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TITLE: Evaluating the Enforcement of World Trade Organisation Dispute Settlement Decisions

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TABLE OF CONTENTS

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PLAGIARISM FORM

'I declare that ***Evaluating the Enforcement of World Trade Organisation Dispute Settlement Decisions*** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references'.

Signed …….. (signed by student)

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Dated: **17 July 2019**

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Dated: 31 **July 2019**

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Trade Agreements

World Trade Organisation (WTO)

WTO Obligations

CHAPTER 1: INTRODUCTION

1.1 PROBLEM STATEMENT

The World Trade Organisation (WTO) deals with regulation of trade in goods, services and intellectual property between participating countries by providing a framework for negotiating trade agreements.[1] Furthermore, it has implemented a dispute resolution process aimed at enforcing participants' adherence to WTO agreements. Ideally, all WTO member states have 'a level playing field' in terms of access and equal rights under the dispute settlement mechanism. Disputes should be resolved in a fair and impartial manner. However, the WTO's DSS has been criticised for being undemocratic, non-transparent and accountable to none.[2]

In light of this statement, the research paper will seek to examine the process of implementation and enforcement of the Dispute Settlement Body's (DSB) recommendations and rulings. In other words, it will critically analyse the operation and practice of the WTO dispute settlement mechanism. It will investigate the trend of non-compliance with DSB recommendations and rulings; and evaluate the effectiveness of the remedies available under Dispute Settlement System (DSS).

In doing so, the Research paper will review the experience of several major users of the WTO's DSS, such as: The United States (US), the European Communities (EC), and China; and evaluate how they have proceeded to approach their various trade policy concerns. Furthermore, it will assess the WTO's success in settling disputes, in terms of whether disputes have been settled with no hesitation, either through mutually agreed solutions or through the implementation of panel and Appellate Body (AB) recommendations.

It will seek to analyse proposals which have been tabled by members for the reform of implementation and enforcement of DSB rulings and come up with possible reforms on the Dispute Settlement Understanding[3] (DSU) that member states can implement, to ensure their active and successful participation in the WTO dispute settlement mechanism.

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[1] WTO Official Website 'What is the World Trade Organization' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (accessed 19 August 2018).
[2] Van den Bossche P and Zdoue W *The Law and Policy of The World Trade Organization Text, Cases and Materials* (2017) 136.
[3] *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter-DSU].

1.2 SIGNIFICANCE OF THE PROBLEM

In this age of globalisation, interactions between countries are customarily hinged on their trade relations. The Marrakesh Agreement created the WTO as a new international organisation with legal personality, legal capacity, and necessary privileges and immunities in order to exercise its functions. In addition, it has bestowed the WTO with decision-making processes, an institutional structure, and distinctive functions in order to regulate the actions of its Member States.[4]

The WTO exists to facilitate the implementation, administration, and operation of the WTO agreements.[5] Beyond this general purpose, the WTO has four specific tasks: (1) to provide a forum for negotiations among Members both as to current matters and any future agreements; (2) to administer the system of dispute settlement; (3) to administer the Trade Policy Review Mechanism; and (4) to cooperate as needed with the IMF and the World Bank.[6] Thus, the WTO's DSU is a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of states under the covered agreements.[7]

Compliance with recommendations or rulings of the DSB is crucial in order to ensure effective resolution of disputes to the advantage of all Members.[8] Under the DSU, if a Member fails to comply with a final ruling in a dispute, the prevailing party may retaliate by suspending trade concessions that it owes to the offending Member. This retaliation can continue until the offending Member implements the WTO's decision. However, several commentators argue that the retaliation remedy is too weak and unpredictable to be of any real use.[9] Alternatively, voluntary compensation may also be used as a remedy, but this has been labelled as theoretical in nature as it is only possible with the consent of the non-complying Member State.[10]

[4] Van den Bossche P and Zdoue W *The Law and Policy of The World Trade Organization Text, Cases and Materials* (2017) 83.You will be criticised for using outdated sources. I told you there are newer editions available?
[5] Article 3 of the DSU.
[6] Van den Bossche P and Zdoue W *The Law and Policy of The World Trade Organization Text, Cases and Materials* (2017) 84.
[7] Article 3.2 of the DSU.
[8] Article 21.1 of the DSU.
[9] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 2.
[10] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 101.

Understanding the WTO DSU provisions, procedures and its dispute resolution mechanism, its applicability and use by Member States will be the main issue for consideration in this research paper. Most worryingly, there is an abundance of suggestions by numerous scholars for possible reform, which have not been adopted by the WTO.

Since the WTO's founding in 1995, the WTO consensus mechanism has failed to create any fresh trade laws except the Trade Facilitation Agreement, which entered into force in 2017. This has significantly influenced the capacity of the WTO to devise new laws governing the new economic order. The legislative wing paralysis has led the AB to act in an organisational vacuum.[11]

1.3 RESEARCH QUESTION

This research will address the following question:

"To what extent are dispute settlement decisions enforced through or by the WTO?"

In answering this question, the research paper will scrutinise the role and functions of the WTO by providing an in-depth investigation of the DSU. It will examine the effectiveness of final rulings; analyse advantages and disadvantages of the DSU's process and explore possible areas of reform. These possible reforms will seek to ensure a more efficient and effective method of implementing panel and AB's decisions.

1.4 CHAPTER OUTLINE

1. **Introduction -** This chapter will involve an outline of the research paper, the problem statement and the various aspects which will be examined, analysed and investigated.

2. **Role and Functions of the World Trade Organisation –** This chapter will entail a background of the WTO, specifically: how and why it was created, what its general and judicial roles are, and how the WTO operates. It will also examine how the system has changed since the GATT.

[11] Nedumpara J, Bhardwaj P 'Crises In the WTO Appellate Body – Analysis' available at https://www.eurasiareview.com/24062019-crisis-in-the-wto-appellate-body-analysis/ (accessed 2 July 2019).

3. **Procedure for Dispute Resolution -** This chapter will entail an in-depth examination of the provisions of the WTO dispute settlement mechanism and more specifically the DSU. It will contain an in-depth analysis of the DSU and DSB institutions and their rules and procedures. namely: consultations; the establishment of a panel; the implementation of an AB; the surveillance of the implementation of recommendations and rulings; and compensation and suspension of concessions. Furthermore, it will explore how Member States adhere to the WTO's decisions and the extent to which rulings have been enforced in previous instances as well as the use of arbitration as opposed to litigation proceedings in this context.

4. **World Trends In Using The Dispute Settlement Understanding –** This chapter will provide a statistical analysis of disputes under the WTO since its inception; including the system's most frequent users and typical duration of disputes. It also examines the history of compliance and certain obstacles Members may face in participating in proceedings.

5. **Advantages and Disadvantages of the World Trade Organisation's Dispute Settlement System –** This chapter will examine the advantages and disadvantages in relation to the overall process, while stressing the effectiveness of the panel's final decisions. It will then focus on the disadvantages and how these disadvantages can be altered, to ensure a concise process with effective implementation of rulings by the Dispute Settlement Panel. It will analyse various issues that are currently hindering the overall process of the DSU that need to be addressed immediately in order to eliminate lack of transparency and ambiguity. Additionally, the chapter will analyse current and proposed WTO dispute remedies, and effective measures that the WTO could potentially implement to ensure compliance. It concludes by exploring general areas of improvement that the WTO needs to scrutinise in order to ensure more effectiveness in proceedings.

6. **Conclusions and Recommendations -** This chapter will evaluate the findings based on the research done and give recommendations on the way forward for the WTO's DSS and its role and functions. It will also summarise the crux of the research paper and give a final conclusion after the analysis of the findings.

1.5 METHODOLOGY

In answering the key question: "To what extent are dispute settlement decisions enforced through or by the WTO?", this paper will examine the proposed necessary reform of the WTO's DSS.

This paper's research will be conducted through desk, library and internet based research. The research relies on published and unpublished material and takes into account significant primary and secondary sources of information. The primary sources include WTO legal texts dealing with the subject, policies, agreements, decided cases and general literature on the WTO.

The secondary sources of information include journal articles, study reports on the performance of the DSB, papers and journal articles written by legal scholars and researchers on issues relevant to this study.

As emphasised in the chapter outline above, the research paper will introduce the history of the WTO; examine its roles and functions; inspect the DSU, advantages and disadvantages, as well as how panel reports are implemented. The final chapter will stress the major conclusions and recommendations on possible strategies for improving the WTO's DSU.

Each chapter will commence with a brief overview of the chapter heading, followed by reference to the sources and a formulated opinion thereof. Various chapters will have sub-headings in order to provide a clear and concise breakdown of each aspect. The idea is to link the end of every chapter to the beginning of the next one.

This research will combine analytical and comparative approaches. An analytical approach will be used to analyse the DSU legal text and major proposals to improve it. This will be done in order to emphasise the major weak points within the DSU that hinder effective implementation of panel and AB reports. A comparative approach will be used to discuss the Member states' participation in The DSU case law, in terms of the nature of disputes and the various outcomes. Along with the US and the EC; Member States such as Canada, China, Brazil, Japan and India have also been avid users of the WTO DSS. The research is seeking to assess the overall

experience of these Members. Some cases, such as the American Salmon Case[12] to name one, have seen the successful implementation of remedies. Nevertheless, the analysis will focus on major cases that have involved non-compliance by the EC with regards to the restriction of imports on bananas[13] and the restrictions on the importation of meat produced with the aid of growth hormones.[14]

1.6 DEFINITION OF CONCEPTS

1. **Appellate Body –** The WTO AB is a standing body of seven persons that hears appeals from reports, that are issued by panels in disputes, which are brought by WTO Members. The AB can uphold, modify or reverse the legal findings and conclusions of a panel. AB Reports, once adopted by the DSB, must be accepted by the parties to the dispute.

2. **Dispute Panel –** The WTO's Dispute Panel is a committee designated by the WTO's DSB. The Dispute Panel is responsible for determining the outcome of a trade conflict between two or more Member States.

3. **Dispute Settlement Body –** The DSB has authority to establish dispute settlement panels, refer matters to arbitration, adopt panel, Appellate Body and arbitration reports, maintain surveillance over the implementation of recommendations and rulings contained in such reports, and authorise suspension of concessions in the event of non-compliance with those recommendations and rulings.

4. **Dispute Settlement Understanding –** Also known as the Understanding on Rules and Procedures Governing the Settlement of Disputes or the Dispute Settlement Understanding. According to the procedures specified in the DSU, Member States can either engage in consultations to resolve trade disputes, or, if unsuccessful, present their case in front of a WTO Panel.

[12] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R.
[13] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R.
[14] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R.

5. **GATT –** Also known as the General Agreement on Tariffs and Trade, was a legal agreement between many countries, whose overall purpose was to promote international trade by reducing or eliminating trade barriers, such as tariffs or quotas.

6. **Regional Trade Agreements –** These are reciprocal trade agreements between two or more partners. They include free trade agreements and customs unions.

7. **Trade Dispute -** A trade dispute arises when a Member State believes another Member State is violating an agreement or a commitment that it has made in the WTO.

8. **WTO –** Also known as the World Trade Organisation, deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.

1.7 CONCLUSION

In comparison to other international enforcement mechanisms, the WTO's DSU is still regarded as a highly systematic mechanism that gives equal opportunities to Members to settle their trade issues and is an extremely effective tool in settling their disputes. However, the system still has some glaring weaknesses, which will be discussed in the forthcoming chapters.

CHAPTER 2: ROLE AND FUNCTIONS OF THE WORLD TRADE ORGANISATION

2.1 INTRODUCTION

The WTO was established and came into operation on 1 January 1995. It is seen as one of the most influential international intergovernmental organisations in recent history. In 2001, Bronkers stated that it has the potential to become a fundamental pillar of worldwide governance;[15] however, since its establishment, it has also become one of the most criticised organisations, with detractors claiming that the WTO is 'pathologically secretive, conspiratorial and unaccountable to sovereign States and their electorate'.[16]

The coming sections will examine the historical background of the WTO, more specifically: how and why it was created; what its general and judicial roles are; and how the WTO operates. Furthermore, it will draw a comparison between the General Agreement on Tariffs and Trade[17] (GATT) and its failings, and how the WTO has sought to eradicate these deficiencies.

2.2 HISTORICAL BACKGROUND

The WTO Agreement resulting from the Uruguay Round[18] is deemed as the most important event in recent economic history and the WTO as the 'central international economic institution.'[19] It created the WTO as a new international organisation with a legal personality, legal capacity, and necessary privileges and immunities in order to exercise its functions. It also bestowed the WTO with decision-making processes, an institutional structure, and distinctive functions in order to regulate the actions of its Member States.[20]

Before the establishment of the WTO, the GATT was the only multilateral framework for administering international trade. However, the WTO now incorporates and administers the GATT and its provisions. Accordingly, Article XVI:1 of the WTO Agreement states:

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[15] Bronkers M 'More Power to the WTO?' (2001) *Journal of International Economic Law* 41.
[16] De Jonquiere's G 'Prime Target for Protests: WTO Ministerial Conference', *Financial Times*, 24 September 1999.
[17] GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].
[18] The Uruguay Round, Trade Act of 1974, §151, 19 U.S.C.A. 2191, as amended, Omnibus Trade and Competitiveness Act of 1988, §§1102-1103, 19U.S.C.A. §§2902-2903; Pub.L.No. 103-49, §1, 107 Stat. 239.
[19] Bierman L, Fraser DR & Kolari JW 'The General Agreement on Tariffs and Trade: World Trade from a Market Perspective' (1996) 17:3 *University of Pennsylvania Journal of International Economic Law* 821 at 845.
[20] Van den Bossche P & Zdoue W *The Law and Policy of The World Trade Organization Text, Cases and Materials* (2017) 83.

'Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.'[21]

2.2.1 THE MARRAKESH AGREEMENT

The Marrakesh Agreement, manifested by the Marrakesh Declaration, was an agreement signed in Marrakesh, Morocco, by 124 nations on 15 April 1994. It marked the culmination of the 8-year-long Uruguay Round and established the WTO, which officially came into effect on 1 January 1995.[22]

The WTO Agreement, developed out of the GATT, is supplemented by a number of other agreements on issues including: trade in services, sanitary and phytosanitary measures, trade-related aspects of intellectual property and technical barriers to trade. It also established a new, more efficient and legally binding means of dispute resolution. The various agreements, which make up the Marrakesh Agreement combine as an indivisible whole. In other words, no entity can be party to any one agreement without being party to them all.[23]

2.3 THE WORLD TRADE ORANISATION'S POLICY OBJECTIVES

The reasons for establishing the WTO and the policy objectives of this international organisation are set out in the Preamble of the WTO Agreement. From the preamble, it can be deduced that the primary objectives of the WTO are: to set and enforce rules for international trade; to provide a forum for negotiating and monitoring further trade liberalisation; to resolve trade disputes; to increase the transparency of decision-making processes; to cooperate with other major international economic institutions involved in global economic management; and to help developing countries benefit fully from the global trading system.[24]

From these rules embodied in the WTO, it can be deduced that the WTO serves at least three purposes:

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[21] Article XVI:1 of the WTO Agreement.
[22] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].
[23] Das DK *The Doha Round of Multilateral Trade Negotiations: Arduous Issues and Strategic Responses* (2005) 196.
[24] Anderson K 'World Trade Organization' available at *https://www.britannica.com/topic/World-Trade-Organization* (accessed 03 December 2018).

- First, the WTO attempts to protect the interests of all Members against discriminatory trade practices. Each WTO Member must grant equal market access to all other Members and that both domestic and foreign suppliers must be treated equally.[25]
- Second, the WTO Agreement limits trade only through tariffs and provide market access not less favourable than that specified to the agreed upon commitments when countries were granted WTO membership.[26] However, all WTO agreements contain special provisions for developing countries, including longer periods to implement agreements and commitments, measures to increase their trading opportunities and support to help them build the infrastructure for WTO work, handle disputes, and implement technical standards. Least-developed countries receive special treatment, including exemption from many provisions.[27]
- Third, the rules are designed to help governments resist lobbying efforts by domestic interest groups seeking special treatment.[28]

Ultimately, the WTO Agreement has sought to bring greater certainty and predictability to the international trading market by enhancing economic welfare and reduce political tensions, but no system is perfect.

2.4 FUNCTIONS OF THE WORLD TRADE ORGANISATION

As stated in the Doha Round, the primary function of the WTO is to 'provide the common institutional framework for the conduct of trade relations among Members in matters related to the agreements and associated legal instruments included as the Annexes to [the WTO] Agreement.'[29] Accordingly, the WTO exists to facilitate the implementation, administration, and operation as well as to further the objectives of the WTO agreements.[30] Beyond this general purpose, the WTO has four specific tasks, namely: to provide a forum for negotiations among Members both as to current matters and any future agreements; to administer the system of

[25] Anderson K 'World Trade Organization' available at *https://www.britannica.com/topic/World-Trade-Organization* (accessed 03 December 2018).
[26] Anderson K 'World Trade Organization' available at *https://www.britannica.com/topic/World-Trade-Organization* (accessed 03 December 2018).
[27] WTO Official Website 'The WTO can help countries develop' available at *https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm* (accessed 4 January 2019).
[28] Anderson K 'World Trade Organization' available at *https://www.britannica.com/topic/World-Trade-Organization* (accessed 03 December 2018).

[29] Article 2.1 of the WTO Agreement.
[30] Article 3 of the DSU.

dispute settlement; to administer the Trade Policy Review Mechanism; and to cooperate as needed with the IMF and the World Bank.[31]

In terms of Article III of the WTO Agreement, the WTO has been assigned five widely defined functions:

> 1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
> 2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
> 3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.
> 4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.
> 5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

In terms of the WTO's DSU, Ziemblicki has identified two roles which the WTO plays. The first is legislative in nature; where the WTO is an international organisation in which agreements are signed. The second is judicial in nature; where the WTO is an international adjudicator that decides trade disputes. The first role is limited to the conduct of trade relations amongst its Members. The second role is to conduct litigation brought pursuant to the consultation and dispute settlement provisions of the WTO.[32] Ziemblicki points out that the WTO DSU system far is better than its GATT predecessor. However, it is not free of errors.[33]

Elaborating on Ziemblicki's statement, there is no rule of *stare decisis* in WTO dispute settlement decisions. Subsequently, previous rulings do not have a binding effect on panels and

[31] Van den Bossche P and Zdoue W *The Law and Policy of The World Trade Organization Text, Cases and Materials* (2017) 84.
[32] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 196.
[33] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 197.

the AB in subsequent cases. Therefore, a panel is not obliged to follow previous AB reports even if they have developed a certain interpretation of the same provisions, which are now at issue before the panel. Likewise, the AB is not obliged to follow the legal interpretations it has developed in previous cases.

2.5 HOW THE DSU HAS CHANGED UNDER THE WTO

As previously stated, the DSU is one of the most notable achievements of the multilateral trading system. Unlike the GATT, the WTO has a far stronger institutional structure. Additionally, the WTO is described as the sole worldwide international organisation governing the trade rules between Member States at a global or near-global level. Whereas the GATT mainly dealt with trade in goods, the WTO and its agreements also cover trade in services and intellectual property.[34]

Prior to the establishment of the WTO, the GATT implemented a political-diplomatic dispute resolution regime.[35] However, since the establishment of the WTO, the dispute resolution regime under the GATT has been substituted with a legalised dispute settlement model.[36] The DSS of the GATT was based on Articles XXII and XXIII of the GATT 1947. It instructed GATT Member States to use consultation to settle their disputes:

1. 'Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.'[37]

The WTO Agreement aimed at ending the 'fragmentation that had characterized the previous system' and to 'develop, more viable and durable multilateral trading system encompassing the GATT, the result of past trading liberalization efforts and all of the results of the Uruguay

[34] WTO Official Website 'History of the multilateral trading system' available at https://www.wto.org/english/thewto_e/history_e/history_e.htm (accessed 03 December 2018).
[35] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 2.
[36] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 2.
[37] Articles XXII and XXIII of the GATT 1947.

Round of Multilateral Trade Negotiations.'[38] Hence, the WTO Agreement largely confirms the aims of the GATT.

As part of the results of the Uruguay Round, the DSU provided more detailed procedures for the various stages of a dispute, including specific time frames. As a result, the DSU contains many deadlines, so as to ensure prompt settlement of disputes. Thus, the DSU introduced a largely strengthened DSS.[39]

Under the GATT, individual parties could block the establishment of panels or the adoption of a report. The DSU changed this, by giving the DSB automatic authority to establish panels and adopt reports unless there is non-consensus, according to the negative consensus rule, which also finds application in the authorisation of countermeasures against a party, which fails to implement a ruling. Furthermore, the WTO DSS implements the Appellate review of panel reports in addition to surveillance of implementation following the adoption of panel and AB reports.[40]

Under the DSU, when a ruling goes against a Member, that Member will not suffer incarceration, injunctive relief, and damages for harm inflicted or police enforcement – instead, it relies upon voluntary compliance.[41] This flexibility 'accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.'[42] Under the GATT, a government could 'renege on its negotiated commitment not to exceed a specified tariff on an item, provided it restored the overall balance of the GATT concessions through compensator reductions in tariffs on other items.'[43]

El-Taweel notes that while the new DSU has not solved all the GATT's DSS inefficiencies, it marks significant improvement; the most obvious being the following:

[38] Brazil – Measures Affecting Desiccated Coconut (Brazil v. Philippines) (1997) WT/DS22/AB/R p. 17.
[39] WTO Official Website 'Historic development of the WTO dispute settlement system' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm (accessed 03 December 2018).
[40] WTO Official Website 'History of the multilateral trading system' available at https://www.wto.org/english/thewto_e/history_e/history_e.htm (accessed 03 December 2018).
[41] Bello J 'The WTO Dispute Settlement Understanding; Less is More' (1996) *The American Journal of International Law* 417.
[42] Bello J 'The WTO Dispute Settlement Understanding; Less is More' (1996) *The American Journal of International Law* 417.
[43] Bello J 'The WTO Dispute Settlement Understanding; Less is More' (1996) *The American Journal of International Law* 417.

- The enforcement mechanism through the DSU is much stronger than that of the previous system. The GATT enforcement procedures were easily delayed or blocked by parties to the dispute; whether at the stage where a Panel was established, or when the Panel issued its report; as a consensus was needed to establish a Panel or accept its report; Now a consensus is needed in order to stop the proceedings from advancing at any stage of the dispute settlement procedures. This is theoretically impossible, as it is always in the winning party's interest to have the Panel report adopted. This results in a quasi-automatic adoption of Panel reports.[44]
- The DSU enforcement mechanism is also stricter. While the GATT's DSS previously stated that the contracting parties may authorise suspension of concessions if the circumstances are serious enough and as they determine to be appropriate, the DSB shall grant authorisation to suspend concessions or other obligation and the level of such suspension is to be equivalent to the level of the nullification and impairment.[45]
- It established a unified DSS for all parts of the WTO, including services and intellectual property rights.[46]
- It established stricter time limits on the operation of dispute panels.[47]

2.6 CONCLUSION

There was an overall necessity to establish the WTO Agreement since the GATT failed to achieve its goals; however, the GATT lives on as the foundation of the WTO. The 1947 agreement itself is obsolete. Nevertheless, its provisions were incorporated into the GATT 1994 Agreement in order to keep the trade agreements going while the WTO was being created. So, the GATT 1994 is itself a component of the WTO Agreement and continues to provide key disciplines affecting international trade in goods.

The GATT's main purpose was to eliminate harmful protectionism, through restoring economic health after the Second World War.[48] The WTO is not a simple extension of GATT; on the contrary, it completely replaces its predecessor and has a very different character.

[44] El-Taweel K *The WTO Dispute Settlement Understanding: How can Africa make better use of the system?* (unpublished LLM thesis, University of Pretoria, 2010) 23.
[45] Article 22.4 of the DSU.
[46] Article 1 of the DSU.
[47] El-Taweel K *The WTO Dispute Settlement Understanding: How can Africa make better use of the system?* (unpublished LLM thesis, University of Pretoria, 2010) 23.
[48] Amadeo K 'GATT, Its Purpose, History, with Pros and Cons' available at *https://www.thebalance.com/gatt-purpose-history-pros-cons-3305578* (accessed 03 December 2018).

Whereas the GATT was a set of rules with no institutional foundation, the WTO is a permanent institution with its own secretariat. Unlike GATT, the WTO covers trade in services and trade related aspects of intellectual property in addition to trade in merchandise goods. Accordingly, establishment of the WTO has changed the features of the global economy by linking the international and commercial relations with the interests of its Member States.

As highlighted above, the dispute resolution mechanisms within the DSU resemble adjudication more than they do diplomacy, a major drawback of the previous regime. The current mechanism has detailed procedures for the various stages of the dispute settlement including specific time frames; and there is a stronger mechanism for monitoring the implementation of rulings.

The overall process avoids the fragmentation embodied in the GATT's DSS. A unified DSS is ensured by the fact that the DSU is binding upon all WTO Members. Additionally, the WTO Agreement introduced some major structural changes, such as the establishment of the DSB; and has broadened the scope of the DSU.

Now that it has been established how the WTO has developed a much more thorough dispute mechanism than its predecessor, the next Chapter will provide an in-depth examination of the procedure for dispute resolution and how rulings are enforced on non-compliant Members under the DSU.

CHAPTER 3: PROCEDURE FOR DISPUTE RESOLUTION

3.1 INTRODUCTION

In the previous Chapter, the overall role and functions of the WTO were examined, with specific reference to how the WTO has improved upon its predecessor, namely, the GATT. In the coming sections, the main stages of the WTO's DSU will be analysed in respect of rules and procedures. Furthermore, it will explore world trends in using the DSU through a comparative analysis by scrutinising how Member States adhere to the WTO's decisions and the extent to which rulings have been enforced in previous instances.

Articles III and IV of the WTO Agreement provide a system of rules and procedures enshrined in the Understanding on Rules and Procedures Governing the Settlement of Disputes applicable to disputes arising under any of its legal instruments. WTO Dispute Settlement Procedures have a number of characteristics, four of which are of most utmost importance: First, only governments have standing; second, compensation for damages is customarily not requested and awarded; third, the ability to enforce rulings is very asymmetric; and the costs of the process are significant.[49]

In the first eight years of its establishment, Members filed nearly 300 disputes with the WTO.[50] Jackson believes that at the core of the WTO is the dispute settlement process. It has not only been credible and efficient in handling conflicts, it has also helped to resolve a important amount at the consultation level.[51] Whilst this is true, many cases – as demonstrated below - are still unresolved even after the entire DSU process has been adhered to.

The WTO DSS has jurisdiction over any dispute between WTO Members arising under the covered agreements.[52] The jurisdiction of the WTO DSS is compulsory in nature. The DSU's application is limited only to disputes involving breaches of the Covered Agreements; namely, the Agreement establishing the WTO, the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade related Aspects of Intellectual Property Rights and in certain circumstances, the Plurilateral Trade Agreements.[53]

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[49] Hoekman BM 'WTO Dispute Settlement, Transparency and Surveillance' (2000) *World Economy Journal* 2.
[50] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 1.
[51] Jackson JH *The World Trade Organisation Constitution and Jurisprudence* (1998) 59.
[52] Article 1.1 of the DSU.
[53] Booysen H *Principles of International Trade Law as a Monistic System* (2003) 829.

Under the current WTO DSS a dispute is deemed to arise when a Member of the WTO adopts a trade policy measure or takes some action that one or more fellow WTO Members consider to be a violation of the WTO agreements, or to be a failure to live up to WTO obligations.[54]

3.2 THE DISPUTE SETTLEMENT PROCESS

There are five stages provided by the DSU, which make up the dispute settlement process of the WTO in the event of a dispute. These include consultations; the establishment of a Panel; appeals to the AB; surveillance and implementation of recommendations and rulings; and lastly, compensation and suspension of concessions.

3.2.1 Consultations

Consultation is the first stage in any dispute involving Member States. The DSU grants the right to all WTO Members to enter to the consultation phase.[55] It states that

> 'Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.'[56]

In Mexico – Corn Syrup (Article 21.5 – US), the Appellate Body explained the purpose of consultations. Consultations provide parties with the opportunity to exchange information, help them to assess the strengths and weaknesses of their respective cases, and, in many cases, help to reach a mutually agreed solution. In the event that a solution cannot be reached, consultations provide an opportunity for parties to define and delimit the scope of the dispute between them.[57]

The Understanding explains in detail the steps and time frame the complainant has to pursue before they can request to establish a Panel. If a request for consultations is made, the Member shall give a response within 10 days after the date of its receipt and enter into consultations within 30 days after the date of its receipt.[58]

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[54] WTO Official Website 'A unique contribution' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (accessed 12 January 2019).
[55] Article 4 of the DSU.
[56] Article 4.2 of the DSU.
[57] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW.
[58] Article 4.3. of the DSU.

