UNIVERSITY OF THE WESTERN CAPE

THE FEASIBILITY OF RETALIATION AS A TRADE REMEDY UNDER THE WTO DISPUTE SETTLEMENT UNDERSTANDING

BY

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DEDICATION

To John Paul, for a lesson well taught, Perseverance and Hope
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I earnestly thank all my family members for their moral support and encouragement, want of which, this research would not have been completed.
DECLARATION OF CONFIDENTIALITY

I, Olaki Clare, declare that the work presented in this dissertation has never been submitted for a degree in this or any other institution of higher learning. All the work contained in this Paper is original unless otherwise stated.

Signed:  ......................................

Date:  ........................................
APPROVAL

This dissertation has been submitted for examination with the approval of my supervisor:

Signed:

Ms. Rickie Wandrag
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LIST OF ABBREVIATIONS

ARB     Arbitration
CVD     Counter-veiling Duties
DSB     Dispute Settlement Body
DSM     Dispute Settlement Mechanism
DSU     Dispute Settlement Understanding
DS     Dispute Settlement
EC     European Community
EU     European Union
ECOSOC United Nations Economic and Social Committee
GATT     General Agreement on Taxes and Trade
GOVT Government
ICJ     International Court of Justice
IGO     Intergovernmental Organizations
ITO     International Trade Organization
MFN     Most Favored Nation
NGO     Non-governmental Organization
NT     National Treatment
UN     United Nations
PS     Private Sector
US     United States
TRIPs Trade Related Aspects of Intellectual Property Rights
WTO     World Trade Organization
ABSTRACT

Retaliation as a trade remedy has been used since the inception of an International Trading System, the GATT. However, the history of the GATT reveals that retaliation as a trade remedy was barely used, and among the reasons cited for the non-use of the remedy, are its cost implication versus the benefit, and the fact that as a remedy, retaliation has reverse effects that can be more detrimental to the complainant more than the respondent, especially if the former is a small country. To-date, retaliation as a remedy is still used as the last resort remedy, with the same old complaints of its shortcomings and yet, so far there appears to be no consensus on how best to utilize the remedy or improve upon it, bearing in mind the inequality of power amongst the members, that is the developed, developing and least developed countries.

This study was undertaken to investigate the feasibility of retaliation as a trade remedy. Throughout the study, the usefulness of retaliation as a remedy is pronounced, the fact that it poses a threat, and hence acts as a deterrence mechanism to would be offenders. Prima facie, its weaknesses as a remedy seem to overwhelm the entire credibility of the remedy. In addition to existing literature, the study was facilitated by use of a self-administered questionnaire, through purposeful/judgmental sampling. Forty-three respondents completed the self-administered questionnaire. The study focused on the practicability of retaliation as a remedy, first by examining the essence of the remedy, and what situation warrants locus for a complainant to retaliate. The study also examined the proposals put forward by the developing countries in a bid to improve retaliation as a remedy.

The study revealed that even though retaliation as a trade remedy has colossal drawbacks de facto, it is overwhelmingly vouched for retention as a remedy due to the restraining role it plays to as a threat to reluctant Members. The study further revealed that the WTO Members, in spite of the various proposals in improving retaliation as a trade remedy,
have not come to a consensus, as to the suitability of the much-debated proposals and how they would be implemented, if at all. The findings in the study reveal that much as compensation is advocated for as an alternative to retaliation as a remedy, it would face a serious problem regarding enforcement of the same, as there would be no way of compelling a sovereign to comply with the compensatory order.

As a result, a major finding herein was made regarding the reluctance of the WTO Members to have an exclusive, effective dispute settlement system with viable remedies. Once faced with non-compliance of the DSB recommendations and failure in compensation, and with the inability of a complainant to resort to retaliation as a remedy, the complainant has no alternative in restoring the balance of the nullified concessions.

Arising from the findings, it is recommended that the WTO Members consider revising the suitability of the remedies available under the DSU. The need for revising the available remedies should be to achieve the main objective of the WTO and primarily, of the DSU, to ensure the rebalancing of trade concessions between the Member parties. As is shown by the study, if continued use of retaliation undermines the rights and obligations of the Members so gravely, that shunning away from the system is an option, the credibility of the entire system overtime shall be affected.
CHAPTER ONE

INTRODUCTION

1.1 Introduction to the Study

This study was undertaken to establish the feasibility of retaliation as a trade remedy under the WTO Dispute Settlement Understanding, and its effectiveness in dispute resolution. Public International Law has long recognized the duty of governments to repair or remedy damage they have caused. The Permanent Court of International Justice stated the principle in the Factory at Chorzow Case being that, “Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”¹ The draft Articles of the International Law Commission on State Responsibility provide that, “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”² This could entail pecuniary compensation or restitution in kind.

As shown above, retaliation is one way of International Public Law of making good the damage occasioned to trading Members under the World Trade Organization (WTO) Dispute Settlement Understanding (DSU). It is deemed part of a corpus of International Economic Law as evidently submitted by Mosoti,³ to secure the long-term predictability of trading concessions and interests in the international legal system. It is a last resort trade remedy as stipulated under Article 3 (7) of the DSU⁴, and expressly provided for as a remedy under Article 22 (2).

¹ P.C.I.J. (Ser A) No. 17 at Page 47-48
The essence of retaliation is when a country, if found responsible for a trade violation, is asked to eliminate policies that are deemed to be in violation of WTO rules. In the event that it fails to comply, it is asked to compensate countries harmed by its violation by granting tariff concessions in goods other than the one in which the violation has been found to occur. If injured Members are not adequately compensated, WTO rules permit them to impose retaliatory tariffs, that is, to suspend the application to any other contracting party or parties of such concessions or other obligations under the Agreement as they determine to be appropriate under the circumstances.\textsuperscript{5} The party upon whom retaliation is visited has the liberty, 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 the Agreement, and such withdrawal takes effect upon the sixtieth day, following the day on which such notice is received by him.\textsuperscript{6}

In carrying out the study, it became pertinent to examine the institutions that administer retaliation as a trade remedy, which are the GATT and the WTO. The GATT is the parent agreement of the WTO that was established in 1948 in Havana, which emerged as the General Agreement on Tariffs and Trade. The WTO dispute settlement system (DSS) was established in 1995 during the Uruguay Round as part of the Marrakech Agreement.\textsuperscript{7} The practice under the GATT with regard to remedies was inconsistent. Panels usually recommended that the offender bring its measure into conformity with the relevant provision of the General Agreement or the relevant Tokyo Round Code. This remedy usually was prospective only, providing no relief for past damages suffered.\textsuperscript{8} If a GATT contracting party failed to bring its measure into conformity, the remedy was “Compensation” from the offending party to the victim, in the form of reduced

\textsuperscript{5} The General Agreement on Tariffs & Trade, 1994, Article 23 (2)
\textsuperscript{6} Ibid, Article 23 (2)
\textsuperscript{7} Incorporated in Annex 2 of the Agreement, as the Understanding on Rules & Procedures governing the Settlement of Disputes
\textsuperscript{8} Palmeter D. & Mavroidis Petros C., Dispute Settlement in the World Trade Organisation, Practice & Procedure (2d Ed., Cambridge University Press, 2004), at Pg. 163
barriers on other products, or “Retaliation” by the victim in the form of increased barriers against imports from the offending party.

The one and only time in the history of the GATT when retaliation as a trade remedy was invoked was in 1952 when GATT condemned the United States restrictions on milk imports on the grounds that they were not necessary and, contrary to the provisions of Article XI.2 (c). The Netherlands was allowed to take retaliatory measures against the US. However, in the face of the US threat to withdraw from GATT, Holland gave up applying any sanctions.

As was the case with GATT, “Compensation” and “Suspension of Concessions” or other “Obligations” are the remedies made available by the DSU when a Member fails to bring a non-conforming measure into compliance with DSB recommendations and rulings within a reasonable period of time. Compensation typically takes the form of a reduction in tariffs or other trade barriers, on a non-Most Favored Nation basis, against the non-complying Member by the successful complainant. It is provided that both compensation and suspension of concessions are considered to be temporary measures, and that neither is preferred to full implementation.

The WTO system is generally limited to orders for Specific Performance and Ex-nunc termination of the unlawful measures. It should be noted that the remedy provisions were not drawn in terms of sanctions. Instead, the organizing principle of GATT was that it was a system of reciprocal rights and obligations to be maintained in balance. However, a matter of grave concern to a scholar and in this study is; how can these reciprocal rights and obligations be maintained in balance, where a member suffers from impairment of its rights, and it is only compensated prospectively, with no remedy to past harm? The ability of the WTO

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10 Dairy Products from Holland, BISD, Vol. II (1952) 116
11 Articles 3(7) and 22(1) of the DSU
12 Jeff Waincymer, WTO Litigation, Procedural Aspects of Formal Dispute Settlement, Cameron May 2002, at Pg. 89
13 Ibid, at Pg. 89, this principle is maintained in Article 3(3) of the DSU
to authorize trade retaliation as a reaction to unrelenting violations is a salient and a most ironical and controversial feature of the DSU.

Although there are constraints on the amount of retaliation permitted by the WTO, the fact that the dispute settlement procedure even allows tariff retaliation appears to be in direct conflict with the notion of liberalization of trade. The preceding statement and the fact that many small countries cannot effectively retaliate via tariffs, have led to calls for alternative trade dispute remedies. With the inception of the WTO in 1995 the world trading system witnessed a drive towards a rule-based system with a strong, legalized and well-structured dispute settlement that placed retaliation at centre stage.14

The study highlights the use of retaliation as a trade remedy, its effectiveness and the perceived shortcomings. In relating to the above, the study examines in detail the use of the remedy by the Members, which is the developed, developing, and the least developed countries, bearing in mind the power imbalance and inequality thereof, which affects the ability of the Members in using the remedy differently. The study also explores the proposals of developing and least developed countries in attempting to improve retaliation as a remedy or having compensation as an alternative to retaliation.

Arising from the findings of the study, it can be observed that much as the entire DSS improved greatly as compared to the GATT history, as well as the remarkable improvement in the utilization of retaliation as a remedy, a large majority of the Membership of the WTO, that is, the developing and least developed nations, are still unable to utilize retaliation as a remedy. The study reveals an appalling situation wherein great dissatisfaction of retaliation as a trade remedy is a trite fact; yet, there is reluctance by the WTO Members in finding mutually beneficial remedies for the entire Membership. However, from the

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findings, there is a move by developing countries in attempting to advocate for the maximum use of the DSU by developing friendly remedies that are more viable than the current retaliation system.

In carrying out the study, it was important to ascertain the term “Developing Country”, as the need to investigate how the remedy of retaliation affects such countries, was pertinent. Although the term “Developing Country” is often used in WTO agreements, the term is left undefined so that countries largely self-designate their status, subject to challenge from another member.15 The term “Developing Countries” shall be used with the meaning imputed to it in the WTO Agreements and in this context shall cover economies ranging from those largely based on subsistence agriculture to those of Brazil and India, which have highly industrialized sectors that include commercial aircraft production and software. It is pertinent to note that in the WTO as well as in Public International Law, there is no precise definition of the term “Developing Country.” The term herein shall be used to imply a relatively poor country, and it shall purposely refer to “Developing Countries” and “Least Developed Countries.”

1.2 Background

In determining the practicability of retaliation as a remedy, it was essential to look at the reasons why the WTO was established and one of its vital structures, the Dispute Settlement Understanding. From the preamble of the Agreement establishing the WTO, it is recognized that it was set up for the following reasons:17

In their relations in the field of trade and economic endeavor, the Parties recognized that conduct of the same should be with a view to raising standards of

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15 Shaffer Gregory, How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies. Working Draft: Feb 14, 2003 at Pg. 32
16 Horn H., & Mavroidis P.C., Remedies in the WTO Dispute Settlement System and Developing Countries. (WWW1.worldbank.org/wbiep/trade/papers, accessed on 23rd January 2007)
17 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Paragraph 2 of the Preamble to the Agreement Establishing the World Trade Organization.
living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.

In addition to the above, it is provided that the parties recognized 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. Additionally, the parties were desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations whilst preserving the basic principles and furthering the objectives underlying the multilateral trading system.  

It was equally vital to present the objectives of the DSU, a system where retaliation as a trade remedy is provided for. The basic objectives governing dispute settlement under the Understanding on Rules and Procedures are embedded in article 3. Article 3 (1) is to the effect that Members adhere to the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947, whilst subsection 2 provides that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system, and that it serves to preserve the rights and obligations of Members under the covered agreements.

According to Article 3(3), it is a vital objective of the dispute settlement system that the prompt settlement of disputes is achieved for the essential effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. In addition to the above, it is provided that the recommendations or rulings made by the DSB are aimed at achieving a

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18 Ibid, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Paragraph 6.
satisfactory settlement of the matter in accordance with the rights and obligations under the understanding and settlement of disputes.\textsuperscript{19}

It is also provided that all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, are to be consistent with those agreements and shall not nullify or impair benefits accruing to any Member, nor impede the attainment of any objective of the agreements.\textsuperscript{20}

Before bringing a case, a Member ought to exercise its judgment as to whether action under the DSS would be fruitful. Additionally, it is provided that the aim of the DSM is to secure a positive solution to a dispute.\textsuperscript{21} It is further provided that a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is preferred and in the absence of a mutually agreed solution, the first objective of the DSM should be to secure the withdrawal of the measures concerned. The provision of compensation can only be resorted to as a temporary measure, and if the immediate withdrawal of the measure is impracticable. The last resort remedy provided for a Member invoking the DSU is suspending the application of concessions or other obligations under the covered agreements, on a discriminatory basis vis-à-vis the violating Member, after authorization by the DSB. It is further provided for that the involvement in dispute settlement procedures should be in good faith.\textsuperscript{22}

It is against the above objectives of the WTO and the DSU, that the feasibility of retaliation as a remedy is measured. A feasible remedy for dispute settlement must not go against the above objectives; it must be a remedy to be applied in good faith for prompt resolution of disputes aimed at rebalancing the rights and obligations of the Members and promoting the principle of free trade, whilst

\textsuperscript{19} Article 3 (4) of the DSU
\textsuperscript{20} Article 3 (5) of the DSU
\textsuperscript{21} Article 3 (7) of the DSU
\textsuperscript{22} Article 3 (10) of the DSU
mindful of the development needs of the parties. The remedy provided must be one that satisfactorily settles the dispute between the parties, in accordance with their rights and obligations and must not nullify or impair them.

1.2.1 The Basic Institutional Framework of the GATT/WTO

It was found to be of great value to enunciate the basic institutional framework of the GATT/WTO, as they form the constitutional governance of the WTO, without which the system cannot stand. These governing constitutional principles once breached prima facie entail the nullification and impairment of the rights of the WTO Members,23 which, once established by the DSB, entitles the complainant with the right to retaliate. With the establishment of the GATT, the Parties agreed to a multilateral cooperative effort generally aimed at liberalizing trade through a series of tariff reductions. Four principles constitute the most important substantive obligations between Parties, though not exclusive.24

The first core principle of the GATT system, set forth in article II, is that Parties will not charge a tariff for a particular product above the level agreed to and set forth in the tariff schedules.25 For clarity, tariffs themselves are legal, and Parties may charge whatever tariff they like for products not listed in the schedules. However, once a "tariff binding" has been negotiated for a particular product, Parties are bound to charge at or below that level. This simple obligation provides the institutional foundation for gradually trimming down artificial barriers to trade through negotiations and reciprocal commitments, the obligation is not open for renegotiation or broad interpretation, and the tariff schedules themselves provide a precise, detailed, and quantitative baseline for gauging compliance.

A second principle, set forth in Article I, is the principle of the Most Favored Nation Treatment (MFN). This non-discrimination principle, which has long been

23 Article 3(8) of the DSU
25 The General Agreement on Tariffs and Trade, 1994
a cornerstone of international trade law, requires that each Party grant to every other Party treatment with respect to any imports and exports no less favorable than it grants to any other nation. Thus, MFN ensures that any trading advantages given by one Party to another nation, whether a Party or not, will also be given to each Party. In essence, this principle "multilateralizes" the trade liberalization notion (at least with respect to obligations and negotiations) and provides a significant incentive for non-members to join.

A third principle, set forth in Article III, is National Treatment on Internal Taxation and Regulation. This non-discrimination principle requires that with respect to internal taxation and regulatory measures, each Party treat imports from other Parties no less favorably than domestically produced goods.

Finally, a fourth principle, set forth in Article XI, is that "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. In essence, these latter two principles, along with a number of other GATT clauses limiting government actions affecting imports and exports, are aimed at restricting measures that could be substituted for tariffs as protectionist tools and at protecting the potential benefits of binding and then reducing tariffs.

1.3 Problem Statement
Retaliation as a trade remedy has drawn so much controversy as being impracticable, especially regarding developing and least developed countries. The research problem is aimed at investigating the practicability of retaliation as a trade remedy. The notion of the remedy is raising tariff barriers against the violating Member. It is a known fact that once a country raises tariffs, the victims
to high tariffs are the consumers, due to the high prices of goods and services, which in turn raise standards of living.

As seen in section 1.2, a positive resolution of disputes amongst Members is sought. However, with retaliation the dispute between the parties is unconstructively resolved, demonstrating a breakdown in negotiation between the parties. In addition to the above, in raising trade barriers against the offending Member, this not only deteriorates the trade between the parties, but also breaches the principle of good faith in dispute resolution.

Retaliation as a remedy is not mindful of the development needs of developing and least developed countries and may retard their economies instead. Retaliation inhibits trade and does not promote the same and may lower the economic welfare of Members, the one that utilizes the remedy and the one it is applied against. The remedy may have repercussions that lead to loss of employment, a reduction in demand and in income and yet, it is still maintained as a remedy. Thus far, the Members of the WTO are yet to make bold steps in improving retaliation as a remedy, to be more development friendly.26

In spite of the reverse effects of retaliation and the fact that retaliation has always been a problem, as seen from the study of the GATT history, it is still retained as the last resort trade remedy.27 In addition to that, the remedy as applied does not take into account the economic power imbalance among the parties, and due to the inability of developing and least developed countries in utilizing the remedy, they are left without a last resort trade remedy when a party failures to comply with the recommendations of the DSB or fails to pay compensation.

26 The basic trade theory of Smith & Ricardo are in favour of abolishing retaliation altogether, as noted by Holger Spaman, The Myth of “Rebalancing” Retaliation in WTO Dispute Settlement Practice, Journal of International Economic Law, Oxford University Press, 2006, at Pg. 8
27 Article 3 (7) of the DSU
1.4 **Objectives of the study**

The main aim of the research was to determine the viability of retaliation as a trade remedy under the DSU; it was to establish whether retaliation as a remedy is beneficial to the entire WTO membership and system. The specific objectives were:

1.4.1 To examine the feasibility of damages as an alternative remedy to retaliation

1.4.2 To determine whether there is need to revise the DSU, for it to adopt a more development friendly approach to dispute resolution.

