The WTO's Dispute Settlement Body and its impact on Developing Countries: problems and possible solutions.

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Abstract

The purpose of this thesis is to discuss the limitation of participation of developing countries in the World Trade Organization's (WTO) Dispute Settlement Body (DSB). Under the DSB, there are many cases that present the limiting of developing countries on some significant ways. This thesis discusses the most significant limiting factors reported and practiced by developing countries in the DSB. Developing countries have a lack of financial and legal resources and ability to impose the DSB rulings on procedural of the DSU. Also, there are a number of significant procedural reforms that the DSU dispute settlement system must consider. This thesis discusses these legal and financial obstacles for developing countries under the DSB. This thesis mentions the most significant potential solutions for tackling the constraints of developing country participation in WTO dispute settlement proceedings. Those solutions try to make the WTO system more workable for developing countries in settling disputes. In addition, it tries to demonstrate the significance of reforming the DSU. Also, it tries to improve developing country use of the WTO DSB. Therefore, it recommends that the proposals appearing in this thesis should be used in actual practice by establishing them in the DSB.

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Chapter 1: Introduction

1.1 Introduction

Globalization is a significant factor that increases trade and economic development, and appears to be the new global force meaning that the global economy is considered to be the main element that affects all countries around the world. International trade is considered to be one of the major factors for the development and growth of any country's economy. In international trade, an economy is not controlled by only one state or country; rather, the economies of all countries are interconnected, leading international trade to be considered the most important factor for all countries.

In order to found, develop and coordinate international trade, a conference on economic matters was held in 1944, in Bretton Woods, New Hampshire. Following the conference, work on tariff reductions and the General Agreement on Tariffs and Trade (GATT) was completed in 1947. During the GATT tariff negotiation rounds, specifically the Uruguay round of negotiations for a reduction in tariffs and other barriers to international trade, the World Trade Organisation (WTO) was established in order to deal with international economic issues[1]. On 1st January 1995, the GATT members adopted the WTO agreement, thereby becoming WTO Members; the agreement is binding for all members[2].

[1] The World Trade Organization: The WTO, *available from:* http://www.wto.org/index.htm [viewed March 2, 2015].
[2] *Ibid.*

The WTO agreement established a new international organisation. This organisation has a legal personality, legal capacity, privileges, immunities and a stronger system for resolving disputes for all members[3]. The WTO's significant subsidiary body is the Dispute Settlement Body ('DSB'), which has established a system for dispute settlement. The dispute settlement system is considered a fundamental and central institution of the WTO[4]. Its purpose is the resolution of trade disputes between WTO Members and it is governed by the Understanding on Rules and Procedures, known as the Dispute Settlement Understanding ('DSU'), which establishes the procedure for dispute settlement[5]. The WTO's DSB and its DSU are considered to be one of the WTO's strongest functions as a result of its aim to settle disputes that might arise between Members regarding their rights and obligations under the WTO agreement[6]. However, the DSU may now be in need of reform. Concerns have been raised that a number of constraints limit the participation of developing countries in WTO dispute settlement proceedings in comparison to developed countries.

The purpose of this research is to discuss in detail certain concerns that limit the participation of developing countries in WTO dispute settlement proceedings. To this end, this research will investigate the current practice of WTO Members. The research will also determine those factors limiting this participation that have been suggested by eastern and western literature. Moreover, it will highlight and evaluate the possible solutions that would address the constraints that limit developing countries' participation in WTO dispute settlement proceedings.

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[3] The World Trade Organization 2015: Dispute Settlement**,** Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, *available from:* http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm [viewed March 2, 2015].
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

1.2 Problem Statement

The developing and developed countries' participation in WTO dispute settlement proceedings is one of the main subjects for people who are working on trade issues for both developing and developed governments[7]. Since the start of the WTO dispute settlement proceedings, those proceedings have become a main method used to settle any disputes arising between WTO Members, whether those members are developing or developed countries. However, developing countries have a number of constraints that limit their participation in dispute settlement proceedings. Since those constraints were first raised, researchers have conducted studies examining how it impacted the performance of the WTO's DSU to settle the disputes as well as how the disputes and settlement proceedings impacted developing countries' participation in the WTO system. This was also the part of the pursuit of developing countries' claimants by their proposal for greater innovation, and the improvement and the development of WTO DSU, such as Cuba[8], Paraguay[9], Haiti[10], Jordan[11] and the African Group's proposals[12].

In this context, this study will consider the most important obstacles that hinder the developing countries in dispute settlement proceedings and how the strategies of developing countries deal with these constraints such as lack of financial and legal resources, litigation

[7] Footer, M. E. (2001).'Developing Country Practice in the Matter of WTO Dispute Settlement'. *Journal of World Trade, 35*(1), pp 55-98.
[8] Proposal by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, Negotiations on the Dispute Settlement Understanding, TN/DS/W/19, at 2 (Oct. 9, 2002).
[9] *See*, Communication from Paraguay, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/16, at 1 (Sept. 25, 2002).
[10] Communication from Haiti, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, TN/DS/W/37, at 3,4(Jan. 22, 2003).
[11] *See*, Communication from Jordan, Negotiations on the Dispute Settlement Understanding, TN/DS/W/43, at 2 (Jan. 28, 2003).
[12] *See*, the African Group in proposal made during negotiations on the Dispute Settlement Mechanism Understanding, TN/DS/W/15, at 2 (Sept. 25, 2002).

costs, retaliation, enforcement of DSU rulings, duration of the DSB process and compensation. The study will be an examination of the DSU and whether it has achieved the objective to settle the disputes fairly.

1.3 Research Questions

In the light of the above problems, this research strives to answer the following questions:

1. What are the constraints that have been faced by the developing countries in WTO dispute settlement proceedings?

    a) Is the cost of the WTO system for settling disputes considered to be too high a cost for the developing countries?

    b) Is the DSB rulings considered to be a constraint that limiting the participation of developing countries in WTO dispute settlement proceedings?

    c) Are the 'retaliation rules' of the WTO dispute settlement system considered to be 'virtually meaningless'?

    d) Is it true that the outcomes of the WTO DSB have no benefits to enforce them and its power is limited, and that this contributes to limiting the participation of developing countries in WTO dispute settlement proceedings?

2) Is it true that the accession of developing countries in WTO dispute settlement proceedings imposes a greater burden on them?

3) What are the specific provisions of the WTO legal framework and agreements that constitute legal barriers to developing countries?

4) Is the legal framework of the WTO's DSB biased against developing countries?

5) Which provisions of the WTO agreement and of the DSB framework are causing concerns for developing countries?

1.4 Research Objectives

The main objective of this study is to examine the participation of developing countries in WTO dispute settlement proceedings. In so doing, the study will seek:

1) To investigate the extent to which developing countries are required by the WTO DSU to settle their disputes in line with the strategic framework of the WTO;

2) To identify the extent of participation of developing countries in dispute settlement proceedings;

3) To ascertain those factors that impede the participation of developing countries in those proceedings;

4) To see if the WTO's agreements and its organizational structure have an impact on participation of developing countries in those proceedings;

5) To highlight any other finding that is of interest and contributes towards the subject of the participation of developing countries in those proceedings;

6) To provide a scientific framework for supporting the participation of developing countries in those proceedings;

7) To make concrete recommendations to ensure greater participation of developing countries in those proceedings.

1.5 Significance of the study

The findings of this research will add to the knowledge and understanding of the participation of developing countries in WTO dispute settlement proceedings and the ability of the WTO system to deal with them. The significance of this research is tied into the importance of the subject matter covered and the context in which it is applied. This study will address the following elements:

1) Allow the identification of the concept and framework of the WTO that takes into account the nature of work and the environment to deal with developing countries;

2) Support both the WTO and the developing countries to create a good system to settle disputes;

3) Generate greater awareness within the organization on the importance of having a proper and practical framework as a method to organizational effectiveness;

4) Provide useful knowledge on factors that might impact and contribute to the successful participation of developing countries in WTO dispute settlement proceedings;

5) Shed light on the participation of developing countries in the WTO as one of the important contemporary concepts;

6) Identify, clarify, and discuss the problems faced by developing countries that affect their participation in the WTO; and

7) Find solutions, by legal provisions or otherwise, for the problems that developing countries face in the WTO.

1.6 Theoretical framework of the study

The objective of the study is basically two-pronged. First, it is to examine the extent of the developing countries' participation in WTO dispute settlement proceedings and second, to see how various factors limit the developing countries' participation in those proceedings. It gathers data on the extent of the developing countries' participation in the proceedings, and amongst the dimensions to be investigated are:

1) Completeness of WTO systems;

2) Establishing the direction of the WTO to deal with developing countries;

3) The implementation of tasks in the WTO dispute settlement process;

4) Improving developing countries' participation in the WTO dispute settlement proceedings; and

5) Avoiding the constraints that limit the developing countries' participation in the DSB.

1.7 Research Methodology

The methodology in this thesis is twofold. First, it is based on the existing literature; books, scientific journals and WTO official legal documentation and publications relating to the specialized subject area of participation in WTO dispute settlement proceedings, including the participation of developing countries in such proceedings. Second, this knowledge is applied to real life cases for a greater comprehension of how the rules are actually affecting the members of the WTO. The thesis will explore how developing and less developed countries fared in the era of the WTO dispute mechanism. Also, this thesis will examine the WTO Members' proposals for evidence of perceptions regarding developing countries' participation in the WTO dispute settlement system. The WTO Members' proposals have been submitted to the WTO during the formal review process of the current WTO dispute settlement system, which aims to identify the difficulties and reform the system. Exploring these proposals is a valuable source of the positions of developing countries regarding the WTO dispute settlement system. Knowing these positions has the advantage of building the picture and providing rich information explaining what is actually happening in the WTO dispute settlement system. This is especially important in testing the research questions, not only theoretically but also practically, and is a vital factor in discovering the relationship between theory and practice.

1.8 Conclusion

This research is the first step of a comprehensive study of developing countries' participation in WTO dispute settlement proceedings. It is important to see the extent of the organizational factors that influence that participation. It is hoped that the output of this study will be beneficial to all parties concerned while at the same time contributing to knowledge enhancement within the academic world.

Chapter 2: Historical Review of International Trade Laws

2.1 International Trade Organization

2.1.1 Introduction

Throughout the eighteenth and nineteenth centuries and into the twentieth, many countries limited the competitiveness of foreign goods in order to foster native industries by using the tariff. A tariff is a tax on imported goods that raises their price, thus making similar domestically produced goods more economically attractive. Tariffs were a significant source of income for many governments before they had revenue from income and sales taxes. However, the need for reduced tariffs was advocated by many, beginning in the nineteenth and throughout the twentieth century. Many countries opened up their national markets to foreign goods by reducing tariffs in return for similar liberalisation by others, because "the key to sustaining increased free trade is to maintain balanced benefits in this process, a concept called *reciprocity*-each government gives similar levels of concessions in order to balance the benefits from the agreements made"[13]. The increase of international free trade has been encouraged principally with the goal of solidifying peace and distributing economic development across "national boundaries by means of multinational negotiations and agreements"[14], in short, "it deals with attempts to liberalize markets"[15] in the world.

[13] Buterbaugh, K. & Fulton, R., 2007, *The WTO primer: Tracing Trade's Visible Hand through Case Studies,* Palgrave Macmillan, New York. p.15.
[14] *Ibid*. p.15.
[15] *Ibid.* p.15.

This chapter considers the development of international trade law. It begins with the creation of the General Agreement on Tariffs and Trade (GATT) and a review of the development of the GATT. It then presents a brief overview of the World Trade Organization (WTO) and the environment that produced the WTO. It will also examine a number of the WTO articles that concern accession to the WTO, and therefore participation in WTO dispute settlement proceedings. Consequently, this part is divided into: Article XI: accession of 'original members', Article XIV: Acceptance, Entry into Force and Deposit, the WTO Accession Process, Current membership, Observer governments, States and customs territories, Developing-country Members, Groups and alliances within the WTO and Observers. Also, this chapter will include a brief review of the development and functions of the GATT and WTO dispute settlement system. Moreover, it will analyse the position and Special and Differential treatment for developing countries in the WTO.

2.1.2 The Environment Produced the GATT

Since the end of World War II, the General Agreement on Tariffs and Trade (GATT) has been part of the reformulation of the international environment that was fashioned under U.S. management. Moreover, the plan was to append two more multinational agreements. The International Monetary Fund (IMF) and the World Bank were created as a result of these other two agreements, considered as the Bretton Woods organizations. While not "specifically linked to the other two in the end, the mechanism that was to become the GATT certainly was conceived at the time as an equal partner"[16].

[16] *Ibid.* p.15.

The United States then accounted for half of the world's total economic activity[17]. It was considered that America believed in free trade because of its need to keep European markets open to its goods, especially its agricultural goods, "an interest that persists in U.S. policy to this day"[18].

The trade environment was governed by direct policy. In the United States, the Reciprocal Trade Agreement Act of 1934 (RTA) gave the executive branch the right to increase or decrease tariffs by as much as 50 per cent[19]. In fact, this act created an interdepartmental Committee on Trade Agreements (CTA) that managed a strategy of both "bilateral reciprocal agreements and multilateral trade agreements"[20]. This committee[21] was considered the foundation of U.S. policy on trade[22], which created more flexible trade agreements and expanded into the "realm of free trade technicians"[23]. The CTA extended its agreements to apply to all trading states "that did not discriminate against American products in each area of agreement"[24]. Therefore, the United States created multinational trade treaties with some forty-eight nations[25].

2.1.3 The International Trade Organization

In 1944, the Bretton Woods, New Hampshire, conference on economic matters considered a major proposal to found an international organization to develop and organize international

[17] *Ibid.* p.15.
[18] *Ibid.*
[19] *Ibid.*p.19.
[20] *Ibid.*p.19.
[21] The committee had not been active for twenty years.
[22] Buterbaugh & Fulton 2007.
[23] *Ibid.* p.19.
[24] *Ibid.* p.19.
[25] *Ibid.*p.19.

trade, while the particulars of such an organization were left for later[26]. In 1946, the International Trade Organization (ITO) was created through several successive trade negotiations, which were organized within the framework of the UN Economic and Social Council[27]. The trade negotiations of ITO were held in a series of stages: in Geneva in 1947; at Lake Success, New York, in 1947; and in Havana in 1948[28]. In the Geneva negotiations, three goals were established: (1) to draft an ITO Charter, (2) to prepare schedules of tariff reductions, and (3) to prepare a multilateral treaty containing general principles of trade called 'the General Agreement on Tariffs and Trade' (GATT)[29]. In 1947, the work on the tariff reductions and the GATT were completed, while the final work on a charter for the ITO was postponed until 1948[30]. However, the ITO Charter was not completed because of the lack of significant support from the United States[31]. In 1950, the United States under President Truman proclaimed that it would no longer seek congressional approval for the ITO. The ITO was therefore dead[32].

[26] Matsushita, M. Schoenbaum, T. & Mavroidis, P., *The World Trade Organization: Law, Practice and Policy,* (Oxford University Press, Oxford, 2003).
[27] Alotaibi, N,. (2011), The WTO (DSU) and Developing Countries: problems and possible solutions, LL.M. dissertation, University of Essex.p.4.
[28] Matsushita *et al*.2003.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] Alotaibi 2011.p.4.

2.2 Review of the GATT

2.2.1 Introduction

2.2.2 The GATT Becomes an International Organization

In the absence, or in other words the failure, of the ITO to be adopted, the GATT gradually began to fill up the void even though the GATT was intended as an interim body. The GATT was considered the primary document for international trade contact. On October 27, 1947, it had been signed as a brief measure, which would take effect on January 1, 1948. The ITO's Interim Commission became the GATT Secretariat. Therefore, it became an international organization, based in Geneva, and it took as its 'Charter' the GATT agreements and understandings[33].

2.2.2.1 GATT Principles

The original documents of the GATT did not establish an organizational framework but did include the GATT principles and procedures[34]. From 1951 to 1960, the GATT was "a small organizational bureaucracy"[35] without any power to "enforce tariff and nontariff barrier commitments within the document"[36]. The GATT's 'contracting parties' dealt with the processes of decision-making. The signatories themselves governed this structure because there was no formal process for a country to become a member[37]. In 1995, the GATT

[33] Matsushita *et al*.2003.
[34] *Ibid.*
[35] Buterbaugh. & Fulton 2007.
[36] *Ibid.*
[37] *Ibid.*

agreements became part of an international organization with a formal membership procedure only through the establishment of the WTO treaty[38].

The GATT had accepted broad based principles of fair and free trade, as the founders had expected[39]. The specific broad goals were tariff reduction and exclusion of discriminatory treatment in trade[40]. The GATT agreement included two important points. First, the agreement was to guide the contracting parties[41]. Second, the agreement included a series of specific rules to lower particular tariffs[42]. The core principles of the GATT agreements were four: (1) "nondiscrimination or the most favored nation principle", (2) "tariff reductions and binding", (3) "national treatment", and (4) "prohibition of protective measures other than tariffs"[43].

2.2.2.2 The GATT Tariff Negotiating Rounds

The GATT held eight 'rounds' of multilateral trade negotiations to reduce tariffs and other barriers to international trade. These rounds were "held periodically and all were successful"[44]. Multilateral negotiating rounds have been named after the person "associated with initiating the round or the place in which negotiations began"[45]. The "names and dates of the GATT rounds are: Geneva 1947, Annecy 1949, Torquay 1950, Geneva 1956, Dillon 1960-1961, Kennedy 1962-1967, Tokyo 1973-1979, Uruguay 1986-1994"[46]. The early

[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] There are some exceptions. *See*, Buterbaugh. & Fulton 2007.
[44] Alotaibi 2011.p.5.
[45] *Ibid.*
[46] Matsushita *et al.* 2003.

rounds of the GATT negotiations were just to reduce tariffs, whereas the stated objective of negotiations in the Uruguay Round was "primarily to reduce non-tariff barriers" it ultimately "culminated in the creation of an immense new body of international law relating to trade"[47]. Consequently, on 15 April 1994, in Marrakesh, Morocco, the World Trade Organization (WTO) was established as a fully-fledged international organization via the Final Act of the Uruguay Round of the GATT[48].

2.2.3 The GATT Accession

2.2.3.1 Provisional Application

The GATT was applied provisionally for almost 50 years, until the WTO came into force. In the GATT[49], the Protocol of Provisional Application (PPA)[50] was applied as a "temporary measure until the formation of the ITO"[51]. As this did not happen, the GATT members, known as contracting parties, had continued to adopt and apply trade rules on a provisional basis.

2.2.3.2 Accession under Article XXXII - The Original Members

Twenty-three countries signed the GATT when the negotiations were completed and the Protocol of Provisional Application was "applied provisionally until the ITO charter was

[47] Alotaibi 2011.p.5.
[48] Uruguay Round Final Act Establishing the World Trade Organization and Settlement of Disputes (Marrakesh, 15 April 1994), *entered into force* 1 Jan. 1995.
[49] *See* Matsushita *et al.* 2003.
[50] *See*, Protocol of Provisional Accession, GATT, 1947.
[51] Basra, H. 2008, "The Caribbean and WTO Accession", PhD thesis, Faculty of Humanities, School of Social Science, Politics, University of Manchester.

complete"[52]. These nations (several of which are developing nations), this thesis will examine the participation of developing nations in the WTO dispute settlement proceedings, are considered the original contracting parties of the GATT. Table 2.1, below, indicates the dates in which the original members applied the GATT provisionally.

Table 2.1: Original Membership

Country	**Year**
Australia	1947
Belgium	1947
Canada	1947
France	1947
Luxembourg	1947
Netherlands	1947
UK	1947
US	1947
Brazil	1948
China	1948
Cuba	1948
Czechoslovakia	1948
India	1948
Lebanon	1948
Myanmar	1948
New Zealand	1948
Norway	1948
Pakistan	1948
South Africa	1948
Sri Lanka	1948

[52] *Ibid.*

Syria	1948
Zimbabwe	1948

The original text of the GATT and the PPA were annexed as the Final Act. The status of the 22 countries was stated under Article XXXII of the PPA, as follows:

> 'The contracting parties to this Agreement shall be understood to mean those governments, which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application'[53].

Moreover, paragraph 4 of the PPA stated that 'the Protocol was open for signature by any government signatory to the Final Act, until June 1948 at the latest'[54]. In October 1947, eight of the 23 countries applied the GATT provisionally; they were Australia, Belgium, Canada, France, Luxembourg, Netherlands, the UK and the US[55]. In January 1948, 14 more countries applied the agreement, which extended the membership under the provision; they were Brazil, China[56], Cuba, Czechoslovakia, India, Lebanon, Myanmar (formerly Burma), New Zealand, Norway, Pakistan, South Africa, Sri Lanka (formerly Ceylon), Syria and Zimbabwe (formerly South Rhodesia). The only country missing from the list was Chile, an original signatory to the GATT[57]. Therefore, these countries were the original contracting parties of the GATT.

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[53] Agreement 1947, at Article XXXII.
[54] WTO (1995), *Analytical Index: Guide to GATT Law and Practice*, vols. 1 and 2. Geneva: WTO. p.1018.
[55] Basra 2008.
[56] Chile was not submitting an application provisionally at the same time, like other counterparts, however it was not accession under Article XXXII.
[57] China, Czechoslovakia, Lebanon, Syria later withdrew their provisional applications. Please note that South Rhodesia in 1947 had not received independence from the UK; however it had achieved full autonomy in its commercial relations. In November 1965, the British Government declared that "the purported declaration of independence was illegal". *See*, Basra 2008. In fact, it has been observed that in the GATT, the status of a contracting party has never ceased nor been suspended. On 18 April 1980, the Government of Zimbabwe, formally South Rhodesia, became independent. Although it had not become a contracting party under Article XXVI: 5(c) nor Article XXXIII. *See*, WTO, 1995. *Guide to GATT Law and Practice*. pp. 1013-1014.

On 7 September 1949, these 22 countries made a decision on the Final Act. They agreed that "if the Final Act had not been signed by 30th June 1948 then they shall not be considered . . . contracting part[ies] as detailed under Article XXXII"[58]. Therefore, "If any such government wished to accede to the Agreement then they would have to do so under the accession provision of Article XXXIII"[59]. Later, these 22 countries set out the trajectory of accession procedures under the GATT.

2.2.3.3 Accession under Article XXXIII

One hundred twenty-eight members, including many developing countries, acceded to GATT 1974 under Article XXXIII. Article XXXIII states that:

> A government not party to this agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the contracting parties. Decisions of the contracting parties under this paragraph shall be taken by two-thirds majority[60].

Article XXXIII came to be enforced "with the initial establishment of the GATT system"[61], and was considered as the formal provision for accession under the GATT. Table 2.2, below, indicates the dates in which the members accessed under Article XXXIII.

Table 2.2: Members Acceding under Article XXXIII

Country	Year	Country	Year
Chile	1948	Poland	1967

[58] Basra 2008.
[59] *See*, GATT document GATT/CP/l p. 36, cited in WTO 1995. *Guide to GATT Law and Practice*.p.1020.
[60] *See*, GATT Agreement 1947, at Article XXXIII.
[61] Basra 2008.

Denmark	1949	Iceland	1968
Dominican Republic	1949	Egypt	1970
Finland	1949	Zaire	1971
Greece	1949	Romania	1971
Haiti	1949	Bangadesh	1972
Italy	1949	Hungary	1973
Liberia	1949	Philippines	1979
Nicaragua	1949	Colombia	1981
Sweden	1949	Thailand	1982
Austria	1951	Mexico	1986
Germany	1951	Morocco	1987
Peru	1951	Boilivia	1990
Turkey	1591	Costa Rica	1990
Uruguay	1953	Ei Salvador	1990
Japan	1955	Tunisia	1990
Portugal	1962	Venezuela	1990
Spain	1963	Guatemala	1991
Switzerland	1966	Czech Republic	1993
Yuoslavia	1966	Slovak Republic	1993
Korea	1967	Paraguay	1994
Argentina	1967	Honduras	1994
Ireland	1967	Slovenia	1994

The first country acceding under Article XXXIII was Chile, which "acceded under the Protocol for the Accession of Signatories to the Final Act of October 1947"[62]. Officially, Chile was awarded automatic accession because it was one of the original 23 countries "invited by the US to engage in multilateral trade negotiations"[63].

