position of developing countries in the WTO dispute settlement system, even if the input of the private sector in this partnership does not measure up to the more sophisticated and advanced private sector in developed countries. Although the private sector in developing countries lacks the financial and legal resources needed for their input in the pre-litigation and litigation stages, any contribution and assistance it provides to their government in this regard would be of value, and, to a degree, would enhance the performance of developing countries' governments in dealing with international trade issues.

5.4.4.2. The Need for Cost-effective Legal Resources

As discussed in Chapter 3, the limited volume, value and variety of most developing countries' international trade gives developing countries the notion that they are less likely to be involved in the WTO dispute settlement system as a result. This notion of unnecessarily frequent participation by developing countries in the system does not present the development of an internal legal expertise as a cost-effective solution to developing countries' lack of WTO legal expertise. Rather, developing countries find it more appropriate to their circumstances that they use external, cost-effective legal assistance.

(a) The ACWL

The ACWL, which was established in Geneva in 2001, represents a welcomed opportunity for developing countries to obtain legal assistance on a more cost-effective basis. The Centre is designed to counsel and represent developing countries in WTO dispute settlement process at discounted rates that vary depending on the country's membership status, share of international trade and per capita income.²³² Funding for the ACWL is done through a 'cooperative' approach. Its membership,

²³² Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 30.

with the exception of the LDCs, contributes to an 'Endowment Fund'. Contributions for developing country Members are made on a sliding scale based on country characteristics. Developed country Members of the ACWL, which do not have access to the legal services provided by the Centre, have made substantial contributions to the 'Endowment Fund'.²³³

Depending on their level of development and the frequency of their participation, the way developing countries may use the ACWL varies. The Centre may be used as a tool to develop the national expertise of larger and more active developing countries, such as India, in WTO dispute settlement. The Centre practices this role through skill-building activities, such as internship possibilities and organising periodic seminars for developing countries' officials.²³⁴ For the small and rarely engaged developing countries in the WTO dispute settlement system, the Centre represents a cost-effective legal service to represent and defend their interests before WTO litigation, as it might be less cost-effective for them to develop their own legal expertise.²³⁵ Even for larger developing countries with adequate WTO legal expertise, the Centre could be used as a resource-complementing tool in the same way developed countries have used private law firms to collaborate with their own legal expertise before WTO litigation.²³⁶

The role of the ACWL as a valuable cost-effective source of WTO legal expertise is consolidated by the collaborative relationship it has formed with a number of private law firms and individuals who offer their services on a pro bono basis. They are listed on the Centre's roster of external expertise.²³⁷ This list currently includes 15 private law firms and two individuals.²³⁸

²³³ Bown and Hoekman, above n 222, 874.

²³⁴ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 31.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Bown and Hoekman, above n 222, 874–875.

²³⁸ The law firms are Akin Gump Strauss Hauer & Feld, Arent Fox, Borden Ladner Gervais, Economic Laws Practice, Fratini Vergano, Gide Loyrette Nouel, King & Spalding, Minter Ellison, O'Connor & Company, Sidley Austin, Shim & Kim, Van Bael & Bellis, Vermulst Verhaeghe & Graafsma, White & Case and Winston & Strawn; for more information, visit the ACWL website <http://www.acwl.ch/e/dispute/counsel_e.aspx> (15 July 2010).

However, there are a number of issues with reliance on the ACWL that limit its role of providing sufficient low-cost legal assistance to developing countries in enforcing their interests in the WTO dispute settlement system.²³⁹ The first issue is funding. The fact that the Centre provides its services exclusively to developing countries in disputes makes many developed countries hesitant to fund a legal assistance centre sufficiently that may ultimately provide assistance directly to challenging their own actions.²⁴⁰ This issue is illustrated in the absence of the governments of the US, France, Germany (as well as the EC collectively) and Japan from the list of ACWL endowment contributors.²⁴¹

The second issue relates to pre-litigation investigation and access to legal services. The ACWL provides its advice and legal assistance to developing countries once a dispute is established and a request for legal assistance is made by a developing country. In this regard, the Centre does not have the resources and the mandate to exercise any role in the pre-litigation stage. It does not provide any investigative role or information to developing countries on trade violations or legally viable cases that they could pursue at the WTO to enforce their international trade rights.²⁴²

An additional issue is that the ACWL does not appear to offer economic advice along with the legal advice it provides to developing countries. The Centre's focus on the legal perspectives of disputes and its disinterest in staffing professional economists means that it cannot provide technical economic consulting services as part of its dispute settlement support. This is a worrying issue as much of the actual litigation over trade matters at the WTO is likely to require a solid legal-economic partnership in order for a strong case to be put together. The WTO dispute settlement process is increasingly involving the use of technical economic tools and economic evidence, which in some cases exceeds the knowledge and skills of the legal experts involved.²⁴³

²³⁹ Bown and Hoekman, above n 222, 875.

²⁴⁰ Hakan Nordstorm, 'The cost of WTO Litigation, Legal Aid and Small Claim Procedures', 2005 (Paper presented at the International Conference on WTO Dispute Settlement and Developing Countries: Use, Implications, Strategies and Reform, 20–21 May, Madison, Wisconsin) 11.

²⁴¹ Ibid.

²⁴² Bown and Hoekman, above n 222, 875.

²⁴³ Ibid 876.

These issues facing the ACWL makes it important for developing countries and the international trade community to find and develop other sources of cost-effective legal expertise in WTO law to supplement its role in providing assistance for developing countries in their participation in the WTO dispute settlement system. In addition to encouraging and developing public-private partnerships, which has already been discussed above, the role of the ACWL could be supplemented through the development of regional advisory centres on WTO law, and the engagement of private law firms.

(b) Regional Legal Service Centres on the WTO Law

Establishing and developing regional advisory centres on the WTO would supplement the role of the ACWL, and even provide a solution to the issues limiting the assistance it provides to developing countries, which were outlined above. The primary goals of such centres would be training, issue-monitoring and consultation on potential disputes.²⁴⁴ The more developed these centres become the more assistance they could provide. This assistance could be developed to include the pre-litigation's fact gathering and analysis, and to be a potential source of legal expertise in the litigation stage.²⁴⁵ This role that regional centres could be developed to play would counter the ACWL lack of pre-litigation assistance in an effective manner.

In establishing and developing regional centres on WTO law there would be less likelihood of experiencing the funding issues that the ACWL faces, and more likelihood of including the economic perspective of disputes alongside the legal one. This could be done by establishing these centres in universities with academics in both the legal and economic sides of international trade collaborating with the Ministries of Trade or Commerce of the Member countries.²⁴⁶ Such collaboration

²⁴⁴ Gregory Shaffer, 'The challenges of WTO Law: Strategies for Developing Country Adaptation' (Paper presented at The WTO at 10: The Role of Developing Countries in Negotiations and Dispute Settlement, Cairo, Egypt, 11–13 February 2006) 14.

²⁴⁵ Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9(2) *Journal of International Economic Law* 427, 453.

²⁴⁶ Hassan. Kartadjoemena, 'Capacity Building for Dispute Settlement in the WTO: A Preliminary Note on the Case of Indonesia' (Paper presented at the Conference on WTO Dispute Settlement and the Developing Countries, Madison, Wisconsin, May 20–21, 2005) 10.

could be conducted through a simple Memorandum of Understanding between the university or research group and departments concerned of the governments of country Members.²⁴⁷ Establishing university-based, academically staffed regional centres would not be heavily capital-incentive ventures, as the need for the hiring of new staff and other institutional and associated extra costs would be forestalled.²⁴⁸

(c) Private Law Firms

In the domestic litigation context, private law firms, particularly the large ones, may offer their services to low income clients on a pro bono basis to improve the firms' reputation as being contributors to their community as part of their public relations agenda.²⁴⁹ This kind of service is more likely to be offered by firms in high profile cases with precedent value or in emotionally charged cases that are likely to generate significant media attention.²⁵⁰ However, this trend is hardly practiced in the context of international trade litigation.

Collaboration between developing country Members of the WTO and private law firms to extend this trend to the context of international trade litigation before the WTO would more likely generate benefits to both parties.²⁵¹ Other than the possibility of developing countries having an effective legal representation by private law firms on a pro bono basis, which would be a huge incentive towards better participation, such collaboration would carry substantial benefits to the participating private law firms. The fact that the DSU is the closest entity in the litigation context of international trade to the 'Supreme Court' in domestic litigation systems lends some element of prestige for private legal firms working on a WTO matter, which is used for the purposes of marketing or client-building.²⁵²

²⁴⁷ Mosoti, 'Africa in the First Decade', above n 245, 453.

²⁴⁸ Ibid.

²⁴⁹ Bown and Hoekman, above n 222, 877.

²⁵⁰ Ibid.

²⁵¹ Ibid 879.

²⁵² Ibid.

To give an example of the value of WTO litigation experience to private law firms, it is relevant to refer to what the website of the prominent Washington, DC law firm Sidley Austin states, which reads that:

Advised numerous governments and companies in over 175 WTO disputes on international property, government procurement, subsidy, trade remedy, environment, taxation, telecommunications and investment matters. They have done so by writing the briefs, arguing the cases, developing the case strategy and coordinating the dispute settlement consultations.²⁵³

The active participation of private law firms on a pro bono basis would also give their junior-level lawyers additional practical expertise in WTO litigation that might not otherwise be obtained in the early stages of their careers, not to mention that providing legal assistance for developing countries through this form of collaboration would serve to enhance their public relations agenda.²⁵⁴

Even though, as is the case in domestic legal systems, private legal firms would be more likely to focus their pro bono work on high profile cases in the WTO dispute settlement system that generate significant media attention with precedent-setting impact rather than uncontroversial and more straightforward cases,²⁵⁵ such collaboration between private law firms and developing countries would still provide these countries with the needed cost-effective legal assistance, even if it was limited to high profile disputes.