1.4.3 To make recommendations regarding the improvement of the dispute settlement Understanding

1.5 **Hypothesis**

1.5.1 WTO Members are not committed to binding obligations, and that is why retaliation is still maintained as a last resort remedy in spite of the inability of developing and least developed nations in using it.

1.5.2 It is not credibly established whether there are methods for improving retaliation as a remedy.

1.5.3 An argument for Damages/ Compensation may not be a viable alternative for retaliation.

1.6 **Scope of the Study**

The study focused on retaliation as a remedy under the WTO Dispute Settlement Understanding, the conceptual remedy of retaliation as envisaged in the early GATT and the WTO, its efficacy and usefulness in the current system and the perceived shortcomings.

The study covered an investigation as to how and when the right to retaliate arises, that is, the prerequisite procedure for a party instituting a complaint, the requisite recommendations of the panel, and the compliance, or non-compliance thereof, entitling one to retaliation as a remedy in violation complaints. The study explored the use of retaliation by the developing countries. In addition to the
above, the study also covered the argument for damages in the Dispute Settlement Understanding, above retaliation. The study highlighted the efficacy of retaliation to Third Party Members in the Dispute Settlement.

1.7 **Significance of the Research**

It is vital for a system that seeks to monitor and safeguard the trading concessions, to be credible before its members. Retaliation as a trade remedy according to article 3.7 of the DSU was designed to perform the rebalancing effect of an impaired member’s concessions. It does defeat the purpose of the remedy and the entire dispute resolution system if the remedy is professed to have reverse effects. As noted by Jeff Waincymer\(^{28}\), it is generally assumed that trade retaliation under the WTO performs a “rebalancing” by allowing the injured member to suspend ‘concessions and obligations’ against the violating member of a level equivalent to that of ‘nullification and impairment’ suffered by the injured member. This research is important in establishing the reliability of the above perception.

The study of the feasibility of retaliation as a trade remedy is vital in analyzing whether there is another mechanism for improving retaliation as a trade remedy. The findings and recommendations will aide in establishing whether there are more feasible remedies preferred to retaliation.

The study is a contribution to the body of knowledge as regards the feasibility of retaliation as a trade remedy. It will be constructive to not only scholars, but also the entire public. Nonetheless, the study triggers off the need for additional and continuous research in related areas.

1.8 **Key words**

General Agreement on Tariffs and Trade (GATT), World Trade organization (WTO), Dispute Settlement Understanding (DSU), Dispute Settlement Body, Ex-nunc termination, Most Favored Nation, Retaliation, Nullification, Damages,

\(^{28}\) Waincymer Jeff, WTO Litigation, Op. Cit, Supra, footnote 12 at Pg. 95
Remedies, Impairment, Multilateral Trade, Developing Countries, Developed Countries, Ultima-ratio, inadimplenti non est adimplendum, clausula rebus sic stantibus, Pacta Sunt Servanda, Good Faith.
CHAPTER TWO
METHODODOLOGY

2.1 Introduction
This chapter presents the methodology that was used in the study and specifically highlights the research design, study sample, research instruments, data collection and analysis and limitations to the study.

2.2 Research Design
The research design was based on a literature study in which various factors that affect the reliability and effectiveness of retaliation as a trade remedy were examined. The research design foremost, involved examining the historical background and origins of the institutions that is, the GATT and the WTO that administer the trade remedy of retaliation, as well as their institutional framework.

The research design included reviewing the entire process of commencement of proceedings of dispute resolution up to the stage where retaliation is authorized. The type of study that was carried out was largely qualitative.

Identification and clarification of variables that seemed to have an impediment to the effectiveness of retaliation as a trade remedy, was done. Qualitative data was collected through self-administered questionnaires and documentary sources. The unit of analysis was the individual respondents. However, heavy reliance upon documentary evidence was made. The findings were generalized and constituted the basis upon which recommendations were made.

The analysis involved identification of the objectives of the Agreement establishing the WTO, and also the objectives for the Dispute Settlement System. The relevance of identifying the objectives of the Agreement establishing the WTO was to enable the ascertainment of what the contracting Parties intended to achieve. The identification of the objectives of the Dispute Settlement System was
also to ascertain what the dispute system was intended to achieve. The identified objectives respectively, were then matched against the objectives of the trade remedy of retaliation in investigating its feasibility. Additionally, it was important in carrying out the study to establish whether the WTO system protects interests of all Contracting Members, bearing in mind the power imbalance among them.

2.3 Area of Study
The study covered the review of retaliation as a trade remedy. It was vital not to have isolated the study of the remedy from the entire dispute settlement mechanism and as a result, the entire system of dispute settlement was highlighted. This was done; reason being that, the reader without knowledge regarding the operation of the Dispute Settlement System would be equipped with the overall structure of dispute settlement.

As background study, it was important to study the institutional framework of the trading system of the World Trade Organization. It is vital to stress herein that the institutional framework highlights the backbone of the essence of the World trading system, which bears down to the very foundation of the system and agreement between the members. This institutional framework and obligations if not respected, lead to the instigation and commencement of dispute resolution proceedings for eventual determination of the retaliatory right.

In line with the above, it was only appropriate that the study cover the underlying essence of the remedy of retaliation and its main objective of “rebalancing of concessions” in determination of its efficacy. An investigation of other perceived ‘suitable’ remedy, which is ‘Compensation’, was carried out, exploring the suggestions for its viability as a remedy.

It was pertinent to give an overview of the origins of the administrative framework of the remedy of retaliation and as a result, the history and evolution of a World Trading System, the “GATT” as the parent organization was studied.
2.4 Study Population
The study population comprised scholars at different levels, some at a masters’ level, and others at PHD. Practitioners of law were also involved, though limited. However, the study population also constituted public servants from the Ugandan government departments, which in this case are; Ministry of Finance, Planning and Economic Development, Ministry of Tourism, Trade and Industry, Ministry of Foreign Affairs and Ministry of Justice and Constitutional Affairs.

In addition to the above, the study population also included respondents from the Uganda Private Sector and the public. Regarding respondents from the private sector and government departments; these were officials who are involved in trade matters, not only at the national level, but also at the international level.

2.5 Study Sample
The purposeful sampling technique was used to identify respondents, in obtaining data. Therefore, target respondents well familiar with the area of study were approached with the questionnaire for purposes of carrying out this research. As a result, specific respondents were selected to complete the self-administered questionnaire, after specifically establishing knowledge of the respondent in the subject area of study.

The targeted number of respondents was 80. Four Ministries in Uganda were purposefully selected, wherein questionnaires were administered. These relevant Ministries are, Ministry of Tourism, Trade and Industry (MTTI), Ministry of Justice and Constitutional Affairs (MOJCA), Ministry of Foreign Affairs (MOFA), and Ministry of Finance, Planning and Economic Development (MOFPED). The respondents in the said ministries are designated desk officers who handle trade matters on behalf of their ministries, whilst others were Officers conversant with the area of study.
In MTTI, it was established that there were ten trade officials and the questionnaire was distributed to all the ten officials, where six responses were obtained. In MOFA, there were five established respondents, and only two responses were obtained, whilst in MOJCA, there were five established respondents, and only three responses were obtained. In MOFPED, there were four established responses, and all the four responded. The remaining twenty-six, (26) targeted respondents in Uganda were from the Private Sector and the general public, wherein only thirteen (13) responses were obtained. The remaining 30 target respondents were administered questionnaires via email, wherein 18 responses were obtained.

2.6 Research Instruments
A research instrument in the form of a questionnaire was designed to facilitate data collection. This questionnaire was administered to a variety of government officials in key positions, dealing with trade related matters and specifically conversant with the area of research. These officials are placed in different ministries, in managerial and administrative positions. The respondents approached in government were the contact persons in matters of trade, representing the specific government ministries, not only at the national but also at the international forum. This specified sample would provide an increased likelihood for identification of both administrative and logistic issues that affect the implementation of retaliation as a trade remedy.

The questionnaire was also administered upon scholarly respondents. The choice of these respondents was based upon the fact that they were up to date with the knowledge and current status of the area of study. This section of respondents would particularly be highlighting/underpinning the debate regarding the suitability of retaliation as a trade remedy and providing an insight into what the scholars suggest/recommend as being more feasible remedies. The use of questionnaires also made it possible to collect data from a wide variety of respondents.
In order to ascertain the validity and reliability of the instruments, the questionnaires were pre-tested on some respondents and some adjustments were made before application to the rest of the respondents, attached as annex 1.

The questionnaire was used for data collection for purposes of enabling the respondents to fill in the questionnaire according to their level of knowledge and understanding of the study area in issue and without being aided.

2.7 Data Collection

Primary data was collected through self administered questionnaires and observations. Several visits to the various respondents were made before they could complete the questionnaires, these visits ranged from 1- 4 visits. Out of a total of 50 respondents in Uganda and hence accounting for a distributed total of 50 questionnaires, only twenty-eight responses were obtained. The failure to obtain the remaining twenty-two responses was explained by either the unavailability of the respondents once the questionnaire had been administered, whilst others were unexplained.

The remaining 30 questionnaires were administered via email, electronically. The reason for this was not being within the same geographical setting with the relevant respondents. Out of the total of 30 questionnaires that were distributed, only eighteen responses were obtained. The respondents both via email and the Ugandan respondents were given the same amount of time to respond to the questionnaire, that is, one month. A follow-up to aide the completion of the questionnaires online was made via email.

Secondary data was obtained through the study of various documents in the category of textbooks, journals, reports and laws; which were extremely vital as sources of information. Qualitative data was obtained through the above data collection methods.
2.8 Data Analysis
Data from the self-administered questionnaires was coded and frequencies regarding various variables obtained. Content analysis was applied in analyzing data from the self-administered questionnaires and observations. The analysis was interpreted and formed the basis for the conclusion and recommendations.

2.9 Limitations to the Study
The most hindering limitation faced was the narrow base of respondents. It is unsatisfactory to note how little society knows about the World Trade Organization, let alone the Dispute Settlement System. It was only persons who have specifically studied International Trade Law that knew about the operation of the WTO and the DSU. It was even more appalling to note that fully learned lawyers, including senior government officials do not know what the WTO stands for.

The other limitation to the study was in data collection, given the fact that retaliation as a trade remedy is for the entire World Trade Organization Membership, in order to carry out a more viable research that would give a wholesome representation of the research findings, it would have been very important to administer the questionnaire to the wide Membership of the WTO.

The fact that people did not readily respond to the questionnaire was another limitation to the study, since several visits had to be made to obtain the questionnaires.
CHAPTER THREE
LEGAL FRAMEWORK OF DISPUTE RESOLUTION IN GATT AND THE WTO

3.1 Introduction
The essence of giving the GATT history is to show the gradual improvement in legal enforcement and to acquire a wholesome picture of the dispute settlement system from whence the legal remedy of retaliation emanates, to show the historical institutional strengths and weaknesses of the system that essentially administers the remedy of retaliation and ultimately to show how the GATT/WTO regime has evolved with respect to substantive obligations, principles, commitments, and compliance of the same. The study of these origins is relevant because the decisions, procedures and customary practices of the GATT guide the WTO in its actions.29

3.2 Origins of the GATT
The origins of the GATT as both the “Constitution of International Trade Law” and the dominant Multilateral International Trade Institution lie in the disastrous experience with protectionism in the 1930’s. The history of the GATT begins in 1945 when the United States (U.S) invited its wartime allies to enter into negotiations to conclude a multilateral agreement for the reciprocal reduction of tariffs on trade in goods. At the proposal of the U.S, the United Nations’ Economic and Social Committee adopted a resolution in 1946, calling for a conference to draft a charter for an “International Trade Organization.”30 The major initiatives leading to the establishment of the GATT were taken by the US during World War II, in cooperation with its allies. It is argued that the mistakes made concerning economic policy during the interwar period (1920-1940) were a major cause of the disasters that led to World War II. In the interwar period, many

29 Agreement Establishing the World Trade Organization, Article 16 (1)
30 1 UN ECOSOC Res. 13, UN Doc. E/22, 1946, See also Van Den Bossche P., The Law and Policy of The World Trade Organisation, Text, Cases & Materials, Maastricht University, Cambridge University Press, 2005 at Pg. 79
other nations began enacting protectionist measures, including quota-type restrictions, which choked off international trade.\(^{31}\)

This made political leaders envision the idea of creating post-war economic institutions that would prevent these mistakes from happening again. Ironically, GATT Article XXIX makes clear that GATT was intended only as a provisional legal instrument.\(^{32}\) The principal and enduring agreement was to be the Havana Charter, which established the International Trade Organization negotiations, wherein Members decided that there ought to be multilateral negotiations to cut tariffs. About 23 countries agreed and participated in the negotiations, which were completed in August 1947. It was assumed that the written product of the tariff reduction negotiations, the GATT, would be a temporary document, and that the exemptions from its disciplines for pre-existing legislation and preference schemes would terminate, once the Havana Charter entered into force.\(^{33}\)

The two-track strategy was doomed when the U.S presence Truman administration announced that it would not pursue congressional approval for the Havana Charter. What remained was GATT, the ostensibly temporary document narrowly aimed at slashing tariffs and the minimalist institutional framework created by that supposedly provisional document. On the 30th October 1947, the U.S and the other original contracting parties approved the GATT on a provisional basis, and it was christened with the formal name of the “Protocol of Provisional Application of the General Agreement on Tariffs and Trade.” It entered into force on 1st January 1948. For almost the next half century, until the WTO was established on 1st January 1995, GATT filled imperfectly the void.


\(^{33}\)\text{Jackson John H., The World Trading System, OP. Cit, Supra footnote 31, at Pg. 39, (The Protocol of Provisional Application of the General Agreement on Tariffs & Trade)
created by the rejection of the ITO. To date, GATT remains the most important legal document in all of International Trade Law.\textsuperscript{34}

It is documented that during the 1960’s, the GATT dispute settlement procedure fell into disuse.\textsuperscript{35} Developing countries pushed through a proposal in GATT designed to strengthen the dispute settlement procedures. In a celebrated exercise, Uruguay brought a series of complaints against industrial countries’ treatment of Uruguayan exports.\textsuperscript{36} It was during this 1962 case that the notion of “Prima facie nullification and impairment” which is being used to date, developed.\textsuperscript{37} The central and formal procedures for dispute settlement were found in Articles XXII and XXIII.\textsuperscript{38} The latter article was the centerpiece for dispute settlement in GATT and is still relevant to the WTO procedures.

Three main features of the GATT dispute settlement system can be stressed; it was always invoked on the grounds of ‘nullification or impairment’ of benefits expected under the agreement, and did not depend on actual breach of legal obligations.\textsuperscript{39} Secondly, they established the power for the contracting parties not only to investigate and recommend action but to give a ruling on the matter and thirdly, they gave the contracting parties the power in appropriately serious cases to authorize a contracting party or parties to suspend GATT obligations to other contracting parties in default of their GATT obligations.

Due to the deficiencies in the GATT Dispute Settlement System (DSS), the Uruguay Round dispute settlement understanding was later adopted, wherein governments agreed to replace parts of the GATT dispute settlement procedure, under which the defendant Member had a right to sanction both the adoption of legal rulings (the act that made them legally binding) and the authorization of

\textsuperscript{34} Bhala Raj, International Trade Law: Theory & Practice, Op. Cit, Supra, footnote 32 at Pg. 127
\textsuperscript{35} Ibid, at Pg. 197
\textsuperscript{36} GATT, BISD 11 Supp. 18 (1967)
\textsuperscript{38} Waincymer Jeff. , WTO Litigation, Op. Cit, Supra, footnote 12, at Pg. 83
\textsuperscript{39} Jackson John H., The World Trading System, Op. Cit, Supra footnote 31 at Pg. 115
retaliation in case of non-compliance. In their place, the new WTO procedure made legal rulings legally binding automatically and made retaliation involuntarily available in the event of non-compliance. The fact that governments adopted the changes, showed that governments were in fact, ready to make a significantly stronger commitment to enforcement of WTO legal obligations.

During the 1986-1994 Uruguay round negotiations, GATT governments initially decided to settle for some minor procedural improvements in the GATT disputes procedure. The decision was made in December 1988, as part of an “early harvest” of negotiating results. However, governments declined to abridge the consensus principle that gave the loosing party the opportunity to veto power over legal rulings and retaliation remedies.

The attitude at the time was that dispute settlement would work better on the whole if Members participated on a voluntary basis and that it would not be productive to try to force governments into adjudicatory rulings they were not prepared to accept willingly. It is argued that what led to the crack of the resistance to enforce GATT legal enforcement was the infamous section 301 law in the U.S, a law that called for the imposition of unilateral trade sanctions against other GATT Members whenever the US government determined that they were in violation of their GATT obligations, or, were behaving in an otherwise unreasonable manner toward US trade. The other Members of GATT viewed the new legislation as extremely threatening, and called a special session of the GATT Council to demand a change of US policy.

What was evident in earlier GATT history was the lack of political commitments Members made to GATT Law. The very evident drawback was the fact that the

41 GATT Doc. C/163 (16) March 1989. The US justification for its resort to unilateral action was the complaint that the GATT Dispute Settlement Procedures were too slow, and too weak, to offer adequate protection of US trade interests. In exchange for a US commitment to adjudicate all WTO based section 301 complaints under the WTO system, the other GATT parties agreed to create a new and procedurally tighter DSS that would meet US complaints.
entire legal performance took place in a setting in which the leading governments had retained the legal authority not to obey GATT law. GATT law was never given direct effect in their domestic laws. It is worthy noting the fact that Members wanted the freedom to disobey, was a fallible point from which the GATT legal system had to built. Hudec gives several aspects of vital legal failures of the GATT system. In September 1986, in Punta Del Este, Uruguay, a large ministerial meeting was held to launch a new trade round, called the “Uruguay Round.” Among the issues to be discussed, focus was to be on the dispute settlement rules, given that the GATT rules were defective.

After several years of negotiating, the settlement, which was reached in 1993, included the draft charter (as well as various other texts) for a World Trade Organization that was finally brought into existence. This draft was signed at a ministerial meeting in Marrakech, Morocco, on 15th April 1995. The results of the Uruguay round do not supplant, but rather supplement the original GATT document and legal instruments under it that were operative before the entry into force of the WTO Agreement.