This time frame can be decreased if the dispute is about perishable goods.[59] If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel.[60] A request for consultations must be submitted in writing and must give the reasons for the request.[61] Article 3.7 of the DSU entrusts the Members of the WTO with the self-regulating responsibility of exercising their own judgment in deciding whether they consider it would be fruitful to bring a case.

3.2.2 The Establishment of a Panel

The request for establishment of a panel initiates the phase of adjudication. The request may be made at the latest DSB meeting, thereafter the request first appears as an item on the DSB's Agenda.[62] A request for the establishment of a panel must be made in writing and is addressed to the Chairman of the DSB.[63] The legal text of the DSU states that the request must indicate whether consultations were previously held, identify the issues of the dispute, and provide a summary of the legal basis upon which the complaint is being brought.[64]

It is imperative to point out that panels are established to assist the DSB in discharging its responsibilities under the DSU and its covered agreements. The DSU advises that,

> 'A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.'[65]

They are there to facilitate a mutually satisfactory solution and should consult regularly with the parties to the dispute.

After considering all arguments from the parties, the Panel should conclude a report and it should forward it to the DSB. The reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.[66] Members who have an

[59] Article 4.8 of the DSU.
[60] Article 4.7 of the DSU.
[61] Article 4. 4 of the DSU.
[62] Article 6.1 of the DSU.
[63] Article 6.2 of the DSU.
[64] Article 6.1 of the DSU.
[65] Article 11 of the DSU.
[66] Article 16 of the DSU.

objection to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.[67]

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[68] Thus, although the panel report contains the findings and conclusions on the ruling and substance of the dispute, it only becomes binding when the DSB adopts it.

3.2.3 The Appellate Body

The AB is established by the DSB in terms of Article 17 of the DSU.[69] Parties to a dispute, which do not accept the Panel's final decision, can appeal to the WTO AB. As a general law, only parties to the dispute, not third parties, may appeal a panel report. However, the DSU legal text states that third parties may make submissions and be given an opportunity by the AB if they have notified the DSB of a substantial interest in the matter before a panel.[70] The third parties' written submissions will be furnished to the parties to the dispute and will be reflected in the panel report.[71]

The AB is viewed as a formidable engine of worldwide economic governance likely the most active and efficient of all international courts, not only in terms of the amount and scope of its decisions, but also in terms of the amount of conflicts that its jurisprudential guidelines have helped to resolve, often outside court.[72]

With regards to its structure, The AB is composed of seven persons, with three individuals administering each case.[73] However, most worryingly, the US has recently declined to agree to the nomination of members, and has even gone so far as to threaten to leave the WTO altogether due to its objections to the AB's decisions and processes. This has reduced the number of panel members from the maximum of seven to the minimum of three. Furthermore, it is predicted that by the end of 2019 there will only be one.[74]

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[67] Article 16.2 of the DSU.
[68] Article 16.4 of the DSU.
[69] Article 17 of the DSU.
[70] Article 17.4 of the DSU.
[71] Article 10.2 of the DSU.
[72] Howse R ' The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) *European Journal of International Law* 76.
[73] Article 17.1 of the DSU.
[74]

The DSU prescribes that the AB shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. It is imperative that the AB be unaffiliated with any government. The AB membership shall be broadly representative of membership in the WTO; and the body cannot not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.[75]

The AB has the authority to modify or reverse the legal findings and conclusions of the panel.[76] The DSU states that, as a general rule, the proceedings shall not exceed 60 days from the date of formal notification of a members decision to appeal to the date that the AB circulates its report.[77]

In instances where the AB cannot provide its report within the prescribed 60 days, it must inform the DSB in writing of the reasons for delay in addition to the estimated period for when the report will be submitted. However, the DSU provides that the proceedings still cannot exceed a maximum of 90 days.[78]

Article 4.9 of the DSU encourages the parties to disputes, panels and the AB to make every effort to accelerate the proceedings to the greatest extent possible in cases of urgency, for example, cases involving perishable goods.[79]

After finishing its report, the AB's report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute, unless the DSB decides by consensus not to adopt the AB report within 30 days following its circulation to the Members.[80]

[75] Article 17.3 of the DSU.
[76] Article 17.3 of the DSU.
[77] Article 17.5 of the DSU.
[78] Article 17.5 of the DSU.
[79] Article 4.9 of the DSU.
[80] Article 4.9 of the DSU.

3.2.4 Surveillance of the Implementation of Recommendations and Rulings

Prompt compliance with recommendations or rulings of the DSB is vital in order to ensure effective resolution of disputes to the benefit of all Members of the WTO.[81] Thus, after the date of the adoption of the AB's report, a DSB meeting must be held within 30 days in which the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB.[82] Particular attention should be paid to dispute settlement proceedings affecting the interests of developing country Members.[83]

If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. According to the Understanding, a reasonable period of time must not exceed 15 months.[84] Furthermore, it is the DSB's duty to supervise the implementation of the adopted recommendations and rulings.[85] Accordingly, if the parties fail to execute recommendations and rulings, written compliances must be reported to the DSB.

3.2.5 Compensation and Suspension of Concessions

If a defending Member fails to comply with the WTO decision within the established compliance period, Article 22 of the Understanding permits the prevailing Member to request that the defending Member negotiate a compensation agreement. According to the DSU, the nature of the compensation is voluntary and shall be consistent with the covered agreements.[86] It is noteworthy that these measures are temporary in nature, and are available in the event that the recommendations and rulings are not implemented within a reasonable period of time.[87] However, the DSU points out that,

> 'Neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.'[88]

[81] Article 21.1 of the DSU.
[82] Article 21.3 of the DSU.
[83] Article 21.2 of the DSU.
[84] Article 21.3 of the DSU.
[85] Article 21.6 of the DSU.
[86] Article 22.1 of the DSU.
[87] Article 22.1 of the DSU.
[88] Article 22.1 of the DSU.

Once the parties to dispute cannot perform pursuant to the recommendations, a demand for compensation or suspension of concessions via negotiation starts between Members in the light of DSU procedures. Moreover, when no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, a request is delivered to the DSB, demanding the DSB authorises suspension of the application to the Member concerned of concessions or other obligations under a WTO Agreement.[89]

Article 22 of the Understanding further requires the DSB to authorise the request within 30 days after the compliance deadline expires; unless the DSB decides by consensus not to do so, or the defending Member requests that the retaliation proposal be arbitrated. In this event, the Understanding stipulates that the arbitrator shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement.[90]

Retaliation most often involves the suspension of GATT tariff concessions — that is, the imposition of tariff surcharges—on selected products from the non-complying Member. However, Smith notes that in some cases, 'that Member may not be a major exporter of goods to the prevailing Member or some or all of the goods that are exported may be critical to the prevailing Member's economy.'[91] Hence, if the non-compliant Member's companies are active service providers or exercise important intellectual property rights in the land of the other Member, the prevailing Member may try to suspend market access obligations under the General Agreement on Trade in Services (GATS) or obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (Agreement on TRIPS). This right is exercised under Article 22.6 of the DSU, which permits the defending Member to object to the level of the proposed retaliation (i.e., that it is not equivalent to the level of trade injury in the dispute).[92]

[89] Article 22.2 of the DSU.
[90] Article 22.7 of the DSU.
[91] Shedd DT & Murrill BJ & Smith JM *Dispute Settlement in the World Trade Organization (WTO): An Overview* CRS Report for Congress (2012) 8.
[92] Article 22.6 of the DSU.

In the Arbitration case of *United States—Subsidies on Upland Cotton*,[93] Brazil argued that, as required under the DSU, suspending concessions on goods alone was not "practicable or effective" and that the circumstances in the case were "serious enough" to permit it to do so. The arbitrator ultimately allowed Brazil to cross-retaliate. However, the arbitrator required that a variable annual threshold tied to the level of US imports into Brazil be exceeded before Brazil could exercise this option. The US and Brazil subsequently entered into an agreement forestalling the imposition of sanctions by Brazil.[94]

Once requested, arbitration is automatic and is to be completed within 60 days after the compliance period ends. After the arbitral decision is issued, the prevailing party may request that the DSB approve its proposal, subject to any modification by the arbitrator. The prevailing Member is not required to request authorisation, nor is the Member required to do so by a given date if it chooses to pursue such a request. Further, even if measures are authorised, the prevailing Member is not required to impose them. If the Member does so, however, the measures may not remain in effect once the offending measure is removed or the disputing parties otherwise resolve the dispute.[95]

3.3 ENFORCEMENT OF WTO DECISIONS

Like any other international law system, the main criticism of the WTO regime is its absence of a direct enforcement mechanism.[96] The WTO does not provide an enforcement mechanism to ensure that the defendant complies with a DSB's ruling. However, if the complainant believes that the defendant does not abide by a ruling, they can use retaliatory measures. The percentage of resolved and unresolved cases in the WTO dispute settlement mechanism, which will be statistically analysed later, can be used as a barometer of how well the system operates.

The WTO DSU requires that in instances of non-compliance, at the end of a reasonable period of time, the complainant can set up retaliatory measures, such as the suspension of concessions

[93] Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871.
[94] Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871.
[95] Shedd DT & Murrill BJ & Smith JM *Dispute Settlement in the World Trade Organization (WTO): An Overview* CRS Report for Congress (2012) 9.
[96] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 3.

and other obligations, against the defendant to prevent continued losses, to induce change, and to deter unlawful behaviour.[97]

Cheng observes that retaliation may play a key position as the ultimate safeguard for complainants against non-compliance, because unwilling respondents can no longer block the dispute settlement process.[98] However, Cheng observes that retaliatory threats bear more weight if they are coming from countries that are richer, due to the fact that they have more influence over the international trade market; and is more credible if the actual retaliation can lead to more welfare losses to the defendant.[99]

Cheng goes on to point out that poorer countries are less capable of making credible threats, because their potential retaliation will have minimal impact on the target market, and can be costly in domestic welfare terms. It is thus not surprising that developing countries have seldom turned to retaliation to enforce dispute settlement decisions against developed countries.[100]

Nwoye contemplates that all of these challenges have provoked critics to advocate for a reform that would make the enforcement system more rigorous, such as, authorising collective retaliation against offending Members, or granting the WTO rules 'direct effect' in domestic courts.[101] Nwoye also cites Magnus's idea of the "three R's" which give defendants incentive to comply in the event of losing:

- Reputation (desire not to be seen as a scofflaw),
- retaliation (authorised by the DSB),
- and possible role reversal (i.e., ability to demand implementation as a victorious complainant in future cases).[102]

Accordingly, the retaliation remedy does not only serve as the most feasible solution of the WTO today, fear of its consequent impact on the economy has often served as an incentive to motivate a Member to comply with its obligations.[103]

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[97] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) (Vol. 3) *Cornell University Press* 9.
[98] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) (Vol. 3) *Cornell University Press* 9.
[99] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) (Vol. 3) *Cornell University Press* 9.
[100] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) (Vol. 3) *Cornell University Press* 10.
[101] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 4.
[102] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 19.
[103] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 19.

It is a requirement that in the event of the use of the retaliation remedy, the prevailing Member must follow DSU procedures in determining the amount of trade retaliation to be imposed. Additionally, the prevailing Member must obtain authorisation from the DSB in accordance with DSU procedures before suspending WTO tariff concessions or other WTO obligations in the event the defending Member has failed to comply.[104]

The effectiveness of retaliatory measures depends on their impact on the economies of both sides and on the amount of trade between the nations engaged in the conflict. It should also be observed that the solution for retaliation is a temporary fix in itself. The greatest drawback is that trade retaliation has a self-punishing nature, as it is usually harmful to the country's interests that do so.

3.4 ARBITRATION AS AN ALTERNATIVE TO WTO ADJUDICATION

Arbitration is an alternative mechanism for dispute settlement and applies to all Members of the WTO. Accordingly, Article 25 of the Understanding distinguishes its predominant judicial settlement system from the secondary mechanisms of third party dispute settlement by the inclusion of the arbitration process. This mechanism is subject to the mutual agreement of the parties. Additionally, the agreement to resort to arbitration must be notified to all parties sufficiently in advance of the commencement of the process.[105]

Arbitral awards are not subject to appeal, and may be enforced by the DSB. The parties to the dispute are thus free to depart from the standard procedures of the DSU and to agree on the rules and procedures they deem appropriate for the arbitration, including the selection of the arbitrators.[106] The parties must also clearly define the issues in dispute. In *US – Section 110(5) Copyright Act (Article 25),* it was the first time since the inception of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU. It was confirmed that

> 'No decision is required from the DSB for a matter to be referred to arbitration under Article 25. In the absence of a multilateral control over recourse to that provision, it is incumbent on

[104] Shedd DT & Murrill BJ & Smith JM *Dispute Settlement in the World Trade Organization (WTO): An Overview* CRS Report for Congress (2012) 10.
[105] Article 25.2 of the DSU.
[106] WTO Official Website 'Dispute Settlement without recourse to Panels and the Appellate Body' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm (accessed 13 January 2019).

the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system....'[107]

Accordingly, a decision by an arbitrator does not require a previous decision from a panel or the AB. The arbitrator arguably exercises greater independence, as the award does not require any formal adoption or approval by the DSB.[108]

It is important to note that the key advantages of arbitration over judicial systems are that it is fast, cheap, and confidential.[109] This was confirmed in *US – Section 110(5) Copyright Act (Article 25)*, where the arbitrators confirmed that arbitration in that case was fully consistent with the object and purpose of the DSU and 'is likely to contribute to the prompt settlement of a dispute between Members, as commanded by Article 3.3 of the DSU.' [110] Additionally, in In *US/Canada – Continued Suspension*, the AB distinguished the alternative means of dispute resolution provided for in Article 25 from adjudication through panel proceedings and concluded that parties to a dispute are not precluded from pursuing consensual or alternative means of dispute settlement foreseen in the DSU. In distinguishing the differences bet ween the two, the AB concluded that in the absence of consent, arbitrational decisions cannot be binding.[111]

In *US – Section 110(5) Copyright Act (Article 25)*, the Arbitrators confirmed that an Article 25 arbitration is an alternative means of dispute settlement.[112] The Arbitrators noted that this is confirmed by the terms of Article 25.4, which provides that 'Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.'[113] Thus, Recourse to Articles 21 and 22 of the DSU is available to implement and enforce the conclusions of these arbitration awards.