To minimise the issue of hand-picking of cases by private law firms, it would be useful to encourage or develop the model established by the ACWL to have private legal firms signed up on the roster of available external legal counsel.²⁵⁶ To develop this model, though, where the pro bono work of private law firms could potentially be used in unglamorous disputes with no public interest, there should be some form of encouragement offered to such firms in return. Currently, there is little advertising for the thirteen legal firms that have participated by putting their names on the list of the ACWL external legal counsel, which means that there is little reputational cost to the

²⁵³ For more information visit <<http://www.sidley.com/practice/group.asp?groupid=1520>> (10 July 2010).

²⁵⁴ Bown and Hoekman, above n 222, 879–880.

²⁵⁵ Ibid 881.

²⁵⁶ Ibid 880.

firms refraining from participating.²⁵⁷ Increasing the advertisement and the public focus by the ACWL on the participating firms could thus increase the interest in the pro bono programme and increase law firm participation of offering pro bono services to developing countries in the WTO dispute settlement system.²⁵⁸

(d) Issue-based NGOs

Some NGOs have been quite successful at drawing media and sometimes political attention to the current systemic inequities of the WTO,²⁵⁹ and developing countries could use this work by such organisations and groups to their benefit by forming alliances with them. Such alliances between NGOs and developing countries would not be expected to have the same scope as the public-private partnership, as few of these organisations have the expertise and resources, or willingness to be engaged in assisting developing countries in the WTO dispute settlement process.²⁶⁰ Many NGOs have the capacity and expertise to mobilise supporters and generate political momentum, but these activities are not particularly useful in a legalistic setting, as they do not have the technical legal and economic skill to engage in assisting developing countries in the preparation of actual cases.²⁶¹

Nonetheless, NGOs could still play an important role in a potential alliance with developing countries. The fact that larger NGOs have a local presence in many countries, through branches, subsidiaries or less formal networks of partners with similar interests, give such organisations a competitive advantage in the context of the pre-litigation stage.²⁶² This competitive advantage allows NGOs to more easily identify and assess violations against the interests of developing countries in foreign markets through collection of information and evidence to finally assist in choosing potential claims that could be pursued through WTO dispute settlement system.²⁶³ This role would of course be complemented by the usual role of these NGOs of

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid 881.

²⁶⁰ Ibid 881–882.

²⁶¹ Ibid 883–884.

²⁶² Ibid 883.

²⁶³ Ibid.

lobbying and public relations to bring these violated interests to the attention of the public to put the political momentum needed to generate compliance in the post-litigation stage.²⁶⁴

There is still another constraint limiting the effectiveness of any potential alliance between NGOs and developing countries in the context of WTO dispute settlement. Some issue-based NGOs tend to have a narrow focus on a single issue, such as the environment, human rights, labour standards, etc. These organisations could also challenge developing country governments for implementing inappropriate or ineffective policies that fall within the context of their issue-based mandate.²⁶⁵ However, other NGOs are available and developing countries could choose to form an alliance with those that have a general development focus, and specialised NGOs that have a development focus but are limited to trade and economic issues.²⁶⁶ Developing countries could also choose NGOs that are committed to putting the long-term commercial interests of developing countries first, in the sense that they ignore some inappropriate developing countries' policies as long as they deliver the development outcomes needed.²⁶⁷

As it would be difficult to implement this partnership in an organised manner between all individual developing country Members in the WTO and all relevant NGOs, it would be useful for an international legal services centre specialised in developing countries' WTO matters, such as the ACWL, to forge such alliances, making itself the contact point between all concerned parties.²⁶⁸ This would not only create a more practical environment for the work of partnership, but also would supplement the role of the ACWL itself through the pre-litigation assistance the NGOs would be set to provide.

²⁶⁴ Ibid.

²⁶⁵ Ibid 884.

²⁶⁶ Ibid 885.

²⁶⁷ Ibid.

²⁶⁸ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 35.

5.4.4.3. Countering Developed Countries' Bilateral Pressure: The Need for North-south Alliance

Developing countries face bilateral pressure from powerful developed countries in their international trade relations that undermine the role of law and affect the worthiness of any potential dispute resolution between them. Powerful developed countries are more likely to exploit power imbalances to push for their actions to pass unchallenged.²⁶⁹ In this context, the threat to withdraw the GSP, which would end any preferential treatment provided by the developed country concerned to the exports of its developing counterpart, or any other financial or food aid is a possible pressuring device utilised by developed countries if developing countries were to challenge their trade measures.²⁷⁰

These kinds of threats make the initiation of disputes by developing countries in these circumstances a very difficult decision that depends more on the political and economic consequences of relationships than on the legal merits of a dispute and the economic gains expected, which should be the case in all disputes. Even if the decision to initiate a dispute was eventually made, and the case was won by the developing country, such threats of terminating preferential trade and aid agreements leaves the enforcement of rulings through retaliation, if needed, completely out of reach for the concerned developing country.

Developing countries could adopt more effective strategies to attempt to constrain such bilateral pressure. They could forge alliances with certain entities within developed countries to counter the bilateral pressure practiced by developed countries with domestic political pressure within developed countries, which, to a degree, would offset some of the power imbalances that affect developing and developed countries relations.²⁷¹

The role of one form of these entities has already been discussed in the previous section in relation to how the public campaigning of some NGOs could be used to the

²⁶⁹ Shaffer, 'The challenges of WTO Law', above n 244, 16.

²⁷⁰ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 33.

²⁷¹ Ibid.

benefit of developing countries in their participation in the WTO dispute settlement system.

To give an example of the role that some NGOs can play to create a form of domestic political pressure that serves developing countries' interests, it is relevant to recognise the role that Doctors without Borders has played in the US' international trade policy.²⁷² This NGO, which is concerned with the recognition, scope and enforcement of pharmaceutical patent rights, helped counter US pressure on developing countries to enforce US pharmaceutical company patents under a strict interpretation of the TRIPS Agreement. This NGO's counteraction, accompanied by pressure from AIDS activists, forced the US to withdraw its threat of initiating a WTO dispute against South Africa during Vice President Gore's presidential campaign.²⁷³ It also forced the US, with the help of advocacy groups, to withdraw its dispute against Brazil's compulsory licensing provisions under Brazil's patent law, after widespread protests that maintained that the US government was placing corporate interests above life-and-death medical concerns.²⁷⁴

Similar to developing alliances with NGOs, developing countries could work with importers and consumer groups in developed countries that benefit from access to increased varieties and volume of trade from developing countries and corresponding low prices.²⁷⁵ These groups have strong incentives to assist developing countries in their market access litigation. This incentive, if used effectively, could lead to collaboration between the two sides that would play an important role in enhancing the position of developing countries in their WTO dispute settlement participation.

To give an example of how the interests of consumer groups could help in assisting developing countries' participation in the system, even without a collaboration agreement, it is relevant to mention how the UK Consumers' Association worked with a UK law firm on a pro bono basis, to prepare an *amicus curie* brief in support of

²⁷² Ibid 34.

²⁷³ Shaffer, 'The challenges of WTO Law', above n 244, 17.

²⁷⁴ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 34.

²⁷⁵ Marc Busch and Eric Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (Paper prepared for the Swedish International Development Cooperation Agency, April, 2004) 6; Bown and Hoekman, above n 222, 886.

Peru's submission to the WTO panel in the case *EC—Trade Description for Sardines*.²⁷⁶ In this dispute, Peru challenged an EC regulation that would not permit Peruvian fish to be sold as Peruvian sardines within the EC, despite being sold around the world as sardines in accordance with international standards. The brief of the Consumers' Association, which had an impact on the WTO panel in its ruling in favour of Peru, addressed how the EC regulation 'clearly acts against the economic and information interests of Europe's consumers', and constitutes 'base protection in favour of a particular industry within the EC'.²⁷⁷

Like the case with any potential alliance with NGOs, any alliance between developing countries and importer and consumer groups in developed countries would be more practical if conducted through an international legal service centre, such as the ACWL.²⁷⁸ The central role the Centre plays in developing countries' WTO litigation makes it well suited to developing working relations between developing countries and such groups, and like the case in Peru's dispute, receive and use all kinds of assistance provided by these groups to the benefit of developing countries in individual disputes.²⁷⁹

5.5. Conclusion

The issues presented in developing countries' proposals during the negotiations on reforms for the WTO dispute settlement system reflect some of the challenges that developing countries encounter during the course of the dispute settlement process. They reflect the negative impact that a long process of dispute settlement has on their ability to utilise the process, considering their limited institutional, legal and financial resources. They also bring to the attention developing countries' dissatisfaction with the system of prospective remedies under which a long process of dispute settlement does not only mean the exhaustion of their resources, but also substantial losses due to

²⁷⁶ *EC—Trade Description of Sardines*, WTO Doc WT/DS231 (mutually agreed solution notified 29 July 2003).

²⁷⁷ Shaffer, 'How to Make the WTO Dispute Settlement System Work', above n 65, 35.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

the continuation of the violating measures during the process, which go unaccounted for at the end of it.

Proposing monetary compensation and collective retaliation as new forms of remedies shows a clear indication of developing countries' desperate need for new rules that touch on their actual concerns and problems in the dispute settlement system, and that are suitable to their circumstances. Their frustration with the current retaliation procedures, for example, and their obvious inability to utilise the procedure effectively against developed countries is clear in Mexico's proposal to trade the right of retaliation, which is hardly expected to result in any benefits when used by developing countries, with other arrangements that might be of benefit to their economies. The notion of a country giving up the right that is supposed to offer its international trade the protection of the WTO system is a clear indication of its lack of faith in this right.

It is understandable that reforming the dispute settlement system is a complicated and tricky process. It has to consider the sensitivity of the international context, and the political and economic interactions that shape the structure of an international organisation like the WTO. In this context, it is a fact that major developed countries still have a substantial influence over the routes that the WTO needs to take, and the way it conducts its business. Therefore, it is hard to imagine reforming the dispute settlement system of the WTO in a way that addresses developing countries' participation issues in the system unless these reforms have the blessing of their developed counterparts. However, the WTO as an organisation along with developed countries as major contributors in this organisation have an obligation to make the system accessible to Member countries, including developing countries. In the context of dispute settlement, this accessibility is achieved by creating an encouraging environment for active and effective participation from all Member countries, which brings back the challenges of developing countries' participation as an important issue that needs to be addressed and resolved.