3.3 Weaknesses in the GATT Dispute Settlement Procedures

To appreciate the inherent frailties the Uruguay round negotiators needed to fix, it is necessary to understand the textual basis for those frailties, that is, GATT Articles XXII and XXIII. Article XXII calls upon each contracting party to accord ‘sympathetic consideration’ to and consult with other contracting parties, article

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43 See Ibid, Hudec at pg. 3 ((a) The story of the collapse of legal discipline over agriculture in the 1950’s, (b) The withdrawal of textiles and apparel from GATT legal discipline in the late 1950s’, (c) The removal of legal discipline over U.S. petroleum trade at about the same time, (d) The accommodation of “Residual” balance of payments restrictions when the balance of payments justification ended in the early 1960s’, (e) The withdrawal of the Treaty of Rome from effective legal review during the 1960s’, (f) The Withdrawal of export financing from GATT supervision through deference to the rules of OECD club and (g) the rise of largely unregulated anti-dumping measures as a new form of protection.)
XXIII establishes a skeletal framework for handling cases where one contracting party believes another Member is acting at variance with GATT obligations, technically known as ‘violation, nullification and impairment,’ or otherwise behaving in a way that denies benefits that should be available, technically known as ‘non-violation, nullification and impairment.’ The distinction between violation and non-violations nullification and impairment must be maintained, because it is unique. The concept of violation is when a Contracting Party fails to carry out its obligations under the Agreement, whereas non-violations nullification and impairment occur when the application by another Contracting Party of any measure, whether or not it conflicts with the provisions of the Agreement, still nullify or impair the rights of another. In the pre- Uruguay round era, GATT articles XXII- XXIII were criticized as insufficiently precise and, therefore, ineffective. Such criticisms were a major impetus behind the Uruguay round negotiations and specifically, the WTO Agreement and the DSU.

Hudec compares the earlier GATT dispute settlement success stories that were essentially diplomatic, as having been akin to walking on eggshells. The GATT DSS reflected a ‘pragmatic’ approach to multilateral dispute resolution, as distinct from a ‘legalistic’ one. The pre- DSU system was a European- style conciliatory one. The emphasis was on negotiation and diplomacy. The implicit assumption in the negotiation/ diplomacy approach was that contracting parties would act nobly towards one another, this proved wrong as the contracting parties started playing power games that added to trade friction rather than leading to mutually acceptable, balanced solutions. A more rigorous system was feared as being law creating and thus threatening the sovereignty of Members.

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47 The General Agreement on Tariffs and Trade, 1994, Article 23 (1) a
48 Ibid, Article 23 (1) b
50 Hudec Robert. E., Broadening the Scope of Remedies in WTO Dispute Settlement, Op. Cit, Supra, footnote 42, at Pg.2
The GATT dispute settlement process and remedies were the same as the ones under the WTO, with the exception that under GATT, the procedural steps were riddled with problems that rendered the entire system insufferably weak, such problems included blockage of the dispute settlement process at any given stage of the proceedings. There were no time periods for the various steps; any step could go on incessantly, accordingly, cases could go on for years.51

The Uruguay round for the first time established an overall unified dispute settlement system for all portions of its agreements, and provides a legal text (rather than just customary practice) to carry out its procedures. These new procedures include measures to avoid ‘blocking’, which occurred under previous consensus decision-making rules. We now have the WTO as the principal institution for international trade, and to understand this institution, it was vital to understand its predecessor, the GATT. The WTO charter “guidance” clause makes it clear that the GATT history is significant; prescribing in Article 16 that the WTO shall be guided by the decisions, procedures and customary practices of the GATT, making the history of the GATT a vital element for the interpretation and understanding of the WTO Institutions and other provisions.52

3.4 Retaliation under GATT

Although retaliation was permissible, rebalancing of concessions remained the dominant solution during the GATT years. In fact no GATT-authorized retaliatory action was taken during its 47-year history.53 Developing countries’ lawsuits had no real force because they simply did not have the market power to injure a developed country by retaliation.54 Authorization to retaliate in the event

54 Hudec R.E., Developing Countries in the GATT Legal System, Trade Policy Research Center, 1987, Pg.48
of non-compliance could be blocked, blockage was possible because under pre-
Uruguay round rules, consensus among the contracting parties was needed to
agree to form a panel or adopt a report, and ‘Consensus’ meant unanimity.

If there was an objection from one contracting party, the action was blocked. To
those seeking to advance international rule of law, this situation was ludicrous.55
Remedial action to enforce compliance was virtually impossible. The only way a
winning party could, consistent with its GATT obligations, retaliate was to obtain
the approval of the contracting parties. However, their approval required a
consensus, and once again, that could be blocked by just one contracting party,
the loosing one. Not surprisingly, in only one pre-Uruguay round case did the
contracting parties sanction retaliation.56 The Members were authorized by
majority vote to suspend concessions by way of retaliation, or rebalancing of
benefits.

In line with the preceding paragraph, the complaining government could at some
point request authorization to retaliate by imposing approximately equal trade
barriers in return, but the defendant would inevitably veto the request. In modern
GATT practice, only two requests of retaliation authorization were made, both
against the US, and both were vetoed.57 Both requests came in the superfund case,
United States; Taxes on petroleum and certain imported substances.58 Despite the
developed Members’ ability to block the procedures, the GATT dispute
settlement procedures produced a considerable number of dispute settlement
complaints during its almost 50 years’ history. GATT cases from 1948 to the end
of 1989, counted to 207 cases, with 88 (Eighty eight) produced legal rulings. Of
the Eighty-eight, 68 (Sixty Eight) were rulings of violation.59

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56 Dairy Products from Holland, BISD, Vol. II (1952) 116
57 Hudec Robert E., The Adequacy of WTO Dispute Settlement Remedies: A Developing Country
Perspective, (Development, Trade and the WTO), A Handbook, Hoekman Bernard, Aaditya Mattoo and
Philip English, The World Bank 2002, at Pg. 82
Pg. 82
In the decade of the 1980s, when the GATT system had matured, there were 115 (One Hundred and fifteen) complaints yielding 47 (Forty seven) legal rulings, of which 40 (Forty) were rulings of legal violation. The GATT had 71 (Seventy one) more complaints in the final five years of GATT operations (1990 – 1994), with 22 (twenty two) legal rulings, twenty of which were rulings of legal violation. In its 1st three decades, the GATT system achieved almost a 100% success rate in producing a satisfactory response to legal rulings.  

Over the GATT’s entire history, 28 (Twenty Eight) complaints were brought by developing countries, of which 17 (Seventeen) ended in legal rulings, 11 (Eleven) of which were rulings of legal violation, and 10 of the 11 (91%) had a successful outcome. Of the 22 complaints known to be based on a valid legal claim, satisfaction was achieved in 18 of the cases (82%) even in the more contentious cases of the 1980s, legally valid complaints by developing countries achieved a 73% success rate.

The paradoxical contrast between the voluntary procedures and weak remedies of the GATT DSS on the one hand, and its rather strong record of success, on the other, contains a lesson. It teaches that the enforcement of international legal obligations cannot be explained by superficial analysis of dispute settlement procedures and remedies. Enforcement requires that member parties be persuaded to reverse decisions they have taken in violation of the agreement.

Clair Wilcox, the Vice- Chairman of the U.S delegation to the Havana Conference noted that the possibility of suspending trade concessions under the GATT was to be regarded as a method of restoring a balance of benefits and obligations that, for any reason, may have been disturbed. He further stated that it was nowhere to be described as a penalty to be imposed on Members that would violate their obligations or as a sanction to ensure that the obligations of Members would be

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60 Ibid, at Pg. 82
61 Ibid, at Pg. 82
62 Ibid, at Pg. 82
observed. He further averred that, even so regarded, retaliation would not operate as a sanction and a penalty.63

Before conclusion of the WTO Agreements, the main standard for the permissible level of suspension (rebalancing of concessions) was GATT Article XXIII.2, which used the looser criterion of ‘appropriate’ suspension. The GATT 1947 used the criterion of ‘substantially equivalent’ only to prescribe the permissible level of compensatory withdrawals/suspension, in reaction to GATT-inconsistent tariff schedule modifications (Articles XVIII.7 (b)/21, XXVIII.3/4(d)) or safeguards (Article XIX.3 (a)) of another contracting party. While the criterion of ‘appropriate’ was often brought into proximity of ‘substantially equivalent’ by GATT players, the former was clearly significantly more open than the latter, and this distinction was affirmed by the Legal Advisor to the Director-General and the Deputy Director-General in GATT Council meetings as recently as 1988, during the Uruguay Round negotiations.64 The DSU negotiators’ choice of the equivalence standard in DSU Article 22 (4) must hence have been a conscious one.

Auspiciously, at the end of the Uruguay round, a more sound DSU was reached that dealt away with the weaknesses of the GATT DSU. The current DSU contains tight deadlines for virtually every stage of the dispute resolution process, and disputes generally are resolved within one year. Blockage of adoption of panel or Appellate Body reports is impossible. The loosing party must notify the DSB how it intends to comply with the recommendations. Failure to comply triggers remedial action, blockage of authorization to retaliate is impossible. In brief, there is “automaticity” and there are ‘teeth’ built into the DSU.65

63 Jackson John. H., The World Trading System, Op. Cit, Supra, footnote 31 at Pg. 113
64 Holger Spamann, The Myth of “Rebalancing” Retaliation in WTO Dispute Settlement Practice, Journal of International Economic Law, Oxford University Press, 2006, at Pg. 5. See GATT Document C/M/220 (Meeting of 8th April 1988), at Pg. 35
3.5 Historical Overview of a Demand for Compensation under GATT

Under GATT, an injured party was not authorized to seek compensation for past harms or to implement punitive measures. During the Uruguay Round negotiations, certain developing countries underlined the importance of compensation in the event of a developed country violating their GATT obligations to the detriment of developing countries. Compensating policies are seen to be welfare enhancing; as compensation lowers trade barriers, which benefits domestic consumers and foreign exporters, it fosters international competition whilst ensuring global resource allocation and drives innovation. Also, compensating trade partners for the damage inflicted upon them is considered a fair measure.

The most obvious and prevalent reason offered by scholars to explain why the GATT system did not expressly authorize retroactively compensatory or punitive measures (or evolve in a manner that authorized such measures) is rooted in sovereignty concerns and the view that the GATT dispute settlement system was primarily a political institution rather than a judicial one. This view is undoubtedly accurate, but it is not complete. Another reason advanced is that disputes generally did not concern intentional non-compliance, which would warrant such measures from the perspective of deterrence, but rather concerned either real disputes over the scope and interpretation of the rules or capacity problems, either of which would not warrant such measures from the perspective of deterrence because non-compliance would not be the result of a party’s lack of intent to comply.

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68 Hudec Robert E., Broadening the Scope of Remedies in WTO Dispute Settlement, Op. Cit, Supra, footnote 42 at Pg. 16
69 Brett Frischmann, A Dynamic Institutional Theory of International Law, Op. Cit, Supra, footnote 66 at Pg. 770
70 Ibid, at Pg. 769
To the extent that disputes between parties did not originate from intentional non-compliance but rather from an actual dispute over the rules or obligations, or from a capacity problem, the process would provide significant benefits to the disputants as well as the GATT regime as a whole. The fact that the settlement rate prior to a panel ruling was high and that the losing party eventually adopted most panel reports, provides support for this conclusion.

Brazil in 1965 during the Uruguay Round proposed a reform of Article XXIII of the GATT, and the proposals were to the effect that:
(I) A financial compensation on mutually acceptable terms to be paid in case of violations of the GATT by developed countries where it was established that the measure at hand had adverse effects on the trade of the developing country.  
(II) The possibility for developing countries to be released from their obligations under the GATT towards a developed country whose restrictive measures were found to have impaired their import capacity.
(III) If a developed country was not found to have complied with a panel recommendation within a certain time limit, the possibility of a collective action in order to obtain compliance would be provided for.

It is worthy noting that the Brazil and Uruguay proposed reforms did not aim at improving the overall GATT dispute settlement system, but at establishing a preferential treatment within the system to favor developing countries. This reform aspired to alleviate the unequal economic relationship between North & South, which was felt to be reflected in the GATT DSS functioning.

71 Gupta K.R., GATT and Underdeveloped Countries, Atma, Ram & Sons, 1976, at Pg. 273
72 Ibid, at Pg. 273
73 Proposals that: (1) Particular attention to be given regarding Differential and more Favourable Treatment for developing countries, (2) Special Consideration must be ascribed to the difficulties faced by developing Contracting Parties seeking equitable solutions in disputes with more powerful Contracting Parties, (3) In the light of the Punta Del Este Declaration, the Dispute Settlement Mechanism could be improved with a view to introducing a higher level of equity and thereby protecting Contracting Parties which can only count upon limited power of retaliation. See MTN.GNG/NG13/W/24,Pg. 1 accessed on 3rd January 2007 at: www.worldtradelaw.net/history/urdsu/urdsu.htm
In demanding compensation, a major concern was to create new remedies in favor of developing countries in order to balance their inability to retaliate against developed Members. Financial compensation was seen to be the best option.\(^74\) This proposal was rejected on the ground that, granting the aggrieved party a right to financial compensation would undermine the defendant Member’s sovereignty.\(^75\) The report of the Ad Hoc Committee on legal amendments also shows that the possibility of a financial compensation was rejected on the ground that “it would be impossible to evaluate the loss occasioned by a contracting party in its export opportunities in money terms.\(^76\)"

In addition, the right for developing countries to be released from their obligations under certain circumstances was considered excessive.\(^77\) Though the above proposals were rejected, they had a certain legislative impact in the form of the inclusion of part IV in the GATT and the adoption of the 1966 procedures. When the Brazil & Uruguay proposals were put forward, the GATT DSM merely consisted of the “Consultation” and the “nullification or impairment” provisions. The first attempt in taking account of developing countries’ particular position as to the GATT DSM was the inclusion of part IV.\(^78\) Although these articles are not directly related to the dispute settlement, their inclusion was mainly designed to encourage collaboration between the developed and less developed contracting countries in order to foster development, (Article XXXVII (2)). The inclusion of part IV constituted a 1\(^{st}\) step though towards the recognition of a special status for developing countries in the GATT disputes settlement mechanism.\(^79\)

\(^74\) Kofi Oteng Kufuor, International Trade, from the GATT to the WTO, Op. Cit, Supra, footnote 67 at Pg. 123

\(^75\) Taxil, B., L’ OMC et les pays en developpement. Montchrestien, 1998, P.133

\(^76\) Gupta, GATT and Underdeveloped Countries, Op. Cit, Supra, footnote 71 at Pg. 273

\(^77\) Taxil, B., B., L’ OMC et les pays en developpement. Montchrestien, Op. Cit, Supra, footnote 50 at Pg. 133

\(^78\) Dispute Settlement Understanding Article 3 (12), Annex P.18 (Trade & Development) which added to The GATT Agreement Articles XXXVI, XXXVII & XXXVIII (See Kuruvila, P.E, International Trade, Developing Countries and the GATT/ WTO Dispute Settlement Mechanism, Journal of World Trade, ISSN 1011-6702, 1997, 31 (6), 171-208, at Pg.172)

\(^79\) Kuruvila, P.E, International Trade, Developing Countries and the GATT/ WTO Dispute Settlement Mechanism, Journal of World Trade, ISSN 1011-6702, 1997, 31 (6), 171-208, at Pg. 172 & 191
It must be noted that as a result of the 1966 procedures, the inclusion of this proviso was added; that the Panel “take due account of all the circumstances and considerations relating to the application of measures complained of and their impact on the trade and economic development of affected contracting parties.”

This provision was designed to call upon panels to take into account the economic dimension of the case, besides its purely legal implications. The new rule represented a political and legal recognition of the unequal economic relationship between developed and underdeveloped countries.

It follows then from the above provision that panels cannot rule on a restrictive measure or practice applied by an industrialized country in a purely legalistic way. Such a restrictive measure is more likely to affect developing countries than the developed countries and this must be taken into account. Note the fact that the economic and not legal implications of the measure at issue were to be taken into account, as a major element in the panel ruling, was a great improvement. This depicts that the GATT approach for dispute settlement, was conciliatory and not binding upon the parties and was not legalistic or judicial in nature.

In case a GATT panel report was adopted, the question of its legal significance remained. As observed earlier, the aim of the dispute system was not to uphold the GATT law but to reach a consensus on its application. Evidently, panels’ recommendations were not mandatory for the losing party. The entire procedure rested upon the disputants’ good faith. A good example depicting the lack of binding obligation of panel rulings is the 1983 Nicaragua-US Case. Nicaragua initiated a complaint against the US alleging that the US decision to reduce the amount of Nicaragua sugar allowed to be imported violated the GATT rules on the administration of quotas. Although the panel ruled in favor of Nicaragua, the

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80 Decision of the 5th April 1966. BISD 14th Supplement (1967) 18, Paragraph 6
81 Hudec, Developing Countries in the GATT Legal System, Op. Cit, Supra, footnote 54, at Pg. 247
82 Taxil B Op. Cit, Supra, footnote 75 at Pg. 129
83 GATT BISD 67 (1985)
US indicated that they were not willing to change its practice. The only way for Nicaragua to obtain some sort of compensation would have been to retaliate against the US, that is, to impose restrictions on imports from the US. However, this would have been contrary to Nicaragua’s best interests and this measure would not have had any noticeable impact on the US economy.\textsuperscript{85}

It is against the above background, that the debate as to the suitability of retaliation as a remedy over compensation prevails. It is not without a doubt that the inability for developing countries to retaliate has raised eyebrows and the usefulness of the entire dispute settlement system is put at risk if the developing and the least developed countries continue to shun the remedy of retaliation as being wholly unworkable for them. It is interesting to note that much has not yet been done to alleviate the above fears.

3.6 Dispute Settlement under the WTO

There are four general phases to post Uruguay round dispute resolution: (1) Consultation (2) Use of a panel; (3) Appeal to the Appellate Body; and (4) Surveillance & Implementation. The procedural steps are laid out hereunder:

1. Informal Dispute Resolution Mechanisms: Often times, a panel is not the first option to be tried, rather, the use of good offices, conciliation or mediation as under article 5 of the DSU. The use of good offices can be terminated at any time. If consultations fail to settle a dispute within sixty days or if the parties mutually agree that the dispute cannot be settled by consultation within sixty days, the complainant is entitled to request for the establishment of a panel as provided under article 4 (7) of the DSU. A panel can be established earlier in an urgent situation.

2. Request for a panel: Under article 3 (4) & (6), the respondent must address the request for a panel within ten days of the request. Consultations should begin within thirty days. The complainant must wait at least sixty days from the day

\textsuperscript{85} Ibid, Jackson, J.H. and Davey W.J at Pg. 1154, GATT BISD 67 (1985)
consultations were requested before seeking a panel, as per article 5 (4). The purpose of this sixty day ‘waiting period’ is to ensure that consultations are given adequate time to succeed.