[107] Award of the Arbitrators, US – Section 110(5) Copyright Act (Article 25), para. 2.1.
[108] Article 25.3 of the DSU.
[109] Bondurant S 'A Practitioners Guide: An Overview of the Main International Arbitration Tribunals' (2007) *South Carolina Journal of International Law and Business* 22.
[110] Award of the Arbitrators, US – Section 110(5) Copyright Act (Article 25), para. 2.5.
[111] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 340.
[112] Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25),* para. 2.3.
[113] Article 25.4 of the DSU.

3.5 CONCLUSION

The dispute settlement process provides parties with ample opportunity to rectify their violation. This is first done through consultation. If consultation does not work, there is a panel that will make a decision on the case before them. If the parties do not accept the panel's final decision, they may appeal to the AB. After the DSB adopts a report of a panel and the AB, the conclusions and recommendations contained in that report are binding upon the parties to the dispute. However, compensation and suspension of concessions/countermeasures are only temporary alternatives that do not resolve the dispute.

It is a quasi-judicial system because political factors usually affect the dispute, and because disputes are channelled exclusively through Member governments and not the private sector. Virtually every aspect of economic regulation and policy is touched upon at least potentially, if not actually, and is already imposing obligations on 153 nations comprising 93% of world trade.[114]

Although many WTO rulings have been satisfactorily implemented, difficult cases have tested DSU implementation articles, highlighting deficiencies in the system and prompting suggestions for reform. There is no doubt that the new system has improved upon its predecessor, with stricter timeframes and repercussions for non-complying members. Aggrieved Members are now backed by the legal text of the DSU in the implementation of compensation and suspension of concessions. The Understanding has even gone so far as to establish arbitration as an alternate method of recourse for those who do not want to be embroiled in adjudication.

The process sounds 'air-tight' in theory; but in practice, the adherence to time frames, lack of enforcement of rulings and recommendations, and the costs involved in a dispute show that serious reform is needed. The next Chapter will observe how WTO Members have made use of the above procedures, by providing a statistical analysis of cases since the inception of the WTO Agreement. It will analyse whether Panels and the AB are in fact following the strict timeframes placed upon them by the DSU and analyse whether rulings are being enforced effectively.

[114] El-Taweel K *The WTO Dispute Settlement Understanding: How can Africa make better use of the system?* (unpublished LLM thesis, University of Pretoria, 2010) 22.

CHAPTER 4: WORLD TRENDS IN USING THE WORLD TRADE ORGANISATION'S DISPUTE SETTLEMENT UNDERSTANDING

4.1 INTRODUCTION

As highlighted above, the procedure for dispute resolution within the context of WTO disputes is stringent in theory; however theory is not always executed as intended, which will be demonstrated below.

It cannot be argued that the WTO is one of the fastest expanding international organisations in terms of Members and mandate. Its Members have increased very significantly since the inception of the GATT. Currently, there are 164 Members of the WTO, of which, over three-quarters are developing or least-developed countries.[115] In 47 years of operation under the GATT's DSS, only 432 disputes were initiated, out of which 188 panels were established, and 150 panel rulings were issued.[116] Since the WTO was established, more than 400 panel reports, AB reports and arbitral awards or decisions were circulated to advance the settlement of the 573 disputes referred to the DSB by WTO members. Over the same period, the DSB, which oversees the WTO's dispute settlement activity, met more than 400 times.[117]

This Chapter provides a statistical analysis of how the WTO's DSS has been put to use. It scrutinises the most frequent users of the system, the average length of procedures and compliance with DSB rulings. It also examines the various obstacles some members face when aiming to make use of the mechanism.

4.2 STATISTICAL ANALYSIS

As the number of cases in the WTO's DSS has increased there has been an increasing effort by the academic community to analyse the statistics for emerging trends within the use of the system.

Torres insists that one of the Uruguay Round's penultimate achievements was to 'ensure that

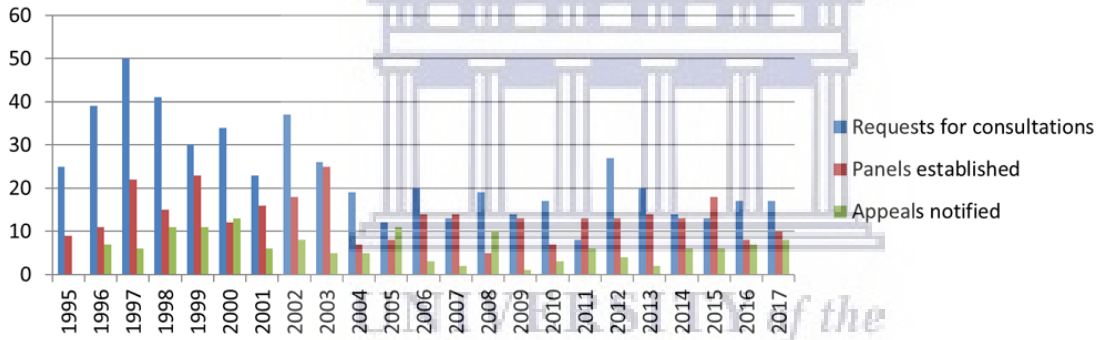
[115] WTO Official Website ' The WTO can help countries develop' available at https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm (accessed 4 January 2019).
[116] El-Taweel K *The WTO Dispute Settlement Understanding: How can Africa make better use of the system?* (unpublished LLM thesis, University of Pretoria, 2010) 40.
[117] WTO Official Website 'Dispute settlement activity – some figures' available at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 4 January 2019).

the decisions of the DSB are binding on all Member countries and adopted in accordance with the principle of negative consensus'[118] and lauds that the WTO has moved to a functional legal framework in which precedent is created and practices are consistent.[119]

4.2.1 The Most Frequent Users of the Dispute Settlement System

As a starting point for analysis, it is important to examine the statistics on the use of the WTO Dispute Settlement Mechanism in its 20 years of operation. Since 1995, over 535 disputes have been brought to the WTO, initiated by 50 Members, in relation to 20 WTO agreements. Not all of these disputes have required formal rulings to resolve them. A mutually agreed solution is always the preferred outcome, and consultations among disputing Members within the framework of WTO dispute settlement can often be sufficient to resolve the matter in dispute.[120]

Figure 1 – Number of requests for consultations, panels established and appeals notified (1995-2017)[121]



The early days of the WTO's DSS were dominated by a spill over of unfinished disputes that arose under the GATT. The above figure shows that as of 31 December 2017, a panel had been established in respect of 308 disputes (that is, in around half of all disputes initiated). This led to panel reports in 235 of these disputes (not all cases in which a panel is established result in a panel report as the parties might settle their dispute even after a panel has been established). This was followed by an appeal in 156 disputes (that is, an appeal was notified in 60 per cent

[118] Torres R (2012) 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 2.
[119] Torres R (2012) 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 2.
[120] WTO Official Website 'Dispute settlement activity – some figures' available at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 4 January 2019).
[121] WTO Official Website 'Dispute settlement activity – some figures' available at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 4 January 2019).

of all cases in which a panel report was circulated in the original proceedings).[122]

Table 1 – The Ten Most Active Users (1995-2017)[123]

Member State:	As Complainant	As Respondent	Complainant + Respondent	As Third Party
United States	114	130	244	140
European Union[24]	97	84	181	165
Canada	35	20	55	119
China[25]	15	39	54	139
India	23	24	47	128
Brazil	31	16	47	111
Argentina	20	22	44	60
Japan	23	15	38	170
Mexico	24	14	38	82
Korea	17	16	33	112

The above table shows that the US and the European Union are by far the biggest users of the system, almost 4-5 times more than the next biggest users, Canada, China, India and Brazil. It also shows, that out of the ten most active users, four are defined as developed countries (US, EU, Canada and Japan), accounting for more than 66% of the total cases of these ten users.[124]

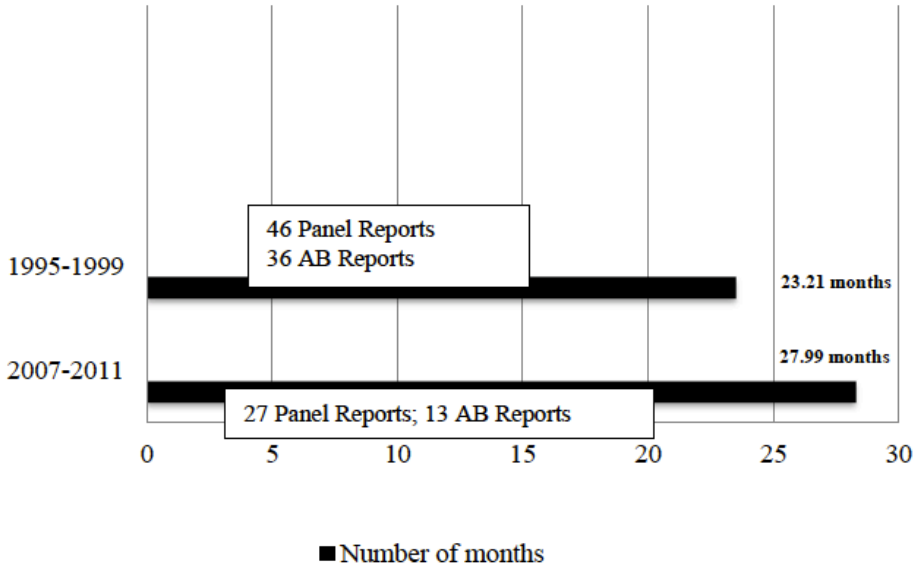
From this table, it can be deduced that developed countries are the most frequent users of the system, followed by developing countries. It seems that richer countries use the system more than poor ones, alluding to the fact that there is some kind of entrance barrier for Least Developed Countries, which is discussed further below.

4.2.2 The Length of Dispute Settlement Procedures

An important component of a DSS's effectiveness is the time that it takes for it to resolve a dispute. When the DSU was first drafted, it was highlighted in the Understanding that prompt settlement of disputes is 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.'[125] The timeline of the dispute settlement process, was highlighted in the previous chapter. The table below examines the actual duration of dispute settlement procedures:

[122] WTO Official Website 'Dispute settlement activity – some figures' available at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 4 January 2019).
[123] WTO Official Website 'Dispute settlement activity – some figures' available at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 4 January 2019).
[124] WTO Official Website 'Dispute settlement activity – some figures' available at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 4 January 2019).
[125] Article 3.3 of the DSU.

Figure 2 – Duration of DSU procedures[126]



The above figures show that from the outset; the WTO dispute system was unable to resolve disputes within the timeframe stipulated in the DSU text. The average duration from consultations request to adoption was much longer than the maximum 15-19 months prescribed by the DSU for a process including an AB appeal. From 1995-1999, the average dispute took 23.21 months.[127] From 2007-2017, the average dispute took 28 months.[128] As seen above, the delay in resolution of disputes is actually taking longer –worryingly, this is despite the fact that the system is dealing with less cases than in the early years.

Thus the system is increasingly unable to fulfil its objective of prompt settlement of disputes. The main case of this deterioration is due to the multiple delays in proceedings due to the lack of experienced lawyers in the Secretariat, unavailability of panelists and the lack of translation services within the WTO.[129] If member states are unwilling to approve the hiring of more experienced lawyers and more translators to support the DSS, the problem is likely to persist. Additionally, the length of panel and AB reports, and the lack of restrictions on the length of submissions and number of exhibits that parties may submit needs to be addressed.[130]

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[126] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 22.
[127] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 23.
[128] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 23.
[129] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 23.
[130] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 23.

4.3 COMPLIANCE WITH DISPUTE SETTLEMENT BODY RULINGS

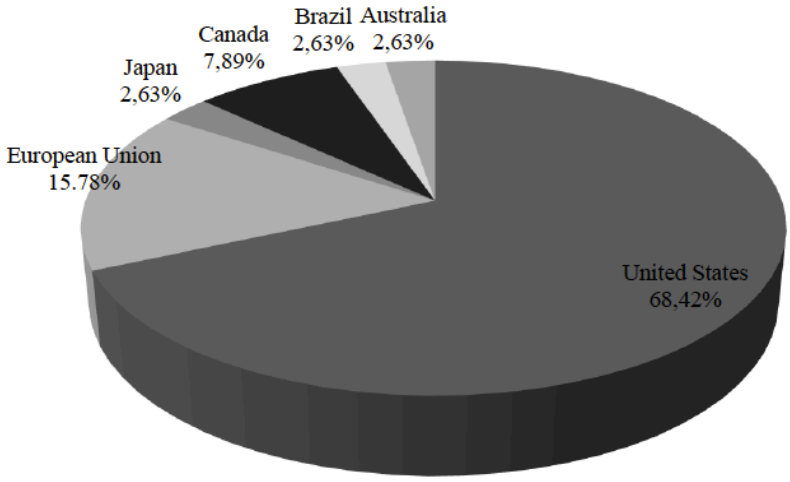
In determining the world trends in using the DSS, it is important to present findings with regards to the compliance patterns of the DSS. The Understanding stipulates 'Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.'[131]

As previously stated, a dispute settlement panel, or, in the case of an appeal, the AB can recommend that the losing Member state brings the non-conforming measure into conformity with the relevant WTO agreement.[132] Such a recommendation will be deemed to have been adopted automatically by the DSB within 60 days of the date that the panel report was circulated to WTO Members. That is, provided that the panel report has not been appealed.[133] In the case that the Member concerned fails to bring the measure into compliance, the affected Member state can introduce retaliatory trade sanctions,[134] which must be authorised by the DSB[135] and must be consistent with the impairment caused by the non-compliance.[136] If a member state that has lost in a dispute settlement procedure continuously fails to comply with the DSB ruling, the prevailing member state may decide that the only way to induce compliance is to ask for suspension of concessions.

In the period between 1995 and 2015, a total of 38 suspension requests were submitted to the DSB. Reich notes that during this period, the non-compliance rate was at 20%, which is not an insignificant percentage, as it is not proportionally distributed among all member states, which we can observe in the figure below:

[131] Article 21.1 of the DSU.
[132] Article 19.1 of the DSU.
[133] Article 16.4 of the DSU.
[134] Article 21.5 of the DSU.
[135] Article 22.4 of the DSU.
[136] Article 22.4 of the DSU.