However, the responsibility of improving the circumstances of developing countries' participation in the dispute settlement system is on not only the WTO and its major

developed countries. Developing countries have the responsibility of searching for new routes outside the scope of the WTO to enhance their position in the system. The negative impact of developing countries' lack of institutional, legal and financial resources that are necessary for an effective utilisation of the dispute settlement process could be minimised through collaboration and partnerships between developing countries and other entities that are concerned with the WTO system. In this regard, the resources of entities such as the private sector, regional legal service centres, private law firms and NGOs could be used to enhance the position of developing countries in the process if some sort of collaborative relationship is encouraged and facilitated by developing countries. In addition, developing countries need to expand and develop the role of the ACWL in order for it to be able to accommodate more responsibilities and play a more active role in assisting developing countries in the system.

There is shared agreement among many Members of the WTO that there is a need for some form of change in the current dispute settlement system, which is reflected in the ongoing negotiations that have been taking place for nearly a decade. The fact that these negotiations are still ongoing means that there is some uncertainty surrounding many of the issues on the negotiation table, including those that relate to developing countries' participation in the dispute settlement system. However, developing countries' issues, in particular, represent a test for the WTO system, which has to properly address and find solutions for them in order to support its proclaimed aim that it is for the promotion of welfare for all Member countries.

Chapter 6: Conclusion and Recommendations

The argument throughout this thesis has been that there are imbalances in the position of developing and developed countries in their participation in the dispute settlement system, and a bias in the system's structure and mechanism against developing countries' utilisation of such system. The GATT dispute settlement system's reliance on consultations and its practice of adopting procedures by positive consensus was not suitable in a system where economic and political circumstances affected the parties' standing and participation. The weakness of the panel stage, as a result of the positive consensus rule, also affected the progress and outcome of the consultation stage, allowing for power-oriented negotiations that manipulated the gap between developed and developing countries in economic and political power. Under this form of negotiations, issues that were not GATT-related, such as unilateral economic sanctions, monetary aid and preferential trade arrangements were more likely to be pressuring devices against developing countries, resulting in unfavourable outcomes to interests and rights.

Other than the fact that the dispute settlement process was an expensive option for most developing countries that required a level of legal and financial resources they lacked, the system's reliance on positive consensus also aggravated the lack of developing countries' participation. The unpredictability and lack of security, resulting from the prospect of blockages and failure to implement panel's rulings made the idea of initiating disputes less appealing for developing countries, affecting their participation and the system's success in protecting their rights and interests.

The prospect of providing S&D treatment for developing countries in the GATT dispute settlement system came as recognition of the difficulties they were facing in the system after years of failing to recognise them as a separate group different from developed countries in their circumstances and needs. However, such treatment, which was mainly based on the 1966 Decision that focused on facilitating and expanding the negotiation option for developing countries, failed to acknowledge the core reasons behind developing countries' limited participation, particularly their lack

of legal and financial resources, which was evident in the limited use of the Decision's procedures by developing countries.

The creation of the WTO represented a great change in the dispute settlement system through the DSU. The new system reversed the positive consensus rule to introduce an automatic transition of the procedures, provided for an interim review at the panel stage and created a new litigation stage by establishing an Appellate Body to examine appeals regarding issues of law in panel reports; all added a strong judicial character to the system. The mandatory, rule-oriented dispute settlement system of the WTO added the predictability and security that were missing under the old system, which was more appealing to developing countries' confidence in the system, as it appeared to offer better prospects of protecting their rights and interests.

However, the current WTO dispute settlement system fails to deal with issues limiting the participation of developing country Members in every stage of the dispute settlement system, placing them in a less advantageous position to their developed country counterparts. In relation to developing countries' ability to initiate disputes, their lack of sufficient financial and legal resources to engage effectively in a dispute settlement process, along with possible political consequences that could include a potential loss of bilateral assistance from the future respondent, play a considerable role as a deterrent from taking such step.

Developing countries' decision to initiate disputes is also restricted by their likelihood of success in the dispute in terms of whether it would actually generate benefits of restored market access rather than a moral legal victory. The fact that the WTO dispute settlement system has a self-enforcing nature means that it is the responsibility of a country to monitor its trade and other countries' trade policies, to initiate a dispute when there is a violation against its rights under the WTO agreements, and to enforce its rights through actual or implicit threats of retaliation. The limited economic and political power of developing countries makes their threat of retaliation lack credibility, especially when practiced against large developed countries, which provides little incentive for such countries to comply. Even if developing countries' threat of retaliation progressed to actual retaliation, it is unlikely to achieve any

noticeable impact on a large developed country's economy, leading to the same outcome of non-compliance, and to developing countries' failure to translate legal success into an actual success. The WTO position not to efficiently deal with these issues reinforces the unequal standing in the system by not offering the same chance of utilising the system to all Members.

Developing countries' position in the consultation stage is to a degree similar to their position in consultations under the GATT system. Under the old system, the threat of blockage pressured developing countries to settle their disputes in the consultation stage to avoid wasting their scarce resources on an unguaranteed dispute settlement process, exposing them to all forms of power-oriented tactics to their disadvantage. While the WTO system provides the security of an automatic, rule-oriented process, the highly demanding dispute settlement process, which could last for a lengthy period of time and require a considerable amount of legal expertise and financial resources, is likely to have an exhausting effect on developing countries' resources, which might eventually end with non-compliance, as discussed above. This could pressure developing countries into achieving an early settlement at the consultation stage to avoid going through a long dispute settlement process. The limitation of options for developing countries is likely to be translated into a weakness in their bargaining power, especially if the opposing party is a developed country that is willing to pursue its interests through all stages of the dispute settlement process. This weakness at the consultation stage, again, puts developing countries in an unequal position with their developed country counterparts.

During the litigation stage, the complexity of the system again presents the issue of developing countries' lack of legal expertise and financial resources as a main concern, restricting their ability to utilise the system efficiently under its multi-agreement complexity. This issue is also more likely to be even further aggravated by a developing trend in panels and the Appellate Body to adopt overreaching and unwarranted interpretations in disputes, adding to the system's complexity. Arguments that the system limits the effects of developing countries' insufficient legal resources through the role the Secretariat plays in assisting developing countries are unconvincing, considering the impartiality requirement in any role provided by the

Secretariat and the limited resources of the Secretariat itself to deal with the large number of developing country Members.

Developing countries' fortunes are not any better at the implementation stage. The dispute settlement system does not have effective procedures to monitor the implementation progress during the reasonable period of time other than the general requirement of a status report, which could allow this period to be used as a delaying tactic to buy additional time for ongoing application of the inconsistent measure without any consequences until the intention for non-compliance is revealed at the end. These delaying tactics are more likely to have a considerable impact on developing countries' fragile economies, as the prospective nature of the remedies against non-compliance do not account for any past damages.

The WTO system of remedies, which aims to place pressure on the non-complying Member to bring its measures into conformity with WTO law, lacks incentives for prompt compliance. Trade compensation is voluntary, subject to the non-complying Member's willingness to offer it, and the disputing parties' agreement on its scope and implementation, which leaves doubts regarding its practicality. Trade retaliation might have a stronger compliance-inducing presence as a unilateral arrangement authorised by the DSB without the consent of the Member. However, any possible effect of retaliation in inducing compliance is diminished when the retaliating Member lacks the power and resources to place the needed pressure on the non-complying Member to make changes in its position. This situation is more likely to be felt by vulnerable developing country Members. The high cost of imposing retaliatory measures and the small size of their markets means that they are not able to put sufficient pressure on larger developed country Members, which also in turn affects their chances of being offered trade compensation by the non-complying Member. The weakness of developing countries in applying effective retaliatory measures gives the non-complying Member no reason to offer compensation other than good faith.

Trade compensation and retaliation are also less likely to offer relief to the parties actually damaged by the violating measure, but damage innocent parties in return. Compensatory trade concessions are more likely to be offered to sectors other than the

one affected, hurting innocent exporters in the violating country without providing relief to the aggrieved parties in the complaining country. Trade retaliation, in turn, is actually a trade restriction that offers no benefit to the sector subject to the dispute, and places one or more of the violating country's sectors under the possibility of retaliatory measures despite their non-involvement with the inconsistent measure concerned.

This situation could have a negative impact on developing country Members if the negatively affected or the wrongly involved industry is one of the few industries with strong economic contribution in the developing country's economy, where the effect could extend to include the balance of the country's entire economic stability. The continuation of the dispute settlement remedies despite the clear indication of their unsuitability for developing countries' circumstances and the potential negative impact they have on their economies, reinforces the thesis' argument of imbalances in standing between developing and developed country Members in the system, and the system's bias against developing countries' interests.

The thesis has addressed the issues and limitations that developing countries have in every stage of the dispute settlement process, which affect and restrict their participation and the benefits from such participation. It is true that developing countries problematic participation issues have resulted from shortcomings in the structure and mechanism of the dispute settlement system, but their circumstances and weaknesses are the factors that have highlighted such defects in the system. The practice followed under the GATT/WTO system has been to offer forms of special and favourable treatment to developing countries in order to ease the effect of such restricting circumstances. This approach is followed in the WTO DSU to restrict the impact of their weaknesses on their use of the system, and to improve the applicability and suitability of its procedures to developing country Members.

However, the thesis has highlighted the deficiency in the special treatment provided in the dispute settlement system, which is based on loose, general, vague, and voluntary requirements that are easily ignored or satisfied without achieving the intended outcome of better and more efficient participation. Even the loose requirements under

these rules are opposed by resisting attitudes by developed Members, and dismissing interpretations by panels and the Appellate Body, leaving the existence of such special procedures meaningless to the detriment of developing countries' interests. On top of all that, the thesis has highlighted the lack of innovation in the special treatment provided under the DSU. Most of the procedures introduced in the WTO dispute settlement system as special and differential treatment for developing country Members have been carried over from the GATT dispute settlement system. Even though the DSU follows a more detailed approach in presenting these procedures, the substance is very similar to what existed in the old GATT system. In this regard, the WTO also follows the GATT dispute settlement system's approach of ignoring the real concern of developing countries of lack of legal and financial resources, as it fails to present special treatment that eases the pressure from these limitations.