3. Formation of the Panel: The panel must be established no later than the first meeting of the DSB following the request. The requirement ensures that panels are formed expeditiously. The panel must consist of three persons, unless the parties agree otherwise within ten days of the establishment of the panel. According to article 8 (1) and (4), if there is no agreement on composition within twenty days of establishing the panel, the Director General must pick the panelists at the request of either party within ten days of the request.

4. Operation and Functions of the Panel: As soon as practicable, the panel must fix the timetable for resolution of a dispute. Where feasible, the timetable should be set within one week of the composition of the panel and the establishment of the panel’s terms of reference. The panel must issue its report to the complainant and the respondent members within 6 months or three months in an urgent case.

5. Adoption of a panel report by the DSB: A panel report cannot be considered by the DSB until twenty days after the report is issued to the members. Members objecting to the report must do so in writing within ten days of the DSB meeting. The DSB must adopt the panel’s report within sixty days of its circulation to the members, unless the DSB decides by consensus not to adopt it or a party to the dispute notifies the DSB of its intention to appeal the panel’s decision. According to article 20 (1), the entire process from establishing of a panel to adoption of the report must take place within 9 months, or twelve, where an appeal lies.

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86 Articles 6 (1) and 8 (5) respectively
87 Article 8 (7)
88 Article 12 (3) of the DSU
89 Article 12 (7 & 9)
90 Article 16 (4) of the DSU
6. Appeals: A party may appeal a panel decision as per article 17. The Appellate Body must render a decision within sixty days, and in no case longer than ninety days. The DSB must adopt the report within thirty days of its circulation to the members, unless there is a consensus against adoption.

7. Compliance: Within thirty days of the DSB’s adoption of a panel report, or an Appellate Body report, the losing Member must inform the DSB of its intentions regarding implementation of the recommendations contained in the report. Compliance is expected within a ‘reasonable period’, not to exceed fifteen months.  

8. Compensation or Retaliation: If a panel recommendation is not implemented within a reasonable period of time, the losing Member unable or unwilling to comply with the recommendation must enter into negotiations with the winning Member to develop a satisfactory scheme of compensation or retaliation to be discussed below.

3.7 Retaliation under the WTO

By the end of February 2006, suspension of concessions was requested in twenty-seven cases and only authorized in fifteen. Article 23 of the DSU provides that WTO Members must use DSU procedures when they seek to remedy a violation of a Uruguay round agreement. In addition, it is provided that no Member may issue a ‘determination’ that another party has violated a Uruguay round Agreement unless a Panel or Appellate Body has first reached that conclusion.

Once a Member is found in breach of the WTO provisions, it has two options in case it decides not to comply with its primary obligation to bring the deviating measure into conformity with the WTO agreements, that is, to specifically

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91 Article 21 (3) of the DSU
92 Article 22 (2) of the DSU
perform the contract. It can either enter into negotiations with the injured Member
to developing a mutually acceptable compensation\textsuperscript{94} or decide to endure
retaliation, which essentially takes the form of suspension of concessions or
obligations previously authorized by the DSB.\textsuperscript{95}

The complaining Member is basically authorized to unilaterally raise its tariffs
against the wrongdoing Member. Both compensation and retaliation are
temporary remedies and are merely instruments to restore the balance of
concessions, with compliance as the ultimate objective; therefore, the primary
remedy under the WTO is Specific Performance, that is, the withdrawal of the
offending measures.\textsuperscript{96}

If an agreement on compensation is not reached within twenty days after the
expiration of the period allotted for implementing the panel or Appellate Body
decision, a complaining party may request the DSB to authorize it to suspend
concessions.\textsuperscript{97} In EC – Hormones, (Article 22.6 - EC), the Arbitrators set out the
minimum requirements of a request for authorization under Article 22 (2) 1, the
request must set out a specific level of suspension, that is, a level equivalent to the
nullification and impairment caused by the WTO inconsistent measure, pursuant
to Article 22 (4) and (2), the request must specify the agreement and sector (s)
under which concessions or other obligations would be suspended.\textsuperscript{98}

According to article 22 (3) of the DSU, the DSB must grant authorization to
retaliate within thirty days, unless it decides to the contrary by consensus. Article
22 (6) is to the effect that the party subject to retaliation may object to the level of

\textsuperscript{94} Article 22 (2); See also Bhala Raj, International Trade Law, Op. Cit, Supra, footnote 32 at Pg. 225
\textsuperscript{95} Article 22 (2) DSU
\textsuperscript{96} Article 3 (7) of the DSU
\textsuperscript{97} Palmeter David and Mavroidis Petros, Dispute Settlement in the World Trade Organisation, Op. Cit,
Supra, footnote 8 at Pg. 266
\textsuperscript{98} Article 22 (3), Decision by the Arbitrators, EC-Hormones, Measures concerning meat and meat Products,
original complaint by the US- Recourse to Arbitration by the European Communities under
Article 22 (6) of the DSU, WT/DS26/ARB.
retaliation, in which case the matter is then referred to arbitration. As a general principle, the complaining Member must first consider taking action in the general sector (such as goods, major services sectors, or particular types of intellectual property) affected by the measure in question. However, if it considers that such retaliation would not be ‘practicable or effective,’ the complaining government can then consider retaliation in another sector.

The complainant in the circumstances suspends concessions it has granted under a Uruguay round agreement in the same general subject area as the Agreement that was the subject of the dispute. If the complaining party considers that even this type of retaliation would be impracticable or ineffective, and if it additionally believes that circumstances are serious enough, it may consider suspending concessions under an unrelated Uruguay round agreement, that is, it may consider increasing tariffs on goods in response to a violation of the Intellectual Property agreement.

In assessing what type of retaliation to select, the complaining government is directed to consider trade in the relevant sector or agreement as well as broader economic considerations. It is the complaining government itself, however, not the DSB or a panel that makes the judgment whether a particular form of retaliation is ‘practicable or effective.’ The DSB must grant a complaining country’s request to suspend benefits within 30 days after the ‘reasonable period’ allotted for implementation of the panel or Appellate Body report has elapsed. However, the retaliation must be subject to the equivalence of the benefits that the defending country is impairing by its WTO inconsistent actions. The government facing retaliation may request arbitration if it considers that the retaliation is not equivalent to the actual loss of benefits. In such arbitration, the panel is not permitted to examine the nature of the concessions to be suspended. The panel must confine its inquiry to whether the levels of the proposed retaliation and the loss of benefits are equivalent.
Retaliation is to remain in place only until there is a satisfactory resolution of the dispute. Such a resolution may be achieved through removal of the offending measure, elimination of the nullification or impairment, or through reaching a mutually satisfactory solution with the other party to the dispute. The DSB monitors any retaliation applied pursuant to the understanding.

Retaliation is depicted as the “Ultima Ratio” in WTO enforcement; it is a last resort adjudication, an interim measure till full implementation.\textsuperscript{99} Retaliation is self-executable, and is argued to be a strong deterrent against breaches of the WTO Agreements and apt to inducing compliance by the Member States. However, the fact that the defendant chooses to withstand retaliation rather than withdrawing the inconsistent unlawful measure goes far to disprove the fallacy of the remedy.\textsuperscript{100} Retaliation is only authorized if the respondent remains passive and it is designed to act as the ultimate safeguard for complaints willing to obtain satisfaction.

\subsection*{3.7.1 Nature of Suspension and Rebalancing of Concessions}

The Suspension of Concessions or other obligations is essentially intended to restore the reciprocal balance of benefits between the Contracting Parties. The rationale for this is the legal maxim, “inadimplenti non est adimplendum,” which enables a State injured by a violation to restore the balance of rights and obligations in the sum total of its legal relationships with the violator on a lower level.\textsuperscript{101} This maxim was embodied in Article XXIII: 2 of the GATT 1947, which provided that ‘if the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or

\textsuperscript{99} Reif, T. & Florestal M., Revenge of the Push – Me, Pull- You: The Implementation Process under the WTO Dispute Settlement Understanding, International Lawyer, ISSN 0020-7810, 1998, Fall, 755 – 788, Pg. 764
\textsuperscript{100} As aptly put by Hudec, Broadening the Scope of Remedies in WTO Dispute Settlement Op. Cit, Supra, footnote 42, at Pg. 7. There is a general rule in diplomacy, that when choosing between evils, the evil in the more distant future is to be preferred. Retaliation as per Article 3 (7) is a last resort trade remedy, it is seldom used by the complainants and the defendants at times choose not to comply with DSB recommendations at the threat of retaliation, as it is deemed to be a lesser evil than specific performance of DSB recommendations. See EC-Bananas III (US) Article 22.6, WT/DS27/ARB/ECU
\textsuperscript{101} Vienna Convention on the Law of Treaties, Article 60.1, 23 May 1969, 1155 UNTS 331, 346
parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement.

Suspension of concessions under article 22 plays a dual role. First of all, it provides a remedy for the nullification and impairment of the benefits suffered by the complainant and secondly, it aims at facilitating the implementation of the DSB recommendations. Suspension of concessions therefore can be referred to as ‘Counter Measures.’ The term that is often used to refer to suspension of concessions, is ‘Retaliation’ which is not defined in traditional legal doctrine, but has a connotation of ‘war.’

Retaliatory measures taken by Members in accordance with WTO provisions are usually a withdrawal of concessions to the respondent’s exports. In such cases, the prevailing Member’s economy is not helped but further harmed by retaliation. This is the standard cost of protectionist barriers. Presently “the injured country then suffers twice, once from the restrictions on its exports imposed by foreign governments, and again when tariffs or duties raise the domestic cost of foreign goods selected for retaliation.”

To further understand the nature of suspension of concessions, it is necessary to expound the very essence of the principles that govern the remedy, as shall be depicted from the following sections.

The notion of rebalancing the level of ‘nullification and impairment’ is embedded in Article 22.4, which provides that 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. In EC - Bananas III (US) (Article 22.6), the

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104 European Communities: Regime for the Importation, Sale and Distribution of Bananas- Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU
arbitrators insisted on this choice as the relevant standard for the permissible level of suspension in WTO dispute settlement. In legal terms, ‘rebalancing’ in WTO dispute settlement refers to the equivalence of two levels, that of suspension on the one hand and that of impairment on the other. The complaining Member is allowed to implement retaliation to a level equivalent to the violation’s ‘adverse impact’ as provided under article 3 (8) of the DSU. The dilemma however, is determining what either “equivalence” or “level” refer to, arbitrators ask members seeking authorization to suspend concessions to submit their calculation methodologies, neither these nor any other submissions not made to the DSB form a part of the arbitrators’ terms of reference.

Article 22 (7) requires the Arbitrator to determine whether the level of retaliation for which authorization is being sought is ‘equivalent’ to the damage caused by the WTO inconsistent measure. The type of retaliation most commonly considered involves the complainant listing a range of products it imports from the respondent on which it will impose prohibitively high tariffs until the respondent’s offending measures are brought into conformity. The gross value of the imports to be prohibited, typically the average for the three most recent representative years for which import data are available, should match the value of the complainant’s imports excluded by the respondent’s WTO- inconsistent measure.

However, ensuring equivalence between the damage and retaliation in terms of the gross value of trade between the respondent and the complainant does not mean that retaliation has the same economic welfare effect on the respondent as

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106 Kym Anderson, Peculiarities of Retaliation in WTO Dispute Settlement, Discussion Paper No. 0207, Adelaide University, Adelaide 5005 Australia, Centre for International Economic Studies, March 2002 at Pg. 7. See EC –Hormones: Measures concerning Meat & Meat Products, Recourse to Arbitration by The EC under Article 22.6 WT/DS26/ARB
the initial damage suffered by the complainant. Holger Spamann does give an asymmetry of retaliation by using the analogy of apples versus eggs. The argument runs that it is not possible to balance the level of nullification and impairment through using the remedy of retaliation, the economic effects felt between the complainant and the respondent are always dissimilar.

In EC- Bananas III (Ecuador), (Article 22. 6- EC) this was the first case in which cross- retaliation occurred. An important factor in this case was that it presented “considerable economic differences between a developing WTO Member and the Worlds’ largest trader, where a great imbalance in terms of trade volume and economic power existed between the complaining party seeking suspension and the other party failed to bring the WTO inconsistent measures into compliance.”

In the preceding case, Ecuador argued that most of its imports of goods from the EC were “primary goods” or “investment goods”, rather than “consumer goods.” Accordingly, Ecuador argued that it was not practicable or effective for it to suspend concessions in the goods sector. As an alternative, Ecuador requested authorization to suspend concessions under the GATS, where a violation also occurred, and under the TRIPs agreement where no violation had been found. The arbitrators determined that the EC had failed to show that it was both impracticable and ineffective for Ecuador to suspend concessions with regard to goods in the primary and investment goods area. The arbitrators went on to find that it was both practicable and effective for Ecuador to suspend with respect to consumer goods.

107 Ibid, at Pg. 7
109 Decision by the Arbitrators, European Communities- Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000
110 Palmeter David and Mavroidis, Dispute Settlement in the World Trade Organisation, Op. Cit, Supra, footnote 8 at Pg. 276
111 Ibid, at Pg. 276
As to services, the arbitrators also found that because Ecuador’s’ concessions were limited, it was correspondingly limited in its ability to suspend services concessions and accepted Ecuador’s proposal. Even with the fact that Ecuador was given the opportunity to suspend concessions in the TRIPs area, it was not able to suspend concessions effectively and thus rebalance the level of nullification and impairment, this was because the other WTO Members that Ecuador sought to export phonograms to without the authority of the EC owners, and who were not part of the dispute, remained bound by their obligations under TRIPs.

In EC- Bananas III (US) (Article 22.6 - EC), which was the first request for suspension of concessions under article 22.2, the U.S requested for authorization to suspend concessions covering only goods, under GATT 1994, although the underlying violation covered both goods and services under GATS. The EC objected, arguing that when findings of nullification or impairment are found in more than one sector, suspension must be commensurate with the harm experienced in each sector. The arbitrators disagreed, holding that “…the U.S had the right to request suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered, if the inconsistencies with the EC’s obligations under the GATT and the GATS found in the original dispute had not been removed fully in the EC’s revision of its regime.”

In EC- Hormones, the U.S and Canada included in their requests for authorization lists of products that covered a significantly higher amount of trade.

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112 Ibid, at Pg. 276
113 The Agreement on Trade Related Aspects of Intellectual Property, Article 51 is to the effect that Members’ Customs Authorities may suspend the release into free circulation suspected counterfeit trademark or pirated copyright goods.
114 Decision by the Arbitrators, 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, 9 April 1999
115 Ibid, Palmeter David & Mavroidis, at Pg. 276
116 European Communities: Measures Concerning Meat and Meat Products (Hormones- Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS26/ARB)
than the amount of the suspension actually proposed. The EC objected, requesting that the U.S and Canada be required to submit lists of proposed suspensions equivalent to the level of nullification and impairment, after the determination by the arbitrators. The arbitrators declined, noting that the DSU did not impose such a requirement. In the event that tariff concessions are to be suspended, the arbitrators said, “Only products that appear on the product list attached to the request for suspension can be subject to suspension.”

It is argued that it is not reasonable to ensure equivalence through identifying of the retaliating measure with the violating one, because with asymmetric trade flows, even an identically specified measure will have different effects depending on the size and composition of the trade flow it applies to and in addition, it is not possible to use revealed preferences to approximate equivalence through reversion to the status quo ante that is, the mutual rights and obligations of the parties before conclusion of the trade agreement.

Violation of the agreement is usually only partial whilst concessions are made on a Most-Favored-Nation basis. Suspension affects only the relationship with the responding Member. Multilateral trade negotiations usually lead to multiparty tradeoffs that cannot be undone bilaterally; and the aggregation of obligations over multiple rounds of trade liberalization means that the status quo ante is an ill-defined concept. There is a need therefore for the development of a comparator, as article 22.4 of the DSU makes no such provision. The definition of impairment and nullification relate to the level of benefits destructed, which are not defined in the DSU. It has been argued by different scholars that the level of

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117 Ibid, Palmer David & Mavroidis, at Pg. 267, EC- Hormones, Recourse to Arbitration by the EC under Article 22.6, WT/DS26/ARB
119 Ibid, at Pg. 5
impairment should be the equivalent of the ‘trade effects’, which is based on Article 31 (4) of the Vienna Convention.\textsuperscript{120}

3.7.2 Nullification or Impairment of Benefits /Violation Complaints

The only situation where suspension of concessions is allowed is when “a nullification or impairment of benefits has been occasioned.” The concept of nullification or impairment lies at the centre of the bulk of GATT and WTO dispute resolution.\textsuperscript{121} A party seeking to formally challenge the behavior of another Member under Article XXIII of GATT 1994 has two broad options. It must either demonstrate that any benefit accruing to it directly or indirectly is being “nullified or impaired”, or demonstrate that the attainment of any objective of that agreement is being impeded as a result of certain actions and events. Practically, all GATT and WTO claims have concentrated on the nullification or impairment test as opposed to the attainment of any objective test. It would be particularly difficult to apply this test, as there would be a need to identify the objectives of the Agreement.

In addition to the above, article 3 (7) of the DSU also provides that a Member shall exercise its judgment as to whether action under these procedures would be fruitful. Article 3 (7) gives leeway to WTO members to determine if they have Locus Standi. To illustrate this point, in \textit{EC – Bananas III},\textsuperscript{122} the European Communities (EC) claimed that the complaining party, the United States (US), did not have a legal interest in its claims since the US had only a token production of bananas and did not (and could not within the foreseeable future) export bananas to the EC. The EC requested the panel not to rule on the claims made by the US. The panel and the Appellate Body rejected the EC’s request. In particular,

\begin{flushright}
\textsuperscript{120} Ibid, at Pg. 6  \\
\textsuperscript{121} Jeff Waincymer, WTO Litigation, Op. Cit, Supra, footnote 12, at Pg. 88  \\
\end{flushright}
the Appellate Body stated that a Member is not required to show a legal interest in order to bring a matter before a panel.\textsuperscript{123}

The Appellate Body further held that it is trite law in all international litigation, that a complaining party must have a “legal interest” in order to bring a matter to court, it then noted that the same principle was not applicable to the WTO dispute settlement system, wherein a complaint may be admissible before a panel without proving a complaining party’s legal interest, as long as the complaining party considers in good faith that its benefits under the WTO Agreements are being nullified or impaired and that a recourse to the procedures under the DSU would be fruitful.\textsuperscript{124} The above statement has been interpreted to imply that a matter can be referred to the dispute settlement system irrespective of the individual interest of the Members.\textsuperscript{125}

The concept of nullification or impairment contains many uncertainties, its meaning has been developed through panel deliberations using a mixture of textual and policy analysis.\textsuperscript{126} One key question to determine the legality of a complaint is to prove whether nullification or impairment exists. Article XXIII: I of GATT 1994 outlines three alternative instances where claims of either impeding of objectives or nullification or impairment can be made. The first refers to breach of obligations, the second and third refer to other measures and situations respectively. Since the latter two do not refer to breach as a precondition, it has been accepted that non-violation nullification or impairment claims can be made. The provisions combine conceptually distinct rights to challenge violation and non-violation activities. They neither define the key elements of nullification or impairment nor establish appropriate processes and procedures.