Figure 3 – Targets of Suspension Requests[137]



Reich describes suspension requests as the 'last station' of the WTO dispute settlement procedures. They reflect the unwillingness of the targeted Member State to submit and comply with its global commitments to the scheme. Suspension of concessions is not a complainant's objective, but simply a last resort means to cause the other party to honor its obligations and to retain the trade liberalisation agreement integrated in the WTO-based Marrakesh Agreement.[138]

Torres observes that one of the obstacles that has received the most attention in academic circles and discussions within the WTO has been the alleged inability of developing countries to enforce compliance with DSB recommendations.[139] Possible reasoning for this inability is that when there is a substantial difference in size between the economy of the developing country and that of the losing country, the effectiveness of retaliation as an instrument of pressure to enforce compliance is questionable.

The obstacle of enforcing compliance with WTO recommendations is largely theoretical, as has been demonstrated in practice by the high level of compliance manifested up to now in the DSS and can be seen in the figures above. However, the theoretical reasons for this obstacle have a solid basis and there is only a small step between theory and practice in this case.[140]

[137] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 18.
[138] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 18.
[139] Torres R 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 16.
[140] Torres R 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 18.

Additionally, the use of delay tactics employed by members when losing a case not only allows them to reap the trade benefits during this period, but also raises the cost of enforcement, thus deterring other member states from initiating dispute settlement procedures against it.[141]

4.4 OBSTACLES TO DEVELOPING COUNTRY PARTICIPANTS

Currently, there are certain properties of WTO remedies that reduce the incentives for filing an official complaint for an inconsistent measure. One could say that based on these statistics, Shafer points out that the following factors could arguably affect Developing Countries and Least Developed Countries (LDC) to a greater extent:

First, WTO panels word their rulings as general recommendations, which results in a degree of ambiguity. In turn, this benefits Members with greater bargaining leverage in the negotiations that follow said ruling whilst adversely affecting those with smaller stakes.[142]

Second, the primary mechanism for enforcement is the retaliation remedy, which relies on market power. Consequently, developed countries can put pressure on developing countries to comply with WTO rules and DSU rulings because access to their large markets is crucial to developing country exporters.[143]

Third, the current system's remedies appear to be only prospective, thus allowing Members to drag out legal cases without any real consequences. Remedies cover losses incurred 'commencing as of the date of [expiration of the period for compliance with an adopted report], and not as of the date of violation (or alternatively, the date of the filing of a complaint or of the formation of a panel).'[144]

In supporting Shafer's view, Torres points out additional obstacles for developing countries: First, owing to the complexity of the procedure and the possibility of it having to encompass various stages, initiating a WTO dispute is a costly exercise in terms of both time and money.[145]

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[141] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 16.
[142] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 21.
[143] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 21.
[144] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 21.
[145] Torres R 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 9.

As developing countries lack the expertise and capacity for litigation, they find themselves obliged to hire external counsel, which can be extremely costly. Various critics have estimated that the costs of initiating a dispute in the WTO are in the region of US$500,000.[146] A number of developing countries have proposed the creation of a Dispute Settlement Fund for developing countries. It has also been proposed to introduce a system of payment of litigation costs for developing countries that prevail in a dispute.[147]

Second is the fear of political and economic pressure on the part of respondent countries, particularly if they have a higher level of development and are major trading partners or aid donors to the developing countries.[148]

With the above in mind, it must be noted that defining one's self as a developed or developing country is purely discretionary. On the other hand, LDC status is not self-declaratory. It is based on objective criteria of gross national income per capita, a human resources weakness criterion, and an economic vulnerability criterion, which is determined by the United Nations.[149]

4.5 CONCLUSION

The system has until now been very busy, which suggests that Member states have confidence in the ability of the system to resolve disputes and to uphold their rights entrenched in the WTO agreements. At the same time, the system is far from perfect and there is a keen interest to improve its effectiveness and solve some problems that have emerged.

As Shafer points out, the aggregate of a WTO Member's exports and imports appears to be the best predictor of a WTO Member's use of the system.[150] Larger and wealthier Member states are much better-positioned to take advantage of the resource demanding procedures of the WTO's legal system; thus the question remains whether the process is neutral in its operation.

The aforementioned statistics show that the US and EC remain by far the principal users of the

[146] Torres R 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 10.
[147] Torres R 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 10.
[148] Torres R 'Use of the WTO trade dispute settlement mechanism by the Latin American countries — dispelling myths and breaking down barriers' (2012) *WTO Staff Working paper* 12.
[149] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 7.
[150] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 3.

WTO legal system, and thereby are most likely to advance their larger systemic interests through the judicial process. Although their proportion of total WTO complaints has slightly wilted in the last few years, they continue to be the system's predominant users.[151]

Conversely, Developing countries, and in particular least-developed countries, are less likely to participate actively in WTO litigation due to the lack of benefits and huge costs involved in making use of the WTO's DSU. As the research suggests, developing countries, which constitute about 53 per cent of all WTO Member States, account for only about 40 per cent of complainants, and even less of respondents. What is most concerning, however, is that Least Developed Countries are almost absent participants in procedures.[152] Shafer notes that developing countries' exports have a reduced aggregate value and range, resulting in reduced aggregate stakes in WTO complaints. As a result, they would profit less usually from a successful claim.[153]

On the cost side, Shafer expresses that developing countries have less domestic legal capacity into which they can tap when needed. One option put forward is for these Members to hire foreign legal counsel; however, the law firms are expensive. Therefore, for most developing countries, the prospective benefits from litigation are less likely to exceed the costs of litigation.[154] Although legal expenses have been rising for all WTO Members, there is no doubt that the costs for litigation are way more hard hitting for developing countries and least-developed countries.

Based on the notion that the effectiveness of a DSS is also determined by the time it takes to resolve a dispute, the research demonstrations that the average duration from the request for consultations to adoption of the DSB recommendations was much longer than the maximum period prescribed by the DSU.

The next Chapter will examine the overall advantages and disadvantages of the DSS, with specific reference to the key structural and procedural issues; and the possible areas of improvement with regards to implementation of rulings going forward.

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[151] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 5.
[152] Reich A 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) *SSRN Electronic Journal* 30.
[153] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 17.
[154] Shaffer G 'Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View' (2005) 17.

CHAPTER 5: ADVANTAGES AND DISADVANTAGES OF THE DISPUTE SETTLEMENT SYSTEM

5.1 INTRODUCTION

As demonstrated in the previous Chapter, the WTO's DSS is one of the busiest of its kind. While this no doubt reflects its success, the system is far from perfect, and has drawn criticism both from within and outside the ranks of its users. As will be discussed in further detail, there are various advantages to the current model of the WTO's DSS; however, there are also some major drawbacks.

This chapter will examine these advantages and disadvantages in relation to the overall process, while ultimately stressing the effectiveness of the panels' final decisions. It will then focus on the areas of improvement, which the WTO eventually needs to address, to ensure a concise process with effective implementation of rulings by the Dispute Settlement Panel.

5.2 ADVANTAGES AND DISADVANTAGES OF THE CURRENT DISPUTE SETTLEMENT MECHANISM

As previously stated, the WTO's DSS has generally been regarded as one f, if not the most effective dispute settlement mechanisms for international disputes. While some believe that the DSS leads to successful settlement disputes between Member States, others believe that it is more geared towards producing political outcomes rather than judicial ones.[155]

Scholars such as Jackson have acknowledged that the DSU has been successful in transforming the multilateral trading system since the GATT, and in bringing certainty to the overall dispute settlement process since its implementation in 1996.[156]

[155] Rissy YW 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) *Jurnal Studi Pembangunan Interdisiplin* 86.
[156] Rissy YW 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) *Jurnal Studi Pembangunan Interdisiplin* 90.

5.2.1 Advantages of the Dispute Settlement System

One of the major advantages to the WTO's DSS is that it is faster and more automatic than the old GATT system.[157] Prior to the WTO, dispute resolution on the international scene was much slower and less developed. Globalisation has facilitated the need for improved resolution to handle the increasing likelihood of disputes, as the world continually becomes a smaller place to live.[158]

Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Currently, WTO panel decisions are adopted automatically, and can only be blocked if there is consensus to reject a ruling.[159] Despite such structure, it remains flexible in having consultation and mediation as available remedies, thereby allowing Member states to come to solutions by themselves.[160] The common belief is that the WTO's ability to enforce decisions is due to the willingness of Member States to maintain and partake in the international trading order; accordingly compliance with the dispute resolution mechanisms is effectively voluntary.[161]

The DSS makes clear judgments about which party is right and which party is wrong; it is the exclusive mechanism for resolving disputes. It is crucial to note that WTO panel and AB decisions are binding on the parties and can only be demolished by the unanimous consensus of the Member States.[162]

5.2.2 Disadvantages of the Dispute Settlement System

Throughout the history of the WTO DSS, several issues have been raised as potential impediments to the efficient and effective operation thereof: the costs and technical capabilities associated with initiating and litigating a dispute, transparency-related issues, security and

[157] Kula CJ 'The Advantage of Utilizing the WTO as a Global Forum for Environmental Regulation' *Journal of International Business and Law* 102.
[158] Kula CJ 'The Advantage of Utilizing the WTO as a Global Forum for Environmental Regulation' *Journal of International Business and Law* 119.
[159] Kula CJ 'The Advantage of Utilizing the WTO as a Global Forum for Environmental Regulation' *Journal of International Business and Law* 103.
[160] Kula CJ 'The Advantage of Utilizing the WTO as a Global Forum for Environmental Regulation' *Journal of International Business and Law* 103.
[161] Kula CJ 'The Advantage of Utilizing the WTO as a Global Forum for Environmental Regulation' *Journal of International Business and Law* 119.
[162] Rissy YW 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) *Jurnal Studi Pembangunan Interdisiplin* 90.

predictability of the system, as well as the implementation phase of the dispute settlement process.[163]

However, Rissy notes that the WTO's DSS also has some downsides; noting that one of the most challenging things is the capacity to get a definitive WTO ruling that encourages the parties to the dispute to achieve negotiated settlements and that the risk of retaliation facilitates adverse WTO rulings.[164] It is also important to note that the WTO DSS is a closed dispute settlement model in which the public can not engage directly in dispute settlement proceedings. Consultations and panel proceedings are confidential, opinions expressed by panellists remain anonymous, and parties are bound to respect any document's confidentiality.[165]

Other shortcomings of the WTO arbitration style are the unenforceability of decisions, issues of economic and political inequality between the Members, and the lack of remedy reparation. Regarding the enforceability of decisions, Rissy quotes Pauwelyn, who declares, "the proliferation of rules and the associated 'legalization' of dispute settlement have not been paired with a strong enough enforcement mechanism."[166] In other words, Pauwelyn believes that the enforcement system is not powerful enough.

Additionally, the reactivation of power politics makes compliance very difficult to accomplish in terms of financial and political inequality between Members. It must be noted that only a small group of powerful countries can be expected to effectively use the retaliation remedy. It is also worrisome that the prospective nature of current WTO remedies does not give countries incentives to comply hastily and may even encourage foot dragging.[167]

The DSB's surveillance continues (even where compensation has been agreed or obligations have been suspended) as long as the recommendation to bring a measure into conformity with the covered agreements has not yet been implemented. However, The DSU is also silent on

[163] Gorbyles 'Retaliation under the WTO Agreement: The "Sequencing" Problem' (2013) *The Estey Centre Journal of International Law and Trade Policy* 119.
[164] Rissy YW 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) *Jurnal Studi Pembangunan Interdisiplin* 91.
[165] Rissy YW 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) *Jurnal Studi Pembangunan Interdisiplin* 91.
[166] Rissy YW 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) *Jurnal Studi Pembangunan Interdisiplin* 91.
[167] Davey WJ 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 124.

how authorised retaliation is to be terminated in the event a defending Member believes that it has complied in a dispute.[168]

5.3 CURRENT ISSUES IN THE WTO

Although the WTO system for resolving trade disputes between WTO Members is considered a remarkable success in many respects; the current procedures can undoubtedly be further improved.

5.3.1 The issue of Institutionalism

All legal systems have some mechanism for political control. This institutional imbalance was acknowledged in the early stages of the WTO, and proposals to strike a distinct equilibrium between political control and adjudicator independence have been made over the years. But nothing has been done to rectify the situation.[169]

The proposal by the EC to move from the current system of ad hoc panellists to a system of permanent panellists is well documented. According to the EC, such a change will lead to faster procedures and increase the quality of the panel reports.[170]

Ziemblicki, argues that it would not cause any harm to strengthen the legitimacy of the DSU by establishing standing panel(s) or decreasing Members' influence on tenure of the AB members.[171] Similarly, experts have advocated that DSU reform should bring in a parallel panel of economic experts, to rule on the economic issues of the case within the legal framework set by the arbitrators. This would give all parties involved a clearer understanding of the consequences of the dispute, because even though it is settled by the judicial branch of the WTO, this process concerns not only legal matters, but first and foremost the trade and economic issues. [172]

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[168] Grimmett JJ *Dispute Settlement in the World Trade Organization (WTO): An Overview* CRS Report for Congress (2009) 7.
[169] McDougall R 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function' (2018) *Centre for Internatonal Governance Innovation* 12.
[170] World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].
[171] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 209.
[172] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 213.