[62] Protocol for the Accession of Signatories to the Final Act of October 1947, 62 UNTS 68, *signed* at Geneva on 14 September 1948, *entered into force* 14 September 1948, quoted in WTO 1995, p. 1019.
[63] Basra 2008.

In 1949, one of the major subjects of the Annecy Round was the issue of accession. Consequently, "the 'Procedures Governing Negotiations for Accession', which had the purpose of governing accession outside tariff conferences, was established as was the Model Protocol of Accession"[64]. Moreover, the contracting parties agreed to the Annecy Protocol of Terms of Accession, which allowed the accession of Denmark, the Dominican Republic, Finland, Greece, Haiti, Italy, Liberia, Nicaragua, Sweden and Uruguay[65].

2.2.3.4 Provisional Accession

The provisional accession to the GATT was possible under Article XXXIII. This provision allowed countries to join the GATT until completion of "Procedures for definitive accession"[66]. Under Article XXXIII, countries had no right to "vote in the GATT"[67] but they could "participate in tariff negotiations"[68]. Whereas the provisional accession was not part of the original GATT accession procedures, it was considered a method that increased "trade liberalisation to expand and become more beneficial"[69] and "ensured the expansion of participation in the GATT"[70].

Switzerland was the first country that officially used a provisional application. In 1956, the first formal provisional application was submitted with respect to Switzerland, which became the first county enter "tariff negotiations on a provisional basis"[71], as recommended by the

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[64] *Ibid.*
[65] WTO 1995, p.1019.
[66] Hoda, A., *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices,* (Cambridge University Press, Cambridge, 2001), p.77.
[67] Basra 2008.
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*

Swiss Working Party Report, which "could later be up-graded to permanent contracting party status"[72]. Many developing counties were given access under Article XXXIII, such as Colombia[73], Tunisia, Argentina, Egypt, and the Philippines. Provisional accession under Article XXXIII changed the formal way of accession to the GATT. The provisional accession postponed official accession for countries. For example, Switzerland had accession provisionally in 1958 while its official "accession did not take place until August 1966"[74].

The Provisional Accession allowed accession for nine countries. After Colombia, no other countries were allowed provisional accession. However, while the provisional accession of the WTO was established, the provisional accession of GATT was formally omitted. Table 2.3, below, indicates the dates in which the members acceded under Provisional Accession.

Table 2.3: Provisional Accession

Country	Date of Provisional Accession	Date of Formal Accession
Switzerland	November 1958	August 1966
Yugoslavia	May 1959	August 1966
Tunisia	November 1959	March 1990
Argentina	November 1960	October 1967
Egypt	November 1962	April 1968
Iceland	March 1964	April 1968
Philippines	August 1973	December 1979
Colombia	July 1975	October 1981

[72] Basra 2008. *See also* WTO 1995, p.1025.
[73] *See*, GATT Agreement 1947, at Article XXXIII, cited in WTO 1995, p.1022.
[74] Basra 2008.

2.2.3.5 Non-Market Economies

The GATT accepted the accession of non-market economies[75], which was possible due to the PPA[76], even though the GATT was a market-based institution for market economies[77]. Also, the GATT included Article XVII, which was one of the three articles dealing with the subject of state trading "included in the 'Suggested Charter'"[78]. Article XVII "obligated state trading enterprises to abide by the general principles of non-discriminatory behaviour and was primarily drafted to regulate the market behaviour of state owned monopolies and state trading countries" [79]. Nevertheless, the article was unclear and quite "flexible in its application, which meant that it could later be used in relation to state trading countries"[80]. Therefore, Lanoszka stated in his "discussion of accession of non-market economies"[81], that

> Since the GATT did not stipulate any membership criteria, the terms of accession were agreed between the contracting parties and a candidate state, the provisions of Article XVII could be used to admit non-market economies into the GATT system. And since the GATT related only to trade in goods, the main concerns of the negotiators were border measures. Such concerns could be accommodated without placing the demands on acceding countries to reform domestic economies[82].

Therefore, Czechoslovakia, "which was involved in the pre-negotiation stages of the GATT and Havana Charter" [83], "was able to join the GATT and become one of the original contracting parties"[84].

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[75] *See*, Members accession on Article XVII. Also, for greater details on GATT accession for non-market economies. *See* Polouektov, A.,(2002). 'Non Market Economy Issues in the WTO Anti-Dumping Law and Accession Negotiations: Revival of a Two-Tier Membership?', *The Journal of World Trade*, 36(1).
[76] *See*, Lanoszka, A. 2001, The World Trade Organization Accession Process Negotiating Participation in a Globalizing Economy. *Journal of World Trade*, *35*(4), 575-602.
[77] Basra 2008.
[78] Polouektov 2002, at p.9.
[79] See Basra 2008. For more details, *see* Lanoszka 2001, p. 580.
[80] Basra 2008.
[81] *Ibid.*
[82] Lanoszka 2001, p.580.
[83] Basra 2008.
[84] *Ibid.*

In 1957, the GATT became more focused on the matter of state trading contracting parties when Poland requested to join. It took Poland almost 10 years to accede. Consequently, the complicated accession process and lack of a customs tariff were making it difficult to "make reciprocal exchanges of trade benefits"[85]. Therefore, Poland had to agree to additional provisions, which were contained in its accession protocol, to access the GATT[86].

In 1971, the accession of Romania was similar to that of Poland[87]. However, in 1973, Hungary's accession was different because "it had introduced a customs tariff and was relaxing state control on foreign commercial relations"[88]. The PPA and Article XVII largely created flexibility to accommodate the accession of non-market economies at the GATT. However, "accession experiences of non-market economies varied by the virtue of their state trading practices and often resulted in accession coming at a greater cost"[89].

2.2.3.6 Accession under Article XXVI: 5(c)

This article allowed many ex-colonies (all developing countries) to accede automatically. Article XXVI: 5(c) states that

> 'If any of the customs territories, in respect of which a contracting party, has Accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party'[90].

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[85] *Ibid.*
[86] Poland accepted raising the total value of its imports from the territories of contracting parties by not less than 7 per cent annually. *See*, Basra 2008.
[87] *See*, GATT document BISD,18 S/23 cited in WTO 1995, p. 1021.
[88] Basra 2008.
[89] Basra 2008.
[90] GATT Agreement 1947, at Article XXVI: 5(c).See also, Basra 2008.

Therefore, this article accepted any state that had been a colony. That could be done if the "colonialist countries were willing to sponsor an application by its ex-colony"[91]. The accession would be "granted on an automatic basis based on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question"[92]. Therefore, the metropolitan state had to negotiate the tariff schedules on behalf of its colonial country and those terms would apply to the newly independent state. Table 2.4, below, indicates the dates in which the members accessed under Article XXVI: 5(c).

Table 2.4: GATT Accession under Article XXVI: 5(c) [93]

Country	**Date of Independence or Autonomy Commercial Relations**	**Date of admission as countracting party**	**Country**	**Date of Independence or Autonomy Commercial Relations**	**Date of admission as countracting party**
Indonesia	27/12/1949	24/2/1950	Mauritius	12/3/1968	2/9/1970
Ghana	6/3/1957	17/10/1957	Singapore	6/8/1965	20/8/1973
Malaysia	31/8/1957	24/10/1957	Suriname	25/11/1975	25/2/1978
Nigeria	1/10/1960	18/11/1960	Zambia	24/101964	10/2/1982
Sierra Leone	27/4/1961	19/5/1961	Belize	21/9/1981	7/10/1983
Tanzania	9/12/1961	9/12/1961	Maldives	26/7/1965	19/4/1983
Trinidad and Tobago	31/8/1962	23/10/1962	Hong Kong	23/4/1986	23/4/1986
Uganda	9/10/1962	23/10/1962	Antigua and Barbuda	1/11/1981	30/3/1987
Benin	1/8/1960	12/9/1963	Botswana	30/9/1966	28/8/1987
Burkina Faso	5/8/1960	3/5/1963	Lesotho	4/10/1966	8/1/1988

[91] Basra 2008.
[92] Basra 2008. *See*, GATT document BISD,10S/73 cited in WTO 1995, p. 1025.
[93] *See*, Basra 2008.

Cameroon	1/1/1960	3/5/1963	Macau	11/1/1991	11/1/1991
Central African Republic	14/8/1960	3/5/1963	Mozambique	25/6/1975	27/2/1992
Chad	11/8/1960	12/7/1963	Namibia	21/3/1990	15/9/1992
Congo	15/8/1960	3/5/1963	Dominica	3/11/1978	20/4/1993
Côte d'Ivoire	7/8/1960	31/12/1963	Mali	20/6/1960	11/1/1993
Cyprus	16/8/1960	15/7/1963	Swaziland	6/9/1968	8/2/1993
Gabon	17/8/1960	3/5/1963	St Lucia	22/2/1979	13/4/1993
Jamaica	6/8/1962	31/12/1963	St Vincent and the Grenadines	27/10/1979	18/5/1993
Kuwait	19/6/1961	5/2/1963	Fiji	9/10/1970	16/11/1993
Madagascar	25/6/1960	30/9/1963	Brunei Darussalam	31/12/1983	9/12/1993
Mauritania	28/11/1960	30/9/1963	Bahrain	18/8/1971	13/12/1993
Niger	3/8/1960	31/12/1963	Angola	11/11/1975	8/4/1994
Senegal	20/6/1960	27/9/1963	Djibouti	27/7/1977	16/12/1994
Kenya	12/12/1963	5/2/1964	Grenada	7/2/1974	9/2/1994
Malawi	6/7/1964	28/8/1964	Guinea-Bissau	10/9/1974	17/3/1994
Malta	21/9/1964	17/11/1964	Republic of Guinea	2/101958	8/12/1994
Togo	24/4/1960	20/3/1964	Liechtenstein	29/3/1994	29/3/1994
Burundi	1/7/1962	13/3/1965	Papua New Guinea	16/9/1975	16/12/1994
Gambia	18/2/1965	22/2/1965	Qatar	3/9/1971	7/4/1994
Guyana	26/5/1966	5/7/1966	St Kitts and Nevis	19/9/1983	24/3/1994
Rwanada	1/7/1962	1/1/1966	Solomon Islands	7/7/1978	28/12/1994
Barbados	30/11/1966	15/2/1967	United Arab Emirates	1/12/1971	10/2/1994

There were some countries that still had a number of colonies, such as the Netherlands, Belgium, France and the UK. So, the general agreement stated that the metropolitan states,

that "managed the trade relations of their colonial countries"[94] and signed the general agreement, had an international responsibility for their external territories. Therefore, Article XXVI:5(a) pronounces that

> Each government accepting this Agreement does so in respect to its metropolitan territory and of the other territories for which it has international responsibility for, except such separate customs territories as it shall notify to the Executive Secretary to the Contracting Parties at the time of its own acceptance[95].

Indeed, the reason for inserting Article XXVI:5 into the general agreement was to allow the possible accession of Burma, Ceylon and South Rhodesia (now known as Myanmar, Sri Lanka and Zimbabwe, respectively) as original contracting parties. At that time, these countries were not independent states but they wanted to join the general agreement in their own right. The GATT examined the possible accession of these three countries[96] by setting up an *ad hoc* sub-committee in 1947. Whereas Sri Lanka and Myanmar were to join the GATT by the process of acquiring independence, as a full contracting party, Zimbabwe had "acquired full autonomy to govern its own external trade relations"[97] but was not seeking full political independence. It joined with this special position. Therefore, the sub-committee had recommended that these countries have full autonomy to govern their own external trade relations[98] and that they should participate as contracting parties, fulfilling all obligations under the GATT.

The sub-committee also recommended significant changes to the accession provisions, which determined how accession to the GATT could be gained. Article XXVI:5 was rooted in the

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[94] Basra 2008.
[95] GATT Agreement 1947, at Article XXVI: 5 (a).
[96] Basra 2008. *See also* WTO 1996, at p. 919.
[97] Basra 2008.
[98] *See*, GATT document EPCT/198: the Sub Committee Report cited in WTO 1995, p. 920.

recommendations of the sub-committee. Paragraph 5, part A refers to "the continuing relationship between imperial and colonial states"[99]. Part C states there was to be a "new relationship that would exist between former imperial states and ex-colonial states"[100].

In general, Article XXVI:5(a) could permit a contracting party to accept an application of the general agreement for their own territory and also to an *ad hoc* acceptance of their "colonies and overseas territories"[101]. Also, the GATT applies to the official list of contracting parties as well as the informal contracting parties consisting of the *ad hoc* states[102]. The original contracting parties, which had colonial links, had the ability to maintain their trade arrangements as well as to receive trade benefits "from their colonial countries out of institutional arrangements"[103], while Article XXVI:5(c) of the GATT provided "arrangements for the continuation of the institutional arrangements between ex-colonial and imperial states once they had gained independence"[104].

Many countries took advantage of this clause when they obtained political independence. This clause had permitted ex-colonial nations an exception from Article XXXIII that meant they could "by-pass the formal GATT accession process but still become contracting parties"[105] which "allowed them to succeed to the GATT rather than accede"[106] by *de facto* status[107].

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[99] Basra 2008.
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] The *de facto* status was eliminated when the WTO was established. The *de facto* contracting parties could join in the GATT negotiations as well as taking part in GATT sessions, but they did not have voting power and

2.2.3.7 Accession during the Uruguay Round

During the Uruguay Round between 1986 and 1994, 26 countries acceded under Article XXVI: 5(c). These countries joined the GATT as a result of the importance of the Uruguay Round as well as the fact that the accession provisions were creating changes to the multilateral trade system[108]. The most important change was for ex-colonial countries, whose accession under Article XXVI:5(c) was no longer considered to be appropriate. Therefore, "Accession was guaranteed to be automatic and this encouraged ex-colonial countries to seek GATT membership before the anticipated change in rules"[109].

In fact, the Uruguay Round did not just affect the ex-colonial countries but also some other developing countries that were joining the GATT under Article XXXIII, enhancing the participation of developing countries in the world trading system. Ten countries joined the GATT before the WTO was established. Table 2.5, below, indicates the dates in which the members acceded under Article XXVI:5(c).

Table 2.5: Completed Accessions during the Uruguay Round under Article XXVI:5(c).

Country	Year
Namibia	1992
Dominica	1993
Mali	1993
Swaziland	1993
St Lucia	1993
St Vincent and the Grenadines	1993

could not benefit from the GATT dispute settlement system. *See*, GATT document cited in WTO 1995, p. 920. *See also*, Basra 2008.

[108] Basra 2008.

[109] *Ibid.*

Fiji	1993
Brunei Darussalam	1993
Bahrain	1993
Angola	1994
Djibouti	1994
Grenada	1994
Guinea-Bissau	1994
Republic of Guinea	1994
Liechtenstein	1994
Papua New Guinea	1994
Qatar	1994
St Kitts and Nevis	1994
Solomon Islands	1994
United Arab Emirates	1994

While some countries succeeded in applying to join the GATT under Article XXXIII during the Uruguay Round, other countries (mostly developing countries) did not succeed in completing the accession process until the WTO was established. Consequently, "their accession applications were converted into applications for accession under Article XII, the new WTO accession protocol"[110]. Algeria and the Ukraine managed "to join the WTO under the new provisions"[111]. Table 2.6, below, indicates the dates in which the members accessed under Article XXXII. Table 2.7 indicates the date of application in which the members accessed the GATT during the Uruguay Round.

[110] *Ibid.*
[111] *Ibid.*

Table 2.6: Completed Accessions during the Uruguay Round under Article XXXII

Country	Year
Mexico	1986
Morocco	1987
Bolivia	1990
Costa Rica	1990
El Salvador	1990
Tunisia	1990
Venezuela	1990
Guatemala	1991
Czech Republic	1993
Slovak Republic	1993
Paraguay	1994
Honduras	1994
Slovenia	1994

Table 2.7: Applications under Article XXXIII during the Uruguay Round

Country	**Date of Application to Join GATT via Article XXXIII**
Albania	11/1992
Algeria	7/1987
Armenia	12/1993
Bulgaria	9/1986
China	7/1986
Chinese Taipei	1/1992
Croatia	9/1993
Ecuador	9/1992
Estonia	3/1994
Georgia	7/1996
Jordan	1/1994

Latvia	11/1993
Lithuania	1/1994
Moldova	11/1993
Mongolia	7/1991
Nepal	6/1986
Panama	8/1991
Saudi Arabia	6/1993
Ukraine	11/1993

The Uruguay Round accession statutes were different from those of any previous GATT round. One of the differences was the cost of entry. Mexico was the first notable case. Obviously, countries that joined the GATT under Article XXXIII and XXVI:5 (c) during the Uruguay Round found accession less cumbersome.

2.2.4 Conclusion

This chapter briefly presented information about the GATT as well as accession under the GATT articles. Also, it showed the environment that produced the GATT. Part 2 presented a review of the GATT and gave details of the GATT principles as well as the GATT tariff negotiating rounds. The GATT accession was described in this section. There were a number of GATT articles for accession of members into the GATT. This section highlighted and evaluated accession of members and considered the practical and key factors for joining and entering into the GATT, in particular for developing countries. The purpose of this section is to study and comment on the participation of certain members of the GATT. So the GATT accession was divided into seven subtitles: Provisional Application, Accession under Article XXXII-The Original Members, Accession under Article XXXIII, Provisional Accession, Non-Market Economies, Accession under Article XXVI:5(c) and Accession during the

Uruguay Round. It showed the timing of accession procedures that had an impact upon the acceding countries. Its observations are significant to understanding how accession to the GATT changed during the period leading up to the WTO. It is also important to see what countries were GATT members. The next part will show an overview of the WTO and demonstrate the link between the GATT and WTO. It will also clearly identify the significant provisions of the WTO for accession to membership.

2.3 Overview of the WTO

2.3.1 Introduction

2.3.1.1 The Creation of the World Trade Organization

The establishment of World Trade Organization (WTO) came gradually from various needs and suggestions. In negotiations during the Uruguay Round, negotiators and observers recognized that significant agreements would be needed to make "better institutional mechanisms and a better system for resolving disputes"[112]. Therefore, one of the Uruguay Round of negotiations was about the 'Functioning of the GATT System' (FOGS)[113]. In the Uruguay Round, one of its negotiators suggested founding a new World Trade Organization. Therefore, the main "idea of a new world trade organization was taken up in the 'FOGS negotiation' of the Uruguay Round"[114]. The final draft act of the Uruguay Round "included a

[112] Alotaibi 2011.p.5.
[113] *Ibid. See also* Matsushita *et al*. 2003.
[114] *Ibid.*

proposal for a new 'Multilateral Trade Organization' (MTO)"[115] and "the name was later changed to the World Trade Organization"[116].

The final draft act of the Uruguay Round included agreements on the "arrangements for subjects that were covered by new WTO Agreement"[117]. On 15 April 1994, these agreements passed, so the WTO was opened for signatures at Marrakesh while "the negotiators decided that the WTO would come into being on 1 January 1995"[118]. All agreements annexed to the WTO Agreement became binding on some Members as a single body of law[119].

So, the birth of the WTO was in 1995. This organisation, in the context of the contemporary international political economy, was the result of the Uruguay Round but also a result of almost twelve years of negotiations. Officially, the Uruguay Round was considered to be completed in 1990 but because of the disagreements between the EU and the United States it was extended four more years. However, the GATT was on the brink of failure that would affect not just the "extension and reform of the GATT, but perhaps even to the GATT itself"[120]. Eventually, all members present "devoted so much time, effort, and political capital to the negotiations"[121].

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[115] *Ibid.*
[116] Officially, the WTO was created via Article 1 of the WTO Agreement, which became effective on 1 January 1995. In fact, the WTO Agreement was enacted in accordance with Article 102 of the United Nations Charter. See Matsushita *et al*. 2003.
[117] Matsushita *et al*. 2003.
[118] Porges, A., 'The Marrakesh Agreement Establishing the World Trade Organization, in Stewart, T. P. (ed.). *The World Trade Organization* (Cambridge University Press, Cambridge, 1996).
[119] Matsushita *et al*. 2003. *See also* WTO Agreement, Article.II:2.
[120] Buterbaugh & Fulton 2007.
[121] *Ibid.*

It has been thought that the Uruguay Round was making a new system for international trade through the creation of the WTO. It expanded the coverage of the GATT in many ways such as "services, intellectual property, and domestic policies of states affecting investment and agriculture"[122]. The most important result is that it formalized the WTO to help "oversee and administer the GATT system"[123]. As result of this, the WTO "was given the power to settle disputes between parties to the agreement"[124]. Since the WTO's beginning, it has been considered that "these changes were the beginning of a truly integrated world economy with the WTO as its linchpin"[125]. In fact, the WTO Agreement established the WTO as a new international organization, which means that it gave the WTO a legal personality and a legal capacity, as well as plenty of rights and immunities to carry out its role[126]. It is believed that the WTO "will continue to play a key role in the global economy of the twenty-first century if it keeps the support of its Members and gains public understanding"[127].

Annex 1 of the WTO Agreement contained the GATT 1994 agreement and additional agreements such as "the Agreement on Technical Barriers to Trade, the Agreement on Trade Related Investment Measures, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Antidumping Agreement'), the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ('Customs Valuation Agreement'), the Agreement on Pre-shipment Inspection, the Agreement on Import Licensing Procedures, the Agreement on Subsidies and Countervailing

[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] Indeed, the creation of the WTO was not the main goal of round participants. It was an afterthought and suggested late in the round, briefly disputed, then accepted. *See* Matsushita *et al.* 2003.
[126] *See*, WTO Agreement, Article. I, II.
[127] Alotaibi 2011.p.6.

Measures, and the Agreement on Safeguards"[128]. Annex 2 contained "the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which established the procedures for resolving trade disputes between WTO Members"[129]. Annex 3 deals with "the Trade Policy Review Mechanism which set up a periodic review of every WTO Member's compliance with WTO agreements and commitments"[130].

The WTO Agreement legally replaced the GATT 1947. Indeed, the fundamental role of the WTO is to "facilitate the implementation, administration, and operation as well as to further the objectives"[131] of the WTO agreements. In addition to this fundamental function, it has three strict tasks:

> "First, it has to provide a forum for negotiations between Members as to current matters and any future agreements. Secondly, it must administer the system of dispute settlement. Thirdly, it administers the Trade Policy Review Mechanism and must cooperate with the International Monetary Fund 'IMF' and the World Bank, as necessary"[132].

The WTO has two governing bodies: the first is called the Ministerial Conference and the second, the General Council. The Ministerial Conference is considered the supreme authority. It consists of representatives of all WTO Members and it meets at least once every two years[133]. The General Council is considered to be the chief decision-making and policy branch. It is also responsible for two significant subsidiary bodies: the Dispute Settlement

[128] Matsushita *et al.* 2003.
[129] *Ibid.*
[130] Matsushita *et al.* 2003. *See also* WTO Agreement, Article II: 3.
[131] Matsushita *et al.* 2003. *See also* GATT Agreement 1994, Article III: 1.
[132] GATT Agreement 1994, Article III.
[133] *Ibid,* Article.IV:1-2. *See also* Matsushita *et al*. 2003.

Body and the Trade Policy Review Body. The General Council is constituted by all the WTO Members and meets as appropriate[134].

From the perspective of enhancing developing countries' role in the world trading system, this chapter reviews a number of the WTO articles that create a participating role in WTO proceedings possibly leading to accession under the WTO. Therefore, it will evaluate the articles in making the WTO system that are significant for accession countries. Thus, this part will be divided into: Article XI: accession of 'original members', Article XIV: Acceptance, Entry into Force and Deposit, the WTO Accession Process, Current membership, Observer governments, States and customs territories, Developing-country Members, Groups and alliances within the WTO and Observers. Also, it examines the timing of accession procedures for potential WTO Members.