\textsuperscript{123} Ibid, Para 132
\textsuperscript{124} Ibid, Para 134
\textsuperscript{125} Yuka Fukunaga, Securing Compliance through the WTO Dispute Settlement System, Op. Cit, Supra, footnote 102 at Pg. 389
\textsuperscript{126} Waincymer Jeff., WTO Litigation, Op. Cit, Supra, footnote 12, at Pg. 89
Early GATT/ WTO disputes had to consider whether proof of violation of obligations was itself proof of nullification or impairment or whether there needed to be separate proof of some trade damage.\(^\text{127}\) If the latter was the case, a further question was whether the damage needed to be in the form of some existing effect on trade volumes or could merely be constituted by potential impact on trade opportunities. Because no clear guidance is provided on these questions within the article itself, it was left to GATT jurisprudence to resolve the matter.\(^\text{128}\)

The GATT jurisprudence developed the notion that breach of the rules by one party is prima facie evidence of nullification or impairment as codified in Article 3.8 of the DSU. Being only a prima facie presumption, it remains theoretically possible for a party in breach to argue that the complainant’s rights were not nullified or impaired by the respondent. This is further confirmed in Article 3.8, which identifies that there is a normal presumption of adverse impact where infringement of obligations has been shown. It is then up to the member against whom the complaint has been brought to rebut the change. Article 3.8 of the DSU affirms that every infringement of WTO obligations presumably entails that there has been nullification or impairment of the benefits of another member.

In Uruguay – Recourse to Article XXIII,\(^\text{129}\) the GATT Panel stated that nullification or impairment does not arise merely due to the existence of any measures, ‘the nullification or impairment must relate to benefits accruing to the contracting party’ under the General Agreement. The said findings imply that nullification or impairment can only be found when certain measures have a harmful effect on the benefits of a Member protected by the WTO Agreements, such as the expectations of a competitive relationship.

\(^{127}\) Ibid, at Pg. 89  
\(^{128}\) Ibid, at Pg. 89  
\(^{129}\) GATT Panel Report, Uruguayan Recourse to Article XXIII, L/1923, adopted 16 November 1962, GATT BISD 11S/95, Para 14
3.7.3 Non-violation or Other Situation Complaints

There is no obligation to withdraw the measure by a party once a claim of a non-violations complaint is made out and hence no right to retaliate arises. Three elements are required to be established under a non-violation complaint: first, the application of a measure by a WTO Member, secondly, there must be a benefit accruing under the relevant agreement and thirdly, there must be a nullification or impairment of the benefit as the result of the application of the measure.

Article 26 provides special rules for cases where a WTO Member seeks redress of another Member’s action that, while not inconsistent with any Uruguay round agreement, nevertheless, results in benefits that should have accrued to it being “nullified or impaired” (so-called ‘non-violation disputes’). In initiating such a case, the complaining government must provide a detailed justification of its grievance. The remedy in a “non-violation” case differs from that of the usual “violation” case. Although there is no obligation for the defending government to withdraw the measure in question, that government must make a mutually satisfactory adjustment and compensation may be part of any final settlement.

It has been argued that the concept of non-violation is both a useless and dangerous construction, derived from a merely grammatical turn of the words in the GATT.\(^{130}\)

In Korea – Government Procurement,\(^ {131}\) the panel considered that the non-violation remedy should not be viewed in isolation from general principles of customary international law. It considered that members should not take actions even those consistent with the letter of a treaty, which might serve to undermine the reasonable expectations of negotiating parties. The panel saw this as a further development of the principle of Pacta Sunt Servanda. In the panel’s view, good faith performance has been agreed by WTO Members to include subsequent


\(^{131}\) WT/DS163/R, adopted on the 1st May 2000
actions, which might nullify or impair the benefits reasonably expected to accrue to other parties to the negotiations in question.

In conclusion, it can be deduced from the foregoing study that the GATT Institution, which was only meant to be a Protocol of Provisional Application, that largely depended on diplomacy and wherein might was seen to override rights, evolved into an International World Trading Institution, called the World Trade Organization, with a more rigorous and legalistic dispute settlement system. However, as the literature reveals, the main area of study, “Retaliation,” has always been a problematic remedy and to-date, still remains a controversial area of WTO law. As a last resort trade remedy, without retaliation as an effective remedy that can be utilized with minimum distress to the parties in the dispute, the intricacy in the implementation of the remedy shall negate the use of the dispute settlement system overtime.
CHAPTER FOUR
EMPIRICAL RESEARCH; PRESENTATION AND INTERPRETATION OF FINDINGS

4.1 Introduction
The findings arising from the self-administered questionnaires and documentary evidence regarding the various variables are presented in this chapter. In general, the findings indicate that retaliation, as a trade remedy does not fulfill the objectives of the WTO as a trade remedy. There is an evident power imbalance amongst the members and indeed, the membership of the developing and least developed countries are dissatisfied with it, for want of capacity to utilize it as a credible remedy.

The findings also depict that developing and least developed countries have made proposals in preference for compensation whether monetary or in the form of tariff concessions over retaliation. Most important, is the finding that there is an overwhelming support for the retention of retaliation as a trade remedy, thus showing that although it does not fully fulfill the objectives of the WTO as a trade remedy, it serves as a threat, enough to serve its justification as a remedy.

4.2 Characteristics of Respondents
The characteristics of the respondents include government Ministries, the Private Sector, Inter-governmental organizations, scholars and gender.

<table>
<thead>
<tr>
<th>Table 1: Respondents to the Self-administered Questionnaire</th>
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<tbody>
<tr>
<td><strong>Intergovernmental Organizations</strong></td>
</tr>
<tr>
<td>Government</td>
</tr>
<tr>
<td>Private Sector</td>
</tr>
<tr>
<td>Scholars</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>
Out of the planned 80 respondents for completion of the self-administered questionnaire, only 46 responded. This represents a total response rate of 57.5%. Of the 80 respondents, 30 were administered questionnaires via email whilst the other 50 were hand delivered.

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
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<tbody>
<tr>
<td>Male</td>
<td>30</td>
<td>65.2</td>
</tr>
<tr>
<td>Female</td>
<td>16</td>
<td>34.8</td>
</tr>
<tr>
<td>Total</td>
<td>46</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 2: Self-administered Questionnaire: Respondents by Gender

Only 34.8% of the respondents were female. This study does not specifically look at the impact of women involvement in international and national trade; this poses a relevant field for future study.

4.3 The Controversy of Retaliation

4.3.1 Free Trade Principle

The preamble of the Agreement establishing the World Trade Organization gives a prominent place to the principle of the mutual advantages deriving from the participation in the system. The preamble enumerates various objectives of the Contracting parties, as already enunciated in Chapter one of this study.

The respondents were asked to indicate to what extent retaliation as a remedy succeeds in fulfilling the objectives of the WTO and the DSU. The relevant and respective objectives herein being: the substantial reduction of tariffs and other barriers to trade and elimination of discriminatory treatment in international relations, and the DSS being a central element in providing security and predictability to the Multilateral Trading System, as per article 3 (2) of the DSU.
Table 3: Objectives of the WTO and the DSU

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>It does</td>
<td>7</td>
<td>15.2</td>
</tr>
<tr>
<td>Partly</td>
<td>14</td>
<td>30.4</td>
</tr>
<tr>
<td>It does not</td>
<td>25</td>
<td>54.4</td>
</tr>
<tr>
<td>Total</td>
<td>46</td>
<td>100.0</td>
</tr>
</tbody>
</table>

From the above responses, it is strongly suggested that the remedy fails to a large extent, in fulfilling the above-enumerated objectives. The norm of suspension of concessions by the injured State goes against the grain of the entire object and purpose of the agreement, and the system.

Retaliation can be compared to avoidance of contractual obligations by the complainant to the extent of the breach of obligations by the respondent, or in the alternative, to the extent of the failure of the specific performance, which is the ultimate goal of the WTO dispute settlement mechanism. Suspension of concessions undermines the principle of free trade; it is tantamount to protectionism, which is economically inefficient and disrupts world trade. Retaliation raises new trade barriers, threatens the progress of liberalization and the integrity of the fundamental principles of free trade.

The DSU provisions importing retaliation are self-defeating as far as the very object and purpose of the WTO is concerned, in that they are an example of mercantilist practice. They are based on the premise that protecting markets is beneficial and that it can offset the “nullification or impairment” caused by the WTO inconsistent measure and thereby force the losing member to comply with

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the rules. It is a paradox that the premier international organization established to promote free trade, makes trade sanctions a basic tool of the system.\textsuperscript{134}

It was argued by Adam Smith in his famous work, “The Wealth of Nations” in 1776, that the key to national wealth and power was economic growth.\textsuperscript{135} Economic growth, he averred, is primarily a function of the division of labor, which is in turn dependent upon the scale of the market. When a mercantilist Member erects barriers against the exchange of goods and the enlargement of markets, as noted by the respondents, it restricts domestic welfare and economic growth as the goods and services that, the member has competitive advantage in the formers’ market suffer from unjustified and exorbitant tariffs, which makes other uncompetitive producers have an edge in the market. The division of labor principle referred to here is the current practice by WTO Members of comparative advantage through trade concessions.

It therefore distorts the economies of nations when these trade concessions are violated. It is astounding to note that, three centuries ago, Adam Smith noted that when a state erects barriers, in this case, tariffs, against the exchange of goods and the enlargement of markets, it restricts domestic welfare and economic growth.\textsuperscript{136} It is even more perplexing that the contracting States of the WTO would come up with a trade remedy such as retaliation that is supposed to be ‘rebalancing’ the distorted trade relationship, whilst at the same time, the very same remedy harms the complaining State.

The essence of retaliation is to execute justice to the injured party for the violation occasioned by the respondent, on a temporal basis, pending the withdrawal of the WTO inconsistent measure or as a prime remedy, if the respondent becomes inflexible in withdrawing the inconsistent measure. The centrality of justice to the

\textsuperscript{134} Asim Imdad Ali, Non-compliance and Ultimate Remedies Under the WTO Dispute Settlement System, Journal of Public and International Affairs, Volume 14/ spring 2003, at Pg. 14


\textsuperscript{136} Ibid, at Pg.10
analysis and construction of international economic law is evident in the nature of the concept of justice itself. Plato perceives Justice as being the ‘Right Order.’\textsuperscript{137}

For Plato, whether there is justice, that is, whether right order exists, which in this study would imply ‘rebalancing of concessions’, depends on the resemblance to what is good. According to Aristotle who expounds this concept, when law and public institutions affect the allocation of social benefits or the correction of improper gain, they raise questions of distributive and corrective justice.\textsuperscript{138} In this case, retaliation cannot be perceived as just and right to the complaining party if it is tantamount to shooting oneself in the foot.

Retaliation according to the concept of Aristotle is intended to be corrective and distributive justice, to impede and discourage the offending party from persisting with the offending measure. This however does not only affect the offending Member, but the complainant as well, and has the potential of harming the complainant more than the respondent. Given the two evils, either withdrawing the offending measure or facing retaliation, the latter (lesser evil) is always chosen by the respondent. Retaliation is one area of International Economic Law that acts as a mechanism for the identification and correction of improper gain through dispute resolution mechanisms on the inter-state level. This is an aspect of International Economic Law that must be evaluated in terms of theories of distributive and corrective justice.

It is vital to recognize the link between trade and justice, the question herein, is whether retaliation can be perceived as a just remedy. The concept of ‘Free Trade’ may not be looked at only from a utilitarian view, but also from a rights perspective. The rights view of free trade is dependent upon the concept of sanctity of contract and the concept of comparative advantage that WTO Members choose to exercise. There is no fairness or justice if a Member decides

\textsuperscript{137} Bhala Raj, International Trade Law: Theory & Practice, Op. Cit, Supra, footnote 135 at Pg.37
\textsuperscript{138} Ibid, at Pg. 37
to retaliate against another by erecting trade barriers of its own to punish foreign producers for their governments’ unfair acts.

Fairness is a process and not an outcome, as intended to be achieved by the remedy of retaliation. In addition to that, erecting trade barriers of a Members’ economy is unfair to the domestic consumers, who must pay higher prices for foreign goods. The circumstances above are not as obvious, they have been overlooked, lest the DSU would not advocate for retaliation as a remedy. It has been argued that since suspension of concessions has visibly been preferred against compensation, sanctions between the U.S and the E.U have caused experts to worry about an upward twist of retaliation and counter-retaliation, which arguably puts the World Trading System at stake.\(^\text{139}\)

The essence of retaliation goes further to reinforce the view that the disobedience and lack of political will and commitment is expressed by the WTO Members, wherein sanctions that are both detrimental to the respondent and the complainant are imposed. The fact that the respondent chooses not to implement the recommendations of the Dispute Settlement Body (DSB) depicts that the impact of retaliation may be more tolerable than implementation of the DSB recommendations as between the two evils.

To understand the impact of an authorization to suspend concessions, it is vital to recall that WTO remedies are prospective. The level of suspension is calculated from the end of the reasonable period of time. Further to that, it is vital to consider the two principal aims of suspension; restoring the balance of concessions that was upset when one member violated its obligations, bearing in mind that it is a temporary aim since compliance is the preferred result; and giving the respondent the incentive to comply.\(^\text{140}\)


\(^{140}\)DSU Article 22 (1). European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6, WT/DS27/ARB,
4.3.2 Want of Good Faith: Retaliation and Developing Countries

The argument reflected herein is to the effect that the system essentially relies on the capacity of the parties to the dispute to suspend concessions or obligations. Retaliation is an instrument of economic power to be used ultimately against a reluctant respondent.

One of the reasons that the respondents identified in highlighting the failure of the remedy in addressing Members’ interests is the lack of good faith in the system. Article 3.10 of the DSU provides that the use of the dispute settlement procedures should not be intended or considered as contentious acts and that all members must engage in these procedures in good faith in an effort to resolve the dispute. Below is a table where the respondents were required to indicate the usefulness (fulfillment of objectives of the entire membership) of retaliation as a trade remedy that is: developed, developing and least developed countries respectively.

Table 4: Extent of Fulfillment of Interests of the WTO Entire Membership

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fulfils</td>
<td>5</td>
</tr>
<tr>
<td>Partly</td>
<td>13</td>
</tr>
<tr>
<td>Does not fulfill</td>
<td>28</td>
</tr>
<tr>
<td>Total</td>
<td>33</td>
</tr>
</tbody>
</table>

The respondents noted that by virtue of the very fact that the dispute settlement remedy of retaliation does not recognize the power imbalance amongst the members, which makes it difficult for members to retaliate at all, or to retaliate with equal power and its continued use without heed to the outcry of small countries, raises doubt in the operation of the entire system.

Engaging in dispute settlement should be in good faith, that is, with the genuine intention to see the dispute resolved, being part of the object and purpose of the

Para.6.3 (9 April 1999)
WTO dispute settlement system. If developing and least developed countries cannot use the system to resolve disputes, there is no good faith to be perceived in commencing legal proceedings. It is argued that the new emphasis on retaliation probably makes the WTO dispute settlement system even more one sided than before. Retaliation by larger countries tends to be most effective when used against smaller countries. Consequently, by making access to retaliation more available, these new reforms give larger countries a still greater advantage over smaller countries that cannot effectively retaliate.\textsuperscript{141}

The threat and effectiveness that counter-measures represent, highly depend on the existence and repartition of concessions between the countries involved in the dispute, as well as the quality of the concessions themselves.\textsuperscript{142} In Developing Countries, trade barriers are normally higher than in Developed countries. Also, the former often receive concessions from the latter, but not vice-versa. Suspension of Concessions has a commercial and welfare cost that can hardly be afforded by developing countries. Retaliation means raising barriers to trade, which is detrimental to the interests of the country that applies the remedy and also impedes world welfare.\textsuperscript{143}

The retaliation threat provides an enforcement mechanism, which deters violation of trade agreements. However, this mechanism is limited by the severity of credible threat of retaliation. Retaliation must be sufficiently high to induce enough long-term losses in order to incite the defendant to match its trade practice to WTO rules. Therefore, the current rules of the dispute settlement procedure entail a bias against countries with weak capacity to retaliate. The nature of authorized sanction is likely, not only to discourage some countries to use the DSU, but more specifically, to influence the final outcome of the litigation.

\begin{footnotesize}
\footnote{Hudec Robert E., The Adequacy of WTO Dispute Settlement Remedies, Op. Cit, Supra, footnote 57, at Pg. 81}
\footnote{Qureshi, A.H., The WTO: Implementing International Trade Norms, Melland Schell Studies in International Law, Manchester University Press, Manchester & New York, 1996, at Pg. 143}
\footnote{As depicted by Bhala Raj, International Trade Law: Theory & Practice, Op. Cit, Supra, footnote 135 at Pg. 10}
\end{footnotesize}
It is argued that a sufficiently large country is better off under tariff war, making retaliation an inefficient tool by developing Members. A large Member capacity to influence its terms-of-trade significantly determines the credibility of its retaliation threat.\footnote{Besson Fabien & Racem Mehdi, Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis, University of Paris, at Pg. 7 Accessed at www.ecomod.net/conferences/ecomod2004/ecomod2004-papers/199-pdf, accessed on 3rd January 2007} This result explains why large countries are the main users of the dispute settlement system. Even if small countries are authorized by the DSU at the term of the procedure to apply retaliatory measures, their impact on terms-of-trade is null and the threat is often regarded as non-credible. Thus, if the plaintiff is a large country, then the threat of trade retaliation can be sufficiently dissuasive for the defendant. In the opposite case, when the plaintiff is a small country, the long-term losses from retaliation are very low and have no influence on the defendant behavior. In the second scenario, the defendant will have no incentive to conform its trade policy (if its decisions are only guided by trade motivations).

Trade sanctions of a large country plaintiff may have two effects; increasing its own welfare and decreasing the defendant welfare. These two impacts of retaliation influence all the more the final outcome of trade negotiation, especially during the stage of bilateral consultations. On the contrary, if the plaintiff is a small country, the retaliatory tariffs have a small effect on terms-of-trade, even if it can impose adjustment costs, its bargaining power is deteriorated by its low capacity to improve its own welfare with higher tariffs.