Additionally, the answer to restoring balance and enhancing legitimacy lies in strengthening collective political oversight of disputes. This includes increasing political control over the launch and finalisation of certain disputes, or certain stages of disputes, or increasing the chances of political override of the results of adjudication.[173]

These changes would deprive WTO members of the chance to interfere with the functioning of the AB, but do not address the underlying legitimacy concerns in themselves and would likely just divert the pressure elsewhere.[174]

5.3.2 The "Sequencing Issue"

While many WTO rulings have been satisfactorily implemented, challenging cases have tested DSU implementation articles, highlighting significant deficiencies in the system. One of the contentious issues arising in implementing the DSS is the relationship between Article 21.5 and Article 22.2 of the DSU. The issue is which of the two procedures, if any, has priority: namely, compliance review or suspension of concessions.[175]

The sequencing issue first occurred in the *EC-Bananas* dispute.[176] In this dispute, the EC had lost a dispute in which Ecuador, the US, and other complainants were challenging the EC banana regime.[177] During the compliance stage, the EC and Ecuador had separately requested the establishment of panels under Article 21.5 of the DSU to determine whether measures implemented by the EC were consistent with the DSB's recommendations. Since there is no requirement for a multilateral determination of non-compliance under Article 21.5 before retaliation can be requested under Article 22.6, the US requested Article 22.6 authorisation to suspend concessions to the EC before the compliance of the measures could be determined under Article 21.5.[178] This case highlighted the necessity for creating a sequence between the

[173] McDougall R 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function' (2018) *Centre for Internatonal Governance Innovation* 14.
[174] McDougall R 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function' (2018) *Centre for Internatonal Governance Innovation* 14.
[175] WTO Official Website 'The process – stages in a typical WTO dispute settlement case' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm* (accessed 11 January 2019).
[176] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC.
[177] WTO Official Website 'The process – stages in a typical WTO dispute settlement case' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm* (accessed 11 January 2019).
[178] WTO Official Website 'The process – stages in a typical WTO dispute settlement case' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm* (accessed 11 January 2019).

two Articles. The parties finally managed to reach an agreement, which initiated the procedures under Article 21.5 and Article 22.2 of the DSU simultaneously.[179]

In subsequent cases, the parties have reached an 'ad hoc agreement' on the sequencing of procedures under Article 21.5 and Article 22 of the DSU. In certain instances, the parties to a dispute have agreed to initiate the procedures under Article 21.5 and Article 22 simultaneously and then to suspend the retaliation procedures under Article 22 until the completion of the Article 21.5 procedure, the most specific examples being that of *Canada – Dairy*[180] and *US - FSC*.[181] In other cases, the parties have agreed to initiate the procedures under Article 21.5 before resorting to the retaliation procedures under Article 22 with the understanding that the respondent would not object to a request for authorisation of suspension of concessions under Article 22.6 of the DSU because of the expiry of the 30-day deadline for the DSB to grant this authorisation, a notable example of this 'sequencing agreement' was seen in *United States – Measures Relating to Zeroing and Sunset Reviews*.[182] In the context of the DSU negotiations, a number of Members have stated that they attach priority to this issue and that the bilateral agreements that have been concluded between parties should be formalised, in the interest of certainty and predictability.[183]

The existing DSU text contains obvious ambiguities and drafting errors need to be amended. Gorbyles observes that it would be desirable to include provisions stipulating clear rules with a precise time frame that prevents any 'loop' in the litigation in the future.[184] However, attempts to find a solution to this issue through an authoritative interpretation or amendment of the DSU have thus far been unsuccessful in previous DSU review negotiations.[185]

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[179] WTO Official Website 'The process – stages in a typical WTO dispute settlement case' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm (accessed 11 January 2019).
[180] Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2.
[181] Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2.
[182] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW.
[183] *TN/DS/W/1 by the European Communities; TN/DS/W/8 by Australia; TN/DS/W/9 by Ecuador; TN/DS/W/11 by The Republic of Korea; and concept paper by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Japan, Republic of Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela on "Remedying the Dispute Settlement Understanding's Articles 21.5/22 'Sequencing Issue"; Job(02)/45, dated 27 May 2002.*
[184] Gorbyles S 'Retaliation under the WTO Agreement: The "Sequencing" Problem' (2013) *The Estey Centre Journal of International Law and Trade Policy* 124.
[185] WTO Official Website 'The process – stages in a typical WTO dispute settlement case' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm (accessed 11 January 2019).

5.3.3 The Issue of Transparency

It is a general consensus by Matushita, Schoenbaum and Mavroidis that there is also a need to improve the WTO's external transparency. This is on the basis that public disclosure of the WTO's business would promote public understanding of the benefits of trade and the complex issues that must be decided.[186] Previously, the EC and Canada submitted a proposal to allow panel meetings and AB hearings to be open to the public (if the parties to the dispute agree).[187]

Sanford notes that problems of non-transparency arise in the context of WTO dispute settlement in a number of ways. These include: non-access by interested WTO Members or non-governmental stakeholders to proceedings; non-access (or access that is not timely) to reports or other dispute settlement documents; lack of understanding of the functioning of the system and the significance of certain elements by either interested WTO Members, other stakeholders, or both; and the impenetrability of complex and lengthy reports or other dispute settlement documents.[188]

A contentious question has been whether panels and the AB can accept and consider amicus curiae submissions they obtain from entities that are not a party to the dispute or a third party. At present, neither the DSU nor the Working Procedures for Appellate Review specifically address this issue; however, According to the AB, the panels' comprehensive authority to seek information from any relevant source permits panels to accept and consider or to reject information and advice, even if submitted in an unsolicited fashion. Therefore, interested entities, which are neither parties nor third parties to the dispute, have no legal right to be heard by a panel, but may submit advice nevertheless.[189]

Transparency is a crucial component in promoting the legitimacy and credibility of the WTO DSS. Internal transparency helps ensure that the process is perceived as valid by Member

[186] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 15.
[187] Communication from the European Communities, TN/DS/W/1, dated 13 March 2003, 6; and Communication from Canada, TN/DS/W/41, dated 24 January 2003, 5.
[188] Sandford I 'The Importance of Transparency in WTO Dispute Settlement' (2007) *Lowy Institute Conference on Enhancing Transparency in the Multilateral Trading System* 7.
[189] WTO Official Website 'Participation in dispute settlement proceedings' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm (accessed 6 June 2019).

governments. More importantly, external transparency helps secure understanding and support amongst affected stakeholders.[190]

Transparency generally helps ensure that the system operates in a robust and proper fashion, and avoids any inkling of corruption.[191] However, some WTO Members are highly sceptical about the appropriateness of opening up the process to influences outside of the WTO membership itself.[192] The General Council of the WTO has previously discussed the matter in a special meeting when the majority of WTO Members that spoke considered it unacceptable for the AB to accept and consider amicus curiae briefs.[193]

In addition, as transparent reasoning and wide availability of reports have encouraged lively critiques of panel and AB decisions, panels and the AB have become ever more cautious in reasoning their reports; resulting in timeframes prescribed by the DSU not being met.[194]

In addition to the previously mentioned proposal for open hearings, a number of proposals have been made in that context to address internal and external transparency issues, such as proposals for

- more timely access to submissions and better access to documents for third parties;
- webcast hearings;
- the opportunity for Members to observe proceedings, or to join proceedings at the Appellate Stage
- Publication of submissions, or the creation of a publicly accessible registry of dispute settlement filings.[195]

[190] Sandford I 'The Importance of Transparency in WTO Dispute Settlement' (2007) *Lowy Institute Conference on Enhancing Transparency in the Multilateral Trading System* 7.
[191] Sandford I 'The Importance of Transparency in WTO Dispute Settlement' (2007) *Lowy Institute Conference on Enhancing Transparency in the Multilateral Trading System* 5.
[192] Sandford I 'The Importance of Transparency in WTO Dispute Settlement' (2007) *Lowy Institute Conference on Enhancing Transparency in the Multilateral Trading System* 9.
[193] WTO Official Website 'Participation in dispute settlement proceedings' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm (accessed 6 June 2019).
[194] Sandford I 'The Importance of Transparency in WTO Dispute Settlement' (2007) *Lowy Institute Conference on Enhancing Transparency in the Multilateral Trading System* 9.
[195] Sandford I 'The Importance of Transparency in WTO Dispute Settlement' (2007) *Lowy Institute Conference on Enhancing Transparency in the Multilateral Trading System* 10.

5.3.4 The Issue of Judicial Overreach

Judicial overreach occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the executive and/or the legislature's mandate. For the past few years, US officials have blocked appointments of AB members to force WTO members to negotiate new rules that limit the scope for judicial overreach and address other US concerns.[196] These concerns fall into three categories: certain substantive interpretations of WTO adjudicative bodies; certain systemic approaches adopted by these bodies, especially the AB; and certain procedural actions of the AB that the US considers to be beyond its authority.[197]

As previously stated, the AB is instructed not to add or diminish the rights and obligations of WTO members contained in the WTO agreements. It should not create law for WTO members and should not become a substitute for multilateral negotiations.[198] While the AB serves as a review on WTO panel decisions, the US has pointed out that there is no effective review on AB decisions.[199]

The US criticism of judicial overreach dates back almost two decades to the AB ruling in the *US – FSC*.[200] The AB ruled that the US Foreign Sales Corporation (FSC) tax program provided illegal subsidies to US firms. Additionally, The AB rejected the US argument that the 1981 Understanding of the GATT Council—an understanding that paved the way for the FSC tax—constituted an authoritative interpretation of subsidy obligations under Article XVI:4 of the GATT.[201]

WTO members have failed to negotiate regulatory updates, including dispute settlement regulations themselves. The WTO AB is therefore increasingly called upon to make decisions on ambiguous or incomplete WTO rules.[202] Its interpretations of such provisions have provoked charges by members, and in particular the US, that binding AB rulings, which establish

[196] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 1.
[197] McDougall R 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function' (2018) *Centre for Internatonal Governance Innovation* 8.
[198] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 2.
[199] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 4.
[200] Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2.
[201] Payosava Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 4.
[202] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 1.

precedents for future cases, effectively circumvent the Member States' prerogative of revising the WTO rules and thereby undermining the national sovereignty of WTO members. [203]

Because of its objections to the decisions and processes of the WTO's AB, the US has declined to agree to the nomination of members, and has even gone so far as to threaten to leave the WTO altogether. This has reduced the number of panel members from the maximum of seven to the minimum of three. Furthermore, it is predicted that by the end of 2019 there will only be one. This will mean that the body will be unable to function and that there will be no enforcement mechanism of WTO rules; accordingly, aggrieved members would then lose their legal rights under the WTO rules.[204]

Thus, failure to address this crisis risks returning the world trading system to a free-for-all power-based scheme, enabling significant trading players to behave unilaterally and use retaliation to get their way.[205] Without the DSU's rules and procedures, disputes between significant trade players, such as the US and China, could intensify into a trade war.[206]

Although any WTO member can nominate its candidate to the AB, according to an unwritten tradition some seats are virtually 'reserved' for major powers, including the US and the European Union.[207]

Most recently, African countries have joined the list of nations wanting an end to a US veto on judicial appointments at the WTO, meaning a large majority of Members now openly oppose the US position.[208] The African group has gone so far as to call on members to fill the vacancies on the AB immediately. Like the European Union, the African Group has also put forward several rule changes, including increasing the number of AB members from seven to nine, introducing non-renewable seven-year terms, allowing members to finish ongoing cases for two years after their term, and giving them longer to complete each case. It has also

[203] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 11.
[204] Ensor L 'Red lights are flashing for WTO' available at *https://www.businesslive.co.za/bd/national/health/2019-06-03-red-lights-are-flashing-for-wto/* (accessed 20 June 2019).
[205] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 1.
[206] Erasmus G 'The Crisis in WTO Dispute Settlement' available at *https://www.tralac.org/blog/article/13530-the-crisis-in-wto-dispute-settlement.html* (accessed 20 June 2019).
[207] Payosova T, Hufbauer GC, Schott JJ 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) *Peterson Institute for International Economics* 2.
[208] Reuters 'African nations join majority in opposing US blockage at WTO' available at *https://m.polity.org.za/article/african-nations-join-majority-in-opposing-us-blockage-at-wto-2019-06-26* (accessed 28 June 2019).

recommended launching the selection of new judges automatically at least three months before an incumbent's term ends.[209]

5.3.5 The Standard of Review

To date the WTO has failed to provide clear and predictable principles to govern the standard of review. As a result, the outcome of individual cases cannot be predicted correctly by member states and panels.

Article 11 of the DSU establishes the standard of review in WTO disputes and states that 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.'[210]

As to the establishment of the facts in a case, there has been no determination on whther the objective assessment contained in the DSU legal text is understood to mandate a de novo review, or a total deference to domestic authorities so far.[211] Identifying the appropriate standard of review requires a determination as to whether the authority to approve certain decisions lies with the Member State or the judicial organs of the WTO. A deferential standard leaves that authority substantially with the state, while a de novo standard gives the panel that authority.[212] Obtaining an effective determination on the standard of review will go a long way to saving parties legal costs and will be time efficient.

[209] Reuters 'African nations join majority in opposing US blockage at WTO' available at https://m.polity.org.za/article/african-nations-join-majority-in-opposing-us-blockage-at-wto-2019-06-26 (accessed 28 June 2019).
[210] Article 11 of the DSU.
[211] WTO Official Website 'Legal issues arising in WTO dispute settlement proceedings' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s5p1_e.htm#fnt1 (accessed 14 July 2019).
[212] McDougall R 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function' (2018) *Centre for Internatonal Governance Innovation* 15.

5.4 CURRENT REMEDIES VS PROPOSED REMEDIES

One of the WTO's main attractions is that it explicitly envisages remedies in the event of non-compliance when a Member state loses a dispute settlement procedure.[213]

The first problem is compliance. The classic remedies of the WTO system are trade retaliation or trade compensation, which aim to exercise pressure on a non-complying Member state to bring its measures into conformity with the WTO law. Bronkers notes that the remedy of trade compensation is only possible when the non-complying Member state offers it and the parties to the dispute agree on its scope and implementation, something that rarely happens.[214] Likewise the cost of imposing trade retaliation measures is simply too high and that developing countries cannot put sufficient pressure on developed Members due to the small size of their markets.[215]

5.4.1 Current Dispute Settlement Understanding Remedies

Some critics believe that that the system suffers from significant flaws by analysing that the existing remedies are theoretical or counterproductive; offer no relief to those actually damaged by a WTO-illegal measure; and damage industries that are not involved in the particular trade dispute.[216] Facing a ruling, the losing party has three choices: withdrawal of the offending measure, compensation, or retaliation. These remedies are discussed below in further detail.

5.4.1.1 Withdrawal of the offending measure

As previously mentioned, under the DSU, a member in breach of obligations must promptly comply with the recommendations of the panel or AB. If it is not possible for the party to implement the recommendations immediately, the DSB may, on request, grant it a reasonable period of time for implementation. However, as all disputes do not end in withdrawal of the offending measure, parties may negotiate compensation.[217]

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[213] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 101.
[214] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 102.
[215] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 102.
[216] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 103.
[217] Toure O *Remedies under the wto dispute settlement mechanism: What are the alternatives for the weakest party?* unpublished LLM thesis, Pittsburgh University of Bamako School of Law and Economics, 2003) 463.