2.3.2 WTO Accession

At the end of the Uruguay Round, the GATT had 128 contracting parties. These contracting parties were eligible to be original members of the newly formed WTO. The WTO had been created by 29 legal agreements. The Uruguay Round was considered as a 'single undertaking' and was open to all the countries that became GATT members under previous agreements. All members had to agree to the 'single undertaking', though original members (the GATT contracting parties) were considered automatic members of the WTO if they ratified the WTO agreement.

[134] *Ibid*, Article.IV:3. *See also* Matsushita *et al*. 2003.

The primary path to accession for WTO Members was governed by Article XI and Article XIV of the WTO Agreement. Article XI governed the accession of the original members. Under Article XIV, a fixed period was recognized, up to two years after the WTO was established, for GATT contracting parties to decide on entry to the WTO. Therefore, not all 128 contracting parties of the GATT members became members of the WTO on 1st January 1995. Only 75 countries became members of the WTO under Article XI. However, an additional 53 countries[135] joined under Article XIV in the years between January 1995 and January 1997. Appendix 1 indicates the WTO Membership under Article XIV.

2.3.2.1 Article XI: Accession of Original Members

The terms and conditions of accession under the WTO are determined by Article XI, which states:

> 1. 'The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO'.
> 2. 'The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities'[136].

2.3.2.2 Article XIV: Acceptance, Entry into Force and Deposit

The terms and conditions of accession to the WTO for pre-existing GATT contracting parties were established by Article XIV, which states that:

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[135] These countries were existing GATT contracting parties that were given extra time to ensure that adequate schedules of tariffs on goods and services were submitted, which met the satisfaction of key developed states.
[136] WTO Agreement 1994, Article XI.

> ‘This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance’[137].

2.3.3 The WTO Accession Process

If a state was not previously a Contracting Party to the GATT, it can become a WTO member by accession under Article XII of the WTO Agreement, which states:

> 1- ‘Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto’.
> 2 - ‘Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO’.
> 3 - ‘Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement’.

So, a state or customs territory that wants to become a WTO Member through accession has to “negotiate the terms of accession with the current Members”[138]. Therefore, the ticket of admission has to be negotiated. The “subjects of the accession negotiations are the market access commitments and the concessions the candidate for membership has to make”[139]. However, the

[137] *Ibid.* Article XIV.
[138] Basra 2008.
[139] *Ibid.*

candidate state must agree to the terms of the WTO Agreement and multilateral trade agreements without negotiations[140].

Accession to the WTO proceeds is through four phases. The first phase is known as 'tell us about yourself'. In this phase, the State or customs territory applying for membership has to create a report that shows all "aspects of its trade and economic policies"[141] which relate to the duties under the WTO agreements. Then the application[142] for accession is examined by the WTO working party[143]. The second phase starts when the working party sees "satisfactory progress with its examination of the trade and economic policies"[144]. This is known as the 'work out with us individually what you have to offer' phase. In this stage, the parallel bilateral negotiations begin between the applicant for membership and current members. The "new Member's market access commitments and concessions"[145] must "apply equally to 'all WTO Members as a result of the MFN treatment obligation"[146].

The third phase of the accession process will start once the parallel bilateral market access negotiations between individual members and the candidate for membership have successfully concluded. In this stage, the 'let's draft membership terms' phase, the candidate country accepts the terms of accession set by the working party in a report that contains "a

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[140] All state or customs territories will instantly receive WTO benefits, such as a reduction of barriers to trade and increased market access, when they acceded to the WTO. *See,* Basra 2008.
[141] Basra 2008. For more details, *see*, World Trade Organization 2015, Understanding the WTO: The Organization Membership, alliances and bureaucracy| *How to join the WTO: the accession process, available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm [viewed February1, 2015].
[142] *See*, *Accession: Becoming a Member of the* WTO, Cancun WTO Ministerial 2003 Briefing Notes, *available from:* www.wto.ork/english/thewto_e/minist_e/min03_e/brieLefbrien3_e.htm [viewed September 2012].
[143] The working party of the WTO was created to deal with the request for membership accession.
[144] For more details, *see*, World Trade Organization 2015, *How to join the WTO: the accession process, available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm [viewed February1, 2015].
[145] *See*, World Trade Organization 2015, *How to join the WTO: the accession process, available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm [viewed February1, 2015].
[146] *See*, the Most Favoured Nation (MFN) treatment obligation, pp. 38-39.

draft membership treaty ('protocol of accession') and lists ('Schedules') of the market access commitments and concessions of the candidate for membership" [147] and the report is submitted to the general council or the ministerial conference. In the fourth and final phase, the 'decision' phase, the ministerial conference or the general council must agree on the application for membership or determine if agreement will not be achieved, by a "two-thirds majority of WTO Members"[148]. In the positive decision, the "candidate for membership accedes to the WTO thirty days after it has deposited its instrument of ratification of the membership treaty.

In general, accession negotiations are always long. For example, [149] Algeria's accession negotiations went from 1947 to 1995 and the WTO were severely criticized as a result[150]. The reason for delays in the accession negotiations was not only "hard bargaining on the part of WTO Members or political factors"[151] but also because of "the tardy supply of information and making of the necessary policy adjustments on the part of the candidate for membership"[152]. In fact, applying the WTO agreements required important changes and time in the WTO Member legislation and practices. So, it could take some years to "draft, approve and apply the new legislation required for accession to the WTO"[153]. Some least-developed countries specifically lacked "the administrative capacity to conduct the complex negotiations and to develop and apply the necessary changes in national legislation and practices"[154]. In

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[147] *See*, World Trade Organization 2015, *How to join the WTO: the accession process*, *available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm [viewed February1, 2015].
[148] *Ibid.*
[149] *See*, the WTO website. The World Trade Organization (WTO): Accessions**,** available at https://www.wto.org/english/thewto_e/acc_e/acc_e.htm [viewed March 2, 2015].
[150] Matsushita *et al.* 2003.
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*

December 2002, therefore, the General Council accepted "guidelines to facilitate the accession of least-developed countries to the WTO, in accordance with a mandate given at the Doha Session of the Ministerial Conference in November 2001"[155]. These "guidelines concern, inter alia, technical assistance and capacity-building"[156].

2.3.4 Current membership

The WTO membership is considered quasi-universal due to the fact that the major trading powers and most developing countries are members of the WTO[157]. The membership of the WTO represents almost 92 per cent of the global population as well as 95 per cent of world trade. In May 2015, there were 161 members of the WTO[158]. Table 2.8 indicates the current WTO membership. Table 2.9 indicates Observer governments accessed under the WTO.

Table 2.8: Current WTO membership [159]:

Country	Join
Antigua and Barbuda	1 January 1995
Argentina	1 January 1995
Australia	1 January 1995
Austria	1 January 1995
Bahrain, Kingdom of	1 January 1995
Bangladesh	1 January 1995
Barbados	1 January 1995
Belgium	1 January1995

[155] General Council, *Decision of the General Council*, dated 4 December 2002. *See*, Matsushita *et al.* 2003.
[156] *See*, Matsushita *et al.* 2003.
[157] *Ibid.*
[158] *Ibid.*
[159] *See*, WTO current membership, at the WTO website. The World Trade Organization (WTO): Accessions**,** available at https://www.wto.org/english/thewto_e/acc_e/acc_e.htm [viewed March 2, 2015].

Belize	1 January 1995
Brazil	1 January 1995
Brunei Darussalam	1 January 1995
Canada	1 January 1995
Chile	1 January 1995
Costa Rica	1 January 1995
Côte d'Ivoire	1 January 1995
Czech Republic	1 January 1995
Denmark	1 January 1995
Dominica	1 January 1995
European Union (formerly European Communities)	1 January1995
Finland	1 January1995
France	1 January1995
Gabon	1 January1995
Germany	1 January1995
Ghana	1 January1995
Greece	1 January1995
Guyana	1 January1995
Honduras	1 January1995
Hong Kong, China	1 January1995
Hungary	1 January1995
Iceland	1 January1995
India	1 January1995
Indonesia	1 January1995
Ireland	1 January1995
Italy	1 January1995
Japan	1 January1995
Kenya	1 January1995
Korea, Republic of	1 January1995
Kuwait, the State of	1 January1995
Luxembourg	1 January1995

Macao, China	1 January1995
Malaysia	1 January1995
Malta	1 January1995
Mauritius	1 January1995
Mexico	1 January1995
Morocco	1 January1995
Myanmar	1 January1995
Namibia	1 January1995
Netherlands	1 January1995
New Zealand	1 January1995
Nigeria	1 January1995
Norway	1 January1995
Pakistan	1 January1995
Paraguay	1 January1995
Peru	1 January 1995
Philippines	1 January 1995
Portugal	1 January 1995
Romania	1 January 1995
Saint Lucia	1 January 1995
Saint Vincent & the Grenadines	1 January 1995
Senegal	1 January 1995
South Africa	1 January 1995
Spain	1 January 1995
Sri Lanka	1 January 1995
Suriname	1 January 1995
Swaziland	1 January 1995
Sweden	1 January 1995
Singapore	1 January 1995
Slovak Republic	1 January 1995
Tanzania	1 January 1995
Thailand	1 January 1995

Uganda	1 January 1995
United Kingdom	1 January 1995
United States of America	1 January 1995
Uruguay	1 January 1995
Venezuela, Bolivarian Republic of	1 January 1995
Zambia	1 January 1995
Trinidad and Tobago	1 March 1995
Zimbabwe	5 March 1995
Dominican Republic	9 March 1995
Jamaica	9 March 1995
Turkey	26 March 1995
Tunisia	29 March 1995
Cuba	20 April 1995
Colombia	30 April 1995
El Salvador	7 May 1995
Botswana	31 May 1995
Central African Republic	31 May 1995
Djibouti	31 May 1995
Guinea-Bissau	31 May 1995
Lesotho	31 May 1995
Malawi	31 May 1995
Maldives	31 May 1995
Mali	31 May 1995
Mauritania	31 May 1995
Togo	31 May 1995
Burkina Faso	3 June 1995
Egypt	30 June 1995
Poland	1 July 1995
Switzerland	1 July 1995
Guatemala	21 July 1995
Burundi	23 July 1995

Sierra Leone	23 July 1995
Cyprus	30 July 1995
Slovenia	30 July 1995
Mozambique	26 August 1995
Liechtenstein	1 September 1995
Nicaragua	3 September 1995
Bolivia, Plurinational State of	12 September 1995
Guinea	25 October 1995
Madagascar	17 November 1995
Cameroon	13 December 1995

Qatar	13 January 1996
Fiji	14 January 1996
Ecuador	21 January 1996
Haiti	30 January 1996
Saint Kitts and Nevis	21 February 1996
Benin	22 February 1996
Grenada	22 February 1996
United Arab Emirates	10 April 1996
Rwanda	22 May 1996
Papua New Guinea	9 June 1996
Solomon Islands	26 July 1996
Chad	19 October 1996
The Gambia	23 October 1996
Angola	23 November 1996
Bulgaria	1 December 1996
Niger	13 December 1996

Democratic Republic of the Congo	1 January 1997
Viet Nam	11 January 2007
Mongolia	29 January 1997
Congo	27 March 1997
Tonga	27 July 2007
Panama	6 September 1997
Kyrgyz Republic	20 December 1998
Estonia	13 November 1999
Latvia	10 February 1999
Jordan	11 April 2000
Georgia	14 June 2000
Albania	8 September 2000
Croatia	30 November 2000
Oman	9 November 2000
Lithuania	31 May 2001
Moldova, Republic of	26 July 2001
China	11 December 2001
Chinese Taipei	1 January 2002
Armenia	5 February 2003
The former Yugoslav Republic of Macedonia (FYROM)	4 April 2003
Nepal	23 April 2004
Cambodia	13 October 2004
Saudi Arabia, Kingdom of	11 December 2005
Ukraine	16 May 2008
Cape Verde	23 July 2008
Samoa	10 May 2012
Montenegro	29 April 2012

Samoa	10 May 2012
Russian Federation	22 August 2012
Vanuatu	24 August 2012
Tajikistan	2 March 2013
Yemen	26 June 2014
Seychelles	26 April 2015

Table 2.9: Observer governments[160]

Country	**Country**
Afghanistan	Lao, People's Democratic Republic
Algeria	Lebanese Republic
Andorra	Liberia, Republic of
Azerbaijan	Libya
Bahamas	Russian Federation
Belarus	Sao Tomé and Principe
Bhutan	Serbia
Bosnia and Herzegovina	Seychelles
Comoros	Sudan
Equatorial Guinea	Syrian Arab Republic
Ethiopia	Tajikistan
Holy See (Vatican)	Uzbekistan
Iran	Vanuatu
Iraq	Yemen
Kazakhstan	

[160] Please note that, 'with the exception of the Holy See, observers must start accession negotiations within five years of becoming observers'. *See,* the WTO website. World Trade Organization 2015, Understanding the WTO: The Organization/ *Members and Observers, available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [viewed February 1, 2015].

2.3.5 States and customs territories

WTO Members can be states, separate customs territories possessing full autonomy in the conduct of their external commercial relations, and/or other entities that covered by the WTO Agreement[161]. In the current period, there are three WTO Members that are separate customs territories: Hong Kong, China (commonly referred to as Hong Kong); Macau, China (commonly referred to as Macau); and Chinese Taipei (which joined the WTO as the separate customs territories of Taiwan, Penghu, Kinmen and Matsu)[162].

2.3.6 Developing-country Members

Three-quarters of the 161 Members of the WTO are developing countries[163]. Since the WTO has no definition of a 'developing country', the standing of 'developing-country member' was selected by the countries themselves. Therefore, a member has to state whether it is a 'developing' or a 'developed' country[164].As a WTO member, all developing-countries can receive WTO technical assistance and they can also benefit from special and differential treatment under some of the WTO agreements[165].

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[161] *See* WTO agreement, Article XII. The explanatory notes attached to the WTO Agreement, stipulate that the term "countries" or "country" used in the WTO agreement as well as the multilateral trade agreements aim to be understood to contain any separate customs territory member of the WTO. Therefore, a separate customs territory member of the WTO must be used as customs territory.

[162] *See*, The World Trade Organization 2015: Uruguay Round Agreement: Decision on the Acceptance of Accession to the Agreement Establishing the World Trade Organization, *available from: https://www.wto.org/english/docs_e/legal_e/55-dwto_e.htm*[viewed March 2, 2015]. For more details, see Bossche, P. V., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed., (Cambridge University Press, Cambridge, 2008). *See, also*, Al Bashar, F., 'The WTO Dispute Settlement Mechanism and the Reform of Third Party Rights: A Study from the Perspective of Developing Countries', PhD thesis, School of Law, University of Portsmouth, (2009).

[163] Matsushita *et al.* 2003.

[164] This point is discussed further in this thesis, see chapter 3.

[165] Any Member can challenge the decision of a member to use 'special and differential treatment provisions' which are available to developing countries. Note also that in the context of the national generalized systems

Developing countries are playing a significant role in the WTO, not only because of their WTO membership but also due to the fact that they have rising importance in the global economy[166]. In addition, they have been significantly increasing the size of their economies and they often "act as spokespersons for other developing countries"[167]. For example, China, Brazil and India without doubt are powerful, activist and significant countries Members in the WTO[168].

The least-developed WTO Members are designated as least-developed by the United Nations. On 5 May 2015, it was observed that there were 34 least-developed members among the developing-countries members[169]. The least developed also can benefit from additional special and differential treatment[170]. The least-developed countries among the WTO Members are: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lao People's Democratic Republic, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Vanuatu, Yemen and Zambia[171]. Moreover, there are eight least-developed countries that have observer status because they are "in the process of accession to the WTO and therefore have Observer status"[172]. They are:

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of preferences (GSP), adopted under the enabling clause of the GATT 1994, it is the preference-giving member that decides which countries qualify for the preferential tariff treatment.

[166] Matsushita *et al.* 2003.

[167] *Ibid.*

[168] *Ibid.*

[169] *Ibid.*

[170] *Ibid.*

[171] *See*, The World Trade Organization 2015: Actions to increase the participation of developing country Members in the work of relevant international standard-setting organizations, *available from:* https://www.wto.org/english/news_e/news00_e/gc_dgreport_15dec00_e.htm[viewed March 2, 2015].

[172] Matsushita *et al.* 2003.

Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Liberia, Sao Tomé & Principe, and Sudan.

2.3.7 Groups and alliances within the WTO

WTO Members are not only classified as developed, least developed and developing country Members. There are other alliances, formal or informal, existing in the WTO. It has been observed that some of those groups were created to "defend common interests and advance common positions; they coordinate (or try to coordinate) positions and, when appropriate, speak in unison"[173]. These groups include "the Association of South East Asian Nations (ASEAN), the Caribbean Community (CARICOM) and the African, Caribbean and Pacific Group (ACP)"[174]. The Southern Common Market (MERCOSUR)[175] and the North American Free Trade Agreement (NAFTA)[176], which "constitute[e] significant efforts at regional economic integration, have not, or have hardly ever, spoken with one voice within the WTO"[177]. Also, an effective alliance within the WTO is "the Cairns group of nineteen agricultural-produce-exporting developed and developing countries"[178].

[173] *Ibid.*
[174] *Ibid.*
[175] Argentina, Brazil, Paraguay, Uruguay and Venezuela. Please note that Bolivia, Chile, Colombia, Ecuador and Peru are associate members of MERCOSUR. *See*, Matsushita *et al.* 2003.
[176] Canada, Mexico and the US. *See*, Matsushita *et al.* 2003.
[177] Matsushita *et al.* 2003.
[178] This group appeared in the mid-1980s to argue for agricultural trade liberalization and was a significant force in negotiations on agricultural products. In September 2003, at the Cancun session of the ministerial conference, the Cairns group include Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand and Uruguay. *See*, the Cairns Group, *available at:* http://cairnsgroup.org/Pages/map/index.aspx [viewed September 8, 2012].

The new influential group of developing countries, including China, India, Indonesia, Brazil, Egypt, Argentina and South Africa, appeared in September 2003, in the Cancun Session[179]. The group has been referred to as the 'G-20'[180]. It has "forcefully demanded the dismantling of the trade-distorting and protectionist agricultural policies of the European Communities, the United States and other industrialised countries"[181]. Moreover, in the Cancun Session, "a new group known as the ACP/LDC/AU alliance (an alliance made up of the ACP countries, the least-developed countries and the countries of the African Union)"[182] became known as the 'representative' of the "interests of the poorest countries"[183].

In addition, there were other groups that provided the ability for "discussion in small(er) groups of Members to agree on new initiatives, to break deadlocks and to achieve compromises"[184]. For example, "during the Uruguay Round and in the early years of the WTO" the Quad "was the group of the four largest trading entities, i.e. the European Communities, the United States, Japan and Canada"[185]. The Quad "was at the core of all negotiations"[186]. Conversely, the Quad has been "replaced by a new group of key WTO Members: the European Communities, the United States, India, Brazil and China (often referred to as the G-4 when excluding China and as the G-5 when including China)"[187]. Without agreement among these key members, "progress within the WTO on the further liberalization and/or regulation of trade is not feasible"[188]. This transfer in

[179] Matsushita *et al.* 2003.
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.*

political power within the WTO reflects the rising significance of China, India and Brazil in the world economy[189].

2.3.8 Observers

Some WTO Members are considered to be observers[190]. According to the WTO agreement, the observer governments have to begin accession negotiations within five years after gaining observer status[191]. In fact, sometimes, the decision to create observer status leads to argument within the WTO[192]. For example, in January 2004, the European Communities "agreed to back a US-sponsored request by Iraq's Governing Council for observer status"[193]. Also, the European Communities pressured to extend this status to Iran and Syria, an initiative opposed by the United States[194]. On 11 February 2004, at the General Council meeting, it established observer status for Iran. The General Council considered that Iran's request started accession negotiations[195]. This request had been supported by the European Communities, China, India, Indonesia and other Members but the General Council had postponed a decision on Iran's request because of the opposition of United States[196].

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[189] In 2004, a group named the 'five interested parties', including Australia, Brazil, the European Communities, India and the United States, played a crucial role in breaking the deadlock in the Doha development round negotiations and successfully brought about an agreement on the new Doha work programme.
[190] *See,* the WTO website. World Trade Organization 2015, Understanding the WTO: The Organization/ *Members and Observers, available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [viewed February 1, 2015].
[191] *Ibid.*
[192] *Ibid.*
[193] Matsushita *et al.* 2003.
[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid; see* also, The WTO website, available at www.wto.orgienglisWthewto_eligo_obs_e.htm [viewed 1 November 2012].

2.3.9 GATT and WTO Dispute Settlement System: Development and Functions

2.3.9.1 The GATT Dispute Settlement System

The GATT 1947 Agreement contained some provisions for resolving any trade disputes among its contracting parties[197]. The main goal of the GATT disputes settlement was to encourage freer international trade [198]. Therefore, any contracting party could protest measures that had been taken by one or more of the GATT contracting parties which were allegedly in breach of their GATT obligations[199].

The dispute settlement system under GATT 1947 evolved quite remarkably over nearly 50 years on the basis of Articles XXII and XXIII of GATT 1947. Over the years, the GATT dispute settlement system principles and practices evolved "codified in decisions and understandings of the contracting parties" [200]. However, the process was not either "judicialized" or "legalized". The initial stage of the GATT disputes settlement was the diplomatic phase and the process was referred to as "conciliation"[201].

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[197] Anyiwe, L., & Ekhator, E., (2013). 'Developing Countries and the WTO Dispute Resolution System: A Legal Assessment and Review'. *Afe Babalola University: Journal of Sustainable Development Law and Policy, 2* (1), 121-138. *See also,* Davey, William J., (1987). 'Dispute Settlement in GATT'. *Fordham Int'l LJ* 11. p. 54.

[198] Davey, William J., (1987). 'Dispute Settlement in GATT', pp.51-53.

[199] Demaret, P., (1995). 'The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization'. *Columbia Journal of Transnational Law*, *34*, 123. p. 6.

[200] Wilson, B., (2003). 'Dispute Settlement System Training Module'. Available at: World Trade Organization, Legal Affairs Division, Web site: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm [Accessed: October 20, 2015].

[201] Demaret, P., (1995). 'The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization'. p.6.

In GATT dispute settlement, the parties to the dispute could appoint three or five panelists. The panel's decision had to be referred to the contracting parties. Under the GATT 1947 dispute settlement system, if the panel's decision was accepted by the contracting parties, then it would be binding on them. Therefore, any decision needed a positive consensus before it could be adopted [202].

However, the "Positive Consensus" was considered as the most significant weak point in the GATT 1947 dispute settlement system[203]. In order to refer a dispute to a panel, there needed to be also a positive consensus in the GATT Council[204]. The positive consensus meant that there had to be no objection from any contracting party to the decision[205]. Therefore, the parties to the dispute fully controlled the dispute settlement process[206]. In addition, a positive consensus was required for the adoption of the panel report, and "the authorization of countermeasures against a non-implementing respondent"[207]. However, the respondent party was able to block the establishment of a panel and the adoption of the panel report either by a positive consensus rule or by refusing to assent to the report[208]. Therefore, the losing parties could take an advantage "by using the consensus rule to stop the establishment of a panel and to guard against unfavourable panel reports"[209].

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[202] Hudec, R. E., (1993). 'Enforcing International Trade Law: The evolution of the modern GATT legal system'. *Salem, NH: Butterworth Legal Publishers* (7), p. 9. cited in Palmeter, D., & Mavroidis, P. C., (2004). *Dispute settlement in the World Trade Organization: practice and procedure* (Cambridge University Press).
[203] Wilson, B., (2003). 'Dispute Settlement System Training Module'.
[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.*
[208] *Ibid.*
[209] Anyiwe, L., & Ekhator, E., (2013). 'Developing Countries and the WTO Dispute Resolution System: A Legal Assessment and Review'.

The other flaw in the GATT dispute settlement was that it had no fixed timetables for resolving disputes. The GATT dispute settlement system did not say much about disputes and the ways to settle them[210]. The contracting parties had to rely on Article XXII[211]. In fact, Article XXII organised the consultation process and "loosely asked Contracting Parties to defer 'sympathetic consideration' to others' requests", but it did not set rules or time limits[212].