Two forms of retaliation in international economic scale have been emphasized in the economic literature. One deals with the bilateral economic assistance, which leads to close economic interdependence. In this context, such a variable may influence the dynamic of the procedure, the Member that receives economic assistance, in this study the developing countries, exercise self-constraint during the whole process in order not to jeopardize its privilege.\footnote{Ibid, at Pg. 8}
The second economic retaliation can be expressed under the perspective of pre-existent preferential trade agreements between two countries or to their joint participation in a privileged trade area. The threat of economic relationship deterioration after litigation between two countries with close economic interdependence influences the litigant’s behavior during a dispute settlement.\textsuperscript{146} The starting point of this degradation can then come either from the illegal trade practice (the defendant is economically depending on the plaintiff, which will seek to sanction it while carrying a complaint), or from the even complaint (the plaintiff is economically depending on the defendant, which is bothered by the plaintiff initiative and then will seek to sanction him).

Given that the largest Members of WTO could not deploy retaliation as an ultimate enforcement measure of the DSU effectively, the prospects for developing countries or small economies are even bleaker.\textsuperscript{147} A recent example involves the DSB proceedings wherein Antigua and Barbuda challenged U.S. gambling laws. In April 2005, the DSB ruled that three U.S. federal laws and the provisions of four U.S. state laws were inconsistent with U.S. obligations under GATS. The dispute settlement body’s “reasonable period” of time allowed for U.S. compliance expired on April 3, 2006. The U.S. failed to comply with the recommendations to-date. Antigua and Barbuda now faces the dilemma of how to secure compliance from a significantly more powerful trading partner.\textsuperscript{148}

Although the dispute settlement under the DSU is legalistic, the factual difference in economic power among WTO members is so glaring. This difference is more conspicuous in the phase of implementation of DSB rulings, as exemplified in the EC-Bananas’ III case.\textsuperscript{149} Consequent upon the EC’s failure to bring its banana regime into WTO conformity, Ecuador as the first developing country in

\textsuperscript{146} Ibid, Besson & Rahem, at Pg. 11
\textsuperscript{147} Asim Imdad Ali, Non-compliance and Ultimate Remedies Under the WTO Dispute Settlement System, Journal of Public and International Affairs, Volume 14/ Spring 2003, at Pg. 4
\textsuperscript{149} European Communities – Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R
GATT/WTO history requested the authorization by the DSB to suspend concessions to a developed WTO Member, the EC. The request was granted by the DSB, as recommended by an arbitration panel, in the amount of US$201.6 million. Conversely, in the course of the proceedings, Ecuador recognized that the adverse economic effects of an actual suspension of concessions would be felt more by itself than by the EC, for the following reasons: \(^{150}\)

a) Regarding goods, higher tariff barriers would prevent EC products from supplying the Ecuadorian market, which was highly dependent on them. Hence, European companies, whose main export targets are the large markets of the EU itself, the USA and Japan, would barely feel the economic crisis.

b) As far as TRIPs are concerned, Ecuador intended to export phonograms to third countries without the consent of the European right holders, thus suspending its obligations to the EC under Article 14 TRIPs (i.e. protection of performers, producers of phonograms and broadcasting organizations). This attempt to improve Ecuador’s export volume however proved illusory. The arbitration panel clarified that all other WTO Members remained bound by their TRIPs obligations to the EC. Consequently, any third WTO Member country into which Ecuador would seek to export EU phonograms as above, would apply Article 51 TRIPs Agreement, obligating Members’ customs authorities to suspend the release into free circulation of those phonograms. The authorization of Ecuador to have recourse to cross-retaliation proved counter-productive, moderately due to Ecuador’s comparative economic weakness as compared to the EC. \(^{151}\)

\(^{150}\) The Arbitrators arrived at a figure of 60% market share for Ecuadorian service suppliers in distributing Ecuadorian bananas within the EC & Ecuador’s nullification & impairment as being US$ 201.6 million per year (European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, Paras, 169-170. Therefore, a conclusion can be drawn that raising tariff barriers to that tune would have immensely hurt the Ecuadorian market.

\(^{151}\) Ibid, Paras 139-165
For developed countries, the move from a power-oriented to a more rule-oriented system contains little additional ambiguity, whereas for developing countries, such a move reinforces the traditional source of weakness, that is, the lack of market size and thus the lack of retaliatory power.

It has been argued that a remedy such as retaliation is of use only to an economy as powerful as that against which it shall be leveraged, and that it will hurt the weaker country much more if it tried to retaliate.152 The developing countries are largely dependant on continuing trade relationships with the agricultural developed world. Most of these agricultural products end up in the economies of the developed world as their primary export commodity. These countries do not have likely alternatives, especially African countries, for use in retaliation. Retaliation by these countries in such circumstances would be akin to shooting themselves in the foot.

A provision to prove the above scenario as to whether it is beneficial at all for developing and least developed countries to have recourse to the DSU is article 24 which provides that WTO governments ought to give special consideration to least developed country members in deciding whether to invoke and pursue dispute settlement procedures. As a matter of fact, they are encouraged to settle disputes diplomatically, by requesting the Director General or Chairman of the DSB to provide good offices, conciliation, or mediation.

As per the above argument, developing countries have greatly suffered from the dispute settlement system being dominated by the possibility and execution of retaliation. Once a developing country has successfully secured a ruling from the DSB establishing the inconformity of a measure by the defendant, the likelihood that the responsible Member will offer to pay compensation are almost zero. It is

152 Mosoti V., Does Africa need the WTO Dispute Settlement System? Towards a development–supportive Dispute Settlement System at the WTO, International Centre for Trade and Sustainable Development, 2003, 67-88, at Pg. 15
a trite fact and judicial notice as evidenced from the above case that developing countries cannot credibly retaliate against a powerful developed trading partner.

The developing countries are left with a weak remedy, thereby indirectly restricting developing countries’ access to the DSS since the cost of litigation outweighs the possibility of any beneficial outcome. As illustrated by Ecuador, even after authorization to cross retaliate, the suspension of concessions under TRIPs failed to mount any pressure. The level of suspension of concessions failed to match the level of nullification and impairment, leaving the litigant uncompensated. Retaliation therefore is not an affordable mechanism for developing countries, given that the economies of the said countries largely depend on the trade of a single product with developed Members.

The WTO Dispute Settlement System stands out by virtue of the broad scope of its jurisdiction as well as by the compulsory, exclusive and contentious nature of that jurisdiction. The dispute system has jurisdiction over any disputes between WTO Members arising under the covered agreements, according to Article 1.1 of the DSU. The fact that the Panel or Appellate Body makes recommendations to the parties with the desired result being the eventual withdrawal of the offensive measure whilst compensation and retaliation remain temporal measures shows the vital need to maintain good faith in the system.

Retaliation is against the very grain of the above position. It would best suit the illustration by using the old English adage that “Two Wrongs, Don’t Make it Right!” In the face of failure by the respondent to comply with the recommendations, and in the absence of compensation for the complainant, retaliation is not the next best option in the resolution of the dispute; it shows lack of the desire to positively resolve the dispute. It turns out to be a ‘tit-for-tat game.’ What is more, retaliation does nothing to alleviate the WTO inconsistent measure suffered by the complainant industry. The illegal measure still stands as against that particular industry and continues to inflict the harm, further depicting the
satirical remedy of retaliation. Retaliation as a remedy is akin to forceful resolution of a political dispute; it is a remedy to induce compliance at any cost!

In addition to the above, the respondent’s industries harmed by the complainant’s retaliatory measures are not the industries that previously benefited from the respondent’s WTO inconsistent measures. Rather, they are the ones that the complainant chooses for purposes of rebalancing the said concessions;\textsuperscript{153} hence perpetuating the recurrent unfairness of the remedy. Retaliation or suspension of concessions or other obligations is compared to the municipal law system of partial rescission of a contract, where equivalent non-performance by one party excuses performance by another, without vitiating the entire contract.\textsuperscript{154} No WTO Member commences an action with the objective of retaliation. Retaliation is an indication of a breakdown, a failure. When a right to retaliate is claimed, inevitably the grander issue of compliance is at play.\textsuperscript{155}

In contrast to Article 94 of the UN Charter, it states clearly that each Member of the UN undertakes to comply with the decision of the International Court of Justice in any case, to which it is a party. It is evident that the multilateral dispute settlement system would be stronger if compliance were a mandatory obligation under International Law. It would also be fairer, in that the least developed and developing countries would be on a more level playing field. Most WTO Members, including the US, believe that compliance is demanded, that there is no option to choose among the alternatives of compliance, compensation, or acceptance of retaliation.\textsuperscript{156} It is hoped that eventually the custom and practice of compliance will evolve into Customary International Law. In conclusion, it was noted by the respondents that retaliation creates rivalry, mistrust and bad faith, in addition to being trade diverting.

\textsuperscript{153} Kym Anderson, Peculiarities of Retaliation in WTO Dispute Settlement, Discussion Paper No. 0207, Adelaide University, Adelaide 5005 Australia, Centre for International Economic Studies, March 2002, at Pg. 10
\textsuperscript{154} Palmeter David & Mavroidis Petros C., Dispute Settlement in the WTO, OP. Cit, Supra, footnote 8, at Pg. 265
\textsuperscript{155} Ibid, at Pg. 241
\textsuperscript{156} Ibid, at Pg. 242
Preceding the above, retaliation as a remedy does not cater for the interests of third parties. Once the respondent fails to comply with the DSU recommendations and withdraw the WTO inconsistent measure, whilst the complainant will have the right to retaliate, third parties to the dispute are not entitled to the same right. Article 10 of the DSU governs third party rights in panel proceedings. To qualify as a third party participant, a government must have a substantial interest in the matter before the panel and must notify the DSB of this interest. Once qualified as a third party, a Member has the right to make written and oral submissions to the panel and the panel must reflect those submissions in its report.

Only Members that participate in the litigation process are entitled to retaliate. Suspension of concessions or other obligations to the Member concerned discriminates against the non-complying Member only, and not against other Members, who are entitled to the continued benefit of the WTO Agreements. All the respondents explicitly stated that it is highly justifiable to keep retaliation as a trade remedy under the DSU, reason being that it acts as a deterrent mechanism; due to the grave threat it poses to members. It therefore restrains breach of and non-compliance with recommendations of the DSU.

4.3.3 National Sovereignty

It is vital to note that retaliation, as a remedy is controversial and unsuitable, because it affects the principle of state sovereignty. Unlike private litigants, governments are complex institutions that make decisions in their own peculiar, often irrational manner called “politics”. Even smaller governments are strong enough to be able to resist coercive forces that would move private litigants. Governments however, usually have a longer-term interest in the efficacy of the legal relationship they have established with other governments and so they are more inclined to act in ways designed to preserve those relationships. Ultimately, the compliance decisions of governments are determined more by calculated self-interest than by force.
Hudec argues that in his view, government compliance with legal rulings is usually the product, of at least 3 inter-related factors that influence the way in which governments make trade policy decisions. 157 Firstly, some parts of the developed government’s decision making apparatus usually want the conduct called for by GATT legal obligations to be pursued for its own sake; because it is good policy, accordingly, such officials, and the private interest groups that share this view, constitute an existing political force within the defendant government and the effect of GATT legal rulings is to give them greater influence in the national decision making process.

Secondly, many officials and private interest groups within the national government’s decision making process perceive a value in the legal system itself, believing that both they and their country will gain more over the long-term from an effective legal system than from non-compliance in an individual case. These actors may not want to tie their country’s hands through rigid commitments to a particular legal system or may not have enough political support to go that far, they will nonetheless argue strongly against non-compliance in individual cases that would damage respect for the system. Thirdly, Hudec argues that one should not under estimate the influence of active pressure by other governments. 158 It is his submission that a majority of member governments believe in the value of an existing legal system, that these governments will have the same incentive to discourage non-compliance with the legal rulings and will express their views in the form of collective condemnation of non-complaisance.

Hudec however avers that it is a valid deduction that even though the remedies available under the WTO dispute settlement system, in this particular instance, “Suspension of Concessions,” are unsuitable, it is nonetheless vital to institute proceedings under the dispute settlement system, for legal rulings sharpen the focus on the issue of compliance, and the normative force of such rulings

157 Hudec Robert E, The Adequacy of WTO Dispute Settlement Remedies, Op. Cit, Supra, footnote 57 at Pg. 83
158 Ibid, at Pg. 83
increases the power of participants who favor compliance. Governments do not have enough political support to make trade agreements that are binding, when it is well suited for the country in question, they make trade policies of popular demand with the community, in violation of their WTO obligations.\textsuperscript{159}

As noted, in Chapter Two, the GATT dispute settlement procedure almost never employed retaliation as an enforcement device. The fact that the GATT nonetheless produced a large number of successful legal rulings indicates that the internal government forces just described above; frequently did play a significant role in bringing about successful outcomes. This is not to say that enforcement would not have been even more effective if more retaliation had been employed. Other things being equal, one would expect a better chance of compliance with a retaliation tool than without it.

The key point however, is that legal rulings without retaliation can still be an effective policy tool for a developing country seeking to reverse a legal violation by a larger country. Although not invariably effective, in many cases it may well be more effective than the other practical alternatives. For the government that does not or cannot retaliate, these changes make it easier for the complainant to focus and maintain community pressures for compliance.

Retaliation is still the final remedy for eventual non-compliance. In contrast to the GATT dispute procedure wherein retaliation was a vague and seldom used remedy, the new WTO procedure appears to make retaliation the central objective of the remedy structure. The defendant no longer has the power to veto retaliation requests. The WTO’s greater emphasis on retaliation as an enforcement tool appears to be somewhat misguided. Members must remember that enforcement is a more complex process than plain retaliation, involving the generation of the political forces needed to bring about the desired compliance decision.

\textsuperscript{159} Ibid, at Pg. 83
4.4 A preview of Developing Countries’ Core Proposals

A trite problem in the WTO dispute settlement procedure is the fact that small countries find it difficult to retaliate against large countries. Even when authorized to do so, small countries such as the Netherlands, Nicaragua and Ecuador, as discussed in the preceding chapters, have not actually implemented retaliatory responses. It is evident that under the current dispute settlement procedures, large countries have an advantage. Developing countries’ Members have supported moves to multilateralize retaliation. As is perceived by Davey, there is a more general problem with suspension of concessions. Whilst it is seen to work when threatened by a large country against a smaller one, and has worked when implemented by one major power against another, it may not be an effective remedy for a small country.

4.4.1 Multilateralize Retaliation

Since retaliation is perceived as a problem in the multilateral trading system, there have been proposals by developing countries to improve retaliation as a remedy, one of them being to multilateralize retaliation as a remedy. When put to task as to whether there is a mechanism for improving retaliation as a trade remedy, below are the responses that were deduced.

Table 5: Whether there is a mechanism for improving retaliation as a remedy

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>5</td>
<td>10.8</td>
</tr>
<tr>
<td>No</td>
<td>20</td>
<td>43.5</td>
</tr>
<tr>
<td>Do not Know</td>
<td>21</td>
<td>45.7</td>
</tr>
<tr>
<td>Total</td>
<td>46</td>
<td>100.0</td>
</tr>
</tbody>
</table>

From the above responses, it is only 10.8% of the respondents who acknowledged that there is a mechanism for improving retaliation as a remedy, whilst 43.5%, did

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160 Tanapong Potipiti, How to sell Retaliation in the WTO, Chulalongkorn University, March 2005, at Pg. 1
not think that it is possible to improve retaliation as a remedy. The respondents that categorically stated lack of knowledge as to the existence of other mechanisms for improving retaliation as a trade remedy expressed strong skepticism at the idea of retaliation as a suitable remedy, and any prospects for its improvement. The 10.8% who averred that retaliation as a remedy can be improved, suggested collective retaliation and also indicated that it is not beneficial for retaliation as a remedy to be allowed generally, as it would not be effective. A suggestion that retaliation be confined to the most affected sector or area, in which the violating member would suffer the most, was perceived to be more beneficial.

A natural way to multilateralize retaliation is to allow it to be tradable. Mexico proposed in 2002 to make retaliation tradable. In this proposal, if a country were authorized to retaliate by increasing tariffs against a country, it would be able to sell the right to retaliate to another country. The respondents thus maintained that the only way to achieve significantly greater retaliation would be to develop a mechanism for trading the right to retaliate. It is not surprising therefore that the proposal usually shifts to one for collective retaliation, asking that the GATT dispute settlement remedies include a proposal calling for collective retaliation.

### 4.4.2 Collective Retaliation

From literature available, it is a contention from different scholars that the inability to retaliate made the developing countries and the African Group to propose the amendment of article 22 (6) of the DSU to allow for collective retaliation in cases brought by developing countries against developed countries, this, it is contended, was inspired by the inability of Ecuador to retaliate against the EC. The African group proposal states that injury suffered is not

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163 The WTO Dispute Settlement System: Issues to consider in the DSU Negotiations, Trade-Related Agenda, Development and Equity (TRADE) Analysis Series, South Centre, Trade Analysis, October
compensated satisfactorily in situations where the offending measures are withdrawn before or after the commencement of proceedings; and that trade retaliation is skewed against and disadvantages African Members. The LDC Group proposal says that the question of little or no utilization of the dispute settlement by developing and least developed country Members is linked to the inadequacies and structural rigidities of the remedies available to poor countries that successfully litigate a dispute.\footnote{164}

According to the preceding reasoning, it is further advanced that it is against conventional wisdom, and a waste of time and money for developing countries to invoke the WTO’s dispute settlement procedure against industrial countries.\footnote{165} The argument runs that even if a developing country obtains a clear legal ruling that an industrial country has violated its legal obligations, the developing country has no effective way to enforce the ruling. The only enforcement sanction provided by the WTO dispute settlement procedure is trade retaliation, the imposition of discriminatory trade sanctions by the complaining country against the trade of the developed country. Trade retaliation by smaller developing countries, it is argued, does not inflict any significant harm on larger industrial countries. In the end, the argument concludes, retaliation will harm the developing country it is supposed to protect.