The deficient special treatment provided for developing countries in the WTO dispute settlement system that is largely based on a system that proved to be unsuitable in addressing developing countries' real participation problems, and is often resisted and dismissed by developed country Members, panels and the Appellate Body, is hardly an indication of any WTO commitment towards achieving a balance in Members' standings in the system.

The thesis has identified possible reforms targeting the dispute settlement remedies as one of the main problematic issues facing developing countries in the system. Introducing other forms of compensation, such as mandatory compensation and monetary compensation, could provide a better alternative to the current system of voluntary trade compensation, especially for developing country Members, which have limited prospects in utilising effective trade retaliation. In addition, the introduction of new concepts into trade retaliation, such as collective retaliation and punitive retaliation, are likely to have more compliance-inducing effect to the benefit of Members that struggle to enforce compliance through the current retaliation system. Above all, the system could witness the introduction of retroactivity as a rule to be applied to both compensation and retaliation. Such a principle, which would involve the retroactive calculation of damages caused by the violating measure, would also have a compliance-inducing effect, and provide a more accurate assessment of

the damages sustained. This would be of a particular interest for developing countries, as their small and less diversified economies make the impact of unacknowledged damages greater on their economies than others.

The special and differential treatment for developing countries in the dispute settlement system could also be improved by recognising the two main factors that affect their position in the process: limited legal expertise in WTO law and lack of financial resources. The Secretariat's role could be improved to become more active and less restricted by impartiality requirements. In addition, a roster of legal experts could be established who are available at the request of developing Members to provide their legal services funded by the WTO. The costs of the dispute settlement process, which is a deterrent for many developing countries against their use of the system, could be recovered through a fund that would be specifically established for that purpose, or costs paid by a developed Member in a dispute won by a developing country. Specific limitations that could be applied as to the extent of legal assistance, amount of recovered costs, nature of disputes, or the developing countries beneficiaries of the procedures would be expected to be added to eliminate any misuse and maximise the efficiency of such procedures.

The process of reforming the WTO dispute settlement system must, however, recognise the interplay between law and international relations, and acknowledge the Member-driven nature of the WTO. As an international organisation, law is a loose concept that is dependent on Members' attitudes, and their willingness to maintain its successful application. This nature was clear in the GATT dispute settlement system, where compliance with panel recommendations was reasonable despite the fact that any procedure could have been potentially blocked by the consensus practice. The same situation exists in the WTO system, where large developed countries could easily ignore the implementation of rulings when their counterparts are small developing countries with minimal retaliatory power or pressuring effect. Therefore, in the WTO context, law should always maintain a balance that allows positive attitudes among all Members towards its application.

While it is reasonable to maintain and enhance the enforceability of WTO law in a way that reinforces the legitimacy of the system and the satisfaction of Members in relation to increased predictability and the security of their interests, such enforceability should not push the boundaries of international relations. In this context, reforms on the WTO dispute settlement system that could be seen by Members as interference in sovereignty, or as imposing a heavy burden that is unsuitable for the international settings of the organisation, might lead to adverse consequences that change Members' attitudes towards WTO law or the system altogether, resulting in its abandonment. Therefore, introducing new concepts, such as mandatory and monetary compensation, collective and punitive retaliation, and retroactive remedies that increase the authority of the WTO over its Members and the burden of abiding by its dispute settlement procedures, should account for these important factors. They should also be drafted in a way that maintains the balance between their intended objectives and ensuring a positive reception among Members in relation to their application.

Keeping in mind the tricky task of introducing new reforms into the WTO dispute settlement system, and the high probability that these reforms might not achieve the blessings of all WTO Members that is required for their adoption, the thesis introduced a number of ideas that could be implemented independently by developing countries to offset the structural biases in the system. Encouraging public-private collaboration, expanding the role of the ACWL, establishing regional legal service centres on WTO law, seeking opportunities for pro bono representation of private law firms, and increasing cooperation with NGOs and alliances with interest groups are all possible paths that developing countries could and should follow. An effective use of these tools by developing countries is more likely to improve their legal preparation and representation, ease the pressure on their financial resources, and enhance their prospects of achieving compliance by developed countries, which would have a positive impact on their position in the dispute settlement process

The thesis has recognised the sensitivity of introducing reforms in the international context of the WTO dispute settlement system, where new obligations or procedures would have to be presented for approval in a less intimidating and more appealing

framework. In doing so, it introduces in the next section an example of a new developing country-friendly DSU that serves in addressing some issues of concern to developing countries in a subtle manner that is aimed at avoiding possible resistance. The proposed DSU only relates to how developing countries' issues could be addressed in any future modifications to the current DSU, rather than being introduced as a new comprehensive DSU. This means that the model does not modify the current DSU text when it is not related, or of relevance, to developing countries' participation issues, which means that only proposed changes to DSU provisions that are relevant to the participation of developing countries are outlined below. Those provisions that require no such changes remain as they are and are not mentioned in the model. The model DSU employs a mix of previous analysis of possible new reforms, which were discussed in the thesis, and a number of proposals introduced by WTO Member countries during negotiations on reform. In this context, the degree of innovation in the proposed changes introduced in the model DSU varies. Some of these changes are exact proposals suggested by Members, and some are only influenced by certain proposal ideas or terms. However, the model DSU involves a number of new ideas that have not been addressed before, which adds to the relevance of this model.

6.1. The Model DSU

The model DSU reads as follows:

Article 3: General Provisions, Paragraph 6:

‘Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified **within 30 days from the date of such agreement and in sufficient detail** to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto. **The DSB has the right to ask for more information from the involved Members on the mutually agreed solutions they reached.**

The Proposed Changes

- Time-limit to the notification procedure.

- More active role for the DSB in monitoring the mutually agreed solutions.¹

The Rationale of the Proposal

Adding a time limit to the notification procedure is a step to shorten the process of dispute settlement, when shortening is needed to avoid delays and wasted time. This step is suitable for the circumstances of developing countries, considering the increased pressure that long disputes put on their limited resources. In addition, regulating the process of notification of mutually agreed solutions by requiring sufficient details of those solutions, and reserving the DSB right to seek more details from the disputing parties, contribute to keeping these mutually agreed arrangements in line with the WTO law. The more active role for the DSB in monitoring mutually agreed solutions provides more protection for developing countries as they are more likely to be the weaker party of any negotiation process with a developed country.

It could be argued that the introduction of this monitoring role for the DSU is a radical shift from the current procedure, as the role of the dispute settlement process is to resolve the dispute, not to create jurisprudence. This argument, however, ignores the fact that even though the dispute settlement process is focused on solving the dispute, it is clear in Article 3.5 of the DSU that all solutions must be consistent with the covered agreements of the WTO, and this is why the notification procedure was introduced in the first place after it was not required for a period of time during the GATT years, which worsened the issue of power tactics against weak developing countries. Adding a monitoring role to the DSB during the notification process is hardly radical, as the DSB exercises this role in other stages of the process, such as its role monitoring implementation during the reasonable period. Therefore, such a procedure would provide a new role for the DSB at this stage, but with a familiar

¹ This proposal was partly proposed by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18. This proposed change differs from the proposal submitted to the WTO in that it requires a shorter period for the notification procedures of 30 days instead of 60, as part of the direction followed in this thesis' proposal to cut unnecessary waiting periods. The proposed change also differs from the original proposal in that it does not only grant the DSB the right to obtain the agreement on mutually agreed solutions 'in sufficient detail', rather it gives the DSB the authority to 'ask for more information'. This authority is more likely to succeed in ensuring the consistency of the agreed solutions than a mere requirement of notification 'in sufficient detail', which could be manipulated contrarily to the intended aim of the change.

concept that Members have already agreed on and accustomed to, which makes their disapproval of such change unlikely.

Article 3, Paragraph 7:

Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures. **Under some circumstances, where the Member invoking the dispute settlement procedures provides evidence that the authorised suspension would more likely have a minimal compliance-inducing impact on the respondent Member's economy, or a substantial damaging impact on its own economy; the DSB may decide, depending on the circumstances, to have the authorised amount imposed collectively by all WTO Members vis-à-vis the other Member.**

The Proposed Change

- Collective retaliation as a new form of retaliation for the enforcement of DSB rulings.²

² This proposed change is influenced by a proposal by the African Group (TN/DS/M/15), and the proposal by the LDC Group (TN/DS/W/17). The only similarity between the proposed change above and these original proposals is the concept of collective retaliation. These proposals suggested collective retaliation to be offered as a special treatment procedure to developing countries to be carried out by all WTO Members against defendant developed Members. The proposal above, however, recognises that such procedure would have a better chance of coming into reality if it is introduced to all WTO Members for a general application. This application would be restricted by certain circumstances which insure that only Members in need for such procedure are benefiting from it.

The Rationale of the Proposal

Introducing the possibility of receiving an authorisation for collective retaliation would present a more usable and practical form of retaliation for developing countries. The efficiency of the current form of retaliation depends on the retaliating Member's economic power, which means that the retaliatory power of developing countries would hardly have any effect on the economies of developed countries. Despite being equivalent to the amount calculated as nullification or impairment, the collective nature of this retaliation would put more pressure on the respondent's economy, and minimise the negative effect of retaliation on the economy of the retaliating developing country.

An argument could suggest that collective retaliation is a form of punishment that should not be part of the dispute settlement remedies, as the system's main focus is the removal of the measure and restoring the balance of rights and obligations. This argument could have merits if the proposed collective retaliation is calculated on a punitive basis that exceeds the amount of nullification or impairment determined by the DSB. However, it would be based on the same amount that is otherwise authorised under the current procedure. The only effect the proposed collective retaliation would have is one of increasing pressure, resulting from collective action by WTO Members, rather than any form of punishment.