5.4.1.2 Compensation

Under the DSU, if a member fails to bring an inconsistent measure into compliance within a reasonable time, it shall enter into negotiations with the member that invoked the dispute settlement procedure to negotiate compensation.[218] Alternatively, the party in breach of the obligations may itself offer to pay compensation; and are expected to bargain in good faith.[219]

Compensation does not imply financial remuneration for the damage caused by the WTO-inconsistent measure, instead, but rather it implies that the member concerned shall provide the complaining member with more trade opportunities. In addition, DSU compensation is not retrospective, but rather prospective, particularly with a view to maintaining the stability of the multilateral trading system.[220]

In practice, it is not often used by participants of WTO dispute settlement, arguably because of its voluntary nature. This is compounded by the fact that forcing members to compensate when they are already in violation of WTO commitments is extremely difficult.[221]

5.4.1.3 Retaliation

Retaliation is the ultimate guarantee that legality is respected. When a party in breach of its obligations fails to withdraw its offending measure; or if no mutually acceptable compensation is agreed, the plaintiff government may seek authorisation from the WTO DSB 'to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.'[222]

Movsesian argues against reforming the retaliation remedy, as it 'promotes compliance with WTO rulings without intruding directly on domestic institutions. In this way, the mechanism is superior to suggested reforms, such as direct effect, that would commandeer courts or other national governmental bodies.'[223] In advocating for effectiveness for the retaliation remedy, Movsesian argues that the genius of the retaliation remedy is its ability to use political processes

[218] Article 22.1 of the DSU.
[219] Toure O *Remedies under the wto dispute settlement mechanism: What are the alternatives for the weakest party?* unpublished LLM thesis, Pittsburgh University of Bamako School of Law and Economics, 2003) 463.
[220] Kozlov O *Enforcing compliance with WTO dispute settlement rulings* (unpublished LLM Thesis, Ghent University, 2017) 10.
[221] Kozlov O *Enforcing compliance with WTO dispute settlement rulings* (unpublished LLM Thesis, Ghent University, 2017) 10.
[222] Charnovitz S 'Rethinking WTO Sanctions' (2001) *American Journal of International Law* 1.
[223] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 2.

to achieve the goals of public interest;[224] concluding that retaliation is not so much an economic strategy as a political one:

> 'The goal is not to make the complaining country "whole" in an economic sense, but rather to spur the target country to adopt free trade policies that ultimately will benefit the citizens of both countries. In this way, retaliation can serve a beneficial purpose, even if it does impose short-term economic loss.'[225]

The efficacy of retaliatory measures relies on their effect on both parties ' economies and on the quantity of trade between the countries involved in the dispute. It must also be noted that the retaliation remedy is in itself, a temporary fix.

Through retaliation or sanctions, some advantages for the parties to dispute include venting and closure for the plaintiff; political foreign pressure against the defendant to change the measures; and it is a de facto political safeguard for defendants. In a broader perspective, the WTO is able to become the gatekeeper as it supervises unilateralism amongst Members. These sanctions also improve WTO stature among international organisations; and lastly sanctions promote compliance with DSB rulings. [226]

However, it is no secret that retaliatory measures currently do not work.[227] Another major disadvantage is that there is no relief to injured economic actors. The biggest disadvantage is that there is a self-punishing nature of trade retaliation, as it is generally detrimental to the interests of the country that does so. Sanctions undermine the WTO and free trade. In approving trade sanctions for commercial reasons, the WTO undermines its own principles favoring open trade. The sanctioning power tends to favour larger economies over smaller ones. This is a disadvantage for the small countries and the WTO system. To the extent that small countries are more trade-dependent than large countries, sanctions will hurt the small country more.[228]

The current WTO remedies do not provide for any actual reparation for damages caused by another Members non-compliance; thus in this context, WTO law does not follow the general rule of thumb of other domestic or international law systems.[229]

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[224] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 2.
[225] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 11.
[226] Charnovitz S 'Rethinking WTO Sanctions' (2001) *American Journal of International Law* 13.
[227] Charnovitz S 'Rethinking WTO Sanctions' (2001) *American Journal of International Law* 17.
[228] Charnovitz S 'Rethinking WTO Sanctions' (2001) *American Journal of International Law* 23.
[229] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 102.

5.4.2 Proposed Dispute Settlement Understanding Remedies

Many propsals to alternative DSU remedies have been put forward by various communities in the past. Some of which are in direct conflict with the current DSU text, but in theory can provide more effective measures of enforcing compliance. These proposed remedies are discussed below in further detail.

5.4.2.1 Mandatory Compensation

One solution that has been put forward is that of mandatory compensation. The reasoning behind this is that compensation does not restrict trade but actually opens up trade for as long as the non-complying measure remains in place.[230] In practice, compensation is hardly ever offered. Bronkers states that the reason for this is simple 'innocent bystanders in the importing country (say, car manufacturers) will oppose any proposal from their government to expose them to more foreign competition as a means of compensating another country for problems created in a different sector (say, agriculture).'[231] The idea behind this form of compensation is that winning countries can indicate which sectors the non-complying country should offer compensation for as long as it does not comply with the WTO ruling. The main issue with this is that WTO Member would not accept that any part of its trade regime could be changed unilaterally, if only temporarily, by another WTO Member.

El-Taweel argues that offering compensation to injured parties has its limitations, as Article 22.1 requires that the compensation must be consistent with the covered agreements. This requirement implies consistency with the WTO's Most Favoured Nation obligation, which means that other WTO Members will benefit. Consequently, as El-Taweel points out, it 'makes compensation less attractive for both the respondent, for whom it raises the price, as well as the complainant, who does not get an exclusive benefit.'[232]

Bronkers sums up the DSS's objectives as ultimately to obtain a satisfactory solution to the dispute in the interest of the disputing parties, and more broadly to guarantee compliance in

[230] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 107.
[231] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 107.
[232] El-Taweel K *The WTO Dispute Settlement Understanding: How can Africa make better use of the system?* (unpublished LLM thesis, University of Pretoria, 2010) 36.

the interest of all Members.[233] Thus, the pressure to induce compliance is exercised on the very government institution that can be expected to be the driving force behind compliance, and the measures induce private parties that are affected by retaliation or trade compensation to pressure their government to comply with WTO obligations, thus resulting in a very effective system.[234]

Although the DSU expresses a preference for compensation over suspension of concessions, it notes that compensation is voluntary. Experts have proposed that the DSU be changed to make compensation compulsory; and have gone to suggest that the winning plaintiff be allowed to choose the products for compensation. However, no solution for making the violating Member state comply has come to fruition as of yet.[235]

5.4.2.2 Monetary Compensation

Another solution that could work is that of monetary/financial compensation. The reasoning behind this is that reparation by governments for injury for which they can be held responsible, is part of the tradition of public international law.[236] The reasoning behind this in the WTO context is that financial compensation is not trade restrictive; helps redress injury; and could induce better compliance going forward.[237] It is also seen as a proportionate burden on innocent bystanders and introduces an element of fairness.[238]

However, there are objections to financial compensation with regards to systematic concerns and its overall effectiveness and practicality. In essence, monetary damages are too difficult to calculate; are seen to be unenforceable and may not reach the rightful recipients. There is also the question of it being more acceptable for certain measures than for others. Financial compensation may also allow richer countries to buy them out of violations; whilst developing countries may not even be able to afford it.[239]

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[233] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 102.
[234] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 103.
[235] Charnovitz S 'Rethinking WTO Sanctions' (2001) *American Journal of International Law* 30.
[236] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 109.
[237] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 110.
[238] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 111.
[239] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 113.

Ultimately, the DSU would have to be amended to make explicit provision for financial compensation in the event of non-compliance with WTO DSS rulings.[240] The crucial advantage is that rather than solely aiming to induce compliance, it also provides equitable reparation for damages caused. This remedy should be available in addition to the traditional WTO remedies, thus giving members a right to choose. If they choose monetary compensation, the individual member can exercise its sovereign discretion on how to distribute the received compensation sum among the private parties who have suffered actual damage.[241] Thus, it could benefit all members as well as their private constituents.

Kozlov notes that compensation has a priority over retaliation; and traditionally, it takes the form of reduced tariffs or providing more market access for the complaining Member. The issue of including monetary compensation to the DSU was raised several times by the WTO members, however, it was never successful and failed to be introduced during the Uruguay round. Although there is no explicit basis in the current DSU for application of such a remedy, sometimes parties mutually agree to provide monetary compensation.[242]

5.4.2.3 Direct Effect

Under a direct effect regime, DSB rulings would bind domestic courts automatically, without further action by national authorities. This would mean that Member States could base their claims in the national court directly on the basis of a WTO ruling. The proposed direct effect regime is a politically sensitive issue, as it provides for the supremacy of the WTO over national law and can lead to threats of loss of sovereignty.[243]

Currently, WTO Members are required to ensure compliance with its WTO obligations in national law.[244] However, the legal status of the WTO agreements and dispute settlement rulings in national law is not specified.[245]

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[240] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 213.
[241] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 124.
[242] Kozlov O *Enforcing compliance with WTO dispute settlement rulings* (unpublished LLM Thesis, Ghent University, 2017) 13.
[243] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 16.
[244] Article 16.4 of the Marrakesh Agreement.
[245] Kozlov O *Enforcing compliance with WTO dispute settlement rulings* (unpublished LLM Thesis, Ghent University, 2017) 27.

Movsesian observes two principal advantages over the present regime. First, by enlisting national courts, direct effect might better promote compliance with WTO requirements, particularly by powerful countries that might otherwise ignore DSB rulings. Second, direct effect might give quicker relief to private.[246] Members are right to reject direct effect. Despite this, Movsesian believes that direct effect would take the advantages of the retaliation mechanism and precisely invert them; as an example, Movsesian explains that 'where retaliation works indirectly, creating incentives for exporters without intruding expressly on the prerogatives of national institutions, direct effect would commandeer domestic courts and make them subalterns of the DSB. Instead of counteracting the influence of protectionist groups, direct effect would empower them with a "patriotic" argument.'[247]

5.4.2.4 Collective Retaliation

The proposal of collective retaliation can possibly build upon the retaliation remedy already entrenched in the WTO. Under this principle, all WTO members would have the right and responsibility to enforce the recommendations of the DSB collectively. Although such a proposition would have a beneficial impact on Member States ' degree of compliance, it is argued that it is unlikely that significant developing countries-which are interconnected with each other with vast financial and commercial interests-would accept such a proposition.[248]

A major constrain to this principle is that it is contrary to the traditional bilateral character of WTO dispute settlement.[249] Participation of a non-party member in a dispute would result in disruption and enhanced tension between the parties and will not contribute to implementation of corrective measures.[250]

5.4.2.5 Temporary Suspension of Membership

Another proposed remedy is the temporary suspension of a non-complying member from the WTO in the event that retaliation fails. This would mean that market access commitments will

[246] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 17.
[247] Movsesian ML 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) *Hofstra Law Review* 18.
[248] El-Taweel K *The WTO Dispute Settlement Understanding: How can Africa make better use of the system?* (unpublished LLM thesis, University of Pretoria, 2010) 38.
[249] Kozlov O *Enforcing compliance with WTO dispute settlement rulings* (unpublished LLM Thesis, Ghent University, 2017) 34.
[250] Kozlov O *Enforcing compliance with WTO dispute settlement rulings* (unpublished LLM Thesis, Ghent University, 2017) 35.

be completely withdrawn. This would be the ultimate sanction pronounced by the DSB for non-complying members.

In order to suspend the market access of a non-complying member, the DSB would be able to decide whether or not to grant the member a reasonable period for compliance. In instances where a reasonable period of time is granted by the DSB, the suspension of membership will be pronounced automatically at the expiry of this period and reintegration will only be granted once the ruling is fully complied with.[251]

Although this would ultimately ensure compliance, it is traditionally believed that raising barriers to trade is felt detrimental to trade and to world welfare in general.[252]

5.5 POSSIBLE AREAS OF IMPROVEMENT

There are various ways in which the enforcement of WTO decisions can be improved, as outlined by Cheng. Cheng states:

> 'A recommendation frequently proposed is to change the rules so that non-implementation of panel rulings would be punished by withdrawal of market access commitments by all WTO Members.'[253]

This would be a sturdier and more efficient form of the retaliation remedy and will force Members who have lost a dispute to comply with the panel's ruling, as it is a much stricter and concrete form of punishment.

Cheng goes on to recommend, 'an alternative to the current practice is to establish a permanent roster of panellists who would be readily available to serve in dispute settlement panels and be compensated for their time through the WTO budget… This in effect would create a standing body of jurists that is similar to the Appellate Body.'[254] Consequently, the use of a permanent panel would reduce the burden on the WTO Secretariat associated with DSS; ensure more prompt conclusion of cases; entail more professionalism, and yield a greater consistency in

[251] Toure O *Remedies under the wto dispute settlement mechanism: What are the alternatives for the weakest party?* unpublished LLM thesis, Pittsburgh University of Bamako School of Law and Economics, 2003) 465.
[252] Toure O *Remedies under the wto dispute settlement mechanism: What are the alternatives for the weakest party?* unpublished LLM thesis, Pittsburgh University of Bamako School of Law and Economics, 2003) 465.
[253] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) *Cornell University Press* 14.
[254] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) *Cornell University Press* 14.

outcomes. However, it is feared that 'such a measure would, however, increase the WTO budget and would require additional funding from the Members.'[255]

In addition, Matsushita argues that the use of consensus and voting, are too cumbersome to be the primary modes of decision-making.[256] Matsushita goes on to state 'these modes may lead to deadlock or back-room deals and other low-visibility decisions.'[257] He proposes the creation of an

> 'Executive Body of the General Council that would have general decision-making power. The Members of the Executive Body should be chosen according to objective criteria based on such factors as (1) GDP; (2) share of world trade; and (3) population. Other criteria could assure representation by developing countries and a geo- graphic balance. The Executive Body should have both permanent Members and a rotating group of Members that would serve fixed terms. Thus, every WTO Member would have a seat on the Executive Body at regular intervals. A weighted voting system could be devised to replace consensus decision-making.'[258]

The creation of an executive body would ensure a more reliable method of making and enforcing decisions. It would ensure non-bias and objectivity in the decision making process. He also advocates the need to improve the WTO's external transparency, as 'greater public disclosure of the WTO's business would promote public understanding of the benefits of trade and the complex issues that must be decided.'[259]

In essence, the use of compensation and enforcement of compliance should be improved upon in order to ensure that defendants rectify their violations in a more effective manner. Davey recommends that

> 'It would be beneficial to expand the use of compensation. It could be particularly desirable for developing countries if they find themselves in a situation where timely implementation is not going to occur and retaliatory action is not practical.'[260] He goes on to state, 'an alternative solution contemplates improving compliance by increasing the effectiveness of the WTO's ultimate weapon-retaliation-or through other remedies.'[261]

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[255] Cheng F 'Case Studies in Food Policy for Developing Countries: Institutions and International Trade Policies' (2009) *Cornell University Press* 14.
[256] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 14.
[257] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 14.
[258] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 15.
[259] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 15.
[260] Davey WJ 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 122.
[261] Davey WJ 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 124.