Hudec reinforces and reiterates the preceding contention, providing that the “Law” of the WTO does not in fact, give weaker Members the same protection that well developed domestic legal systems usually afford their weaker citizens. It is his submission that the remedies provided by the WTO system allow larger countries to exert significantly stronger enforcement pressures against developing countries than developing countries can exert in the reverse situation.\footnote{166}

\footnote{2005, from \url{http://www.southcentre.org}, accessed on 9\textsuperscript{th}/01/2007, at Pg. 3\footnote{164}Ibid, The WTO Dispute Settlement System: Issues to consider in the DSU Negotiations \url{http://www.southcentre.org}, at Pg. 19\footnote{165}Hudec Robert E., The Adequacy of WTO Dispute Settlement Remedies, Op. Cit, Supra, footnote 57, at Pg. 81\footnote{166}Ibid, at Pg. 81}

69
The standard complaint of developing countries about the remedy of trade retaliation is that it is too weak to be effective against large countries.\textsuperscript{167} The amount of retaliation is limited to the trade loss caused by the illegal trade measure in question. Since individual developing countries tend to have only a small share of the defendant countries’ market, their retaliation measures can affect only a small amount of that country’s trade, usually not enough to cause any significant hardship for the large industrial country or its producers.

Academic discussions of GATT/ WTO remedies usually arrive at the question whether GATT/WTO trade retaliation should not be measured according to a scale that would make certain that the amount of retaliation is large enough to be meaningful against large countries. Such proposals are usually justified by arguments that the law must have sanctions large enough to accomplish its task. Two objections are usually interposed against such proposals for proportional retaliation. The most vital, is the assertion that the purpose of retaliation has never been to serve as a punitive sanction; on the contrary, the right to retaliate has always been viewed as a right to maintain the balance of reciprocity in GATT obligations.

The starting assumption has been that the obligation undertaken by each Member involves a balance of benefits granted to others in the form of a country’s own obligations, balanced against the benefits that country obtains from the obligations undertaken by others. The theory is that a breach of legal obligations reduces the benefits being received by the complaining country and that, if the breach is not cured, the complaining country must be allowed to re-establish the balance by withdrawing obligations of its own. Such balancing however requires only retaliation equal to the amount of the benefits lost.\textsuperscript{168}

\begin{footnotesize}
\textsuperscript{167} Ibid, at Pg. 86
\textsuperscript{168} Ibid, at Pg. 86
\end{footnotesize}
This compensatory theory of trade retaliation has run through GATT law since the days of the negotiations on the International Trade Organization (ITO) in 1947-48. The significance of the history of the compensatory theory is simply that it shows a steadfast desire on the part of leading GATT members not to have a law with stronger sanctions. The second objection to proportional retaliation is a practical one; an individual developing country usually does not have a large enough market to assemble the amount of trade retaliation that would be needed to cause noticeable pain in a large industrial country, at least not without shutting down most of its own economy.\textsuperscript{169}

The deficiencies of the WTO legal system in this regard do raise a legitimate concern for developing country Members whilst exercising their discretion in deciding whether it would be beneficial for them to employ the dispute settlement procedure against larger countries. In addition, these shortcomings raise the question of whether it would be worthwhile for developing countries to expand negotiating capital in an effort to remedy these shortcomings, and if so, what particular reforms should be sought.

The proposals for the reform of the WTO dispute settlement procedures are not in black and white, it is a debatable issue whether the proposed transformation of the DSU would be feasible. It becomes pertinent then to examine the apprehension of how well the current system can work. Over three-fourths of the WTO’s Members are developing countries, and consequently, this question assumes great importance for a large majority of the Members. If instances of non-compliance go unchecked and cannot be remedied, it may not be very long before the euphoria about the WTO’s “giant leap” withers away and serious questions are raised about the efficacy of the dispute settlement system.\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item[169] Ibid, at Pg. 86
\item[170] Asim Imdad Ali, Non-compliance and Ultimate Remedies Under the WTO Dispute Settlement System, Journal of Public and International Affairs, Volume 14/ spring 2003, at Pg. 4
\end{enumerate}
\end{footnotesize}
4.4.3. Compensation

The present compensation scheme under the DSU depends upon the willingness of the respondent to negotiate, and there is no compensation for past harm. Scholars put forward the argument for financial compensation, averring that the crucial element of their proposal is the idea that financial compensation is not just about inducing compliance, but also providing equitable reparation for damages caused and in that light, that the DSU must be judged as a ‘lex specialis’, which sets forth its own system of remedies, and which limits the relevance and application of general principles of Public International Law to specific instances.¹⁷¹ The respondents were required to indicate whether there are other remedies that are more feasible than retaliation. Below, a summary of the responses is given.

Table 6: Indication whether there are other remedies more feasible than retaliation

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>22</td>
</tr>
<tr>
<td>Do not know</td>
<td>24</td>
</tr>
<tr>
<td>Total</td>
<td>46</td>
</tr>
</tbody>
</table>

The responses from table 6 indicate that there is skepticism as to how other remedies can be more workable than retaliation. A total of 52.2% averred that they were not aware if there was a more feasible remedy than retaliation, this category of respondents acknowledged limitations to other available remedies, which curtail their operation as much as the retaliatory remedy. The remaining 47.8% of the respondents averred that there are other remedies that can be more viable than retaliation. Among the proposed remedies, compensation was vehemently vouched for. The other proposal by respondents was forced compliance, that is, compliance at any rate, through unified trade sanctions, though at the same time the respondents noted the major drawback to the latter suggestion being that; Members not privy to the dispute would soon tire of the sanctions.

Under the DSU, a discontent complainant of the respondent’s policy reform is entitled to seek compensation until satisfactory reforms are implemented. If compensation agreed upon is in the form of temporary lowering of import barriers on some other products, the changes must be consistent with existing agreements. In particular, they must be offered on a Most Favored Nation basis (MFN). In economic terms, compensation in the above form is trade liberalization, which boosts economic welfare in the respondent country, in the complainant country, and even in third countries that export the products whose import barriers have been lowered. Even if some third countries that import like products were to lose from terms of trade deterioration, the knowledge from standard gains from trade theory shows that the world as a whole would be better off economically.\textsuperscript{172}

The demand for compensation or damages stems from the fact that the economic threat, which is implied in retaliation can not be seriously employed by developing countries against major industrialized Members as an effective substitute for compensation.\textsuperscript{173} It is worth noting that no least developed country has been involved in a WTO dispute neither as a respondent nor as a complainant.\textsuperscript{174} The special treatment afforded to Developing Countries has been the subject of criticisms, most provisions are difficult to enforce because of their want of precision. They have been described as hortatory in nature.\textsuperscript{175} The most obvious evidence of the ambiguity of the legal significance of panels and Appellate Body rulings is the idea of judicial restraint present in the DSU as laid down in Article 3.12 (18) which states, “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreement.”\textsuperscript{176}

\textsuperscript{172} Kym Anderson, Peculiarities of Retaliation in WTO Dispute Settlement, Op. Cit, Supra, footnote 105 at Pg. 5
\textsuperscript{173} Jackson J.H. and Davey W. J, Legal Problems of International Economic Relations, Op. Cit, Supra, footnote 84 at Pg. 352
\textsuperscript{174} Footer, M.E., Developing Country Practice in the matter of WTO Dispute Settlement Journal of World Trade, ISSN 1011- 6702. 2001, 35 (1), 55- 98, Pg. 73
\textsuperscript{175} Qureshi, A.H., The WTO: Implementing International Trade Norms, Melland Schell Studies in International Law, Manchester University Press, Manchester & New York, 1996, at Pg. 143
\textsuperscript{176} Jackson, J.H., The Jurisprudence of GATT and the WTO. Cambridge University Press, 2000 Pg. 186
Although Developing Countries trust that large developed countries will abide by the decisions of the new WTO dispute settlement, it still takes considerable courage and political will for Developing Countries to commence a dispute against industrialized Members.  

It is against the above background that an argument for damages is put forward by the developing countries. Until the end of February 2006, compensation was agreed upon in three cases. In two of these cases, the parties agreed on tariff reductions as compensation whilst in the other case, monetary compensation was agreed upon. It is argued that compensation is a less trade distorting measure that should be implemented in place of retaliation. Compensation being voluntary in nature, parties seldom attain an agreement and the complaining party often resorts to suspension of concessions. It is against this fact that the respondent is argued to compulsorily offer compensation to the complainant.

Reference is made to the trite rule of International Law, which provides that an injured State is entitled to obtain compensation from the offending State. It is further argued that it is not only the ICJ but also other international tribunals as well, such as the International Tribunal for the Law of the Sea, the Iran -United States Claims Tribunal, the International Centre for Settlement of Investment Disputes Tribunals, and human rights courts, have ordered payment of compensation to injured States.

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177 Darlin C.C., WTO dispute Settlement: Are Sufficient Resources Being devoted to enable the System to Function Effectively. International Lawyer, ISSN 0020 – 7810. 1998, Fall, 863 – 870, at Pg. 868
Oxford University Press 2006, at Pg. 411
179 Japan – Alcoholic Beverages II, Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/41, 26 February 1998, at 2; Turkey – Textiles, Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/116, 31 January 2002, at 20
180 United States – Section 110(5) of US Copyright Act (US – Section 110(5)), Notification of a Mutually Satisfactory Temporary Agreement, WT/DS160/23, 26 June 2003.
181 Yuka Fukunaga, Non-compliance and Ultimate Remedies Under the WTO Dispute Settlement System Op. Cit, Supra, footnote No. 178 at Pg. 412
However, some authors aver that compulsory compensation is not a valid option and should not be introduced in the WTO dispute settlement system, reasons being that, it is debatable whether the respondent Member would actually comply with the order to compensate. Tariff compensation may not be possible, as other producers in other sectors may strongly object to the proposal and the offending Member may find it impossible to secure compliance in other sectors whilst the complainant Member will have no recourse to force the offender from complying with the compensation order.\textsuperscript{182} Therefore, as pointed out by some of the respondents, compulsory compensation shall not be a feasible and effective option.

Compensation is a dual remedy; it can be in the form of tariff concessions in another sector or monetary compensation. It is argued that monetary compensation may not evoke resentment from domestic producers of the Member concerned and hence would be a lot easier to abide by the offending party. It is also argued that the explicit adoption of retrospective compensation that wipes away past injury may be a feasible remedy. It is understood that the purposes of compensation is to “wipe out all consequences of the illegal act” suffered by the injured State or its nationals.\textsuperscript{183} Though there is no clear mention of retrospective damages under the DSU, an acknowledgement of the same facilitates an agreement.\textsuperscript{184} It is on record that monetary compensation particularly is preferred by developing countries.\textsuperscript{185}

The other argument is that monetary compensation allows for the provision of non- most favored nation (non- MFN) compensation. Compensation would be consistent with the MFN principle, if it took the form of tariff reductions. The rationale for this is the well- established policy perspective that a discriminatory

\textsuperscript{182} Ibid, at Pg. 412, quoting Bronckers and Broek, at 107–08
\textsuperscript{183} Factory at Chorzów, 1928 P.C.I.J., at 47; Draft Articles, Article 36
See also Yuka Fukunaga, Op. Cit, Supra, footnote No. 95 at Pg. 415

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trade policy could distort trade, increase transaction costs, and thereby undermine the security and predictability of the multilateral trading system. Nevertheless, the same policy reasons do not apply to monetary compensation. Monetary compensation, unrelated to particular import or export transactions, neither distorts trade nor increases the transaction costs; no policy reason appears to successfully refute non-MFN monetary compensation.186

Criticism centres on retaliation being highly ineffective to induce compliance of DSB recommendations. As a result, a more worthy remedy is sought that will pinch a hole in the pockets of the respondent Members concerned. Compensation, be it tariff or monetary, is believed to carry that weight. In addition to the above, the suspension of concessions may not effectively influence the trade flows and trade policies of the Member concerned. As an elaboration of the above point, an example of the US and the EC is given as the worst record holders with regard to the implementation of the DSB recommendations.187

However, there is a major drawback to the proposed remedy of monetary compensation. As a matter of sovereignty of nations, it is odd to think that a WTO Member would accept that any part of its trade regime could be changed unilaterally, if only temporarily, by another WTO Member. Yet if ‘mandatory compensation’ amounts to no more than an obligation on the non-complying country to offer compensation, the risk is that a Member not complying with a ruling will not comply with this obligation either.188 Domestic industries, being innocent bystanders to a particular dispute, will still not accept that they suffer adverse consequences to resolve problems of non-compliance in another sector.

The respondents however noted that offering tariff compensation might encounter problems. Being a direct measure where the connection between cause and effect

186 Ibid, at Pg. 415
187 Ibid at Pg. 416
is a straightforward case, the rules of collective action will bring out the violent opposition of the (concentrated and well-organized) losing industries. The import-competing industries in the liberalized industry would be quick to point to huge job losses and dumped imports of inferior quality connected with the compensatory measure.

It is argued that since compensation has to be offered on an MFN basis, it is not old-fashioned mercantilism that makes policymakers believe that offering MFN liberalization is bad, but rather enlightened self-interest.\textsuperscript{189} It is perceived that paying off an injured Member would not be problematic; however, a unilateral liberalization on an MFN basis will have major domestic repercussions from affected parties. Also, the compensation has the potential to upset the (carefully carved) multilateral balance of concessions in a way not hitherto planned by trade policymakers.

It is further argued that compensation is costly, as the terms of trade and time gains are foregone.\textsuperscript{190} Compensation, it is stated, internalizes the economic costs connected with protectionism. It clearly happens at the expense of the protectionist country. Offering voluntary compensation, in contrast to violation-cum-retaliation, is happening very early on in the process, in addition, the possible terms-of-trade gains for large countries are deliberately foregone through the compensatory policy measure.

It is now debatable, whether safeguard actions under Art. XIX GATT or compensated breach of the WTO under DSU Art. 22, is more attractive to policymakers. Safeguard actions have a high threshold of application, but the SGA (Art. 8 (1) grants a three-year grace period before the enacting country has to offer compensation. Compensated violation, on the other hand, does not come

\textsuperscript{189} Froukje B., Schropp S., Tovaglieri F., Compensate Before You Retaliate – And Comply At Any Rate": The Case for Tariff Compensation in the WTO, Graduate Institute of International Studies Geneva, at Pg. 24

\textsuperscript{190} Ibid, a Pg.25
with procedural strings attached, but inflicts onto policy makers reputation damages of a lost litigation, as well as the cost of litigation connected.

In conclusion, the findings presented herein largely depict that retaliation as a remedy is highly controversial and goes against the spirit and notion of the WTO system, as well as the principles of the DSU. Particularly, retaliation has been presented to be a negative trade remedy that must be re-evaluated by the WTO Members. The remedy of retaliation is under debate by various scholars, practitioners and academics, and yet, there has not been an agreement upon a satisfactory mode, for improving retaliation as a trade remedy.

However, it is recognized that the fear for loss of National Sovereignty is a major impediment to creating more plausible and effective remedies such as damages, for dispute settlement. Nonetheless, from the findings, it has been acknowledged that in the absence of an alternative last resort remedy at the failure of compliance with DSB recommendations, the threat of retaliation to the blameworthy party validates its retention as WTO Law.
CHAPTER FIVE
RECOMMENDATIONS AND CONCLUSION

5.1 RECOMMENDATIONS

Arising from the literature review and the analysis of findings, the following recommendations are made:

**Having an Effective Enforcement Mechanism.** If an enforcement mechanism is effective, the result is the successful loss and diminishment of Sovereignty and autonomy of action by the target Member. The effective loss of autonomy and power is a cost that does not affect each prospective treaty party equally. Effective enforcement mechanisms restrict State autonomy to a common denominator with regard to matters covered by the treaty; the norm, obligation or restriction set out by the treaty. The result is to restrict the powerful, those who have more autonomy, control, and options to begin with, much more than others.

As a result of the above, the effects of the loss of autonomy and power are strongly asymmetrical. The asymmetry suggests that the most powerful Members stand to lose the most from effective enforcement mechanisms and de facto, are least likely to support such mechanisms. Related to the sovereignty and political institution explanation, is the argument that States face a reciprocal-conflict problem. Most breaches of International Law are intentional, and it is because of the intentional nature of breaches that the law of state responsibility deals with facilitating the efficient operation of unilateral retaliative strategies aimed at preventing opportunistic defection. Perhaps, for political or other reasons, the system was designed with a presumption that disputes would not originate from intentionally noncompliant actions by parties and that a formal finding of non-compliance would be necessary to establish notice and awareness on the part of the noncompliant Member. This view comports with the premises of the managerial theory of compliance.
**Surveillance:** The WTO Members should have committees or working groups systemically to examine the trade measures of particular Members, conceivably on a rotating basis and to comment on the GATT consistency or policy appropriateness of such measures.\textsuperscript{191} As it is widely evidenced that negotiations aim to develop understandings and arrangements: to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system. In addition to the above, a GATT body should report semi-annually as is now done, on the status of the trading system, to flag discrepancies between measures actually taken, such as the ‘gray area’ or export-restraint arrangements, of such measures.\textsuperscript{192}

**Payment of Fines or Damages:** Bearing in mind the unsuitability of retaliation as a trade remedy under the WTO dispute settlement understanding, it is appropriate to explore payment of fines or damages as an alternative, although this may be faced with the problem such as the difference in fine-paying ability among WTO Members. The system would have to be designed to avoid the possibility that rich Members could effectively buy their way out of obligations in a way not available to the poor Members. It is proposed that this could be accomplished by tying the amount of fines to the size of the Member’s economy, or otherwise provide for a sliding scale that would minimize “discriminations” against poor Members.\textsuperscript{193} There should be some degree of retroactivity so as to encourage compliance within the reasonable period of time; and adjustment mechanism to increase the sanctions overtime, so as to preclude non-compliance from becoming an acceptable status quo position.

\textsuperscript{191} See Ministerial declaration GATT, BISD 33 Supp.19; GATT/1396, 25 September 1986, Part 1 (e) (i)
\textsuperscript{192} Jackson, John H., The World Trading System, Op. Cit, Supra, footnote 42 at Pg. 137
\textsuperscript{193} Davey William J., Implementation in WTO Dispute Settlement Op. cit., Supra, footnote 161 at pg. 13
Freedom to elect between Suspension of Concessions and Compensation:
A customary party should be allowed to elect between suspension of concessions and receipt of a periodic monetary payment.\textsuperscript{194} Though there is an evident hindrance such as the enforcement problem, in that it may be difficult to ensure that the payment is made, the right to receive a payment is still more valuable and attractive than the never used and probably unusable right to suspend concessions, which is so detrimental to the interests of developing countries. There are indications that payments of fines or damages may be gaining in acceptability as evidenced in the US free trade agreements, and the recent case where the U.S Congress authorized around $50 Million for the U.S to use in paying damages in trade cases.\textsuperscript{195}

Retrospective Assessment: Customary International Law provides for both prospective and retrospective remedies in international dispute settlement. A state found to be acting inconsistently at International Law has an obligation both to stop the illegal act (prospective), and to provide reparation for the damage suffered by the injured party (retrospective).\textsuperscript{196} Members of the WTO should consider introducing this International Law principle into WTO Law and allow payment of retrospective damages; this shall be a viable step in actually rebalancing of concessions. The Appellate Body considered that the General Agreement is not to be read in clinical isolation from Public International Law.\textsuperscript{197}

The respondent is normally given a reasonable period of time to comply with the recommendations of the DSB or Appellate Body, and still, this provision is abused. To counter this quandary, and to create incentives for prompt compliance, it should be provided that any remedy, be it retaliation or money payment, should be calculated from a date prior to the one set for implementation, that is, the date

\begin{footnotesize}
\begin{enumerate}
\item[196] Ibid, at pg. 553 See Chorzów Factories case, Op. Cit, supra, footnote 1
\end{enumerate}
\end{footnotesize}
of adoption of the said report, as is the case in civil judgments in respective domestic jurisdictions. This would be an inducement for prompt compliance.