Another argument could see the introduction of collective retaliation as a radical shift from the current procedure. Such a shift would be the case if the proposed collective retaliation is based on a punitive application that would completely substitute the current procedure, or has offered exclusively to a group of Members. Instead, the proposed collective retaliation would not be punitive, and would not be introduced as the only new form of retaliation. It would be equivalent to the amount of nullification or impairment to be offered as a second option to the current procedure only under circumstances that are argued before and judged by the DSB. Adding a form of a restricted application into the proposed collective retaliation would ease the sense of radicalism in the proposal and make it more appealing for Members' approval. In addition, the proposed collective retaliation would actually be a special treatment rule

for developing countries that is masked with a general application appeal. Even though the option of requesting collective retaliation would be open for all WTO Members, which would also make it more appealing, the practical logic suggests that only developing countries with limited economic power would satisfy the requirement of proving their need for such a procedure. It is hardly imaginable to see the US or the EC arguing that they lack the economic power to impose a sufficient level of pressure on the violating Member or to survive the negative impact of retaliation on their economies.

Article 4: Consultations, Paragraph 7:

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute. **Where one or more of the parties is a developing country Member, the time period of 60 days shall, at its request, be extended by up to 30 days.**

The Proposed Change

- Longer period of consultation for developing country Members (if requested).

The Rationale of the Proposal

Developing countries' lack of financial and legal resources is one of the main issues that affect negatively their participation in the dispute settlement system. A long litigation process puts pressure on those limited resources. The extension of the period allocated for negotiations if requested by the concerned developing country would maximise its chances of an early settlement, and spare it from proceeding to a long and resource-exhausting litigation process. There is no reason to suggest that this change would not be suitable for adoption. As it is for developing countries, it is also for the interest of other Members to find a suitable solution for the dispute if such solution is achievable without the need to proceed to other dispute settlement stages.

Article 4, Paragraph 10:

During consultations Members **shall** give special attention to the particular problems and interests of developing country Members, **and shall explain in the panel request as well as in submissions to the panel as to how the special attention was paid during consultations, and how it was appropriate to the particular problems and interests of the developing country Member concerned. Holding consultations in the capitals of least-developed country Members shall always be the preferred arrangement for consultations involving least-developed countries.**

The Proposed Changes

- Replace the term ‘should’ with the term ‘shall’.³
- The requirement to explain in the panel’s request how the S&D provision was implemented.⁴
- The arrangement of holding negotiations in the capitals of least-developed country Members in disputes involving them.⁵

The Rationale of the Proposal

Developing countries need the full effect of every S&D provision. Using the term ‘should’ limits such effect as it serves the understanding of a voluntary application of the provision. Replacing this term with ‘shall’ adds a mandatory effect for the application of this provision, which better serves the aim of this provision. It could be argued that the change from ‘should’ to ‘shall’ would make no practical difference. However, as discussed in Chapter 4 of this thesis, the language of S&D treatment provisions has a great impact on how these rules are interpreted and applied. It has been demonstrated that the vague, general and voluntary language of most of these

³ Proposal by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19.

⁴ This proposed change is influenced by a proposal by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19. The proposed change in this thesis is very similar to the original proposal submitted to the WTO. However, it adds the ‘appropriateness’ factor of the ‘particular attention’ paid to the problems and interests of developing countries. The inclusion of the ‘appropriate’ requirement would ensure that the aim of the provision is achieved, as it would not only require Members to explain how the special attention was paid, but also how it was appropriate under the circumstances.

⁵ This proposed change is greatly influenced by a proposal by Haiti (TN/DS/W/37). Other than choice of words used, the proposal in this thesis is very similar to Haiti’s proposal in that it is restricted to least-developed Members.

provisions are some of the main factors contributing to their inefficiency. Whether or not the change would make a practical difference, introducing this change would at least have the potential of representing a stronger mandatory requirement, which is by itself an improvement.

It is also for the benefit of developing countries to present S&D provisions in clear language. The requirement of ‘special attention’ in this paragraph is vague, which weakens its context and intended effect. Adding the requirement of explaining in the request for a panel how the S&D provision was implemented and the appropriateness of the measure used as a tool of ‘special attention’ would limit the vagueness. It is unlikely that such change would be problematic for Members’ approval on the basis that the change would not introduce a new concept. The original requirement of giving special attention to developing countries’ problems and interests already exists, and Members are expected to satisfy it. The new change would only add some details to the original text by requiring an explanation as to how it was carried out.

Holding negotiations in the capitals of least-developed Members in disputes involving them is very appropriate for least-developed countries, considering their very limited resources. This procedure would save some resources for those countries. It is unclear how this proposed change would be received by WTO Members, as it would place a financial burden on the rest of the WTO Members. However, judging by the current level of participation of least-developed Members, such burden would not be substantial, which might help in selling the idea with minimal resistance.

Article 6: Establishment of Panels, Paragraph 1:

If the complaining party so requests, **the DSB shall establish a panel at the meeting at which the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel.**

The Proposed Change

- Establishing the panel at the DSB meeting where the request for a panel first appears rather than the following meeting.⁶

⁶ A proposal by China, TN/DS/W/51.

The Rationale of the Proposal

The impact of the violating measure on the economy of developing countries is far greater than the impact of a similar measure on developed countries. Therefore, it is in the interest of developing countries to extend some stages, which could help in achieving early settlement such as the consultation stage, and shorten the period to implement other procedures, such as the in-between-stages procedure of this Article. It could be argued that this change would have no practical effect. The purpose of this change, however, is not to have a practical effect. This change instead would serve the larger need of extending the process where there is a potential of achieving suitable settlement, and shortening the process where such periods are unnecessary. Such change would increase the efficiency of the process without placing extra burden on Members, which could increase its chances of Members' approval.

Article 6, Paragraph 2:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. **The request shall also identify how special attention to the problems and interests of developing country Members was paid during consultations with them.** In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

The Proposed Change

- A follow-up to the 'special attention' requirement of paragraph 10 of Article 4 by adding the requirement of explaining the special attention paid to the problems and interests of developing country Members during consultations in the request for the establishment of a panel.

The Rationale of the Proposal

This proposal reaffirms the ‘special attention’ requirement proposed in paragraph 10 of Article 4, which strengthens the sense of special treatment provided for developing countries at the consultation stage.

Article 7, add new paragraph 4:

Where a developing country Member is party to any dispute under this Understanding, the panels, in consultation with relevant development institutions where necessary, shall consider and make specific findings on the development implications of the issues raised in the dispute, and shall consider any adverse impact that findings may have on the welfare of the developing country Member. The DSB shall fully take those findings into account in making its recommendations and rulings.⁷

The Proposed Change

- The requirement that the panel investigates the development implications of the issues raised in the dispute on the developing country involved, and takes the result of such investigation into consideration when making the ruling.

The Rationale of the Proposal

Most developing countries’ economies are vulnerable and sensitive to external and internal shocks. They are likely to have difficulties in their balance-of-payments, and struggle to meet their development needs. It is important to add a new dimension to the dispute settlement system that recognises the weakness and vulnerability of developing countries’ economies alongside its legal discipline. Under this recognition, violating measures taken by developing Members as a result of economic instability might not be treated in the same way as similar measures of developed Members. Also, such recognition might make developing Members eligible for more amounts of compensation or authorized retaliation than otherwise provided under the current system. An argument against this change could suggest that this requirement weakens the integrity and credibility of the dispute settlement system, as it would have the

⁷ A proposal by Kenya, TN/DS/W/42.

potential of creating panel reports full of exceptions as a result of accommodating such development considerations. The requirement for special consideration to be paid to developing countries' circumstances is not, however, new in the DSU. This requirement currently exist in a number of DSU provisions, such as in paragraphs 7 and 8 of Article 21. This is evidence that the dispute settlement process could still function appropriately while addressing developing countries' development and economic circumstances. WTO Members' approval of the current provisions with a similar requirement is an indication of their willingness to accommodate this requirement.

Article 8: Composition of Panels, Paragraph 7:

If there is no agreement on the panellists within **10** days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

The Proposed Change

Again, in order to shorten the dispute settlement process when appropriate, a suggestion to:

- A Shortened period for the parties to reach an agreement on panellists from 20 days to 10 days.

The Rationale of the Proposal

It is in the interest of developing countries to have a shorter dispute settlement process in order to save much-needed resources and to end the negative impact of the violating measure sooner when complainants. Shortening the period needed to agree on a panel to 10 days is reasonable and would cut off unnecessary 10 resource-exhausting days of the dispute settlement process. It could be argued that the proposal

recommends inconsistent amendments, in relation to suggested time-frames, as it claims that it is in the interest of developing country Members to have a shorter dispute settlement process, prompting it to suggest shorter time periods in this Article and in the previous Article 6.1; while it proposes longer periods in other Articles, such as in Article 4.7. As discussed earlier in the rationale for the change in Article 6.1, the aim of this proposal is not to suggest a blind policy of shorter or longer time periods, it aims, instead, to extend these time-frames where such extension could have a potential in settling the dispute, as the case at the consultation stage, and to shorten these periods where their current length is of no benefit to the dispute settlement process. In this Article, providing 20 days for the parties to reach an agreement on the composition of a panel has little effect on reaching a settlement on the dispute itself, so why not shorten this period to 10 days, considering that the Director-General would ultimately determine such composition if the parties fail to agree on one. Other than contributing to a more efficient process, such change would be likely not to make a noticeable impact on Members' positions in the system, making it easier to pass their approval.