The GATT dispute settlement system was criticised as an inappropriate system because disputes could only be resolved through negotiations[213]. Therefore, the GATT 1947 contracting parties, both developing and developed countries, felt that due to the inherent problems in the GATT dispute settlement system which needed improving and strengthening. Therefore, one of the main points discussed in the Uruguay Round negotiations was the readiness of the contracting parties to implement some preliminary improvements to the GATT dispute settlement rules and procedures[214]. Eventually, one of these negotiations was the creation of the WTO dispute settlement system.

2.3.9.2 The WTO Dispute Settlement System

The new dispute settlement system aimed to introduce a significant change in the way of settling the GATT 1947 disputes. Specifically, the "positive consensus" rule was reversed

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[210] Junior, R. D. S., (2009). An Advisory Center on WTO Law for Mercosur Members: Bridging Disparities through Collective Action. *Institut québécois des hautes études internationales – IQHEI.*

[211] This Article was dealing with disputes claimed by any member that suffered loss as a result of being nullified or impaired by any other member.

[212] Junior, R. D. S., (2009). An Advisory Center on WTO Law for Mercosur Members: Bridging Disparities through Collective Action.

[213] *Ibid. also see,* Davey, William J., (1987). 'Dispute Settlement in GATT'. p. 65.

[214] Wilson, B., (2003). 'Dispute Settlement System Training Module'.

and the litigation process became more rules-based. These were the two principal changes which made the system more "predictable and less susceptible to power politics"[215].

The WTO dispute settlement system was introduced in January 1995, and disputes brought to the WTO covered a wide range of economic activities[216]. The WTO Members established the current dispute settlement system during the Uruguay Round of Multilateral Trade Negotiations and highlighted the importance of compliance by all Members with their obligations under the WTO Agreement[217]. The system was based on the principle that a stronger, more binding system to settle disputes would help to ensure that the WTO's carefully negotiated trading rules are respected and enforced[218]. Also, the system is referred to as the "WTO's unique contribution to the stability of the global economy"[219]. Today, the backbone and the fundamental support of the multilateral trading regime is the WTO dispute settlement system.

The current WTO dispute settlement system is referred to as the Dispute Settlement Body (DSB) which includes the Dispute Settlement Panels (DSP) and the Appellate Body (AB). The first phase of the DSB is the "Consultations" phase which could be regarded as a political process within the WTO, while the DSP and AB are judicial-type institutions[220]. The DSB is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding (abbreviated as

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[215] Junior, R. D. S., (2009). An Advisory Center on WTO Law for Mercosur Members: Bridging Disparities through Collective Action.
[216] Wilson, B., (2003). 'Dispute Settlement System Training Module'.
[217] *Ibid.*
[218] *Ibid.*
[219] *Ibid.*
[220] Bossche, P. V., (2008). *The Law and Policy of the World Trade Organization,* (2nd ed, Cambridge University Press). p.235.

"DSU"). The DSU provides rules and procedures for the dispute settlement system. It is the result of the evolution of rules, procedures and practices developed over almost 50 years under the GATT 1947 building on the principles for the management of Articles XXII and XXIII of GATT 1947[221].

In the WTO DSU, a trade dispute arises when any of the WTO Members adopts a trade policy measure allegedly violating their WTO obligations, and one or more other Members takes action against this[222]. In essence, disputes in the WTO are essentially about broken promises. WTO Members have agreed that "if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally"[223]. That means "abiding by the agreed procedures, and respecting judgments"[224].

Also, the function of the DSU is the prevention of the detrimental effects of international trade conflicts and alleviation of the imbalances between stronger and weaker nations through having their disputes settled pursuant to DSU[225]. Therefore, since the DSU entered into force, it has been a practical significant system as the WTO Members often use the WTO system to settle their disputes[226].

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[221] Wilson, B., (2003). 'Dispute Settlement System Training Module'.
[222] See WTO Website available at https://www.wto.org/, [Accessed: October 20, 2015]. *See also*, Wilson, B., (2003). 'Dispute Settlement System Training Module'.
[223] See WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [Accessed: October 20, 2015].
[224] See WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [Accessed: October 20, 2015].
[225] Wilson, B., (2003). 'Dispute Settlement System Training Module'.
[226] *Ibid.*

Moreover, the function of the DSU [227] is providing security and predictability for the multilateral trading system, as businesses involved in international trade in goods and services need predictability and stability in the government rules, regulations and laws relating to their trade activity. Thus, offering a fast, effective, dependable and rule-oriented system to resolve disputes under the provisions of the WTO Agreement is the function of the DSU. Strengthening the rule of law of the dispute settlement system eventually makes the trading system more secure as well as predictable[228]. Further, the dispute settlement system facilitates a fast resolution of the matter through an independent ruling which must be applied promptly, or else the possible trade sanctions will be applied for the non-implementing Member[229].

The WTO dispute settlement system has been often praised as one of the significant innovations of the Uruguay Round[230]. Compared to the previous system, the DSU provides more procedures for the various stages including specific time-frames for dispute settlement[231].

The DSU is an integrated framework for all the WTO agreements[232]. It has departed from the GATT by eliminating the right of individual parties "whose measure is being challenged, to block the establishment of panels or the adoption of a report"[233]. The DSB "automatically establishes panels and adopts panel and Appellate Body reports unless there is a consensus

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[227] See Article 3.2 of the DSU.
[228] Wilson, B., (2003). 'Dispute Settlement System Training Module'.
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.*
[232] *Ibid.*
[233] *Ibid.*

not to do so"[234]. This negative consensus rule is in contrast with the practice under the GATT 1947. The DSU also applies "to the authorization of countermeasures against a party which fails to implement a ruling"[235]. Besides, it authorises "the appellate review of panel reports and a formal surveillance of implementation [of rulings and recommendations] following the adoption of panel (and Appellate Body) reports"[236]. These rules also are incongruent with the practice under the GATT 1947. Hence, the DSU process has shifted from a "diplomatic to a legalized process and from a power-based to rule-based procedure"[237]. It has been classified as a judicialized method of trade dispute settlement.

One of the GATT duties was resolving disputes between the parties by a friendly accommodation[238]. Moreover, "disputes were mainly treated as internal, to be resolved quickly within the organization"[239]. These features were approved by the DSU. Article 3.3 states that "the prompt settlement […] is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Article 3.4 provides that "recommendations or rulings […] shall be aimed at achieving a satisfactory settlement of the matter". As for Article 3.7, it illustrates that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution

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[234] *Ibid.*
[235] *Ibid.*
[236] Wilson, B., (2003). 'Dispute Settlement System Training Module'. *See also*, Anyiwe, L., & Ekhator, E., (2013). 'Developing Countries and the WTO Dispute Resolution System: A Legal Assessment and Review'.
[237] Van der Borght, K., (1999). 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate'. *American University International Law Review*, *14*, 1224.
[238] McRae, D., (2004). What is the Future of WTO Dispute Settlement? *Journal of International Economic Law*, *7*(1), p. 7.
[239] TRADE Analysis., (2005). The WTO Dispute Settlement System: Issues to Consider in the DSU Negotiations. *Geneva, Switzerland. Available online*: http://www.southcentre.int/wp-content/uploads/2013/07/AN_DS1_WTO-Dispute-Settlement-Issues-to-consider-in-DSU-negotiations_EN.pdf [Accessed: October 20, 2015]; *also see*, Weiler, J. H., (2001). 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement'. *Journal of World Trade*, 35(2), 191-207, at p. 5.

mutually acceptable […] is clearly to be preferred". In addition, Article 17.4 states the following: "only parties to the dispute, not third parties, may appeal a panel report". These provisions imply an intention to focus on the actual dispute itself and "to ensure that it is resolved quickly and to the satisfaction of the parties"[240].

The function of Panels and the Appellate Body is prompt settlement and a focus on resolving the dispute that are the essential aspects of their work. The obvious indication of this was in *US-Shirts and Blouses* dispute, the Appellate Body stated that "panels are not required to decide issues that are not necessary to dispose of a particular dispute; and that the basic aim of dispute settlement in the WTO is to settle disputes"[241].

The DSU is more than just a mechanism for "the application of legislation to disputing parties"[242]. It is also "a mechanism of governance and guidance"[243]. Some DSU provisions provide that the WTO dispute settlement system has a greater role than just resolving the dispute between the parties to disputes that, by its rulings "affect entities other than the main parties"[244]. For example, Article 3.2 provides that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". To ensure predictability under the DSU, it has to adopt well-reasoned rulings to make WTO Members learn what the provisions mean and how they should be applied.

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[240] TRADE Analysis., (2005). The WTO Dispute Settlement System: Issues to Consider in the DSU Negotiations.
[241] *Ibid. see also, US-Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R), p. 19.
[242] TRADE Analysis., (2005). The WTO Dispute Settlement System: Issues to Consider in the DSU Negotiations.
[243] *Ibid.*
[244] *Ibid.*

Article 3.2 also states that the aim of the DSU is to "preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions" [245]. Concerning Article 3.5, it provides that all "solutions […] shall be consistent with [covered] agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements". Article 3.6, for its part, requires "[m]utually agreed solutions [by disputants] shall be notified to the DSB". Also, Article 21 provides rules for the multilateral surveillance of the implementation of DSB rulings and recommendations. Articles 3.5, 3.6 and 21 illustrate that "dispute settlement reports are of interest to all the WTO Members"[246].

Indeed, some of the WTO case laws detected that the rulings and recommendations of the DSU may affect a much wider community than just the parties to disputes[247]. In *EC-Bananas*, the Appellate Body approved the panel statement stressing that "increased interdependence of the global economy means Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly"[248]. Moreover, a panel has clearly stated that the WTO disciplines have an impact not only upon WTO Member governments: "it would be entirely wrong to consider the position of individuals is of no relevance to the GATT/WTO

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[245] Jackson, J. H., (2004). International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"? *American Journal of International Law*, p.116. "Preserving rights and obligations supports the notion of the desirability of developing jurisprudence that not only would accord particular disputants some predictability and reliability but also would provide guidance to all government Members of the WTO".

[246] TRADE Analysis., (2005). The WTO Dispute Settlement System: Issues to Consider in the DSU Negotiations.

[247] Ng'ong'ola, C., (2004). 'African Contributions to Dispute Settlement Negotiations in the World Trade Organisation: An Appraisal'. *SATRN Working Paper* No. 8, p.44.

[248] *See European Communities–Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R), para 136.

legal matrix"[249]. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on "[…] the activity of individual economic operators in the national and global market places[250]. The purpose of many of these disciplines, "[…] indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish"[251].

At the very least, the DSU has to resolve disputes satisfactorily and promptly. It is the only way for WTO Members to enforce their rights and obligations under the covered agreements. The DSU deals with trade disputes between the WTO Members to ensure that trade flows as smoothly, predictably and freely as possible[252]. This is achievable by promoting fairness and equality among all the WTO Members[253].

2.3.10 The Position of Developing Countries in the WTO

The majority of WTO Members are developing countries. They are grouped as "developing countries" and "least developed countries"[254]. In this part, the term "developing country" will be used in the legal sense as it is used in the WTO Agreement. However, in the WTO, there is

[249] *United States – Sections 301-310 of the Trade Act of 1974* (WT/DS152/R), paras 7.73.
[250] *United States – Sections 301-310 of the Trade Act of 1974* (WT/DS152/R), paras 7.73.
[251] *United States – Sections 301-310 of the Trade Act of 1974* (WT/DS152/R), paras 7.73.
[252] See WTO Website available at https://www.wto.org/index.htm [Accessed: October 20, 2015].
[253] Anyiwe, L., & Ekhator, E., (2013). Developing Countries and the WTO Dispute Resolution System: A Legal Assessment and Review.
[254] *See*, WTO Website available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, [Accessed: November 17, 2015].

no exact definition of term "developing country"[255]. Defining a country as developing depends on the country declaring itself to be so[256]. Therefore, it is the WTO Members that can announce themselves either as "developed" or "developing" countries[257]. Nevertheless, other members can challenge the decision of a member to be a "developing" country and can challenge such a member for using provisions available to developing countries. Chapter three of this thesis addresses and discusses the term "developing country" elaborately[258].

Developing countries are about two thirds of the 161 WTO Members[259]. Due to their number, these countries play an important and increasingly active role in the WTO, and they increasingly view trade as a vital and significant tool in their development efforts[260]. Consequently, they have varied increasingly and significantly in terms of the size of their economies[261]. In addition, they are rising as a significant trade in the global economy, and "they are becoming more important in the global economy"[262]. This grants the developing countries an important position in the WTO. The evolution of developing countries' participation in the trading system witnessed some changes in the WTO compared to the GATT system. In 1995, when the Uruguay Round was completed, "developing countries had

[255] *Ibid.*
[256] *See*, WTO Website available at https://www.wto.org/, [Accessed: November 13, 2015].
[257] Henrik, H., (1999). 'Remedies in the WTO Dispute Settlement Understanding and Developing Country Interests', *available at*: http://www.econ-law.se/Papers/Remedies%20990611-1.pdf, [Accessed: November 13, 2014]. *See also*, WTO Website available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, [Accessed: November 17, 2015].
[258] The term "developing countries" is discussed further in this thesis, see chapter 3.
[259] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm, [Accessed: November 17, 2015].
[260] *Ibid.*
[261] Peters, M. & Kumar, M., (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. *International Arbitration Law Review*. p.2.
[262] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm, [Accessed: November 17, 2015].

assumed a much higher level of commitments within the system than ever before"[263]. This trend can be attributed to the fact that some of the developing countries had rapid growth and succeeded in varying their economies[264]. This made them better equipped to be more participative in the WTO trading system and enhanced their interests in the WTO negotiations.

Due to the fact that the majority of WTO Members are developing countries, the major focus of the WTO is to make sure that these developing countries are able to benefit from joining in international trade and from the multilateral trading system. Therefore, the Agreement establishing the WTO recognized that "there is need for positive efforts designed to ensure that developing countries, and especially least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development"[265]. Accordingly, the WTO deals with the special needs of developing countries in the DSU[266]. The DSU contains several provisions that seek to improve the possibilities for developing countries to take advantage of the WTO system[267]. Thus, under the current DSU rules, there are some special provisions which developing countries can benefit from.

[263] Peters, M. & Kumar, M., (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. p.6.
[264] Particularly in Asia and Latin America. *See*, Peters, M. & Kumar, M., (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. p.6.
[265] *See*, WTO Website available at https://www.wto.org/english/thewto_e/coher_e/mdg_e/development_e.htm [Accessed: November 17, 2015].
[266] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm [Accessed: November 17, 2015].
[267] Peters, M. & Kumar, M., (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. p.2.

2.3.11 Special and Differential Treatment Provisions for the Developing Countries

The DSU included some provisions concerned with developing countries' special needs. These provisions are referred to as Special and Differential Treatment (S&D) provisions and are recognised as the "integral point of WTO agreements"[268]. They give developing countries special rights in all stages of the DSB process [269].

The Uruguay Round emphasised the basic conceptual premises related to Special and Differential Treatment which are:

(i) Developing countries are intrinsically disadvantaged in their participation in International Trade.

(ii) Any Multilateral Agreement must take this into account when specifying a developing country's rights and obligations.

(iii) Trade policies that maximise sustainable development in one country may not necessarily do so in another.

(iv) It is in the interest of developed countries to assist developing countries in integration into the multilateral trading system[270].

These underlying conceptual premises led to the framework of the S&D provisions.

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[268] Peters, M. & Kumar, M. (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. p.9.

[269] *See*, WTO Website available at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, [Accessed: November 13, 2015].

[270] *Ibid.* p.9. *See also*, Ezeani, E. C., (2010). *'The WTO and Its Development Obligation: Prospects for Global Trade'.* (Anthem Press: *Wimbledon Publishing Company*, London).

Therefore, the conclusion of the Uruguay Round can be divided into two main focus areas[271]. The first area focuses on the developed countries' need to take positive action to enhance their participation in the WTO that falls into the following three categories:

(i) safeguarding the interests of developing countries;

(ii) increasing trade opportunities; and

(iii) providing technical assistance to developing countries[272]

The second area focuses on giving developing countries additional flexibility in their schedule of commitment to WTO obligations that fall into the following three categories:

(a) flexibility commitments;

(b) transitional time periods and;

(c) differential and more favourable treatment of the least-developed countries (LDCs)[273]

Therefore, DSU contains the substantive rules governing special and differential treatment for developing and least-developed country Members. It recognizes the special situation of developing and least-developed country Members by dedicating additional privileged procedures and legal assistance to them[274]. Moreover, it encourages WTO Members to give special consideration to the situation of developing and least-developed country Members.

[271] Novel, A. S., & Paugam, J. M., (2006). 'Why and how differentiate developing countries in the WTO? Theoretical options and negotiating solutions. Reviving the Special and Differential Treatment of Developing Countries in International Trade', *Paris: IFRI,* 151-180.
[272] *Ibid.*
[273] *Ibid.*
[274] Wilson, B., (2003). 'Dispute Settlement System Training Module'.

Whereas some of these provisions are applied very often, others have not yet had much practical relevance. Furthermore, a number of these rules are not very specific or definite[275].

There are some provisions entailing that the WTO Members should address and safeguard the interests of the developing members such as 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24.1, 24.2 and 27.2[276]. The operational side of these articles has been reviewed and analysed by some developing countries that offered many proposals with respect to each of these provisions in order to make them more effective[277]. The main issue which the developing members highlighted in their proposals is that S&D provisions may not be appropriate for developing members[278]. Besides, these provisions have turned out to be of limited value to developing countries and declarative rather than operative[279]. Therefore, the developing members have been suggesting ways of improving and reforming these provisions.

Regarding the consultation stage of the DSB, Article 4.10 of the DSU provides that during consultations, "Members should give special attention to developing country Members' particular problems and interests". Indeed, the consultation stage of the DSB is mandatory and it supposed to grant the disputing parties an opportunity to discuss their views, giving this chance particularly to the defending party that needs to explain its measure subjected to the dispute. However, the DSU does not indicate as to how this provision is implemented[280]. The

[275] *Ibid.*
[276] Article 27.2. discussed in this thesis, see chapter 4.
[277] Peters, M. & Kumar, M., (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. p.10.
[278] *Ibid.* p.10.
[279] *Ibid.* p.10.
[280] Babu, R. R., (2003). 'Special and Differential Treatment under WTO Agreements: A Study'. *Asian-African Legal Consultative Organization. , p. 70*, available at http://ssrn.com/abstract=887860, [Accessed: November 13, 2015].

African group's proposed reform suggested that where there is no exact definition of the term "should give special attention", it should be mandatory for a complaining developed Member seeking a panel's establishment "to explain in the panel request […] how it had taken or paid special attention to the particular problems and interests of the responding developing country"[281]. In addition, when a developed Member is a defending party, "it should be made mandatory for it to explain in its submissions to the panel as to how it had addressed or paid special attention to the particular problems and interests of the complaining developing country"[282]. While it is adjudicating the matter, the panel "should give ruling on this matter as well"[283]. Moreover, this article may imply that if a developing country is part of a dispute, both disputing parties may agree to extend the regular periods of consultation. If the parties cannot agree that the consultations have concluded at the end of the consultation period, the DSB chairperson can extend the time-period for consultations that in accordance with Article 12.10 of the DSU[284].

In addition, the S&D provisions are available for a developing country at the panel stage. First, the DSU provides special treatment provisions for developing countries that are presented by Article 8.10. This Article provides that when a dispute is between a developing

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[281] Proposal on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, Negotiations on the Dispute Settlement Understanding, TN/DS/W/19, at 2 (Oct. 9, 2002). Proposal of the African Group in the WTO, TN/CTD/W/3/Rev.1, para.84.
[282] *See*, the African Group Proposal, TN/DS/W/19, at 2 (Oct. 9, 2002).
[283] *Ibid.*
[284] Wilson, B. (2003). 'Dispute Settlement System Training Module'.*see, also* Article 12.10 of the DSU provides that "In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph".

country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member. This may be considered in the favour of developing countries. Yet, the panelist, who belongs to a developing country Member, should be characterised by neutrality and refrain from being biased in favour of the developing country.

Further, Article 12.10 is about extending the consultation period especially for the benefit of the developing countries; it states that "the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long". Also, the second part of this article directs the panel to give, when the developing country Member is the respondent, "sufficient time for the developing country Member to prepare and present its argumentation". However, the article does not give any guideline either to the DSB Chairman or to the panel concerning the length of the additional time to be given. Therefore, this article causes operation disorder in the dispute settlement procedure for the developing country Members [285]. Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, in their joint communication concerning removing the ambiguity from article 12.10, proposed that it should allow a "fixed extension of not less than 15 days, in cases of urgency" and "not less than 30 days in normal circumstances"[286]. However, this should not affect the overall time period for the panel to complete the dispute settlement procedure. Indeed, this provision has already been applied by one panel upon the responding developing country Member's request

[285] *See*, the African Group Proposal, TN/DS/W/19, at 2 (Oct. 9, 2002), *para.86.*
[286] *See*, the African Group Proposal, TN/DS/W/19, at 2 (Oct. 9, 2002), *para.87.*

for an additional period of ten days for it to prepare its first written submission to the panel, despite the complainant's objection[287].

Moreover, Article 12.11 provides that when a developing country is a party to a dispute, the panel report must clearly indicate the form in which the special and differential treatment of the DSU has been taken into account. This article implies the necessity of transparency in showing "how effective these rules have been in a given case" and "how they have actually been applied"[288].

In addition, the special and differential treatment for developing country Members has been applied at the implementation stage of the DSB. Article 21.2 provides that, at the stage of implementation, "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement"[289]. This Article is not entirely clear. Therefore, the India proposal suggested clarifying this Article by replacing the word "should" with "shall" to make this provision mandatory[290]. In addition, the provision must be made mandatory, for the panel and AB to interpret it as an overarching provision in all disputes, involving a developing country Member.

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[287] *See*, Panel Report, India-Quantitative Restrictions on Import of Agricultural, Textile and Industrial Products, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999: V, 1977.

[288] Article 12.11 provides that "Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures".

[289] *See*, Articles 21.2 of the DSU.

[290] *See*, Proposal of India, TN/CTD/W/6, para.16.

Moreover, in the implementation stage of the DSB, Articles 21.7 and 12.8 organize the supervision of the implementation. Article 21.7 provides that the DSB shall consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country Member has raised the matter. Articles 21.8 states that in a case brought by a developing country Member, the DSB has to consider appropriate action not only regarding the trade coverage of the challenged measures, "but also their impact on the economy of developing country Members concerned"[291]. Nonetheless, this article does not force any other party to the dispute to accept the obligation. Therefore, it is suggested that, a successful implementation of this provision requires adding the following sentence: "the parties to the dispute shall enter into such a process, in good faith, in accordance with the provisions of art.5"[292].

Additionally, the DSU sets out a particular rule applicable to least-developed country Members. The DSU seeks to "emphasise on due restraint being exercised in bringing a dispute settlement proceeding against an LDC as well as in seeking compensation or suspending concession in a proceeding brought against an LDC"[293]. According to Article 24.1, particular consideration must be given, at all stages of the dispute settlement procedures, to the special situation of the least-developed country Member that is involved in a dispute. Moreover, Members must "exercise due restraint in bringing disputes against a least-developed country Member and in asking for compensation or seeking authorization to

[291] *See*, Articles 21.8 of the DSU.
[292] Peters, M. & Kumar, M., (2014). 'Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system'. p.13; *see also*, Articles 5 of the DSU.
[293] *Kennedy,K."Special and Differential Treatment of Developing Countries" in Patrick F.J. Mackrory, Arthur E. Appleton et al. (eds) The World Trade Organization: Legal, Economic and Political Analysis (Springer,* New York, *2005), p.1523*.

suspend obligations against a least-developed country Member that has 'lost' a dispute"[294]. As for Article 24.2, it provides that the Director-General or the Chairman of the DSB must offer their good offices, conciliation and mediation when this is requested by a least-developed country Member. This article in fact aims at assisting the parties to settle the dispute before the establishment of a panel, and, for this aim, the Director-General or the Chairman of the DSB may consult any source either considers appropriate.