Finally, Davey recommends that future 'WTO remedies for non-implementation should incorporate (i) the possibility of substituting fines or damages as a remedy in lieu of suspension of concessions; (ii) some degree of retroactivity, so as to help encourage compliance within the reasonable period of time; and (iii) some adjustment mechanism to increase the level of sanctions over time, so as to preclude non-compliance from becoming an acceptable status quo position.'[262] These remedies have the potential to improve the WTO's DSS implementation record.

5.6 CONCLUSION

In comparison to other international enforcement mechanisms, the WTO's DSU is still regarded as a highly systematic mechanism that gives equal opportunities to Members to settle their trade issues and is an extremely effective tool in settle their disputes.

However, the system still has some glaring weaknesses. For example, despite the deadlines, a full dispute settlement procedure still takes a considerable amount of time, during which the complainant suffers continued economic harm if the challenged measure is indeed WTO-inconsistent. No provisional measures (interim relief) are available to protect the economic and trade interests of the successful complainant during the dispute settlement procedure.

Moreover, even after prevailing in dispute settlement, a successful complainant will receive no compensation for the harm suffered during the time given to the respondent to implement the ruling. Nor does the "winning party" receive any reimbursement from the other side for its legal expenses. In the event of non-implementation, not all Members have the same practical ability to resort to the suspension of obligations. Lastly, in a few cases, a suspension of concessions has been ineffective in bringing about implementation. However, these cases are the exception rather than the rule.[263]

Nwoye suggests that the WTO DSS should be restructured. He states that 'despite the legalization of the WTO Dispute Settlement System and its enforcement mechanism, it is

[262] Davey WJ 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 125.
[263] WTO Official Website 'Evaluation of the WTO dispute settlement system: results to date' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s3p1_e.htm (accessed 11 January 2019).

constrained by international legal discourse and politics.'[264] Finally, there are suggestions on possible ways to incentivise countries to comply with their WTO obligations.

Although there is broad consensus that the current WTO DSS has worked reasonably well, there also is a widely shared view that improvements need to be made.

When discussing the WTO System as a model for other international organisations to strive towards, Ziemblicki observes that Member States actually make use of this system and implement its rules regularly - something that cannot be said about most of other international organisations.[265] The second observation Ziemblicki makes is that the WTO's System harmonises laws in the economy, trade and business sectors,[266] which is something unique to the international rule of law. On the other hand, some critics point out that the biggest problems within the system are undesirably long timetables to conform to rulings, and incentives and sanctions to help achieve the implementation objective of prompt compliance are lacking.[267]

With regards to procedural issues, the major matters that need to be formally addressed within the DSU legal text are the issues of institutionalism, sequencing and transparency. The way forward could be the implementation of a permanent team of panellists, or even an executive body to ensure objectivity in decision-making.

In recommending new remedies to ensure compliance within a reasonable period of time, many critics have proposed remedies such as mandatory compensation, monetary compensation and direct effect. Although all of these proposals have their shortcomings, the necessity for a new mechanism to ensure the enforcement of rulings cannot be undermined.

The next Chapter will take into account the previous Chapters' findings, and culminate in possible recommendations, which may benefit the WTO's enforcement mechanism in the long run.

[264] Nwoye IS 'Evaluating the Enforcement of the Decisions of WTO Dispute Settlement System: The Comply or Not to Comply Considerations' (2015) *SSRN Electronic Journal* 2.
[265] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 198.
[266] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 199.
[267] Ziemblicki B 'The Controversies over the WTO Dispute Settlement System' (2009) *Wroclaw Review of Law, Administration & Economics Journal* 199.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

The goal of this paper was to examine the extent to which dispute settlement decisions are enforced through or by the WTO.

In answering this question, the research paper has scrutinised the role and functions of the WTO; provided an in-depth investigation of the DSU procedure; examined the effectiveness of final rulings; analysed advantages and disadvantages of the DSU's process; and studied possible areas of reform, which the WTO should explore in order to ensure a more efficient and effective method of implementing the panel and AB decisions.

6.2 CONCLUSIONS

The WTO is not a simple extension of GATT; rather, it completely replaces its predecessor and has a very different character entirely. The dispute resolution mechanisms within the DSU resemble adjudication more than they do diplomacy, a major drawback of the previous regime. Ultimately, this unified DSS avoids the fragmentation embodied in the GATT.[268]

Although many WTO rulings have been satisfactorily implemented, difficult cases have tested DSU implementation articles, highlighting deficiencies in the system and prompting suggestions for reform. The process sounds 'air-tight' in theory; but in practice, the adherence to time frames, lack of enforcement of rulings and recommendations, and the costs involved in a dispute show that serious reform is needed.[269]

This review of certain operational aspects of the WTO DSS suggests that since its inception, the system has worked reasonably well in providing a reasonably effective mechanism through which WTO Members are able to resolve disputes.[270] However, larger and wealthier Member states are much better-positioned to take advantage of the resource demanding procedures of the WTO's legal system; thus the question remains whether the process is neutral in its operation.[271]

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[268] As discussed in Chapter 2.5 pg. 18.
[269] As discussed in Chapter 3.5 pg. 32.
[270] As discussed in Chapter 3.5 pg. 32.
[271] As discussed in Chapter 4.4 pg. 40.

Based on the notion that the effectiveness of a DSS is also determined by the time it takes to resolve a dispute, the research demonstrates that the average duration has been much longer than the maximum period prescribed by the DSU.[272] With regards to procedural issues, the major matters that need to be formally addressed within the DSU legal text are the issues of institutionalism, sequencing, transparency, judicial overreach, and the standard of review.[273]

With regards to compliance issues, no provisional measures (interim relief) are available to protect the economic and trade interests of the successful complainant during the dispute settlement procedure. Moreover, even after prevailing in dispute settlement, a successful complainant will receive no compensation for the harm suffered during the time given to the respondent to implement the ruling. Nor does the 'winning party' receive any reimbursement from the other side for its legal expenses.[274]

6.3 RECOMMENDATIONS

The recommendations below are split into three parts, namely: the implementation of remedies; fair access to make use of the dispute mechanism; and the eradication of ambiguities within the DSU legal text.

6.3.1 Implementation of Remedies

The reality is that the overall good record of the system is due mainly to the good faith desire of WTO Members to see the system work effectively. However, Davey notes that, as in past instances, there will be cases in which good faith cannot be relied upon.[275] Accordingly, it is proposed that the WTO remedies for non-implementation should incorporate:

- The possibility of substituting fines or damages as a remedy in lieu of suspension of concessions;
- some degree of retroactivity, so as to help encourage compliance within the reasonable period of time; and
- some adjustment mechanism to increase the level of sanctions over time, so as to preclude non-compliance from becoming an acceptable status quo position.

[272] As discussed in Chapter 4.2.2 pg. 36.
[273] As discussed in Chapter 5.3 pg. 45.
[274] As discussed in Chapter 5.4.2.2 pg. 57.
[275] Davey WJ 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 126.

Solutions such as suspension of voting rights or suspension of the right to use the DSS have also been put forward,[276] but these remedies have been considered disproportionate countermeasures and could sway Members into non-compliance with any WTO ruling in the future.[277] However, it is submitted that a stricter approach is needed, as the threat of suspension of rights can potentially scare non-complying Members to adhere to rulings.

Collective retaliation, under which developing countries would be permitted to join forces and jointly exercise pressure on a non-complying developed Member has been contemplated,[278] but this too has been mooted, as it still requires developing countries to 'shoot themselves in the foot' and will still create costs for innocent bystanders.[279] Nevertheless, it is submitted that in cases where a developing countries are successful in their dispute, collective retaliation should be available automatically. such a proposal would have positive effect on the degree of compliance between member states.

Apart from the aforementioned remedies, there is need a for community pressure among the Members to obey WTO recommendations and rulings. It is a positive sign that most members are standing together in opposing the US blockage at the WTO and fill the necessary vacancies required in the Appellate Body.[280] This movement affirms the assumption that there is still belief in a system which has come under much scrutiny. Despite this, reform of the DSU is an absolute necessity, one which needs a political commitment from Members of the WTO.

Ultimately, it is submitted that the use of collective retaliation, trade compensation and financial compensation should be encouraged. These remedies should co-exist with other remedies, which are already in place in the WTO DSS. If these remedies are not followed, withdrawal of market access commitment by all WTO Members needs to be implemented. This would be a more robust and effective method of the retaliation remedy and will force Members who have lost a conflict to abide by the decision of the panel, as it is a much more stringent and concrete form of penalty.

[276] As discussed in Chapter 5.4.2.5 pg. 59.
[277] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 108.
[278] As discussed in Chapter 5.4.2.4 pg. 59.
[279] Bronkers M 'Financial Compensation in the WTO: Improving the remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 107.
[280] As discussed in Chapter 5.3.4 pg. 50.

6.3.2 Fair Access to the Dispute Settlement System

As previously pointed out, the more active users of the system are repeat players, such as the EC and the US, and they appear as both complainants and respondents in various disputes.[281] The many obstacles that lead to the lack of participating developing countries in the DSS need to be eradicated. Financial assistance and, more importantly, legal assistance needs to be afforded to these Members who have legitimate cases within the system. Financial constraints should not prevent developing countries from initiating cases under the DSU. The WTO needs to provide technical assistance for lawyers and government officials, which can provide them with practical knowledge about DSU procedures.

As previously mentioned, the DSU is a a quasi-judicial system because political factors generally impact the dispute, and because disputes are channelled entirely through Member states, not the private sector.[282] It is evident that political factors play a significant part in persuading developing members to not make use of the DSU, even if they had a valid case. It is submitted that a more rule based approach can offer more protection for small and poor countries that can exercise little economic or political power.

6.3.3 Eradication of Ambiguity within the DSU Legal Text

As detailed as it is, the DSU remains inaccurate and incomplete on a number of issues, including the objectives of the system, the standards of review, and the scope of adjudication.

First, it is submitted that the overall objective of the DSS needs to be clarified. for the purpose of the simplicity and consistency of the WTO dispute settlement system, the wording and purpose of these provisions should be put in order.[283] Clearer provisions lead to more legal certainty for all Members.

Second, the standard of review to be employed by adjudicators when reviewing national measures needs to be further developed.[284] A more prescriptive and deferential standard of review needs to be adopted.

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[281] As discussed in Chapter 4.2.1 pg. 34.
[282] As discussed in Chapter 3.5 pg. 32.
[283] As discussed in Chapter 5.3.2 pg. 46.
[284] As discussed in Chapter 5.3.5 pg. 52.

Third, the mandate of the Appellate Body needs be clarified to introduce a higher standard of deference toward panel findings.[285]

As previously mentioned, consensus mechanisms have almost always ended in a stalemate.[286] There is a particular need for the creation of an Executive Body of the General Council, which would be granted general decision making power based on a weighted voting system. The creation of such a body would ensure a more reliable method of making and enforcing decisions; and would ensure non-bias and objectivity in the decision making process.[287] It is time for the WTO to recognise its flaws and make the necessary legislative amendments. These changes would likely improve the WTO's DSS implementation record.

6.4 CONCLUDING REMARKS

Since the WTO has come into force, a Member has the following three choices if a measure is successfully challenged:

> First, it may (and preferably would) come into compliance with the ruling by withdrawing the offending measure or rectifying the relevant omission.[288]
>
> Second, it may maintain the offending measure or determine not to rectify the relevant omission, but instead, provide compensatory benefits to restore the balance of negotiated concessions disturbed by the non-complying law or measure.[289]
>
> Third, it may choose to make no change in its law or measures and decline to provide compensation, and instead, suffer likely retaliation against its exports authorised by the WTO for the purpose of restoring the balance of negotiated concessions.[290]

Members are encouraged to comply with the ruling because it benefits when other Members do likewise. It also prevents the loss of international credibility; avoids self-inflicted damage to its economic interests through compensation or retaliation; and encourages international

[285] As discussed in Chapter 5.3.4 pg. 50.
[286] Davey WJ 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 127.
[287] As discussed in Chapter 5.5 pg. 60.
[288] As discussed in Chapter 5.4.1.1 pg. 52.
[289] As discussed in Chapter 5.4.1.2 pg. 54.
[290] As discussed in Chapter 5.4.1.3 pg. 54.

cooperation by meeting its responsibilities in the WTO.[291] It is believed that, ultimately, the WTO seeks to encourage economic cooperation while preserving democratic accountability.[292]

While the WTO DSS is definitely still open to improvement, it currently already constitutes an effective and efficient system for the peaceful resolution of trade disputes. It brings a degree of security and predictability in international trade to all its Members and their citizens.[293] The system has not, however, achieved its goal of promptness in many cases.[294] There is a genuine danger that Members overburden, and thus undermine, the DSS as a result of their inability to agree on rules governing politically sensitive issues concerning international trade.

The great body of law administered by the WTO continues to expand as each agreement gives rise to new needs and controversies, leading to new negotiations and further agreements. As the sole global intergovernmental organisation responsible for international trade, its role has become indispensable to the functioning of the world economy.[295]

Word Count: 18 463

[291] Bello J 'The WTO Dispute Settlement Understanding; Less is More' (1996) *The American Journal of International Law* 417.
[292] Bello J 'The WTO Dispute Settlement Understanding; Less is More' (1996) *The American Journal of International Law* 418.
[293] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 298.
[294] Davey WJ 'The WTO Dispute Settlement System: The First Ten Years Journal of International Economic Law' (2005) *Journal of International Economic Law* 50.
[295] Matsushita M *World Trade Organization: Law, Practice and Policy* (2015) 16.

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