Article 12: Panel Procedures, Paragraph 10:

In the context of consultations involving **a developing country Member as a party to a dispute**, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall, **if requested by the developing country Member, extend the relevant period for a duration subject to his/her determination**. In addition, in examining **a dispute involving a developing country Member as a party**, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

The Proposed Changes

- The expansion of the provision's scope to include all developing country Members that are parties to disputes rather than only including defendants.
- Making the extension of the consultation period for developing country Members an automatic privilege depending only on a request made by them,

rather than having it dependent on an agreement between disputing parties or a decision by the Chairman of the DSB.⁸

The Rationale of the Proposal

The lack of resources that triggered this paragraph in the first place is a problem that developing countries face regardless of their position. Therefore, it is of interest to developing countries to maximise their chances of an early settlement in the consultation stage and avoid a long and costly litigation stage. It is also reasonable to leave the judgement of developing countries chances of an early settlement through an extended negotiation period to the developing country Members involved. This would serve the purpose of the paragraph better than placing developing country Members under the pressure of reaching an agreement with the other disputing parties on the time extension. It is only sensible that any special treatment provision should take these considerations into account.

The idea of expanding the scope of developing Members that benefit from the procedure rather than restricting it to defendants would be unlikely to face resistance from other Members, as it would hardly impose a great impact on their interests. However, making the extension of time-frames an automatic privilege depending only on a request by the developing country concerned could be the tricky part of the proposed change. There is a risk that WTO Members would view this change as an unwarranted authority by the Chairman of the DSB, and an undesired privilege to developing countries, especially when such extension could hurt their interests, as it is the case with perishable goods in Article 4.8, which is covered by these possible extensions. Nevertheless, there is also a logical point that an extension of consultations could be the key for an early settlement to the dispute that would save

⁸ This change is partially influenced by a proposal by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19. The proposed change in this model is similar to the original proposal in that it added an automatic extension to the consultation period, which only depends on a request by the developing Member concerned rather than a decision by the Chairman of the DSB. However, it does not have the detailed timeframes suggested in the original proposal, as the different circumstances of each dispute make it more appropriate to leave the length of extensions subject to the determination of the Chairman of the DSB.

the interests concerned from even longer periods of litigation, which could be a persuasive issue in gaining support for such change.

Article 12, Paragraph 11:

Where one or more of the parties is a developing country Member, the panel's report shall, **when appropriate, apply any relevant provision on differential and more-favourable treatment for developing country Members** that form part of the covered agreements. **The panel's report shall explicitly indicate the reason for not applying a provision on differential and more-favourable treatment for developing country Members that would generally be viewed as relevant to a similar subject matter.**

The Proposed Change

- Replacing the panel's obligation of merely taking into account the relevant S&D provisions and only when raised by a developing country Member with a stricter obligation of applying all relevant S&D provisions unless there is a reason preventing such application, which is to be explained in the report.

The Rationale of the Proposal

The present requirement is vague and inadequate. Taking into account the relevant S&D provisions does not necessarily mean applying and could be manipulated to provide a minimal form of favourable treatment for developing countries. The proposal would consolidate the context of the special treatment provided. It would limit the vagueness and limitation that exist in the text, and would offer a greater and more precise form of special treatment. It could be suggested that requiring the application of appropriate S&D treatment provisions instead of merely taking them into account, and providing an explicit explanation for failure to do so is a drastic change to the current procedure. The new change would not add any burden on Members other than what is already agreed on under S&D treatment provisions of the DSU, but would increase the burden on panels to appropriately satisfy the requirements of such provisions, which might be a persuading factor in securing Members' approval for the change. The current vague procedure that allows panels to satisfy the requirement of the provision with minimal or inadequate attention for S&D

treatment provisions might provide a desired outcome for Members other than developing countries, which means that it is in their interest to keep such vagueness. However, the success and credibility of the system, which prompted the contracting parties in the GATT dispute settlement system to allow unfavourable rulings against them despite their power to block them, might again be a factor in achieving the approval of Members for such change.

Article 17: Appellate Review, Paragraph 6:

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, **and shall provide the reasons as to why the issues concerned are an acceptable ground for an appeal. The Appellate Body has the right to refuse an appeal on the basis of insufficient grounds of appeal.**

The Proposed Change

- The inclusion of an ‘admissibility text’ in the appeal process.

The Rationale of the Proposal

One of the criticisms of the Appellate Body stage is that it does not have a filtering mechanism for issues that can be appealed other than the ‘matter of law’ requirement. As a result, many Members could use the appeal process as a tool to delay the implementation of the panel’s ruling. These delays have a particular negative impact on developing countries, as they lead to more wasted resources. Therefore, it would be important to make the appeal process more controlled, and subject to the approval of the Appellate Body. The Appellate Body’s right to refuse an appeal could be argued to be a radical move that would conflict with the Member-driven nature of the WTO. The radical nature of this proposed procedure does not, however, deny its correctness. The transition of disputes from the panel stage to the Appellate Body stage needs to be controlled more than the ‘matter of law’ requirement. It is understandable, though, that selling this change to WTO Members would be a challenge, as it represents a clear limitation to their right of appeals. Refusing a Member’s request for appeal could affect its attitude towards the implementation of the panel’s report. Also, the role of the Appellate Body could be regarded as

overactive or overreaching, which could clash with Members' interests, especially in sensitive disputes. Admittedly, this change, which would involve adding more powers to the role of the Appellate Body and restricting the rights of WTO Members, could be pushing what is considered tolerable in a Member-driven organisation. Nonetheless, easing the pressure on the Appellate Body by ensuring that only genuine claims progress, which in turn would eliminate less genuine appeals and delaying tactics, could present a persuasive factor in considering such procedure.

Article 21: Surveillance of Implementation of Recommendations and Rulings,
Paragraph 2:

Particular attention **shall** be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement, **and when considering the length of the implementation period by the parties concerned or by the DSB.**

The Proposed Change

It would be important to make the provision's language more mandatory by:

- Replacing 'should' with 'shall'.⁹
- More detailed and specified term of 'particular attention'.

The Rationale of the Proposal

The aim of this paragraph is to provide favourable treatment for developing countries at this stage of the dispute settlement process. However, the term 'should' hardly serves such aim as it does not have the mandatory effect needed to apply the provision effectively. It would be important to render the provision's language mandatory by replacing 'should' with 'shall' in order to have more enforcement in serving the aim intended for the text. Any dismissive argument against the practical effect of such change would ignore the negative impact that the term 'should' has had on the

⁹ Proposal by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18.

provision's interpretations and application by panels and the Appellate Body. This impact is clear in *EC—Bed Linen*¹⁰, where the Panel stated:

Turning first to the text of Article 21.2, we find nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word 'should' must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of 'shall'.¹¹

This form of more mandatory requirement is not new in the S&D treatment provisions of the DSU. Other paragraphs with similar obligations, such as Articles 8.10, 21.7 and 21.8, follow the mandatory approach, which makes the idea of achieving Members' approval for this change feasible.

The vagueness of the 'particular attention' requirement limits the positive impact that could result from such favourable requirement on developing countries' participation, as many meaningless procedures could be interpreted as a form of paying particular attention to the interests of developing countries. Therefore, it would be important to limit the vagueness and the limitation in the paragraph by adding some specification on the 'particular attention' requirement. In the paragraph's context and order in the Article, it would be appropriate to link such a requirement with the length of the implementation period in disputes involving developing countries, which would be considered by the parties to the dispute or the DSB, whichever appropriate. This change would not only be of the interest of developing countries, as it would identify a practical specific area where the required 'particular attention' would be translated; it could also be viewed by other Members as a restriction on the application of this requirement instead of the general terms that could be manipulated and misused. Such a view could make it in their interest to limit the 'particular attention' requirement to the length of implementation period rather than other unanticipated areas, which could be a persuasive factor in securing their approval.

¹⁰ *EC—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, Recourse to Article 21.5 of the DSU by India, WT/DS141/RW

¹¹ *Ibid*, paragraph 6.267.

Article 21, Paragraph 3:

At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

- a) The period of time proposed by the Member concerned, provided that such period is approved by the DSB, **and in accordance with the requirements set forth in paragraph 2 of this Article**; or, in the absence of such approval,
- b) A period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings, **and in accordance with the requirements set forth in paragraph 2 of this Article**; or, in the absence of such agreement,
- c) A period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. **In this regard, in disputes involving developing country Members, their circumstances as developing countries in general and in relation to the dispute and their position in the dispute as defendants or complainants shall have an additional effect in considering longer or shorter periods of implementation.**¹²

The Proposed Change

- Reflecting the changes of paragraph 2 in this paragraph.

¹² This proposal was partially influenced by a proposal of Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19. The original proposal presented to the WTO requires that in disputes involving a developing country as a complainant against a developed country, the 'reasonable period of time' (RPT) should not exceed 15 months, while in disputes where a developing country is a defendant against a complaining developed country, the RPT should have the 15 month period as a minimal limit. The proposal in this thesis recognises that this procedure might not be practical under some circumstances. Therefore, it considers that an explicit requirement of acknowledging developing countries circumstances in general and in relation to their position in the dispute in considering the implementation period should be sufficient in providing the special treatment intended for the Article.

The Rationale of the Proposal

The proposal represents a follow-up on the changes proposed for paragraph 2 of this Article.

Article 21, Paragraph 5:

During the reasonable period of time, each party to the dispute shall accord sympathetic consideration to any request from another party to the dispute for consultations with a view to reaching a mutually satisfactory solution regarding the implementation of the recommendations or rulings of the DSB.¹³ Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, and consultations fail to solve such disagreement, the dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. A sympathetic consideration shall be accorded by the panel and parties involved to the development issues of developing country Members with respect to the compliance measures taken.

The Proposed Change

- The encouragement of a greater role for consultations to be used as a tool to reach a satisfactory implementation.
- The requirement of ‘sympathetic consideration’ to the development issues of developing country Members with respect to the compliance measures taken.

The Rationale of the Proposal

The achievement of full implementation of the DSB ruling is important to developing country Members in the dispute settlement system whether they are complainants or respondents. They lack the economic power necessary for an effective retaliation in case of failed implementation, and they struggle to cope with retaliation against them.

¹³ Proposal by Costa Rica, TN/DS/W/12.