From the beginning, the reasons for S&D have covered different positions of the needs of developing countries in the DSB. The purpose of S&D is to give developing countries a greater priority in the DSB process, thereby allowing them to give priority to their own needs. The existing S&D provisions were reviewed. The issues that have been considered are: whether some of the non-mandatory provisions should be made mandatory, the way of making them more effective and the help to be offered to developing countries to use them more effectively. However, there was little evidence of the implementation of these provisions. Making the S&D provisions legally binding would make them more effective. The basic aim should be placing developing countries in the position that allows them to effectively defend their rights in the DSB system. The S&D treatment in the field of WTO dispute settlement should take primarily the form of privileged access to developing country Members.

[294] Wilson, B., (2003). 'Dispute Settlement System Training Module'.

2.3.12 Conclusion

This chapter presented a brief review about the WTO and the environment that produced the WTO. Also, it includes a number of the WTO articles that creates a participating role in WTO proceedings possibly leading to accession under the WTO. Therefore, it highlighted and evaluated articles that indeed are key factors for countries entering into the WTO. The WTO accession was important to mention in this part. So, the aim of accession is to make clear the accession under the WTO Articles, which considered the practical and key factors for joining and entering into the WTO. This chapter presented brief information about the development of the WTO as well as accession under the WTO article. So, this chapter tried to evaluate the articles that are important in making the WTO accession system. Consequently, this part was divided into: Article XI: accession of 'original members', Article XIV: Acceptance, Entry into Force and Deposit, the WTO Accession Process, Current membership, Observer governments, States and customs territories, Developing-country Members, Groups and alliances within the WTO and Observers. Also, this chapter has brought into view the timing of accession procedures for potential WTO. The chapter, in addition, includes a brief review of the development and functions of the GATT and WTO dispute settlement system and analyses the position and Special and Differential treatment for Developing Countries in the WTO. Therefore, the next chapter will try to classify the meaning of "a developing country" which can benefit from the Special and Differential treatment of the WTO and examine this classification according to the WTO.

Chapter 3: What is a "Developing Country"?

3.1 Introduction

There are various concessions granted to developing countries under the GATT/WTO, particularly in their dispute settlement systems. Therefore, the meaning of 'developing country' has to be classified clearly by the GATT/WTO body. So, status as a developing country is given to those countries that qualify for it, but not to countries that seek the status only so they can benefit from it. Therefore, it is a most significant issue to classify, demarcate and identify the meaning of 'developing country' in theory by considering the opinions of scholars of laws, politics and economics and in practice by considering the operation of organizations such as GATT or/and WTO.

This chapter tries to establish the meaning of "developing country" under the GATT as well as under the WTO. Also, it will examine the classification of 'developing country' by the World Bank, United Nations and United Nation Statistics, International Monetary Fund (IMF) that as result to appear developing countries in clear principles, which they may consider to be methods for classifying the developing countries. However, all the principles of developing countries, which appear in this thesis, do not consider a method as the main principle for classifying the developing countries, but they might take in account of important ways for classify developing countries. So, the WTO may be interested in accepting them for the purpose of classifying countries.

3.2 Developing country under the GATT Agreement

The GATT 1994 was not trying to classify or explain the meaning of 'developing country' whereas the GATT 1947 did provide an explanation of 'developing country'[295]. Article XVIII of GATT 1947 grants certain privileges to least developed and developing countries. Developing countries were referred to in the statement:

> The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development[296].

Whereas the statement is written in indistinct terms, an attempt was created to further illuminate its meaning in an interpretative note to the provision. It states that:

> 1. When they consider whether the economy of a contracting party 'can only support low standards of living', the Contracting Parties shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.
> 2. The phrase 'in the early stages of development' is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production[297].

In addition, the meaning of the term 'developing country' was explained in the GATT Agreement on Subsidies and Countervailing Measures as "a country whose GNP per capita

[295] Matsushita *et al*. 2003; *see also* Jiang, M., 'Developing Countries and the GATT/WTO Dispute Settlement Mechanism: Case Study of China, LLM dissertation, *University of Essex* (2002).
[296] *See*, GATT Agreement 1947, Article XVIII:1.
[297] Jiang 2002. *See also*, the GATT Agreement 1947, Anneal, Note Ad Article XVIII: 1 and 4.

has reached $1,000 per annum based on the most recent data from the World Bank on GNP per capita"[298].

In the 1947 GATT, Portugal lost its attempt in a committee to define what 'developing countries' meant[299]. The GATT committee avoided defining the term and left it to developing countries 'to self declare'. Also, it remains up to contracting parties, the organization's members, to decide on whether or not a country is a developing country[300]. The GATT was trying to solve the issue of identifying 'developing countries' under the 'self declare' method, but that was not enough. The term required a simpler and clearer definition and an identifiable set of criteria based on a country's involvement in the world trade context. So, the integration of developing countries into the GATT or in the multilateral trading system is most significant for their economic development and for global trade expansion[301]. Therefore, the next part will discuss the categorization of developing countries under the WTO.

3.3 Developing country under the WTO Agreement

Developing countries make up the majority of the WTO membership. Under the WTO, they are known as 'developing countries' and 'least developed countries'. Unfortunately, the WTO does not state specific definitions of the terms 'developing countries' and 'least developed countries'. During the period from 1980 to 2000, it has been observed that the

[298] Gross National Product (GNP);Matsushita *et al*. 2003; *see also* Jiang 2002.
[299] Matsushita *et al*. 2003; *see also* Jiang 2002.
[300] Regarding Article XVIII of GATT 1947, it has observed that the ten original GATT contracting parties were developing countries which consider as Brazil, Burma, China, Ceylon, Chile, Cuba, India, Pakistan, Syria, and Lebanon. Also, it has been observed that China, Lebanon, and Syria withdrew from the GATT that was in the first few years of the GATT. *See*, Matsushita *et al*. 2003.
[301] Matsushita *et al*. 2003.

share of developing countries in international trade was approximately unchanged: 27.4 per cent in 1980 and 28.8 per cent in 1999[302].

The WTO states that "[t]here are no WTO definitions of 'developed' and 'developing' countries" [303]. Members announce for themselves whether they are 'developed' or 'developing' countries. However, other "members can challenge the decision of a member to make use of provisions available to developing countries"[304]. It may be supposed that the WTO has not created any criteria because the members could not agree on a definition and the organization does not want to be criticised by scholars of law, economic or even politics. Also, the WTO might be far away from making distinctions between developing and developed countries, because that could led to some states might be deterred from joining the WTO if it had rigid definitions of 'developing country' as well as that would lead to a disadvantage for some countries that want to benefit from the WTO provisions.

In November 1999, the Ministerial Conference of the WTO in Seattle, Washington, created a step forward in the identification process for developing countries via the Advisory Centre on WTO Law [305]. In general, member countries being classified as developed countries, economies in transition, or least developed countries[306]. The Advisory Centre classifies developing countries by their share of world trade and per capita income for the last three years based on the data of World Bank statistics. Therefore, developing countries are separated into three categories: "1) Category A: more than 1.5 per cent of world trade or High

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[302] *Ibid.*
[303] *See*, World Trade Organization 2013, *WTO |Development. Who are the developing countries in the WTO?*. Available from: http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm [viewed, February 17, 2013].
[304] *Ibid.*
[305] Matsushita *et al*. 2003; *see also* Jiang 2002.
[306] *Ibid.*

Income; (2) Category B: more than 0.15 per cent but less than 1.5 per cent of world trade; and (3) Category C: less than 0.15 per cent of world trade"[307]. While there is no classification for least developed countries, it may be assumed that they might have just a little or none of the world's trade. The Advisory Centre's criteria might be considered best suited for identifying developing countries. This may be because the Advisory Centre is detached from the WTO and has its own legal personality[308].

The draft agreement that established the World Trade Organization states that

> There is a need for positive efforts designed to ensure that developing countries especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development[309].

In addition, there are many provisions in the WTO agreement granting developing countries 'special and differential treatment'; it is also significant for them to achieve the goal of securing special and differential treatment[310]. The term 'developing countries' is not clearly defined under the WTO agreements nor the GATT regime; the classification is given on "an *ad hoc* basis and primarily through self-selection"[311]. 'Least-developed' countries were not mentioned by the WTO Agreement but their definition has been based on how the United Nations identified them[312].

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[307] Jiang 2002.
[308] Matsushita *et al*. 2003; *see also* Jiang 2002.
[309] Jiang 2002.
[310] Matsushita *et al*. 2003; *see also* Jiang 2002.
[311] Matsushita *et al*. 2003.
[312] The UN Committee for Development Planning periodically makes this determination by reference to four criteria: per capita income, population size, quality-of-life index, and economic diversification. *See,* UN (1994) *Report on the Twenty-Ninth Session, 12-14 January 1994*, Committee for Development Planning, Economic and Social Council Official Records, 1994, Supplement No.2, New York: United Nations Publications, E/1994/22. (1994) at 64, 67.

Indeed, one might demand an answer to the question 'what countries are developing countries?' particularly under the GATT/WTO [313]. The vagueness of the notion of 'developing countries' was argued in the WTO in negotiations about the accession of China, which is considered a developing country[314]. It was suggested that the term 'developing countries' required clear criteria to describe and identify the status[315]. It is thought that the reasons for vagueness of the term 'developing countries' might be because the term is used for different aims in many international contexts and there is a lack of international consensus on the term[316]. The purpose of the following paragraphs is to illustrate how 'developing countries' is classified by some significant organizations, which may lead the WTO to include these definitions for the purpose of classifying countries specifically as developing countries.

3.4 World Bank

As noted above, there is not a clear meaning to the term 'developing countries', even though the term is commonly used. Indeed, the World Bank, considered to be one of the most significant bodies in this field, is trying to establish a classification for 'developing countries'. It uses a special classification system to differentiate between countries based on income[317]. On 1 July every year, the World Bank classification[318] separates countries into

[313] Jiang 2002; *see also* Kipel, A. A., 'Special and Differential Treatment for Developing Countries' in Terence P. Stewart (ed.), The World Trade Organization (1996).
[314] Jiang 2002.
[315] *Ibid.*
[316] *Ibid.*
[317] For more information about the World Bank's classification of economies, see the World Bank's web page on Country Classification (under the Data & Statistics section), The World Bank 2013, *How We Classify Countries*. *Available from:* http://data.worldbank.org/about/country-classifications [viewed February 17, 2013].
[318] See The World Bank, 2013, *World Bank Group*. *Available from*: http://www.worldbank.org/ [viewed February 17, 2013].

three income groups based on gross national income (GNI) per capita, by using ranges of income. These groups are 1) low income, countries with GNI per capita of US$ 1,025 or less per capita in 2000[319]; 2) middle-income, countries with between US$ 1,026 and US$ 12,475 per capita. This group is further sub-divided into lower middle income, countries with GNI per capita between US$ 1,026 and US$ 4,035; and upper middle income, countries with GNI per capita between US$ 4,036 and US$ 12,475[320]. The final classification is 3) high income, countries[321] with GNI per capita[322]US$ 12,476 or more[323].

It has been argued that the classification system of the World Bank has some inconsistency[324]. In other words, it may not be possible to classify countries clearly because, as the World Bank has stated,[325]

> the use of the term is convenient; it is not intended to imply that all economies in the group are experiencing similar development or that other economies have reached a preferred or final stage of development. Classification by income does not necessarily reflect development status[326].

So, the classification system of the World Bank does not necessary define developing and/or developed countries. In the World Bank classification, all low-income and middle-income economies are occasionally referred to as developing economies, while there are many countries in the Middle East that have high per-capita incomes as a result of their oil and

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[319] *Ibid.*

[320] In fact, several upper-middle-income economies are known as "newly industrialized" countries. *See*, Matsushita *et al*. 2003.

[321] These are the original members of the Organization for Economic Co-operation and Development (OECD). *See*, The World Bank, 2013, *How We Classify Countries*. *Available from*: http://data.worldbank.org/about/country-classifications [viewed February 17, 2013].

[322] *Ibid.*

[323] *See*, Matsushita *et al*. 2003.

[324] *Ibid.*

[325] *See*, The World Bank, 2013, *How We Classify Countries*. *Available from*: http://data.worldbank.org/about/country-classifications [viewed February 17, 2013].

[326] *Ibid.*

other resources that are not really industrialized. They are still considered to be developing countries. For example, Saudi Arabia and Singapore have high per-capita incomes. In 2014, the per-capita in Saudi Arabia is 25,961.8 US dollars and the in Singapore is 55,182.5[327] US dollars, but they are still considered as developing countries by some international organizations [328] . Also, there are some countries that are considered middle-income economies, such as Russia and Eastern European economies, which have several of the characteristics of industrialized countries[329].

In general, when the system is updated every year, it can make the situation of the developing countries change every year. However, this system did not apply to the WTO and the position of the developing countries is still the same as it was many years ago. One of the weaknesses of the World Bank system is that it may be refused by any country as well as any international organization[330]. The WTO may be interested in using the system of the World Bank to classify countries. However, it is significant to examine other methods for classifying countries, specifically developing countries. The United Nations and United Nations Statistics Division will be discussed in the following paragraphs.

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[327] *See* the World Bank's web page on the World Bank 2015, GDP per capita (current US$), available from: http://data.worldbank.org/indicator/NY.GDP.PCAP.CD [viewed February 22, 2015].“GDP per capita is gross domestic product divided by midyear population. GDP is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources”.

[328] Matsushita *et al*. 2003.

[329] *Ibid.*

[330] Generally, it has been thought that the term 'developed countries' is just for North America and some European countries, while many of the Asian countries are considered developing countries even though they have high income. It is significant to note that it is not just high income, but high infrastructure levels, high employment levels, and high education levels. In many ways, it is quite imperialistic to still consider these countries to be ‘developing’ when they provide as much or more than, for instance, the US does for its citizens. It could be argued that the US’s wide-spread poverty, poor education, and unequal and poor distribution of health care means that the US should be considered a developing country.

3.5 United Nations and United Nations Statistics Division

The United Nations states that there is no established convention for the designation of 'developed' and 'developing' countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in Northern America, Australia and New Zealand in Oceania, and Europe are considered 'developed' regions or areas. In international trade statistics, the Southern African Customs Union is also treated as a developed region, countries emerging from the former Yugoslavia are treated as developing countries, and countries of Eastern Europe and of the Commonwealth of Independent States (code 172) in Europe are not included under either developed or developing regions[331].

The United Nations Statistics Division states, in standard country or area codes for statistical use, that developing regions are Africa, the Americas, excluding the US and Canada, Asia, excluding Japan, and Oceania excluding Australia and New Zealand. Developed regions are North America, Europe, Japan and Australia and New Zealand[332].It also states that the designations 'developed' and 'developing' are "intended for statistical convenience and do not necessarily express a judgement about the stage reached by a particular country or area in the development process"[333].

[331] United Nations, 2013, *United Nations Statistics Division-Standard Country and Area Codes Classifications (M49)*. *Available from:* http://unstats.un.org/unsd/methods/m49/m49regin.htm [viewed February 17, 2013]. The Southern African Customs Union (SACU) consists of Botswana, Lesotho, Namibia, South Africa and Swaziland. *See,* the Southern African Customs Union's web page on Southern African Customs Union 2007, what is SACU?. *Available from:* http://www.sacu.int/ [viewed February 22, 2015].
[332] United Nations, 2013, *United Nations Statistics Division-Standard Country and Area Codes Classifications (M49)*. *Available from:* http://unstats.un.org/unsd/methods/m49/m49regin.htm [viewed February 17, 2013].
[333] *Ibid.*

Comparing the United Nations and the United Nations Statistics Division, it is easily observed that the United Nations was trying to list the developed countries without being fully interested in developing countries, while the United Nations Statistics Division lists the developing countries first, and then lists developed countries. In the United Nations and in the United Nations Statistics Division, all European countries are commonly considered developed regions or areas[334], but in the international trade statistics, Eastern Europe and the Commonwealth of Independent States (code 172) in Europe are not included under either developed or developing regions[335].

Indeed, the United Nation has no established principle for the designation of countries. It states that "[t]here is no established convention for the designation of 'developed' and 'developing' countries or areas in the United Nations system"[336]. The United Nations used the term "common practice" when trying to classify countries, while 'international trade statistics' was also used as a method to organize countries. Yet, there is not any method for organizing countries when it states ". . . countries of eastern Europe and of the Commonwealth of Independent States in Europe are not included under either developed or developing regions"[337]. So, these countries are not developed or developing. What they are, then? However, generally, the United Nations and United Nations Statistics Division systems categorized countries and name them more clearly than other organizations, such as the World Bank. However, while it may seem brilliant to use the United Nations system in the WTO, the next paragraph will present some significant comments and a brief discussion that might reveal a better way to define the term 'developing countries'.

[334] *Ibid.*
[335] *Ibid.*
[336] *Ibid.*
[337] *Ibid.*

3.6 Analysis of the Concept of Developing Countries

In April 2014, the International Monetary Fund (IMF)[338] classified all nations of the former Soviet Union (USSR) in Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Mongolia as well as all nations of Eastern Europe including Central European countries which still belong to the UN institutional 'Eastern Europe Group'[339] as countries not classified as either developed or developing regions. They were classified as 'countries in transition'[340]. The IMF has developed a flexible system for classifying nations. The system divides the world into advanced economies and emerging markets. Under the classification, the developing nation economies are defined based on "(1) per capita income level, (2) export diversification, and (3) degree of integration into the global financial system"[341].

Moreover, any nation with a low or medium standard of living may be considered a developing country[342]. Also, any nation may be considered, or categorized, as a developing

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[338] The HDI has been developed by the UN to determine the level of human development for any countries when the data is available and correct. The Human Development index is a measure of economic development and economic welfare. The Human Development Index examines three important criteria of economic development (life expectancy, education and income levels). *See*, Human Development Index (HDI) website, available at http://hdr.undp.org/en/content/human-development-index-hdi [viewed 13 March 2015]; The IMF describes itself as an organization of 188 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. Please see IMF website: International Monetary Fund, 2013, *IMF-International Monetary Fund Home Page*. *Available from*: http://www.imf.org/external/index.htm [viewed February 17, 2013].

[339] *See*, Eastern Europe Group, 2011, *What Is EEG? Available from:* http://www.eastern-europe group.com/index.php/134-what-is-eeg [viewed February 17, 2013].

[340] See, IMF website: International Monetary Fund, 2013, *IMF-International Monetary Fund Home Page*. *Available from*: http://www.imf.org/external/index.htm [viewed February 17, 2013].

[341] International Monetary Fund, 2012, *World Economic Outlook-Frequently Asked Questions*. *Available from*: http://www.imf.org/external/pubs/ft/weo/faq.htm [viewed February 17, 2013].

[342] There is a strong correlation between low income and high population growth. *See* United Nations, 2013, *United Nations Statistics Division-Standard Country and Area Codes Classifications (M49)*. *Available from:* http://unstats.un.org/unsd/methods/m49/m49regin.htm [viewed February 17, 2013].

country or a newly industrialized country[343] if it has not obtained an important degree of industrialization relative to its population, define as a country in development and, if it creates an economy that is more advanced than other developing countries but it has not yet demonstrated fully the signs of a developed country[344]. In general, the concept of development may be based on the measure of a nation's statistical indexes, for example, gross domestic product per capita, rate of literacy, life expectancy, etc.

It thought that the term 'developing countries' may be used when discussing the intent of those who utilize these terms. In fact, some international organisations have started to use the term 'less economically developed country' (LEDCs) for developing countries as well as for the poorest subset of developing countries in order to moderate the euphemistic aspect of the term 'developing'. There are some other terms used for developing countries such as 'underdeveloped nations', 'non-industrialized nations', 'less developed countries' (LDCs), and 'Third World nations', while higher level countries may be called 'developed countries', 'industrialized nations', 'most economically developed countries' (MEDCs), and 'First World nations'[345].

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[343] See Investopedia (2013), Definition of Newly Industrialized Country. *Available from*: http://www.investopedia.com/terms/n/newly-industrialized-country.asp#axzz2BBxvXFgo [viewed February 17, 2013].

[344] Also, the developing countries may be considered to be nations that allow all of their population to enjoy a free and healthy life in a safe environment. It has been suggested that gross national happiness, measuring the actual satisfaction of a population, is more important than how money oriented a country is for classification purposes. *See* United Nations, 2013, *United Nations Statistics Division-Standard Country and Area Codes Classifications (M49)*. *Available from:* http://unstats.un.org/unsd/methods/m49/m49regin.htm [viewed February 17, 2013]. The UN Human Development Index (HDI) measures "poverty, literacy, education, life expectancy, and other factors. It is a standard means of measuring well-being, especially child welfare. … The nearer it is to 1, the higher the level of human development. Countries and regions have classified into three categories: Low human development: <0,499 Medium human development: from 0,500 to 0,799 High human development:> 0,800". *See*, International Human Development Indicators, 2011, *Indices & Data|Human Development Index (HDI)| United Nations Development Programme (UNDP)*. *Available from:* http://hdr.undp.org/en/statistics/ [viewed February 17, 2013].

[345] *See*, Jiang 2002; *see also* Investopedia (2013), Definition of Newly Industrialized Country.

In general, there are some criticisms of term 'developing countries'[346]. In fact, the term may mean the inferiority of a 'developing country', which might be adverse to the nation when contrasted to a 'developed country'. The developed countries have higher-class economies and expect the 'developing country' to follow them, as a 'model economy', in order to become a 'developed country'. Normally, the term may be considered as a term suggesting the mobility of the economy, while it sometimes appears as a method that does not show increasing economic development of any countries. In this case, the term may be considered as a euphemism. However, it may stand for homogeneity among countries that have similar economies. In contrast, the term 'developed country' will not be the correct term because it implies a lack of continuing economic development and/or growth in developed countries, which is not correct at all.

In fact, economic development may require a modern infrastructure for the nation, not natural resource extraction or agriculture. Indeed, the economic systems of several developed countries are based on high material standards of living, continuous, self-sustaining economic growth in the tertiary sector of the economy and quaternary sector of the economy. However, there are exceptions for some developed countries such as Australia, Canada, and Norway because their primary industries may be considered as playing the most important part in their national economies. Also, the USA and Western Europe have a very significant agricultural sector in their national economies; therefore, they play a major role in international agricultural markets. Natural resource extraction may also be consider as a high value added when it be a very profitable industry, such as oil extraction.

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[346] *Ibid.*

A country with an economy in transition and deep, extensive poverty may be considered a developing country. Such countries are importers rather than developers of innovations in technology and science. Least developed countries (LDCs) appear in the greatest need of assistance and their trade is just 0.4 per cent of world trade[347]. The GATT has adopted an enabling clause and established the policy of special and preferential treatment for developing countries[348]. The Uruguay Round has continued this policy of special and preferential treatment for developing countries. In the WTO, there are many agreements that include special provisions or exceptions, such as longer phase-in periods, for developing countries. For example, the agreements on textiles and agriculture apply policies long sought by developing countries.

3.7 Conclusion

The WTO has shown an interest in developing countries in many ways. It shows respect for developing countries in a number of the WTO articles that favour developing countries and are key factors for the countries entering into the WTO. However, the term 'developing countries' may not be well enough defined under the WTO agreements while the 'developing country' classification is on 'an *ad hoc* basis and primarily through self-selection'. Countries can announce for themselves whether they are 'developed' or 'developing' countries, while other members can challenge the decision of a member to make use of provisions available to developing countries. So, we might demand an answer to the question 'what countries are developing countries?', particularly under the WTO.

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[347] Country Grouping Glossary (2013), 'Country Grouping *Glossary' Available from:* http://cyberschoolbus.un.org/infonation3/glossary [viewed February 17, 2013].
[348] *See* GATT Agreement 1947, at Article XVIII.