**Increasing Sanctions over time:** An increasing sanction over time seems to offer possibilities for improving implementation. Such a procedure would help to avoid the perception that the payment of fines or damages is simply an alternative to compliance. In a sense, this concept has been used by the EC in the FSC case, where the duty it imposed on a long list of US products started at 5%, was increased at a rate of 1% each month.\(^{198}\) The monthly change focused attention on the case each month and the impending increase, even if small, created an incentive to act so as to forestall it.

**Early settlement of disputes by Developing Countries:** It is argued that ‘early settlement’ offers the greatest likelihood of securing full concessions from a defendant at the GATT/WTO.\(^{199}\) It is further argued that it is the threat of legal condemnation, rather than a ruling per se that induces settlement. As noted by a scholar, no functioning legal system can wait until the verdict stage to exert its primary impact.\(^{200}\) Hence Developing Countries should capitalize on early settlement of disputes than commencement of litigation, which is expensive for them, and yet still, after the acquisition of the Panel/Appellate Body rulings, enforcement of compliance or worse still, suspension of concessions is impractical in their situation. Therefore, due to a lack of legal capacity, Developing Countries need immense assistance before commencement of litigation, that is, they should be facilitated more at the consultation stage and negotiations before the establishment of a panel.

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\(^{198}\) Hudec Robert. E. Broadening the Scope of Remedies in WTO Dispute Settlement, Op. cit., supra, footnote 42 at pg.15


Differential treatment between Retaliation and Compensation: Differential treatment of remedies could be to base the calculation of compensation on prospective trade damages, while letting retaliation be based on retrospective trade damages. Although the prospective element of damages in the WTO has been recognized as a general principle so far, there seems to be room for change towards an ex nunc determination of damages. Countervailing Duties and Subsidy cases have regularly applied the thinking of retroactivity, so it is fair to say that the concept per se is not alien to the WTO. Indications in the direction of this change can be found in proposals made by several countries, academics but also in the decision in the Australia – Automotive Leather case. Discrimination in trade remedies establishes a real trade-off for policy makers in the violating Members.

Collective Retaliation: As noted by the respondents, collective retaliation is an option that should be investigated in the attempt to improve retaliation as a remedy for developing countries that cannot singly retaliate on their own. It is also important that motivated and genuine effort to take into consideration the views of poor and developing countries rather than dismissing their proposals. Therefore, the proposal by the African group for collective retaliation should be taken into consideration and investigated as to its potential of being workable, other than attracting a mere dismissal.

Promotion of the Good faith Principle: Members of the WTO should be encouraged to commence and settle disputes in good faith. It is often overlooked that the legitimacy of a dispute settlement system flows not only from the

201 Australia- Subsidies Provided to Producers & Exporters of Automotive Leather WT/DS126/RW, Adopted 11 February 2000
202 Mosoti V., Does Africa need the WTO Dispute Settlement System? Towards a development–supportive dispute settlement system at the WTO, International Centre for Trade and Sustainable Development, 2003, 67-88, at Pg.6. See African Group's Proposal (WTO Doc. TN/DS/W/15) for reform of the DSU to the effect that collective retaliation should be included in the DSU. Immediately, upon submission of this proposal for change, a developed country envoy was quoted remarking that "there is no chance such a change would ever be approved. It's just a non-starter." See Robert Evans, Africa Asks for Mass Retaliation in Trade Rows, September 11 2006 (Reuters) http://www.cnn.com/2002/WORLD/africa/09/11/trade.disputes.reut/ (last visited on October 23, 2002).
effectiveness of its remedies ex post, but also in dissuading parties from engaging in particular behavior ex ante. To that end, the continuing function of moral suasion reflected in the Customary International Law principle of good faith in promoting observance of GATT/WTO obligations must be highly accredited.  

It is no wonder that in its 50 years of GATT 1947 existence, the remedy of retaliation was only resorted to in one occasion as seen in Chapter Two to this study, this further goes to confirm the undesirability of the remedy itself.

**Rewarding Prompt Compliance:** In the current system, prompt compliance could be rewarded, thus creating an incentive for the Member to adhere to the ruling. However, this may work only in a few cases, and the injured party may be tempted to take unilateral action in such cases, which may create more complications for the treaty system itself.

**Contributing to Retaliatory Cost of Small Countries:** It has been proposed by the World Bank study that consideration be given to the notion that other WTO Members contribute to the cost of small countries taking retaliatory action, so as to reduce the risk of large trading States remaining WTO-inconsistent (Horn and Mavroidis 1999). However, the above idea assumes an exceptional and infrequent commonality of interests among WTO Members. Many small States may never muster the courage to join in this collective action when the losing Member is disproportionately strong and has an attractive market.

**Invoking the Principles of Equity:** As recommended by the respondents, the principle, “He who comes to Equity, must come with clean hands” must be applied. The best and most effective remedy would be to prohibit a Member from invoking the jurisdiction of DSU unless it complies with the earlier ruling. After all, how can a Member seek assistance from an institution whose decision and

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203 Article 26 (Pacta Sunt Servanda) of the Vienna Convention provides that: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’


205 Ibid, at Pg. 17
authority it challenges by non-compliance with its rulings? Such a remedy would provide an incentive to the member to comply with the rulings but would not be so onerous as to provide it an incentive to break away from the international trade regime.

**Cross Retaliation:** In light of the limited effectiveness of conventional economic retaliation, the suspension of WTO Member commitments under GATS and TRIPs may prove more effective in securing implementation of the DSB rulings.\(^\text{206}\) In part, because large multinational corporations based in wealthy countries stand to benefit enormously from the commitments made by poor Members under both GATS and TRIPs and so have a strong interest in these obligations being respected. These companies exert considerable political influence in the countries where they are based.

**Taking into Account the Development Implications of DSB Rulings:** Both the Least-Developed Countries Group and the African Group have proposed adding a requirement that a panel make findings on the “development implications” of the issues in a case and consider any “adverse impact” that its findings may have on the social and economic welfare of a developing country in a case. The DSB is to take such findings into account in making its recommendations. However, given the controversies over what policies are in the best development interest of developing countries (the views of the International Monetary Fund, the World Bank, the United Nations Development Program and the United Nations Conference on Trade and Development, for example, are not in any sense uniform on these issues), it is not clear what such a requirement would add in practice.\(^\text{207}\)

\(^{206}\) Ben Lilliston, “Strengthening a Culture of Compliance: The potential use of cross-retaliation by WTO Developing Member countries”, IATP Trade and Global Governance Program, 2006

5.2 CONCLUSION

The argument in favor of International trade can be simplified as follows: (1) competitive markets are generally the most efficient way to provide private goods to consumers; (2) international trade simply involves competition between domestic and foreign firms in domestic markets; (3) government-imposed restrictions on international trade, whether tariffs, subsidies, quotas, or regulatory measures, artificially raise the costs of foreign firms, reduce the scope of entry and reduce competition; and (4) removing existing restrictions on international trade makes markets more competitive, is generally efficient, and is thus economically desirable.\(^{208}\)

It warrants emphasis that the purpose of the WTO dispute settlement system is not to secure compliance irrespective of the specific injury, but rather, to settle disputes and remedy the injury.\(^{209}\) Having considered the feasibility of retaliation as a trade remedy, it is my considered opinion that it is highly unworkable as against Developing Countries, let alone all African and least developed countries.

The impracticability of the remedies under the DSS has made the system repellent to the developing Members since the cost of litigation would outweigh the benefits as already seen. As noted by Mosoti,\(^{210}\) the lack of participation by large sections of the WTO Membership, such as African countries, is a danger to the long-term 'predictability' function of the WTO and could undermine the usefulness of the entire process eventually. It is therefore in the interests of all WTO Members to work towards resolving the problems that prevent them from making use of the system when they need to. This is because, as a whole, the dispute settlement process may be viewed as a public good whose usefulness and

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\(^{210}\) Mosoti V., Africa in the First Decade of WTO Dispute Settlement, Journal of International Economic Law, Oxford University Press 2006, JIEL 2006 9 (427) at Pg.4
proper functioning is in the interest of all players, be they developed or developing countries. In particular, it serves all members' interests to ensure that it remains credible and functional.

It is evident that the lack of feasible remedies in the WTO dispute settlement system has discouraged and disbarred some Members completely, especially the African countries in participating in the dispute settlement system. It is important to highlight the importance of participating in the WTO dispute settlement system. As put forward by Shaffer, it is important for developing Members to participate in the WTO Dispute Settlement System matters for shaping WTO Law and International Economic Relations. He further argues that participation in WTO judicial processes is arguably more vital than is participation in analogous judicial processes for shaping law in national systems. He goes ahead to give two reasons as follows:

1. The difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence, unlike national or EC law, WTO law requires consensus to modify, so that the WTO political/ legislative system remains extremely weak. Changes in WTO rules only take place through in frequent negotiating rounds (held around once per decade), involving complex tradeoffs between over one hundred and forty countries with widely varying interests, values, levels of development and priorities. In addition, because of the complex bargaining process within the WTO, rules are often purposefully drafted in a vague manner as part of a political compromise. WTO members thereby delegate significant de facto power to the WTO dispute settlement system to interpret and effectively make WTO law.

2. Although it does not formally adopt a common law approach, the WTO takes a Common law orientation, with the WTO Appellate Body and

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211 Shaffer Gregory, How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, Working Draft: Feb 14, 2003 at Pg. 9, 10 & 11
WTO panels citing and relying on past WTO jurisprudence in their legal reasoning. Individual WTO cases involve more than the judicial resolution of an individual dispute. WTO panel and Appellate Body decisions also produce systemic effects for future cases. As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process to modify it through legislation, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law’s interpretation and application over time to their advantage. Not surprisingly, the United States and EC remain by far the predominant users of the system, and thereby are most likely to advance their larger systemic interests through the judicial process.

Concern is raised\(^{212}\) that in addition to the difficulty of evaluating the effectiveness of existing international rules, there are several important policy issues about rule implementation, which often do not get explicitly addressed. One of the concerns averred, is the issue whether the legal system be improved to make rules more effective, and second, whether new rules should be added and be made more effective. It is further argued that in international economic affairs, many government and private practitioners are not all in favor of an effective international rules system.\(^{213}\)

Part of the contention for the real or concealed and implicit opposition to the effectiveness of international rules, is acknowledgment of the older concepts of national Sovereignty.\(^{214}\) This explains the reason why the GATT/WTO system of remedies is as they are. As indicated, since the time when the GATT was conceived, the remedy of retaliation was seen not to be suitable for the multilateral trading system, to date, the remedy has remained unappealing to

\(^{213}\) Ibid, at Pg. 108
developing and least developed Members, and yet, no motion is made to improve the system.

As noted by Robert Hudec, “Larger and more powerful countries, those accustomed to living by rules slanted in their favor, are likely to aim for a somewhat less balanced result. For them, the optimal remedy package will be one that works well against others but not so well against themselves. This tendency also has to be considered in explaining why WTO remedies are as they are.”

There should be more explicit procedures for compensatory measures, as suggested by history, sanctions and even compensation, have limited utility. More vital is the credibility and advisability of the panel reports in the face of the international community.

A scholar suggests that international resolution of disputes, more so regarding economic matters, has as its prime objective neither ascertainment of right or wrong, nor establishment of responsibility of a particular nation, but instead the most rapid cessation of the violations. The author and others stress the vitality of diplomatic means and negotiating approaches to resolving disputes.

The above viewpoints however miss vital policy considerations and can be misleading. It is important to note that considerable utility exists in publicly designating or threatening to do so the “wrong doer” in an international dispute, especially if the validity of the process that determines the wrong doing is widely accepted. Most significant however, is that in most cases, it is not the resolution of the specific dispute at hand that is most vital, rather, the efficient and just future functioning of the overall system that is the primary goal of a dispute settlement procedure.

215 Quoted by Shaffer Gregory, How to make the WTO Dispute Settlement System Work for Developing Countries; Op. Cit, Supra, footnote 211 at Pg. 59
When all is said and done, it is still vital to stress that a strong legal system could be seen to jeopardize national sovereignty of Member States, and this could cause further antagonism for the Multilateral Trading System. It would therefore benefit all concerned to tread cautiously whilst proposing and indeed implementing suitable changes to the WTO dispute settlement system, for as noted, WTO law arguably provides for only limited remedies because governments, and in particular powerful governments, have not wanted WTO law to be that binding.

In recommending that prospective remedies should be provided for under the DSU, care must be taken in conferring with principles of Public International Law by taking into account the basic principles and objectives of the multilateral trading system, lest the character of the WTO system as an international establishment in which Members have bound themselves for a specific purpose may be derailed. At the examination of the provisions of the DSU, there is no lacuna in the law; indeed the Contracting Members merely intended that the remedies under the DSU would not be retrospective, but rather prospective, maintaining a balance of rights and obligations between Parties, to preserve future trading opportunities rather than address past injuries.

In one considered case, Australia – Automotive Leather implementation report, where retrospective remedies were considered, the dispute involved a complaint by the US against a grant of 30M Australian Dollars (A$) (US$15M) and a concessional loan of A$ 25M provided by the Australian Federal Government to the Howe Leather Company. The panel found the grant to be a prohibited export subsidy under Article 3.1 (a) of the Agreement on Subsidies and countervailing measures and recommended that Australia withdraw the subsidy. The Panel ruled that Australia had failed to properly ‘withdraw the subsidy’ by

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218 Shaffer Gregory, How to make the WTO Dispute Settlement System Work for Developing Countries, Op. Cit, Supra, footnote 162, at Pg. 66
219 WTO Article 21.5 Panel Report, Australia- Subsidies Provided to Producers and Exporters of Automotive Leather (‘Automotive Leather’), WT/DS126/RW, adopted 11 February 2000
220 GATT Secretariat, The results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts (Geneva, 1994), at Pg. 231
not retrospectively recalling the $30M grant provided to the company. This ruling was highly criticized by the WTO Member States as it purported to grant a retrospective remedy\textsuperscript{221} and comments were made to the effect that WTO Members should treat the panel ruling as a one-time aberration of no precedential value.\textsuperscript{222}

As depicted from above, the Members of the WTO never intended to remedy past injury, rather to maintain a balance of concessions between parties. Article 19.1 of the DSU provides that in the event of a finding of the panel of a WTO inconsistency, the panel or the Appellate Body shall recommend that the responding Member bring the measure into conformity. Article 3.7 of the DSU provides that the first objective of the Dispute Settlement Mechanism is ‘to secure the withdrawal of the measures concerned’.

The foregoing provisions ascribe panel or Appellate Body recommendations as being purely prospective, interpretation of the above provisions otherwise, would be an express violation of the Customary International Law principle expressed in Article 31 of the Vienna Convention on the law of Treaties, which requires a treaty to 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.

Having amply established that the WTO dispute settlement understanding remedies were merely meant to be prospective and not retrospective, the remedial object and purpose of the system should be altered to impute responsibility upon offending Members, not only to maintain a balance of rights and obligations of the parties, but also to cater for past injuries occasioned to complainant Members as provided for under the principles of Public International Law.

\textsuperscript{221} Gavin Goh & Andreas R. Ziegler, Op. Cit., Supra, footnote 147 at pg. 547
\textsuperscript{222} Meeting of the Dispute Settlement Body, 11 February 2000, WT/DSB/M/75 at Pg. 8
In conclusion, the study revealed that the remedy of retaliation has generated great dissatisfaction amongst the WTO Membership, especially the developing and least developed countries. To a great extent, the respondents noted how unfeasible retaliation as a remedy is, and recommended that a mechanism should be devised to improve retaliation as a remedy, as it does not fulfill the aims and objectives of the WTO.
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QUESTIONNAIRE

Esteemed Respondent, my name is Clare Olaki; I am a student at the University of the Western Cape, studying towards a Masters’ degree in International Trade and Investment Law in Africa. As a prerequisite for completion of my LL.M, I am required to submit a research paper. I am carrying out research and my thesis is entitled: The Feasibility of Retaliation as a Trade Remedy under the Dispute Settlement Understanding

I shall highly appreciate your cooperation in the completion of this questionnaire.

Retaliation is a last resort trade remedy under the World Trade Organization (WTO) Dispute Settlement Understanding (DSU). However, much is debated about the efficacy of Retaliation as a remedy under the Dispute Settlement System, whether it fulfills the objectives and purpose of the WTO and the Dispute Settlement Understanding respectively. The main objectives of the State parties under the WTO in relevant part, is depicted in the preamble to the Marrakech Agreement as: “…entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.” The main objective of the WTO DSU according to Article 3:2 is: “The Dispute Settlement System (DSS) of the WTO is a central element in providing security and predictability to the multilateral trading system”.

This research is for study purposes only, and information provided shall be treated confidentially, unless prior consent for disclosure has been obtained from respondents. The major aim of this study is to provide practical recommendations to the adjustment of the WTO dispute settlement system trade remedies. An electronic copy of the research paper shall be availed to interested respondents after successful completion of the research.

With the above brief background, your cooperation and detailed answers will be highly appreciated.
1. To what extent does retaliation as a remedy succeed in fulfilling the objectives of the WTO and the DSU respectively?

2. Does retaliation as a remedy fulfill the interests of all the member states, that is, developed, developing and least developed countries?
   (a) If it does, how?

   (b) If it does not, why not?

   (c) Is there a justification for keeping retaliation as a remedy under the WTO?

3. Is there a mechanism for improving retaliation as a remedy? If yes, how?

4. Are there other remedies that are more feasible than retaliation? If yes, what difficulties do you envisage in enforcing the proposed remedies?

5. What needs to be done in order to make the WTO Dispute Settlement System useful to all Member States whilst still fulfilling the WTO objectives?

6. Additional general information and comments about the implementation of the WTO Panel or Appellate Body decisions.

7. Kindly indicate which sector you are working with:
   (a) Government (Department)
   (b) Private Sector
   (c) Non governmental Organization
   (d) Civil Society

Thank You