Therefore, it is important to keep the door open for consultations between the disputing parties during the implementation period in order to achieve faster and more efficient implementation. Such negotiations could also open the door for much-needed concessions, which would be in the interest of developing Members. This should be a welcomed change by Members, as it is in their interests to reach an agreement on suitable implementation rather than going back to the panel again for a ruling, unless the implementation period is used as a delaying tactic and the intention of compliance does not exist.

Also, as a result of the economic circumstances and development issues of developing countries, their ability to implement the DSB rulings within a reasonable period of time could be affected. Therefore, it would be important to add a 'sympathetic consideration' requirement as another form of special and differential treatment for developing countries. An argument against this change could suggest that it would undermine the legal integrity of the dispute settlement system, as it would create exemptions for developing countries from their obligation of compliance, which would be a ground for Members' refusal to adopt such change. Nevertheless, the 'particular attention' requirement to the circumstances of developing countries currently exists in a number of DSU provisions, such as Articles 4.10, 21.2, 21.7 and 21.8. Therefore, it is not a new concept in the system, and the fact that it is currently used means that this form of special treatment does not undermine its legal integrity.

Moreover, the proposed special consideration would not only be limited to defendant developing countries and their obligation to comply, it would also include complaining developing countries that might face a greater impact from incompetent compliance measures as a result of their economic vulnerability.

Article 21, Paragraph 6:

The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting immediately after **two** months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is

resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings. **The status report shall specifically present the measures that have been taken and the measures that are planned to be taken to implement the adopted recommendations or rulings. The status report shall also include a time schedule for those measures that shows its consideration of the overall length of the reasonable period of time.**

The Proposed Changes

- Shorter time period to place the issue of implementation on the agenda of the DSB meeting (from 6 months to 2 months).
- The addition of specific requirements in the status report.

The Rationale of the Proposal

The present procedure places the issue of implementation on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time. The lack of surveillance during this period potentially gives the respondent six months to keep benefiting from the violating measure. Shortening the period before the issue of implementation is placed on the agenda of the DSB meeting from six months to two months would put more pressure on the respondent to start implementing the rulings earlier. This requirement should not be considered a radical change from the current procedure, as the present obligation expects procedures of compliance to commence from the start of the reasonable period of time. Therefore, starting the surveillance procedure after two months from the date the reasonable period of time was commenced instead of six months would keep the same obligation, but produce more control over the process, contributing to a more efficient process of implementation.

Also, one of the criticisms of the implementation stage is its weakness in requiring merely a general status report of its progress. The weakness of this surveillance procedure leads Members to use the implementation period as a delaying tool, knowing that their intentions are not going to be detected through a general status report. It would be important to add specific requirements to the status report to

strengthen the surveillance procedures during the reasonable period of time. When the implementing Member finds itself required to present the measures that have been taken and the measures that are planned to be taken for the implementation of the ruling alongside a detailed time schedule for those measures after only two months of establishing the reasonable period of time there would be no room for time-wasting actions.

The idea of introducing this procedure for Members' approval would not be unrealistic, as it is based on the original concept of providing status reports during the reasonable period of time. The authority already exists under the current procedure, which entitles the DSB to demand the status report, and the obligation also currently exists, which requires the Member to provide a status report of its progress in the implementation process. The new procedure would only provide specification and more detail to the same procedure.

Article 21, Paragraph 7:

If the matter is one which has been raised by a developing country Member, the DSB shall **take any further action** which would be appropriate to the circumstances. **The DSB shall provide a written explanation of the further actions taken, and why they were considered appropriate to the circumstances of the dispute and the developing country Member involved.**

The Proposed Change

- The use of more mandatory and affirmative language.
- A clearer role for the DSB in taking the appropriate further action that suits developing country Members' circumstances.

The Rationale of the Proposal

This paragraph is another good example of the vagueness and weak obligatory language that characterise many of the S&D provisions of the DSU. This kind of language deprives the text from its intended aim of providing favourable treatment for developing Members, and restricts its application in the dispute settlement process. In

order to strengthen the special treatment provided for developing countries in this paragraph, and to limit its vagueness and generality, it would be appropriate to consider making the further actions taken by the DSB a mandatory requirement rather than just an obligation to consider such action. Also, it would be appropriate to consider restricting the freedom of the DSB in choosing the further actions required by establishing some kind of supervision on its choices of actions to be followed for the benefit of the developing country involved. Would this change have a practical effect? The fact that the DSB would be required to take further actions, rather than just consider doing so, would alone make it more likely to produce a difference. Also, the requirement of a written explanation of the appropriate measures taken, and of a justification for the appropriateness of such measures, would restrict the vagueness and the generality of the requirement in the current paragraph, leading to a clearer interpretation and a better application.

The proposed procedure would not represent a drastic change to the current one, giving it a better chance for Members' approval. Although it is not as affirmative as the proposed change, the requirement to provide further action already exists in the current procedure, making the new procedure an extension rather than an innovation. Also, in relation to the proposed procedure monitoring the appropriateness of the further actions provided, the DSB is expected to provide appropriate actions under the current procedure, and the text's lack of measures to determine the appropriateness of the actions taken does not mean that the DSB does not have an obligation of providing such actions. The proposed change, therefore, would only emphasise this obligation, and provide a clearer guide as to what is expected from the DSB.

Article 21, Paragraph 8:

If the case is one brought by a developing country Member, in considering what appropriate action **to take**, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

The Proposed Change

- The replacement of the phrase ‘action might be taken’ with the phrase ‘action to take’.¹⁴

The Rationale of the Proposal

This is another form of the weak obligations that exist in the S&D treatment provisions in the DSU, which do little in providing the favourable treatment intended for developing country Members in the dispute settlement process. It would be important to add some affirmation on the DSB commitment for providing special treatment for developing countries, and for providing an understanding of their economic and development issues. Therefore, replacing the probability of taking such actions found in the phrase ‘action might be taken’ with the certainty of the phrase ‘action to take’ would be a suitable change to reflect the new mandatory requirement.

It could be argued, again, that this change would not make a practical impact on the current procedure. However, the fact that under the proposed change the DSB would have to comply with an obligation rather than a possible choice suggests otherwise. This change would also be an affirmation of the already existing procedure of providing further action appropriate to developing countries’ circumstances, which could be considered a persuasive factor when introducing it for Members’ approval.

Article 22: Compensation and the Suspension of Concessions Paragraph 2:

If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, and

¹⁴ This change is influenced by a proposal by Haiti, TN/DS/W/37. The proposed change is similar to the original proposal by Haiti in suggesting the replacement of ‘action might be taken’ with the phrase ‘action to take’. However, it does not include the second part of the original proposal, which suggests a differentiation between developing and least-developed countries in the application of the Article, and proposes a procedure of monetary compensation offered exclusively to least-developed countries if the dispute is brought against a developed country, which would be calculated from the date of the adoption of the measure. The proposal in this thesis takes the position of offering monetary compensation to both developing and least-developed countries, and from the date of the establishment of the panel, which makes the concept in the original proposal unsuitable to the approach adopted by the thesis’ proposal.

no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. **Such negotiations shall take into account the appropriate implementation of the following considerations:**

- a) **Compensation shall be equal to the loss or injury suffered and directly arising from the offending measure or foreseeable under the offending measure.**
- b) **The quantification of loss or injury to be compensated shall always commence from the date of the establishment of a panel.**
- c) **If the complaining Member is a developing country, and the respondent is a developed country Member, monetary compensation shall be applied until the removal of the offending measure. In this regard, each developed country Member is required to post a bond as part of its Membership commitments. Such bonds are to be used for the purpose of monetary compensation, and calculated in a similar manner as followed for Membership contributions. If the amount determined as monetary compensation exceeds the amount placed as a bond, the amount outstanding could be added to the contribution of the Member concerned.**

If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements. **Pursuant to Article 3.7 of this Understanding, under some circumstances, where the Member invoking the dispute settlement procedures provides evidence that the authorised suspension would more likely have a minimal compliance-inducing impact on the respondent Member's economy, or a highly damaging impact on its own economy, the DSB may decide, depending on the circumstances, that the authorization to suspend the application to the Member concerned of concessions or other obligations under the covered agreements shall be carried out by all Members collectively except the respondent, and the DSB shall determine the share of each Member's suspension taking into account its share in international trade.**

The Proposed Changes

- The introduction of retroactive compensation to be applied from the date the panel was established.

- The introduction of retroactive monetary compensation as a form of favourable treatment for developing Members.¹⁵
- The introduction of retroactive collective retaliation as an option for retaliation under certain circumstances.¹⁶

The Rationale of the Proposal

The dispute settlement remedies have always been problematic issues for developing countries' participation, as discussed in Chapter 5, considering how little benefit they receive from the current compensation procedure based on the MFN clause, and their inability to implement the current retaliation system effectively. Therefore, it would be desirable to consider some other options that could be offered exclusively to developing countries or as new general procedures for all Members. In this context, it would be appropriate to consider options, such as adding retroactive monetary compensation as an exclusive privilege for developing countries, and adding the possibility of collective retaliation to be carried out by all WTO Members except the complained against Member.

The introduction of these remedies was discussed in Chapter 5, which analysed arguments both for and against their application. Hence, there is no need to repeat these arguments in this Chapter. The changes presented in this Paragraph could be the most difficult to gain support for among WTO Members for the proposed changes. Introducing retroactivity into compensation (including monetary) is likely to face resistance from Members as a result of the additional and substantial burden such change would have on their economy. Limiting the scope of retroactivity to the date of the establishment of a panel instead of potentially much longer periods, such as the

¹⁵ This proposed change is influenced by proposals by the African Group (TN/DS/W/15) and the proposal by the LDC Group (TN/DS/W/17). The proposed change shares the concept of adopting retroactivity with the proposals by the African Group and the LDC Group. However, as discussed above, the proposal under this thesis finds it more appropriate to base the suggested retroactivity on the date the panel was established rather than what is suggested under the original proposals of adopting the date on which the violating measure took place as a point of reference.