While there is no clear classification of the term ‘developing countries’ in the WTO, this chapter shows and analyses the classification of ‘developing countries’ under other international organisations. I believe that the WTO can benefit from and be inspired by such classifications, so that it creates and enhances a clear classification of ‘developing countries’ for its own purposes. Since the WTO deals with developing countries not only in the DSU but also in all WTO regulations and agreements, such a classification is necessary for the WTO and its Members to understand what a developing country and its circumstances are. Moreover, a clear classification of ‘developing countries’ is needed for the WTO to provide more assistance for the developing countries to better benefit from the Special and Differential treatment provisions when they are dealing with the WTO and all its Members, specifically in the DSU.

The WTO system for classifying countries has been mentioned in this chapter while it will be better if the WTO takes a greater interest in methods of classifying countries under other organisations, as discussed further above in this chapter of the thesis, in order to address the vagueness of the term ‘developing countries’. The United Nations and United Nations Statistics Division systems classify and name countries more clearly than other organisations, such as the World Bank. Hence, I believe that it will more productive to classify and name developing countries in the WTO in accordance with the classification presented by the United Nations and United Nations Statistics Division systems.

Indeed, there are some countries that are concerned about their participation in the WTO's DSB. The next chapter will analyse and elaborately deal with some factors that may be considered as the most significant constraints limiting the participation of developing countries in the WTO's DSB.

Chapter 4: Constraints limiting developing Country participation in WTO Dispute Settlement Proceedings

4.1 Lack of Financial and Legal Resources

4.1.1 Introduction

There are some factors that may be considered as the most significant constraints for limiting the participation of developing countries in the WTO dispute settlement body (DSB). The aim of this chapter is to illustrate and emphasize these factors. Therefore, it will highlight and analyse factors that happen frequently in practice and that have been already addressed and reported by WTO Members. Moreover, other factors which might not occur regularly in practice will also be illustrated because they affect the participation of developing countries in the WTO dispute settlement body such as financial and legal resources, inability to impose rulings through retaliation rules, and enforcing decisions and compensations.

The purpose of this section, specifically, is to analyse and evaluate the financial and legal resources. It argues that the financial and legal resources are the most significant factors as regards developing countries' use of the DSB. In practice, however, developing countries lack financial and legal resources and this limits the participation of these countries in the DSB. Therefore, this section assesses the consequences of this lack of financial and legal resources. First of all, it highlights the internal resources of some developing countries. Indeed, some developing countries with a small proportion of trade may not be able to afford the expensive cost to pursue legitimate claims under the DSU. Secondly, the internal expertise of developing countries will be analysed and evaluated, since it affects the ability of

developing countries to recognize their rights and properly defend themselves under the WTO rules.

Also, it will illustrate how the lack of legal expertise and financial recourses may affect developing countries in practice in the WTO dispute settlement proceedings. In addition, the costs will be addressed in this section. WTO law and the DSU provisions require legal and financial resources that may entail high costs for the different stages of WTO dispute settlement proceedings and create a dilemma for developing countries in participating in those proceedings. Moreover, this chapter will examine whether the lack of financial and legal resources of developing countries in those proceedings are tackled by Article 27.2 of the DSU. Indeed, Article 27.2 was an attempt to tackle the high cost of litigation and the lack of legal expertise that constrain developing countries' disputes settlement proceedings. Finally, the discussion will verify if the Advisory Centre on WTO Law (ACWL) can address the constraints of the lack of expertise in WTO law and the high cost of litigation in the WTO dispute settlement system, which limit the participation of developing countries in WTO dispute settlement proceedings. To what extent is ACWL the best option for developing countries to seek legal assistance and to determine whether to carry complaints forward under the DSU?

4.1.2 Lack of Financial and Legal Resources

4.1.2.1 Internal Resources (Internal Trade)

4.1.2.1.1 Analysis and Evaluation of Constraints

Some of the WTO's members, such as developing countries, with little income from trade may find it is difficult to pursuing legitimate claims under the DSB. In the European Union or the United States, one million dollars is a small proportion of the available budget. It may "only be a few seconds worth of exports"[349]. On the other hand, one million dollars would be a dizzying amount of money for small developing countries such as Burundi, Gambia and Guinea-Bissau. It would match an average of 1.45% of annual exports for Gambia[350] or "put in relationship to national income, between 0.17% and 0.42% of gross domestic product (GDP)"[351]. Table 4.1, below, indicates the relative importance of 1 million USD of exports for some developing countries. In fact, the WTO does not "take into account the inherent variation in exports across the WTO's membership"[352]. Under the WTO dispute settlement system, the dispute worth a million dollars is considered the same as the dispute worth one billion dollars. So, it considers that the WTO system may not neutral to traded size. Small trading nations might be forced to not use the legal system every time they need to. There is data analysis that has tried to investigate "how dependent each country is on small export quantities, and, in this indirect way, to investigate its sensitivity to high litigation costs (including the cost of maintaining internal personnel experienced with the DSU's

[349] Nordstrom, H. & Shaffer, G. (2008). "Access to justice in the World Trade Organization: A case for a Small Claims Procedure?" *World Trade Review* 7, (4): 587-640.
[350] *Ibid.*
[351] *Ibid.* It is 0.17% (GDP) for Burundi and 0.42% (GDP) for Guinea-Bissau.
[352] *Ibid.*

complexities)"[353]. Table 4.1 provides the total exports of some small nation against one million US dollars.

Table 4.1: The relative importance of USD 1 million of exports (2003)

Rang	Member	Share of exports (%)	Share of GDP (%)
1	Burundi	1.47	0.17
2	Gambia	1.45	0.27
3	Guinea Bissau	1.43	0.42
4	Solomon Islands	1.01	0.41
5	Rwanda	0.86	0.06
6	Dominica	0.84	0.38
7	Djibouti	0.80	0.16
8	Central African Republic	0.79	0.09
9	Saint Kitts and Nevis	0.66	0.27
10	Sierra Leone	0.63	0.09
11	Saint Vincent and the Grenadines	0.60	0.27
12	Grenada	0.57	0.27
13	Mauritania	0.28	0.09
14	Burkina Faso	0.27	0.03
15	Belize	0.27	0.11
16	Saint Lucia	0.26	0.14
17	Niger	0.24	0.04
18	Antigua and Barbuda	0.22	0.15
19	Haiti	0.22	0.03
20	Lesotho	0.19	0.09

[353] *Ibid.*

21	Malawi	0.18	0.05
22	Maldives	0.17	0.14
23	Chad	0.15	0.04
24	Guinea	0.15	0.03
25	Togo	0.15	0.06
Notes: Calculations based on data from the WTO and UNSTAT[354].			

The litigation costs mentioned above will be an extremely high cost for some nations. Therefore, for some small WTO Members it will be very difficult to litigate a one million dollar claim. Indeed, smaller trading countries are more sensitive to costly dispute settlement proceedings rather than larger trading nations. As for export quantities below one million dollars, for example the export of Djibouti's, Gambia's and Rwanda's is less than one million dollars. In fact, five Caribbean countries, Dominica, Saint Vincent and the Grenadines, Barbados, Grenada, and Saint Lucia, depend on a small export quantities, and, therefore, it might not be worthwhile litigating at the WTO under the current procedures[355]. The trade data for some individual WTO Members is shown below in Table 4.2[356].

[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*

Table 4.2: Trade data

Country	Export by $million
Europe and Central Asia	
Albania	433
Armenia	539
Bulgaria	6,368
Croatia	4,708
Georgia	262
Iceland	2,308
Republic of Kyrgyz	370
Liechtenstein	NA
Macedonia	1,044
Moldova	365
East Asia and Pacific	
Brunei Darussalam	4,136
Cambodia	2,075
China	418,786
Chinese Taipei	138,602
Fiji	443
Hong Kong	226,710
Indonesia	59,780
Japan	444,195
Republic of Korea	181,653
Macao	2,536
Malaysia	101,510
Mongolia	567

Myanmar	2,764
Papua New Guinea	996
Philippines	35,994
Singapore	135,138
Solomon Islands	122
Thailand	75,381
South Asia	
Bangladesh	5,639
Maldives	113
Nepal	651
Pakistan	11,898
Sri Lanka	4,528
Middle East and North Africa	
Bahrain	1,849
Djibouti	11.2
Egypt	7,045
Jordan	1,894
Kuwait	19,513
Morocco	8,444
Oman	2,826
Qatar	12,415
Saudi Arabia	86,185
Tunisia	6,544
United Arab Emirates	42,321
Sub-Saharan Africa	
Angola	9,304

Benin	394
Botswana	2,016
Burkina Faso	318
Burundi	62.5
Cameroon	2,608
Republic of Central African	64.8
Chad	97.5
Congo	2,671
Côte d'Ivoire	4,673
Democratic Rep of the Congo	1,036
Gabon	303
Gambia	4.8
Ghana	2,286
Guinea	702
Guinea-Bissau	76.2
Kenya	2,035
Lesotho	433
Madagascar	471
Malawi	488
Mali	222
Mauritania	505
Mauritius	1,838
Mozambique	1,011
Namibia	1,280
Niger	207
Nigeria	23,833

Rwanda	50.2
Senegal	982
Sierra Leone	217
Swaziland, Kingdom of	562
Tanzania	1,203
Togo	485
Uganda	158
Zambia	977
Zimbabwe	1,753
Latin America and the Caribbean	
Antigua and Barbuda	404
Argentina	28,014
Barbados	184
Belize	200
Bolivia	1,638
Brazil	68,173
Chile	19,325
Colombia	12,774
Costa Rica	5,762
Cuba	988
Dominica	37.8
Dominican Republic	5,147
Ecuador	5,719
El Salvador	1,223
Grenada	37.6
Guatemala	2,573

Guyana	464
Haiti	371
Honduras	976
Jamaica	1,506
Mexico	163,494
Nicaragua	585
Panama	785
Paraguay	1,110
Peru	8,635
Saint Kitts and Nevis	47.3
Saint Lucia	60.5
Saint Vincent and the Grenadines	36.9
Suriname	545
Trinidad and Tobago	4,916
Uruguay	2,092
Venezuela	18,963

As can be seen from Table 4.2, there are many Members of the WTO that would be extremely sensitive to high litigation costs as result of the small amount of their exports[357]. In general the claim under the WTO dispute settlement system may cost one million dollars to bring[358]. So, it has been considered that practically many of the LDCs as well as small island economies nation may be at risk when they litigate under the WTO dispute settlement

[357] Result in Table 4.2 Show a description of the ICTSD project on the WTO dispute settlement system and developing countries. *See,* International Centre for Trade and Sustainable Development (ICTSD).[Online] *Available from*: http://ictsd.org/. [Accessed: May 30, 2013].

[358] Shaffer, G., "The Challenges of WTO Law: Strategies for Developing Country Adaptation", *World Trade Review,* 5(2): pp.177-198 (2006), *Available from*: http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=gregory_shaffer [Accessed: May 30, 2013].

system[359]. Thus, the benefits for a developing country to bring a case are less likely to exceed the threshold of litigation costs that make bringing a WTO case not worthwhile, especially in light of the uncertainty of WTO remedies. Moreover, there is no clear way to make sure any developing country will gain any benefit from the WTO legal system's use[360]. If truth be told, the cost of bringing an individual WTO case is extremely high and reduces developing countries' incentives to participate. While the poorer countries have scarcer resources with limited government budgets, and perhaps more immediate economic and social priorities, the WTO legal costs are higher and the future benefits may be uncertain. Therefore, they are not likely to continue in a longer-term legal complex process when the outcome is uncertain and the legal process is very costly.

4.1.2.2 Internal expertise (Human Resources)

4.1.2.2.1 Analysis and Evaluation of Constraints

The lack of financial and legal resources is one of the factors that limits the participation of developing countries in the WTO dispute settlement body. It has been argued by the African Group [361] that the WTO dispute settlement body is an "expensive and complicated" systemparticularly for developing countries[362]. The high cost of the WTO system[363]also was

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[359] *Ibid.* There is a cost of data analysis too.
[360] Shaffer, G., (2005) "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining", *based on paper prepared for WTO at 10: A Look at the Appellate Body Sao Paulo, Brazil, May 16-17, 2005*.
[361] It was presented by the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002). For additional details, *see also*, Bown, C. & Hoekman, B., 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', (2005) *Journal of International Economic Law, 8.(4) pp.861-890.* at. 875. *Available from*: http://www.ycsg.yale.edu/focus/gta/wto_dispute.pdf [Accessed: June 23, 2014].
[362] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System", *The Global Economic Governance Programme*. [Online] *Available from:* http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf [Accessed: May 30, 2013].

mentioned by the ambassador of India, Bhatia, who stated that the WTO dispute settlement system is a "major deterrent" for both small and large developing countries[364]. Also, under the WTO dispute settlement system, the proceedings require human and financial resources to follow a case from the consultation to the appeal stage which may be a long period, close to three years[365]. However, there are many developing governments that lack financial and human resources to settle their disputes in the complicated and extended legal procedure of the WTO[366]. Therefore, the developing countries may not able to recognize their rights, properly defend themselves under the WTO rules and operate as effectively as developed countries[367] as result of the scarcity of legal expertise and financial resources which are available to developed countries. Whereas developing countries' complainants may show an interest in the system and wish to ensure satisfaction of their rights, the system is costly and complicated for them. Several developing countries have complained that they cannot bear the high costs of WTO litigation[368]. In the DSU cases, developing countries with less-

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[363] *See*, Conti, J., "The Good Case: Decisions to Litigate at the World Trade Organization", *Law & Society Review* 145, pp. 165-169 (2008). [Online] *Available from*: http://law.wisc.edu/gls/documents/joe_conti_paper.pdf. [Accessed: May 30, 2013]; Kim, M., "Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures", *International Studies Quarterly, 52* (2008). [Online] *Available from*: http://spot.colorado.edu/~moonhawk/research/Kim2008-ISQ.pdf. [Accessed: May 30, 2013]; Tussle, D., & Delich, V., "Dispute Settlement between Developing Countries: Argentina and Chilean Price Band" (2013). *Available from*:http://www.wto.org/english/res_e/booksp_e/casestudies_e/case1_e.htm [Accessed: May 30, 2013]; Gallagher, P., Low, P., & Stoler, A., "Managing the Challenges of WTO Participation: 45 Case Studies", (Cambridge University Press, New York, 2005).

[364] Presentation at the WTO Public Forum 2008, 24 September 2008, by H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO. [Online] *Available from*: http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm. [Accessed: May 12, 2013].

[365] *See*, Zhang, M., 'A Legal Analysis of Developing Countries Use of the WTO Dispute Settlement Mechanism to Resolve Their Disputes with Developing Countries'. University of Essex, LLM Thesis (2001).

[366] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".

[367] *See*, Pham, H., "Developing Countries and the WTO: The Need for More Mediation in the DSU". *Journal of World Trade* 9 (2004): p.331. *See*, Parlin, C., 'WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?', *The International Lawyer 32*.pp 863, 868 (1998); Delich, V., 'Developing Countries and the WTO Dispute Settlement System,' in Hoekman, B., et al. eds.,. Development, Trade, and the WTO (2002). pp.71-79.

[368] *See*, the African Group Proposal, TN/DS/W/15, at 1 (Sept. 25 2002). ("The DS is complicated and overly expensive"). The proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/17, at 1 (Sept. 19, 2002). [hereinafter LDC Proposal] stated that "It should be remembered that one of

qualified experts and with little experience may not overcome developed countries with better-qualified experts[369]. As a result of the disproportion in resources between developing countries and developed countries, the 'fight' is not fair[370].

Because of the inadequacy of skilled personnel needed for developing countries to participate in the DSU[371], they always have to "hire professional legal experts from developed countries"[372], who are considered as external legal counsel. Some of developing countries are often use private law firms to help them. However, in recent years, the cost of hiring private legal counsel is high for developing countries. Lawyers[373] "would cost the developing

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the greatest difficulties that LDCs have to cope with in their participation in the multilateral trading system is an extreme human resource constraint. LDCs are often under-represented or not represented in Geneva". *See also,* Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002). ("Our experience over the past seven years of the dispute settlement process has been that the cost of litigation before the WTO panels and the Appellate Body is prohibitively high"); Communication from Paraguay, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/16, at 1 (Sept. 25, 2002) [hereinafter Paraguay Proposal] ("Another factor to be taken into account is the very high cost involved in a dispute settlement procedure, which developing and least-developed country Members are often unable to assume. This makes it even more necessary to promote measures or the prompt and amicable resolution of disputes").

[369] Parlin, C., (1998) 'WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?'*;* Pham 2004.p.333; Michalopoulos, C. (2001). *Developing Countries in the WTO*. *New York: Palgrave.* p.170; Srinivasan, T. N. (1998). *Developing countries and the multilateral trading system: from the GATT to the Uruguay Round and the future*. Boulder, CO: Westview Press.p102.

[370] Parlin, C., (1998) 'WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?'. *See also,* Delich, V., (2002). 'Developing Countries and the WTO Dispute Settlement System',("The Dispute Settlement Understanding brought about a positive and beneficial change for developing countries. Weaker states have a better chance to defend their interests in a rule-oriented [system] than in a power-oriented system. However, since the DSU provisions relating to enforcement of S&D language in WTO agreements are ineffective, developing countries do not enjoy a 'neutral' playing field. Although the DSU is not biased against any party in a dispute, developing countries are less well equipped to participate in the process: they have fewer people with the appropriate training, they are less experienced, and they can bring fewer financial resources to bear").

[371] South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',* in Trade-Related Agenda, Development and Equity, working paper no. 1, p. 31. available online at http://www.southcentre.org/index.php?option=com_content&view=article&id=372%3Aissues-regarding-the-review-of-the-wto-dispute-settlement-mechanism-&catid=63%3Aworld-trade-organization-governance&lang=en. [Accessed: May 12, 2014].

[372] Zhang 2001.

[373] It considers that the majority of the international trade lawyers who are recognizable are from United States. *See,* Zhang 2001.

country concerned tens of thousands of dollars per case"[374] to bring proceedings in the WTO dispute settlement system. For example, in the *Cotton and Sugar Subsidies* cases[375], Brazil hired private law firms to assist in bringing complaints. Brazil's paid a high cost of legal fees, which was over two million dollars. It worked with Sidley Austin Brown & Wood in the cases against the United States and EC[376].

In addition, developing countries had to pay attorney fees of more than four hundred thousand dollars[377], for example in the case of '*Chile-Price Band System and Safeguard Measures relating to Certain Agricultural Products'*[378]. The case of Brazil against U.S. (*Cotton Subsidies)* resulted in significantly greater legal costs. Brazil's Cotton Trade Association paid a high cost of legal fees, which was over two million dollars[379]. Indeed, bringing an individual case in the WTO would be costlier in the internal income of a developing country, which leads to it being less likely to have experience in WTO litigation.

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[374] *See*, Zhang 2001. *See*, *also*, Mukerji, A.,(2000).'Developing Countries and the WTO, Issues of Implementation'. *Journal of World Trade*, 34(6) p. 69.

[375] *See*, Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R. *See also*, Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R,WT/DS266/R and WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, and WT/DS283/AB/R.

[376] *See*, Shaffer, G. (2006) "The Challenges of WTO Law: Strategies for Developing Country Adaptation".p.185. The cost of the case was high. *See*, *also*, Communication from the Appellate Body, United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/13 (Oct. 12, 1998).

[377] *See*, Shaffer, G. (2006) "The Challenges of WTO Law: Strategies for Developing Country Adaptation".p.185.

[378] The Report of the Panel, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207; Tussie, D., & Tussie, V. "The Political Economy of Dispute Settlement: A Case from Argentina", *Latin American Trade Network (LATN)* (2004). [Online] *Available from*: http://ictsd.org/downloads/2010/12/diana-tussie-arg_chile-final-version.pdf. [Accessed: May 12, 2013].

[379] Confirmed by some private lawyers. *See*, Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".

Indeed, the different cost of a small or large case is not clear because of the complexity[380]of the case and/or "how far the case goes before a settlement is reached"[381]. Moreover, any case which holds a "full three-year course with appeal and subsequent wrangles over implementation may cost millions"[382], such as the *Japan-Photographic Film* case[383]. In an informal report, it has been observed that legal fee of *Japan-Photographic Film* case exceeded $10 million[384] on both sides of the dispute[385]. It has been noted that the bill of lawyers cannot be predicted or estimated in advance in any dispute. In fact, sometimes it is dependent upon the other party's decisions. So, the cost will increase when the other party decides to insist upon a panel procedure after consultation has failed, or to appeal a ruling in WTO dispute settlement proceedings to the Appellate Body. Additionally, if the other party does not comply with the ruling "then the entire litigation can be for naught"[386].

Hiring external counsels may address the legal expertise dilemma, but cannot solve the problem that developing countries have limited financial resources. Many criticise private law firms. First of all, some private law firms may deliberately expand disputes to obtain more money[387]. Secondly, they do not train domestic equivalents from developing countries

[380] A lawyer only how can classified simple or complicate of case.
[381] *See*, Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".
[382] *Ibid.*
[383] The Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper ('Japan – Film')*, WT/DS44/R, adopted 22 April 1998.
[384] Shaffer, C., '*Defending* Interests: Public-Private Partnerships in WTO Litigation' (Washington: the Brookings Institution Press, 2003).
[385] The Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper ('Japan – Film')*, WT/DS44/R, adopted 22 April 1998.
[386] *See*, Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".
[387] *Ibid.*

but they train their own legal experts[388]. Under the Dispute Settlement Understanding, only government officials are allowed to present a case before a panel or appellate body[389]. This makes it less beneficial to the developing country to be supported by private law firms[390]. Indeed, it is believed that a dispute settlement system may be easier to use for richer countries. This undermines the confidence of developing countries in the system[391]. The lack of monetary means is persistent problems in developing countries[392], which limit their practice in the DSU.

4.1.3 Litigation costs

4.1.3.1 Analysis and Evaluation of Constraints

One of the most frequent obstacles preventing developing countries from using the WTO dispute settlement system is the lack of expertise and knowledge of complicated WTO law[393]. There are many requirements set by the DSU, as well as preparatory work, that have to take place before presenting a case in the WTO dispute settlement system, such as preparing

[388] Ierley, D., 'Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute over Bananas', *Law and Policy in International Business* 615, (2002).
[389] *Ibid.*
[390] The first present of this process was by the AB in the Banana III dispute at the request of St Lucia who has participated as third party. See, Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".
[391] Srinivasan, T.N., 'Developing Countries and the Multilateral Trading System after Doha', *Yale University Economic Growth Centre Discussion* Paper No. 842, p.14. (2002); Bhagirath, L. D, 'The Current Negotiations in the WTO: Options, Opportunities and Risks for Developing Countries'. (Zed Books, London, 2005), pp. 68-69.
[392] Pham 2004.p.333.
[393] Malkawi, B. H. (2012). Arab Countries'(UNDER) Participation in the WTO Dispute Settlement Mechanism. *Flinders LJ*, *14*, 1. *See also*, Pauwelyn, J. (2002). The use of experts in WTO dispute settlement. *International and Comparative Law Quarterly*, *51*(02), 325-364.

substantial documentation[394] necessary as evidence, preparing commercial and economic data[395] and testimony. In any case, parties may have to show economic and technical evidence[396]. So, parties may use quantitative economic analysis and utilize either econometric or non-econometric evidence in order to "strengthen their argument"[397] and to meet the DSB's principles. Frequently, this might be extremely complicated and may take a long time[398]. Therefore, developing countries may not able to make a case in the dispute settlement system when they do not have adequate technical skills[399]. This may reduce their ability to litigate and develop their influence within the dispute settlement system[400].

The law of the WTO became more detailed, precise and binding since it was introduced on January 1, 1995. It includes "a package of eighteen multilateral agreements, many understandings and protocols, and around 26,000 pages of text"[401]. The texts of the WTO panel and Appellate Body decisions made a more complex case law and their decisions require difficult legal analysis. Also, reading the WTO rules is a huge task even for specialized academics. Under the WTO, the panel decisions may range from 100 to 500 pages. The WTO Appellate Body and WTO panels employ a highly contextualised, case-

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[394] Malkawi, B.H. (2012) 'Arab Countries (UNDER) Participation in the WTO Dispute Settlement Mechanism'. *See also,* Shaffer, G. (2006) "The Challenges of WTO Law: Strategies for Developing Country Adaptation".p.185.

[395] Malkawi, B.H. (2012) 'Arab Countries (UNDER) Participation in the WTO Dispute Settlement Mechanism'.

[396] It might be difficult to obtain regular legal evidence such as information on the laws and regulations. Also, It may not be totally accessible to the public.

[397] Bohi, K.(2009) 'Problems of Developing Countries Access to WTO Dispute Settlement', *Journal of International&ComparativeLaw.*Availablefrom:http://www.kentlaw.edu/jicl/articles/spring2009/BohlSubmissionWTOFinal.pdf.[Accessed: May 12, 2013]. "Exploring the Links between Trade, Standards and the WTO".

[398]Bohi, K.(2009) 'Problems of Developing Countries Access to WTO Dispute Settlement'.

[399] This is a general problem facing developing countries and LDCs in all WTO issues. *See,* Al Bashar 2009. *See, also*, Michalopoulos, C., 'The Participation of the Developing Countries in the WTO' (1998).[Online] *Availablefrom*:http:wwwworldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1906/wps1906Pdf.[Accessed: May 12, 2013].

[400] *See,* Al Bashar 2009.

[401] Shaffer, G., (2005)'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining'.

based approach, based on jurisprudence where the individual case opinions average hundreds of pages[402]. The WTO Appellate Body requires extensive time by lawyers and "higher standards of proof, involving greater use of statistical trade data as opposed to legal presumptions,"[403] which adds to the high cost of legal expertise. As a consequence, the demand for lawyers increases. Due to the growing complexity of WTO jurisprudence, litigation involves "a distant forum in which legal expertise tends to be U.S. and Euro-centric, highly specialized, and expensive"[404].

There are some WTO agreements that require added conditions in the disputes. Under the Subsidies and Countervailing Measures SCM [405] Agreement and Customs Valuation Agreement, there are some provisions that necessitate "experts examine or analyze evidence presented before the panel"[406] and often request that various technical committees provide advisory reports on complicated subjects[407]. These provisions may help developing countries to address the crucial stages of pre-litigation investigation and preparatory work. However, the WTO agreements refer to such experts just before the matter is ready to be presented to

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[402] For example, *see*, Communication from the Appellate Body, United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/13 (Oct. 12, 1998); Report of the Appellate Body, EC–Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), para. 133. For an overview and analysis of the Appellate Body shrimp-turtle decision, see Shaffer,G.(1998),'The U.S. Shrimp-Turtle Appellate Body Report: Setting Guidelines Toward Moderating the Trade-Environment Conflict, Bridges'*(ICTSD),2*(7), at 9; also see Shaffer, G., 'United States–Import Prohibition of Certain Shrimp and Shrimp Products', 93 *American Journal of International Law* 507 (1999) [hereinafter Shaffer, Import Prohibition]. In a case challenging Argentina's customs treatment of U.S. textiles, USTR provided data on the customs treatment of 118 separate tariff categories. *See*, Report of the Appellate Body, Argentina–Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/AB/R (issued Mar. 27, 1998, adopted Apr. 22, 1998).

[403] Shaffer, G. (2005)'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining'.

[404] *Ibid.*

[405] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14, Article. 4.5 [hereinafter SCM].

[406] SCM, Article. 4.5.

[407] Alotaibi 2011.p.20; Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System"; *see also*, Nordstrom, H. & Shaffer, G., (2008), "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".

the panel. Indeed, the agreements fail to address the requirements for collection of technical evidence prior to the litigation that may help developing countries to be more successful in disputes.

Other WTO rules that require detailed economic analysis[408], which make it more costly in multiple stages[409] of settling disputes, include the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Developing countries have to provide detailed economic analysis in any case regarding the SPS Agreement. So the provisions create additional costs for developing countries to satisfy these requirements.

These additional costs include supporting litigation such as "the hiring of experts as testifying witnesses"[410]. However, it has been observed that the fees of private law firms may cost a million dollars even before the DSU process[411]. Furthermore, it has been observed that the fees of private law firms is from $250 to $1,000 per hour[412].

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[408] *Ibid.*

[409] These stages are provided by the DSU Articles 11, 17, 21.3(c), 21.5 and 22.6.

[410] Pham 2004.p.333; *see also,* Bown, C.P. & Hoekman, B.M. (2005) "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector".p.870.

[411] Malkawi, B.H.,(2012) 'Arab Countries (UNDER) Participation in the WTO Dispute Settlement Mechanism'. *See also,* Bown, C., & Hoekman, B.,(2008) 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough'. *Journal of World Trade* 42(1).177, pp.189-192.

[412] Hartigan, J.C. (ed.), 'Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment', *Emerald Group Publishing Limited(6)* (2009), 167-190; *see also*, Pham 2004.p.333; Nordström, K. B, 'The Cost of WTO litigation, legal aid and small claim procedures', (*Stockholm: Swedish National Board of Trade),* Global Trade Department, 1 n.3 (2005) [Online]*Availablefrom:*http://wage.wisc.edu/uploads/WTO%20Conference/nordstroem_update.pdf.[Accessed: May 12, 2013]; Shaffer, G., 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies,' in Towards a Development-Supportive Dispute Settlement System in the WTO', (International Centre for Trade and Sustainable Development (ICTSD), Geneva, 2003). [Online] *Available from*: http://ictsd.net/downloads/2008/06/dsu_2003.pdf. [Accessed: May 12, 2013]; Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?"; According to legal costs outlined in the context of the Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper ('Japan – Film')*, WT/DS44/R, adopted 22 April 1998.

The panel and the appellate body reports are usually extremely long and complex, which may take more time, and strong attempts may be made by official trade experts and private lawyers to settle the dispute[413]. In the *Export Subsidies on Sugar dispute*[414], for instance, under the DSU procedures, the disputing counterparts Australia, Brazil and Thailand, took a long time to make a decision for the "definition of the amount of imported sugar from ACP/India which would be subject to export subsidies"[415].

Indeed, it has been observed that the disputing parties who have superior legal power can obtain positive decisions because they are better able to deal with the complexity of WTO rules and dispute settlement procedures. In particular, developed countries are able to deal with the expenses and disparity of a case under the DSU by their representative officials in the WTO[416]. Developed countries have many representative officials with good experience with the WTO rules. This would reduce the possibility for developing countries to win their cases brought to the DSU[417]. Thailand, for instance, is one of the developing countries that is considered as "an advanced developing country which is more familiar with the dispute settlement process"[418]. It has many trade officials who can prepare and evaluate economic cases, but it "lacks the international and trade lawyers required to present them before a panel

[413] *See*, Al Bashar 2009; Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[414] *See* Shaffer, G. (2003). 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' ; *see*, Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R,WT/DS266/R and WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, and WT/DS283/AB/R.
[415] *See*, Al Bashar 2009.
[416] *Ibid.*
[417] *Ibid. See, also*, Besson, F., & Mehdi, R.'Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis',(2004), available at http://www.univnancy2fr/RECHERCHE/EcoDroit/DOWNLOAD/DROITSETDEVELOP/Besson-Mehdi05-04Tpdf, p. 14. [Accessed: May 12, 2013].
[418] Al Bashar 2009.

or the appellate body"[419]. Moreover, it has difficulty in employing enough staff with good experience with multilateral trading systems, to deal with their cases in Geneva as well as in Bangkok.

Indeed, it has been observed that while fact finding, such as data collection, economic analysis, and testifying witnesses and, in particular, technical evidence are significant, they present a challenge for WTO litigants[420]. Therefore, developing countries have to deal with specialized experts to address economic or scientific evidence[421]. However, developing countries face difficulties attempting to "hire experts for research and testimony to support their cases"[422] as well as technical skills. Furthermore, developing countries need the internal capacity to "coordinate with outside legal counsel"[423] when they subcontract to foreign legal counsel in compliance with the WTO dispute settlement proceedings. However, foreign legal counsel is more costly for developing countries and does not solve the problems. It has been observed that since developing countries may not participate as effectively in the WTO, the possible benefits for them may be less likely to justify the litigation costs, and they have fewer technical skills, it makes less sense for them to invest in WTO legal expertise and participate in WTO dispute settlement[424].

The high cost of the different stages of WTO dispute settlement proceedings is a dilemma for developing countries because they have small trade shares and government budgets.

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[419] *Ibid.*
[420] *Ibid.*
[421] Bohi, K.(2009) 'Problems of Developing Countries Access to WTO Dispute Settlement'.
[422] *Ibid.* Under the WTO framework, the use of experts has become much more common. *See*, *also* Pauwelyn, J., (2002)'The Use of Experts in WTO Dispute Settlement', p.325.
[423] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".
[424] Shaffer, G., (2005) "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining".

Moreover, the support from developed countries' on technical assistance to developing countries has been criticised as "very poor and unorganized"[425]. Furthermore, in the WTO context, developing countries have no inducement to participate in the system.

4.1.4 Article 27.2

4.1.4.1 Analysis and Evaluation of Constraints

DSU Article 27.2[426] tackles the high cost of litigation in the dispute settlement proceedings as well as the lack of legal expertise, which impose constraints on developing countries. Under Article 27(2) of the DSU, developing countries can request technical assistance from the WTO Secretariat. Article 27.2 of the DSU states that the WTO Secretariat has to provide expert 'legal advice and assistance' and make available a qualified legal expert from the WTO technical cooperation services to any developing country Member[427].

However, experts do not support developing countries before a dispute is initiated in WTO dispute settlement proceedings. It is important to provide aid before a dispute initiated in the proceedings. Moreover, the role of legal assistance is just giving "advice and clarification

[425] *See*, Al Bashar 2009; *see, also,* Ierley, D., (2002). 'Defining the factors that influence developing country compliance with and participation in the WTO dispute settlement system: Another look at the dispute over bananas', p. 642.

[426] Article 27.2 of Dispute Settlement Understanding states that'[w]hile the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat." For more details see, Shaffer, G. (2006) "The Challenges of WTO Law: Strategies for Developing Country Adaptation".p.185.

[427] Alotaibi 2011.p.22.

concerning WTO law and processes"[428]. Therefore, it is believed that the experts' assistance might be for 'ensuring the impartiality of the Secretariat', as mentioned in the provision[429]. This means they could not operate as an advocate during the legal proceedings.

Indeed, Article 27(2) may limit the efforts of Secretariat experts to assist developing countries because of the requirement that the assistance of Secretariat experts not 'compromise the neutrality of the Secretariat'. In several disputes, the expert's latitude in assisting developing countries with strategic legal issues is significantly reduced by the impartiality requirement[430]. Therefore, some developing countries, such as Jamaica and the group of least developed countries, have complained about the nature of assistance. They suggest that

> "[w]hile in most instances the 'expert' was sincere and sought to provide useful advice, he did not provide the wide-ranging, in-depth assistance that the countries felt they needed. In short, he was not 'their lawyer.' Rather, he merely provided technical assistance on a narrow range of issues, frequently doing no more than critiquing possible arguments or defenses and providing basic advice about the course of WTO dispute proceedings. Thus, rather than fulfilling the more encompassing role of a 'public defender' for developing countries, the experts are only intended and allowed to serve as short-term, narrow-range technical advisors"[431].

Moreover, some developing countries illustrated that the legal assistance was not helpful to them. The legal assistance provided by the WTO has been criticized by developing countries. The WTO secretariat has a restricted number of staff[432] with part-time jobs. In 1999, the Legal Division of the WTO had only two attorneys who could serve as legal consultants for

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[428] *See*, Al Bashar 2009.
[429] *Ibid.*
[430] Pham 2004.p.343; *see, also*, Delich, V., (2002).'Developing Countries and the WTO Dispute Settlement System.
[431] Pham 2004.p.343; *see, also*, Parlin, C., (1998) 'WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?'.
[432] Pham 2004.p.343.

developing countries[433]. The legal assistance constitutes just a simple guidance regarding the WTO dispute settlement process[434]. It is, therefore**,** extremely difficult to deal with the dispute settlement system with such limited support.

In sum, DSU Article 27.2[435]casts a light on the high cost of litigation and the lack of legal expertise, which creates constraints on developing countries' dispute settlement proceedings. However, it fails to effectively address the level of high costs of litigation and lack of legal expertise of developing countries.

4.1.5 The ACWL

4.1.5.1 Analysis and Evaluation of Constraints

Article 27.2 of the DSU could not totally tackle the high cost of the WTO dispute settlement system, and the lack of legal and financial resources of developing countries has been significant[436] for a long time. Therefore, the WTO Members established the Advisory Centre on WTO Law (ACWL) on 1 December 1999 at the WTO Ministerial Meeting in Seattle, Washington[437]. The Agreement establishing the (ACWL) was signed by 29 countries and

[433]*Ibid*; *see, also*, Chow, D., (2001) 'A New Era of Legalism for Dispute Settlement Under the WTO', 16 *Ohio State Journal on Dispute Resolution* 447 (book review), at 452-54.
[434] Pham 2004.p.343; Footer, 2001, p.74; proposal by Jamaica, Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding (DSU), TN/DS/W/21, at 2 (Oct. 10, 2002). *See* Delich, V, (2002) 'Developing Countries and the WTO Dispute Settlement System', at 75; see *also,* Al Bashar 2009.("The minimum request seems to be an augmentation of the staff provided for in Article 27.2 of the DSU, currently consisting of two part-time consultants").
[435] *See* Al Bashar 2009.
[436] Shaffer, G. (2005) "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining".
[437] *Ibid.*

entered into force on 15 July, 2001[438]. The ACWL is considered as an innovative initiative, an independent 'non-governmental' organization and the first 'international legal aid'[439] centre in international law[440]. The ACWL is operated independently from the WTO Secretariat. The aim of this body is to provide legal advice, aid and training for developing countries[441] officials on WTO (DSU) law[442] as well as to assist developing countries in the preparation and presentation of their trade cases in WTO disputes[443].

Between 2001 and 2009, the ACWL provided support in several[444] WTO disputes that represent over 20 per cent of all DSU proceedings[445]. Besides, it provided several views on issues of WTO laws and on WTO dispute settlement procedures. In addition, it offers "detailed training activities, based in Geneva, to delegates"[446] from developing countries[447]. The ACWL offers high quality expertise for parties to WTO disputes. The ACWL has "an investment fund devoted to subsidizing the costs of such expertise"[448]. Indeed, the ACWL has been "used on occasions to assist developing countries in acquiring scientific, economic

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[438] *Ibid.*
[439] *See*, the Advisory Centre website at 'Welcome to the Advisory Centre on WTO Law'.[Online] Available from: http://www.acwl.ch/e/index_e.aspx.[Accessed: May 12, 2013].
[440] Mike Moore, Director General of the WTO, Speech at the Inauguration of the ACWL on 5 October 2001.Bohi, K.(2009) 'Problems of Developing Countries Access to WTO Dispute Settlement'.
[441] Bohi, K.(2009) 'Problems of Developing Countries Access to WTO Dispute Settlement'. In December 2008, the assistance of the ACWL was available to 28 existing countries that had become Members of the ACWL. See ACWL webpage at http://www.acwl.ch [Accessed: May 12, 2013].
[442] Porges, A,. (2003), 'Settling WTO Disputes: What do Litigation Models Tell Us?', *Ohio State Journal on Dispute Resolution,19* p. 141. available online at http://www.academia.edu/852495/Settling_WTO_disputes_what_do_litigation_models_tell_us (last visited March 17, 2014).
[443] Bohi, K.(2009) 'Problems of Developing Countries Access to WTO Dispute Settlement'; Legal advice and training are provided for all developing country and LDC Members. The support in dispute settlement proceedings is charged according to hourly rates of each country's share of world trade and income per capita.
[444] The ACWL provided support in 25 disputes.
[445] Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".
[446] Alotaibi 2011.p.24.
[447]ACWL Document, 'How to Use the Services of the ACWL: A Guide for Developing Countries and LDCs', October 2007. [Online] *Available from*: http://www.acwl.ch.[Accessed: May 12, 2013].
[448] Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".

and domestic law expertise presented"[449] to be presented when litigating disputes[450]. Moreover, the ACWL can contract with developing countries in a broader and more tactical way and play a role of 'public defender' for the developing countries because it functions separately from the WTO secretariat, but with preserving the impartiality of the WTO secretariat. Also, the WTO Advisory Centre can provide assistance in the 'consultation phase' of disputes as well as consulting advice in respect of potential claims[451]. While the Advisory Centre operates "in a more ad hoc manner for developing countries"[452], it can develop a WTO expertise from which developing countries can benefit over time[453].

The ACWL has a budget to decrease "the heavy burden on the developing countries"[454] to create "internal legal expertise"[455]. Ehlermann, once Chairman of the Appellate Body, stated at the inauguration of the ACWL that the ACWL organization "will strengthen the notion that the dispute settlement system of the WTO is available to the economically weak as much as it is available to the economically strong"[456].

However, the ACWL is not free[457]. The fees imposed by the ACWL are "only a small part of the real cost of representing a developing country from the beginning to the end of the

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[449] *Ibid.*
[450] *Ibid.*
[451] *See*, Al Bashar 2009; *See*, listing at ACWL webpage at http://www.acwl.ch/e/dispute/swto_e.aspx.[Accessed: May 12, 2013].
[452] Shaffer, G. (2006) "The Challenges of WTO Law: Strategies for Developing Country Adaptation".p.185.
[453] Shaffer, G. (2005) "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining".
[454] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".
[455] *Ibid*.
[456] Speech delivered by Claus-Dieter Ehlermann, Chairman of the Appellate Body, at the Inauguration of the ACWL on 5 October 2001.
[457] *See*, Advisory Centre on WTO Law, 'Report on Operations: July 2001-June 2002' [Online] available from www.acwl.ch. [Accessed: May 12, 2013]. The term 'least developed country' is clearly defined according to United Nations criteria based on per capita income and related development indicators. The criteria used in the

appeals process"[458], because of heavy subsidies mainly financed by a number of developed countries. The legal assistance of ACWL confers the right to use its facilities but is not free[459]. However, the membership fees for access to the ACWL services might still be high for some developing countries and less developed countries. The fees for use of the ACWL may affect the decisions of developing countries to bring complaints under the DSU. As a result of the membership fee, a developing country might wait to join the Centre until it is sure that it can benefit meaningfully from WTO litigation.

It has been observed that there are several capacity constraints for developing countries in WTO dispute settlement procedures[460] since the ACWL was established. The assistance is given after a dispute starts in the DSU process. If assistance were also be given before the disputes arose in the DSU process, this would be better for developing countries. In addition, the ACWL has some deficiencies. It has a small number of staff[461], and few lawyers with distinguished knowledge and skills[462]. Consequently, it does not have "the capacity to handle all cases referred to it"[463].

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triennial review in 2003 were based on domestic gross domestic product (under $900 average over three years), a human resource weakness index, and an economic vulnerability index. *See*, UN, 'The Criteria for the Identification of the LDCs', available at http://www.un.org/special-rep/ohrlls/ldc/ldc¨criteria.htm.[Accessed: May 12, 2013].

[458] *See*, Pham 2004.pp. 356-357

[459] Al Bashar 2009.

[460] *Ibid*. *See, also,* Abbott, R., (2007),'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005', *ECIPE Working Paper No. 01/2007*, p. 12. *Available from* http://www.ecipe.org/media/publication_pdfs/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system.pdf[Accessed: August 11, 2011]. *See also*, Bown, C. & Hoekman, B., (2005), 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', at p.875. The higher share of the recent period 2001-2005 suggests that developing members, after a slow start within a new system, are beginning to find it more familiar and learning that it can be used to their best advantage.

[461] Shaffer, G. (2005) "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining". In May 2005, the Centre consisted of eight lawyers.

[462] Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".

[463] *Ibid.*

Furthermore, there are considerable concerns when any developing countries bring a case against another developing country[464]. The ACWL cannot support all developing countries in both sides of a dispute. Indeed, this conflict took place in the *Sugar dispute*[465] when the ACWL refused to support one of the developing country parties. In this case, Brazil was dealing with a private law firm with monetary support from its sugar business[466]. Australia had its own legal experts and Thailand relied on the ACWL. In fact, the Thai government was taking the initiative to be presented by the ACWL while other parties were also keen to be represented by the ACWL[467]. However, the other party' order was declined because Thailand was the first party to ask for help from the ACWL[468]. Therefore, the Thai government gained the benefit of the reduced cost of the litigation, the good quality of the services provided and the expertise of The ACWL's director from being supported by the ACWL.

Due to these deficiencies of the ACWL, there are just a few developing countries that are members of the ACWL[469]. These countries are Bolivia, Bolivarian Republic of Venezuela, Chinese Taipei, Colombia, Costa Rica[470], Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Honduras, Hong Kong, China, India, Indonesia, Jordan, Kenya, Mauritius,

[464] Pham 2004. p.357.
[465] Panel Report, *European Communities–Export Subsidies on Sugar*, WT/DS265/R,WT/DS266/R and WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, and WT/DS283/AB/R.
[466] Al Bashar 2009.
[467] *Ibid.*
[468] *Ibid.*
[469] Borght, K. (2007), 'The Reform of the Dispute Settlement System of the World Trade Organization: Improving Fairness and Inducting Fear', 4(2) *Journal of International Economic Law* 2, p. 22.
[470] Cost Rica Join the Centre in 2005, for more details see the ACWL website. Advisory Centre on WTO Law 2015, Advisory Centre on WTO Law Members: Accessions. Available from: http://www.acwl.ch/e/members/accessions.html.[Accessed: May 12, 2014].

Nicaragua, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Thailand, Tunisia, Turkey, Uruguay, and Vietnam[471].

In May 2005, however, it was revealed that the WTO Advisory Centre had represented eight developing countries (Ecuador, Honduras, India, Indonesia, Pakistan, Paraguay, Peru, and Thailand) in 12 WTO cases[472]. In fact, the WTO Advisory Centre is designed to represent and counsel developing countries to protect their rights under WTO rights. The ACWL has not addressed all constraints that face developing countries in accessing the WTO dispute settlement system, but the lack of expertise in WTO law amongst developing countries is now considerably less. However, the high cost of WTO dispute settlement system litigation is still largely unaddressed and limits the participation of developing countries in WTO dispute settlement proceedings.

4.1.6 Conclusion

This discussion casts light on and highlights the most significant factors regarding the participation of developing countries in the WTO dispute settlement body. Therefore, the lack of financial and legal resources was illustrated and was shown to be among the most significant constraints that limit the participation of developing countries in the WTO dispute settlement body. This part analysed the internal resources of some developing countries that cannot afford the costs to pursue legitimate claims under the DSB. This makes it more

[471] *Ibid.*
[472] Shaffer, G., (2005), "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining".

difficult for developing countries to litigate their disputes under the DSB. Furthermore, the internal expertise of developing countries was analysed and evaluated. Some developing countries may not have the ability to recognize their rights and properly defend themselves under the WTO because of the lack of legal expertise who can deal with WTO dispute settlement proceedings. The WTO law and the DSU provisions demand legal and financial resources, which causes high costs for the different stages of WTO dispute settlement proceedings and causes a dilemma for developing countries in participating in the WTO dispute settlement proceedings. DSU Article 27.2 and the ACWL tackled the lack of financial and legal resources of developing countries in the disputes settlement proceedings. However, it is observed that neither Article 27.2 nor the ACWL tackle effectively the high cost of litigation and the lack of legal expertise that create constraints on developing countries disputes settlement proceedings.

In fact, it is worth to mention that none of the solutions of assistance under Article 27.2, from a WTO Secretariat consultant, outside legal counsel, or from the ACWL attorneys has addressed one of the most significant goals of a developing country to train its own cadre of lawyers to a level of expertise and self-sufficiency to be able to represent itself in DSU proceedings as well as lack of costs of the DSB legislations. Moreover, none has found a solution for the lack of financial and legal resources that have been happening frequently in practice and have been already addressed and reported by the WTO Members as factors limiting the participation of developing countries in the DSB.