¹⁶ This proposed change is influenced by proposals by the African Group (TN/DS/W/15) and the proposal by the LDC Group (TN/DS/W/17).

date of adopting the violating measure, is, however, a compromise that would ease the effect of such practice, and should be considered when retroactivity is negotiated.

Financial compensation is introduced mandatorily in this proposal as a guarantee of its application until the violating measure is removed, considering the poor record of the current voluntary compensation's application. It would still be a challenge, however, to convince developed Members to approve such change, especially because they would not benefit from it and would bear considerable financial commitments. Also, the proposed procedure would see them lose control over the decision of awarding such compensation and the process under which it is conducted, which could exceed the boundaries in the Member-driven nature of the WTO.

In relation to collective retaliation, as discussed earlier in this Chapter, introducing collective retaliation as a general procedure with a restricted application could represent successful criteria under which it would serve developing countries' interests while having a tempting appeal towards the rest of Members.

Article 22, Paragraph 3:

In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures, **taking into account the procedures of Paragraph 2 of this Article.**

The Proposed Change

- Reflecting the impact of the new procedures of paragraph 2 on the procedures of paragraph 3.

Article 22, Paragraph 4:

The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment. **The quantification of the level of nullification or impairment shall always commence from the date of the establishment of a panel.**

The Proposed Change

- Retroactive quantification of the level of nullification or impairment from the date of the establishment of a panel.

The Rationale of the Proposal

This change is a follow-up to previous changes as a result of introducing retroactivity to the dispute settlement procedures of the DSU. Retroactive quantification of nullification or impairment would serve as a tool to limit delays in the dispute settlement process, as a longer dispute would result in a greater level of nullification or impairment. Recognising some past losses resulting from the violating measure is of a particular interest for developing countries considering the fragility of their economies.

Article 22, Paragraph 6:

When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations, **which may be imposed collectively pursuant to Articles 3.7 and 22.2 of this Understanding**, within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

The Proposed Change

- The introduction of collective retaliation.

The Rationale of the Proposal

This proposal reflects previous changes on Articles 3.7 and 22.2 as a result of introducing collective retaliation as a possible form of retaliation.

Article 22, Paragraph 7:

The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment, **measuring such nullification or impairment from the date of the establishment of a panel**. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

The Proposed Change

- Retroactive determination of nullification or impairment from the date of the establishment of a panel.

The Rationale of the Proposal

This proposal reflects previous changes on Article 22 as a result of introducing retroactivity to DSU remedies.

Article 22, Paragraph 8:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is

reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended **or monetary compensation has been provided to complainants from developing country Members** but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

The Proposed Change

- The inclusion of monetary compensation for developing countries as a new procedure of the DSU.

The Rationale of the Proposal

This proposal reflects the previous changes in article 22 as a result of introducing monetary compensation as a new form of favourable treatment for developing country Members in the dispute settlement system.

Article 24: Special Procedures Involving Least-Developed Country Members, Paragraph 1:

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures. **Members shall provide a written explanation on how such restraint was exercised.**

The Proposed Change

- The requirement of a written explanation on how restraint was exercised in using the DSU remedies against least-developed country Members involved.

The Rationale of the Proposal

Unlike many S&D provisions in the DSU, this paragraph is clear and specific in providing special treatment for developing countries, as it specifies the ‘particular consideration’ required. It requires Members to exercise restraint in raising matters under the procedures of the DSU against least-developed country Members involved. The text also points to seeking compensation or retaliation as examples under which such restraint could be exercised. It is important, however, to add a follow-up to this requirement in order to ensure that this restraint was actually exercised, and to examine the appropriateness of the restraint action. This extra requirement could be introduced by requiring a written explanation on how the restraint was exercised. It could be argued that this procedure would be another example of unwelcomed additional burden that could be viewed as restrictive to Members’ discretion in conducting the obligation. However, similar to other proposed changes, this procedure would not be a radical change from the current one. The obligation of exercising restraint is part of the current procedure, and Members are already expected to comply with it. The proposed procedure, therefore, would only ensure the appropriateness of such compliance, making it an extension of the current obligation rather than a new obligation.

Article 24, add new paragraph 3:

A legal expert shall be provided for least-developed country Members involved in disputes, upon their request. Such expert is to be chosen from a roster of legal experts, appointed by the Director-General, in consultation with the Chairman of the DSB, and funded by the WTO budget. The appointed expert shall discharge the functions of counsel for the least-developed country Member concerned.

The Proposed Change

- The establishment of a roster of legal experts who would be responsible for providing legal support to least-developed country Members.¹⁷

¹⁷ This reform is influenced by a proposal by Haiti, TN/DS/W/37. The proposed change is similar to Haiti’s proposal in suggesting a legal roster to be made available for least-developed Members.

The Rationale of the Proposal

The lack of legal expertise is one of developing countries main participation restrictions, which forces them to hire private law firms, leading to more pressure on their financial resources. There have been steps taken outside the WTO to ease the effect of developing countries' lack of legal expertise on their participation in the system by providing a subsidised legal service through specialised legal bodies such as the ACWL. However, there is a need to address this issue in the actual framework of the DSU.

As discussed earlier, the current role of the Secretariat could be criticised for being passive in providing any role that would exceed general guidance and legal assistance due to the impartiality requirement. A greater role by the Secretariat would be desired where it would make one of its legal experts available as a legal counsel without the impartiality requirement. However, this change could be hard to achieve as many Members might view the impartiality of the Secretariat as an integral and non-negotiable part of its role in the system.

Therefore, the change proposed above would reserve the Secretariat's impartiality while providing sufficient legal assistance. The reason behind limiting the proposed option to least-developed country Members is to avoid any disagreements between WTO Members on the entitlement for such procedure, considering that the 'developing country' status for some Members is still controversial in the system. Also, providing the procedure to all developing country Members, which includes countries that are clearly in no need of any legal assistance, might tempt these countries to use this incentive for the wrong reason, creating a wave of frivolous disputes and increasing the pressure on the system. Hence, choosing a defined group of developing countries, which needs such assistance the most would be more appropriate. The assistance to the rest of developing country Members that are not included in the least-developed country Members' group, but in need for legal

However, the thesis' proposal suggests, for the reasons discussed above, that this roster be independent from the Secretariat in a form that would maintain the impartiality requirement of the Secretariat.

assistance would be provided in another form as it is discussed next in the proposed Article 28.

Add new Article 28: WTO fund on dispute settlement:¹⁸

Paragraph 1: There shall be a fund on dispute settlement to facilitate the effective utilization of this Understanding by developing country Members in the settlement of disputes arising from the covered agreements.

Paragraph 2: The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget. However, to ensure its adequacy, the fund may additionally be funded from extra-budgetary sources, which may include voluntary contributions from Members.

Paragraph 3: Developing countries involved in disputes shall recover the financial costs of their participation from the fund only if they win the case.

Paragraph 4: The General Council shall annually review the adequacy and utilization of the fund with a view to improving its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.

The Proposed Change

- The establishment of a fund to facilitate developing countries participation in the system.

The Rationale of the Proposal

The lack of financial resources of developing countries is one of the main factors that negatively affect and restrict the participation of developing countries in the WTO dispute settlement system. Therefore, establishing a fund to facilitate effective utilisation of the system by developing countries would be an important step towards limiting the effect of their inadequate financial resources on their ability to participate in the dispute settlement process. The establishment of the fund would benefit developing countries that are left out the provision on legal counsel discussed above. It would enable them to employ private legal counsels without the financial pressure resulting from such process.

¹⁸ Proposal by Kenya, TN/DS/W/42.

The reason behind limiting the scope of the fund to the winners of developing country Members is similar to that with the legal counsel procedure. The win requirement would restrict less genuine disputes that might use the fund to support claims used for political reasons or as pressuring tools. The ideas of establishing a roster of legal experts and a dispute settlement fund could face resistance from WTO Members, as they would involve a substantial amount of financial commitments. However, the issue of developing countries' lack of legal and financial resources has to be recognised in the DSU legal framework. Also, the limitations on the beneficiaries of these two procedures, and the restrictions against their abuse might be persuasive factors in presenting them for approval.

6.2. Concluding Remarks

This model is a synthesis of proposals, providing an original yet realistic perspective on what changes could and should be made to improve developing countries' participation in the DSU. By accommodating a range of proposals, this model DSU provides solutions to many of the problematic issues that affect developing countries participation in the system. It recognises that remedies are one of the main obstacles facing developing countries in the sense that they do not suit the developing countries' circumstances in the system. Hence, it offers remedies that are suited to all Member countries including developing countries, such as collective and retroactive retaliation, which would ensure stronger and more efficient enforcement to the benefit of all Members.

The model also offers developing countries exclusive remedies that suit their economic circumstances, such as the option of monetary compensation. In addition, this model provides more effective special and differential treatment for developing countries, whether it is introduced through giving them more flexibility in carrying out their obligations, or through special requirements from the WTO dispute settlement entities, such as panels, the Appellate Body and the Dispute Settlement Body, to be provided as a special and differential treatment for developing countries.

In addition, this model has brought together a suite of proposals to improve developing countries' participation. These include ideas that target developing countries' problems of limited financial resources, which affects their chances of utilising the system effectively. Ideas such as holding the dispute negotiations in the capitals of least-developed countries when such countries are involved in a dispute, establishing a roster of legal experts available for least-developed country Members, or creating a fund to facilitate developing countries' utilisation of the system, limit the effect of inefficient financial and legal resources on developing countries' chances for an effective dispute settlement process. Embracing all these changes, in a way not formally achieved, will facilitate an improved situation for developing countries.

To conclude, the proposed changes may not offer the answer to every problematic issue developing countries have in the system, or be acceptable to all parties. They are not sought to be the panacea for overcoming the problem of participation of developing countries in the DSU. But if they are implemented these changes will go a long way in addressing some of the major obstacles that developing countries encounter in their bid to participate in the WTO dispute settlement system. Moreover, these changes are set to offer a clear understanding for trade scholars and negotiators on how some of these issues could be addressed in future modifications of the current DSU.

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