4.2 Retaliation

4.2.1 Introduction

There is a factor that may be considered as the most important constraint for limiting the participation of developing countries in the WTO dispute settlement body (DSB). The aim of this chapter is to highlight and analyse factor that has happened frequently in practice and has been addressed and reported by the WTO Members. The purpose of this section is to analyse and evaluate the retaliation rules of the WTO. Retaliation is the most significant remedy for developing countries using the DSB. Indeed, the WTO agreements indicate clearly the objective and means of the DSU for settling a dispute between any conflicting members, to achieve the mutually satisfactory resolution for parties which is compatible with the WTO rules so that all violations case and uses of the retaliation rules are consistent with WTO agreements[473].

Under WTO rules, the right of retaliation entails the 'suspension of trade concessions or obligations' and countermeasures[474]. The retaliation rules of the DSU allow for withdrawal of tariff concessions offered to the violating country or countries. Also, it can result in an increase in tariffs for any imported goods that come from the relevant WTO Member. The reason behind the retaliation rules when disputes arise between WTO Members, particularly between smaller and larger WTO Members, is to cause economic harm for any non-

[473] *See*, Al Bashar 2009; *see*, *also*, Article 3.7 of the DSU states that, 'The first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements'.
[474] *See*, Article 22 of the DSU. For more details see Articles 4.10 and 7.9 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). These articles refer to these enforcement options, as 'retaliatory measures'.

complying WTO Member to encourage its compliance with the retaliation rules[475]. This is considered to be the perfect solution for making larger WTO Members comply with the DSU rulings.

However, it has been observed that the inability to enforce rulings against larger WTO Members is an unavoidable disadvantage in the DSU for developing countries[476]. DSU legal rulings cannot pressure the developed countries with greater economic market power[477] to comply with the rulings if they lose the case. As long as the rulings of the WTO DSU have no bailiff to enforce them, any country can simply choose to ignore judgments and even put up with possible sanctions.

Therefore, this section analyses the WTO retaliation rules that may undermine the utility of the DSU for developing countries. The aim is to see whether an ability to effectively retaliate is considered as a key determinant for WTO Members' participation with the DSU. First, this section will set out a statistical analysis of WTO Members' use of the dispute settlement system, particularly as regards developing countries. Secondly, this section will examine the way in which developing countries' use of WTO retaliation may be ineffective due to the lack of retaliatory force when have recourse to these procedures against developed countries. In practice, developing countries may lack the ability to impose compliance with DSU rulings

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[475] Nottage, H., (2008). "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries", HEI Trade Sanctions Conference on 18 and 19 July 2008. *Availablefrom*:http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fgraduateinstitute.ch%2Fwebdav%2Fsite%2Fctei%2Fshared%2FCTEI%2Fevents%2Fworkshop%2520sanction%2FNottage_panel_4.doc&ei=tlpUpvFBYKl0QXgmoDoDA&usg=AFQjCNFi4hXH073wWRL0XmRQ4-3pRrpMuA [Accessed: November 9, 2013].

[476] *Ibid.*

[477] Ierley, D., (2002), 'Defining the factors that influence developing country compliance with and participation in the WTO dispute settlement system: Another look at the dispute over bananas', pp. 625-626.

through the retaliation rules, and this limits the participation of these countries in the DSB. Therefore, this section will discuss and assess the consequences of this lack of rules. Also, this section will evaluate the experience of developing countries with cross retaliation. Developing country experiences with enforcement of the DSU rulings will be highlighted to find out the effect on undermining the utility of WTO dispute settlement for developing countries. The analysis of the constraints will focus on three issues: first of all, developing countries, with small domestic markets, may not be able to impose sufficient economic or political losses upon the larger WTO Members to generate vital pressure to induce compliance. Secondly, the retaliation ('suspension of concessions') might be more detrimental to the developing country rather than the developed country WTO Member. Thirdly, the WTO rulings may not be enforceable by the developing countries, therefore developing countries receive little attention in the WTO dispute settlement proceedings.

4.2.2 Statistical of developing countries with DSU

The WTO Agreement entered into force more than 20 years ago and more than 492 cases have been raised as of May 13, 2015. This indicates that WTO Members have developed great experience in using the dispute settlement system. Particularly, developing countries have been involved in a large number of disputes, with both developed countries and developing countries equally[478].

[478] Hoda, A,.(2012), 'Dispute Settlement in the WTO, Developing Countries and India', ICRIER No.15 April 2012. *Available from*: http://www.icrier.org/pdf/Policy_Series_No_15.pdf[Accessed: November 9, 2013].

Indeed, there are some arguments[479] that the DSU has worked for developing countries very well. Developing countries are major users of the dispute settlement system. Up to February 29, 2012, 180 cases were initiated by developing countries. 106 of these cases were against developed countries and 74 were against the developing countries. So far, thirty-six developing countries have initiated complaints. Of these countries 12 countries complained once, 18 complained twice and 7 complained 10 times or more. Regarding developing countries using the DSU, the countries using the process most often were Brazil with twenty-five (25) disputes, then Mexico with twenty-one (21) disputes and India with twenty (20) disputes.

Between 1995 and 2012 (29 February), developing countries completed 60 complaints and 42 legal rulings were in their favour, 12 getting mutual agreement and just six disputes were lost. The success rate is 88 per cent (42 out of 48)[480]. There has been full implementation of the rulings and recommendations in some cases. However, a caveat regarding retaliation may be added in some disputes. A somewhat "unexpected interpretation by the AB of the provisions of the WTO provisions has diminished the level of satisfaction of developing countries with the DSU"[481].

[479] *Ibid.*
[480] The DSU has worked better for the developed countries against developing countries. Regarding 64 cases pursued by the developed against developing countries, in 23 there was a mutual settlement and in the remaining 41 disputes, the verdicts were in favour of the complainants in 39 cases. Out of these 39, in 35 cases the rulings and recommendations have been implemented. Hoda, A,. (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[481] *Ibid.*

4.2.2.1 Experience of developing countries with retaliation and cross retaliation

There is study evaluating the WTO dispute settlement data[482]. The data displays a high rate of compliance with WTO dispute settlement rulings by the WTO Members[483]. The study analyses the first ten years of the WTO dispute settlement system and illustrates that 83 per cent[484] of panel and Appellate Body reports successful adopted. The author of that study states that "it is the case that most reports are eventually implemented"[485]. There is another study examining the period from 1995 to March 2007, noting the "generally positive record of Members in complying with adverse rulings"[486]. It found that 90 per cent of 109 panel and Appellate Body reports adopted during that period found violations of WTO law, and that in "virtually all of these cases the WTO Member found to be in violation indicated its intention to bring itself into compliance and the record indicates that in most cases has already done so"[487]. Indeed, there are high compliance rates with adverse DSB rulings brought by both developed countries and developing countries[488].

The study demonstrates that

> "WTO dispute settlement experience to date does not suggest that responding Members have a manifestly worse record of compliance with DSB rulings in

[482] *Ibid.*
[483] *Ibid.*
[484] Davey, W., (2005), 'The WTO Dispute Settlement System: The First Ten Years', Journal of International Economic Law (*JIEL)* 8(1) 17, at 46-48. *Available from:* http://jiel.oxfordjournals.org/content/8/1/17. [Accessed: November 9, 2013].
[485] Davey,W., (2006), 'The WTO: Looking Forwards' Journal of International Economic Law (*JIEL)* 9(1) 3, at 12. *Available from*: http://jiel.oxfordjournals.org/content/9/1/3.extract [Accessed: November 9, 2013].
[486] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[487] Wilson, B., (2007), 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings': The Record to Date', Journal of International Economic Law (*JIEL)* 10(2) 397, at 397-403. *Available from*: http://jiel.oxfordjournals.org/content/10/2/397. [Accessed: November 9, 2013].
[488] Hoda, A,. (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.

> cases where the complaining Member was a small or developing country than in cases where the complaining Member was another type of developing country or developed country"[489].

In fact, during 17 years, developing countries raised many disputes against developed countries and succeeded in getting decisions of legal violations in 88 per cent of the disputes; therefore they are successful in dispute settlement. Also, they have achieved implementation in 94 per cent of the rulings in their favour. It has been observed that developing countries have even been successful in cases against developing countries. It observed that the developing countries have increased their participation in the DSB where they were hesitant in using DSU[490].

However, under the DSB, seventeen disputes have led to requests for authorization of retaliation. The requests have been made by thirteen Members; eight of them were developing country Members[491]. Some of those countries which have varying market sizes and trade shares[492] found "utility in at least requesting retaliation"[493]. Regarding the rate of the WTO disputes, there are only nine cases in which "the complainant pursued and gained retaliation rights from the DSB with retaliatory measures being imposed in only five of those disputes"[494]. In those five, developing countries "pursued their right to retaliate through to the

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[489] Malacrida, R,.(2008), 'Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures' *Journal of Wolters Kluwer*,(*JWT)*42(1)360,at20. *Available from*: http://www.kluwerlawonline.com/static.php?type=aboutus&page=index[Accessed: November 9, 2013].

[490] Hoda, A,. (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.

[491] They are Antigua and Barbuda, Argentina, Brazil, Chile, Ecuador, India, Korea and Mexico.

[492] Hoda, A,. (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.

[493] Nottage, H,. (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries.

[494] *Ibid*. For more details see Hoda, A,. (2012), 'Dispute Settlement in the WTO, Developing Countries and India'. Under Article 22.6 of the DSU, on the level of 'suspension of concessions or other obligations', nine disputes led to Arbitration proceedings.

Arbitration stage"[495]. So, it has been suggested that developing countries "have seen merit in pursuing actual DSB authorisation to retaliate"[496] and have been "at least as active as developed countries in requesting authorisation from the DSB to retaliate"[497]. While the DSB has authorised retaliation, "retaliation has been the exception rather than the rule"[498]. It has been observed that "the overall positive record of Members in complying with adverse rulings is reflected in, and confirmed by, the low number of cases where Members have sought and received authorisation to impose retaliatory measures"[499].

However, there were worries via the Uruguay Round that small Members may not benefit from dispute settlement procedures and they were uncomfortable about the impact of quasi-judicial dispute settlement procedures[500]. The reason behind this concern is that the small nations do not have the economic muscle for effectively enforcing a retaliation or cross-retaliation in large countries, which was the last necessary tool to enforce the ruling in a

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[495] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

[496] The disputes pursued by developing countries are: *US-Upland Cotton (Article 22.6-US), US-Gambling (Article 22.6 -US), US-Offset Act (Byrd Amendment)(Article 22.6-US)(Brazil, Chile, India, Korea, Mexico),* Canada-Aircraft Credits and Guarantees (Article 22.6-Canada), and *EC-Bananas III (Ecuador)(Article 22.6 EC).*

[497] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

[498] *Ibid*. See, also, Malacrida,R., (2008), 'Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures' at 7; A number of disputes resulted in a mutually agreed solution after the authorisation to request retaliation was made, such as: Australia-Measures Affecting Importation of Salmon (DS18); Canada-Measures Affecting the Importation of Milk and Exportation of Dairy Products (DS103 and DS113); US-Section 110(5) of the US Copyright Act; US-Anti-Dumping Act of 1916 (DS136 and DS162); Japan-Measures Affecting the Importation of Apples (DS245); US-Final Countervailing Duty Determination with Respect to Softwood Lumber from Canada (DS257) and US-Investigation of the International Trade Commission in Softwood Lumber from Canada (DS277); US-Final Dumping Determination on Softwood Lumber from Canada (DS264) and US-Oil Country Tubular Goods Sunset Reviews (DS268). *See* Malacrida, R., (2008), 'Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures' Table at Annex B. *See also*, Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

[499] Wilson, B., (2007), 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings'. at 397. *See also*, Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

[500] *Ibid.*

dispute[501]. Therefore, cross-retaliation may be considered as a beneficial tool for developed countries rather than developing countries. Retaliation has been sparingly used by developed countries, but a WTO Member may rely on moral pressure rather than apply legal measures to enforce compliance[502]. Also, the cross-retaliation agreements on goods, services and intellectual property rights raised another concern for developing countries using the DSU,[503] which affects their participation in the dispute settlement system.[504]. It has been observed that there are discrepancies in the imposition of retaliatory measures between developing and developed countries in some cases such as *EC-Bananas III (Ecuador), US-Gambling (Antigua and Barbuda)*[505]. Therefore, in the next part, I will discuss the developing countries' recourse to retaliation as well as cross retaliation under the DSU.

4.2.2.2 Recourse to Retaliation

There has been no occasion in which developed countries considered retaliation or cross-retaliation against the developing countries, because developing countries always implement the rulings and recommendations of the DSB[506]. Moral pressure was considered to be a greater factor in getting governments to implement rulings and recommendations, rather than coercive legal action[507].

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[501] *Ibid.*
[502] *Ibid.*
[503] *Ibid.*
[504] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[505] Also, Mexico imposed retaliatory measures in the context of *U.S.-Offset Act (Byrd Amendment) (Article 22.6-US).*
[506] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[507] *Ibid*. The retaliation and cross-retaliation are considered to be good tools for developing countries, but Members were reluctant to use it.

On the other hand, it has been considered that the major factor for securing implementation of DSB rulings and recommendations in dispute is recourse to retaliation in the DSU[508]. It has been observed that developing countries have had success in implementing DSB rulings and recommendation without recourse to retaliation[509]. However, they had authorisation to retaliate in five cases: Ecuador in *EC-Bananas III*; Brazil, Chile, India, Indonesia, Korea and Thailand in *US-Offset Act (DS 217)*; Brazil in *US-Upland Cotton (DS 267)*; Brazil in *Canada-Aircraft Credits and Guarantees (DS 222)*; and Mexico in *US-Offset Act (DS 234)*.

In *Bananas III*, Ecuador had not gone ahead with retaliation[510]. In *US Offset Act (DS217)*, Brazil, Chile, India, Indonesia and Korea did not benefit from the authorisation whereas "three developed countries that were co-complainants viz., the EC, Japan and Australia did"[511]. In *US-Upland Cotton* and *Canada-Aircraft Credits and Guarantees* cases, Brazil did not use its authorisation to retaliate[512]. In *US-Offset Act (DS 234)*, Mexico and Canada (Canada was a co-complainant) applied the authorised measure[513].

In other cases, developing countries took the step for being authorised to retaliate but they did not follow up[514]. In *US-Oil Country Tubular Goods Sunset Reviews* (DS 268), Argentina requested authorisation but did not continue, and as result of that "the US announced withdrawal of the WTO inconsistent measure, bringing itself into full compliance with the

[508] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[509] *Ibid.*
[510] *Ibid.*
[511] *Ibid.*
[512] *Ibid.*
[513] *Ibid.*
[514] *Ibid.*

recommendations of the DSB"[515]. In *US-Gambling*, Antigua and Barbuda received the recommendation of the arbitrators for retaliation, but did not go to the next step of applying for the DSB to authorise the retaliation.

It has been argued that the biggest factor for implementation of rulings and recommendations is the moral pressure placed on governments to be seen as abiding by their international obligations, rather than coercive legal action[516]. However, it has been observed that in the *EC-Bananas* and *US-Offset Act* cases the developed country co-complainants have been caused pain by the retaliation[517].

In particular, Ecuador and Antigua, in the *EC-Bananas III* case *(Ecuador)* and In the *US-Gambling* case *(Antigua)*, were not able to cause any economic or political pain by retaliation against the US and the EC to secure compliance[518]. However, in the large developing countries, such as Brazil, the position could be different. Therefore, Brazil's position can cause pain to the US and Canada[519]. In the two cases, Brazil obtained authorisation to go ahead with the retaliation. However, Brazil has baulked at proceeding against Canada[520]. Also, Brazil signed an interim 'Framework Agreement' with the US and "the latter has promised to provide annual payments of US $ 147.3 million for the establishment of a technical fund for Brazilian farmers"[521] and "payments are to continue until the US reforms

[515] *Ibid.*
[516] *Ibid.*
[517] *Ibid.*
[518] *Ibid.*
[519] *Ibid.*
[520] *Ibid.*
[521] *Ibid.*

its subsidy programme under the 2012 farm bill"[522]. The threat of retaliation by a large developing country such Brazil can work. However, moral pressure does not always work for developing countries: see the *EC-Bananas III* case, for example.

It would be better to ensure compliance the DSB rulings by means of retaliation. A DSB legal ruling with more using retaliation rules can be an effective tool for a developing country seeking to reverse a legal violation by a larger country[523].

4.2.2.3 Recourse to Cross-Retaliation

Under Article 22.3 of the DSU, while the retaliation would not be practicable or effective, it allows for using retaliation across agreements[524].There are three cases, concerning the TRIPS and GATS agreements, which showed the prospect of cross retaliation against developed countries to ensure compliance with the recommendations of the DSB in goods and services areas. These cases show how the cross-retaliation rules work in practice in disputes involving developing countries.

In *EC-Bananas III*, the arbitrators indicated that the extent of 'suspension of concessions' under GATT 1994 and GATS was "insufficient to reach the level of nullification and impairment determined by the arbitrators" [525] . However, Ecuador could apply for

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[522] *Ibid.*
[523] *Ibid. See, also* Hudec, R., 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' in Development, Trade, and the WTO: A Handbook, at 81- 84 (Bernard Hoekman et al. eds., 2002) (Washington D.C., World Bank) at 81.
[524] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[525] *Ibid.*

authorisation through "TRIPS in Section 1 (copyright and related rights); Article 14 on protection of performers, producers of phonograms and broadcasting organisations), Section 3 (geographical indications) and Section 4 (industrial designs)"[526]. Also, in *US-Gambling*, the arbitrator decided that Antigua could apply to suspend obligations under the TRIPS agreement by authorisation from the DSB "at a level not exceeding US$21 million annually"[527].

In *US-Upland Cotton*, the arbitrators ruled that Brazil could impose sanctions by increasing tariffs on imports of goods coming from the USA, by imposing limitations on US service providers and by means of "lifting of intellectual property rights for US right holders in copyright, trademarks, industrial designs, patents and protection of undisclosed information" [528]. However, they placed conditions, including that "Brazil may begin exercising the right relating to services by US service suppliers and US IPRs only if the sanctions exceed a certain threshold (estimated at US$409.7 million based on 2008 figures)"[529].

4.2.2.4 Cross-Retaliation as regards Intellectual Property Rights

Under the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement), there is an interesting development in practice by developing countries which make requests to cross-retaliate through the 'suspension of obligations' under the TRIPS[530].

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[526] *Ibid.*
[527] *Ibid.*
[528] *Ibid.*
[529] *Ibid.*
[530] *Ibid.*

The first request was by Ecuador in *EC-Bananas III (Ecuador)* and there were later requests by Antigua in *US-Gambling* and Brazil in *US-Upland Cotton*[531].

The suspension of obligations under the TRIPS Agreement has been argued to be useful for developing countries in disputes against developed countries[532]. However, the main concerns of developing countries with traditional retaliation are that (1) the retaliation may be ineffective for inducing larger WTO Members to comply with the DSU rulings while the developing countries' domestic markets are too small to place any effective pressure on developed countries to comply, and (2) the suspension of concessions may be more detrimental to the developing country than the non-complying WTO Member[533]. It has been argued that both concerns may be addressed by cross-retaliation through 'suspending obligations' under intellectual property rights[534]. Therefore, regarding the first concern, it has been argued that the intellectual property obligations under the TRIPS Agreement have significant political and economic value for many companies in some industrialised countries[535]. In particular, "developing countries have undertaken serious commitments on TRIPS from which large, multinational corporations based in industrialised countries stand to

[531] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[532] Subramanian, A., & Watal, J., (2000), 'Can TRIPS serve as an enforcement device for developing countries in the WTO?', Journal of International Economic Law (*JIEL)* 3,(3), at 403-416. *Available from*: http://jiel.oxfordjournals.org/content/3/3/403 [Accessed: November 9, 2013]. *See, also*, Ruse-Kahn, H, G,. (2008), 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations', Journal of International Economic Law (*JIEL)*11(2), 313-364. p.332.*Available from*: http://jiel.oxfordjournals.org/content/16/3/505.full[Accessed: November 9, 2013].
[533] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[534] *Ibid*.
[535] Ruse-Kahn, H, G,. (2008), 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations'.p.334.

benefit enormously"[536]. Therefore, it has been observed that when developing countries use retaliation as regards intellectual property rights that would be a significant tool to generate important lobbying which could induce industrialised governments to comply with their WTO obligations[537].

Regarding the second concern, it has been argued that "retaliation in TRIPS can be genuinely welfare enhancing in a way that conventional retaliation . . . is not"[538]. By this theory, intellectual property protection may tend "to serve the interests of developed countries with a comparative advantage in innovation"[539]. However, the suspension can provide greater benefits to developing countries than burdens[540] if selected and applied correctly.

So, one has to think about the extent to which cross-retaliation under intellectual property rights can be the perfect retaliatory in trade disputes for developing countries against developed countries. However, the Arbitrator in *EC-Bananas III (Ecuador)* stated that even under the TRIPS, retaliation involves "distinctive legal, practical and economic difficulties for the retaliating Member"[541]. Moreover, Ecuador and Antigua had the right to cross-retaliate by suspending TRIPS Agreement obligations in *EC-Bananas III (Ecuador)* and *US-Gambling* but they did not take measures[542]. In practice, there has been no evaluation of the

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[536] Subramanian, A., & Watal, J., (2000), 'Can TRIPS serve as an enforcement device for developing countries in the WTO?', at 406.
[537] *Ibid*.
[538] *Ibid*, at 405.
[539] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[540] Ruse-Kahn, H, G,. (2008), 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations'
[541] Decision was by Arbitrators in *EC-Bananas III (Ecuador) (Article 22.6-EC).* p.332.
[542] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

effectiveness and benefits of suspending TRIPS obligations[543]. So, the major constraints affecting developing countries' participation in DSU are evaluated in the next section.

4.2.2.5 Developing country experience with enforcement of DSU rulings

Developing countries often are weak and lack economic and political tools to pursue the implementation of DSU rulings in their favour, particularly if the rulings are against a major economic power such as the EU or the US[544]. This problem still remains and is considered as the biggest concern for developing countries in the DSU. In the *US-Upland Cotton* dispute, involving Brazil and the US, this concern has obviously appeared. Hagstrom states that Brazil is itself unlikely to be able to force US compliance[545] when the US refused to comply with the DSB's decision. Therefore, Brazil applied for DSB authorisation for countermeasures under Article 22.2 of the Dispute Settlement Understanding (DSU)[546]. By suspending obligations under the TRIPs and GATS, it had cross retaliated against US pharmaceutical patents. However, it is believed that the consequence of cross-retaliation would be "so dire for the US-based pharmaceutical companies that the US is unlikely to tolerate it"[547]. On 26 August 2008, Brazil requested for the recommencement of arbitration in the matter of countermeasures.

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[543] *Ibid.*
[544] *Ibid.*
[545] Altaer, A., (2010), The WTO and developing countries: the missing link of international distributive justice, PhD thesis, University of Portsmouth. *See, also,* Hagstrom, J., (2007) 'Cotton council picks fight with WTO over March meeting', *Congress Daily*, 22 February 2007, p.6.
[546] Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes.
[547] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.

The DSB authorised of cross-retaliation by means of suspending TRIPs and GATS obligations in the *EC-Bananas* case[548], where Ecuador was authorised[549] to suspend such obligations as regards the EC. Ecuador tried to settle the dispute with the EC while it had the authority for suspension and "despite having filed for the establishment of a second panel in February 2007 to seek redress against EC non-compliance" [550]. In the *US-Gambling* case[551], Antigua was also authorised[552] suspend TRIPS obligations as regards the US, but "Antigua as yet has no domestic legislation in place to indicate how it means to use the DSB authority to retaliate"[553].

In 2008, Karen Halverson Cross expected that

> 'The DSB has authorized cross-retaliation before for two small countries, but the DSU only provides for cross-retaliation where suspending concessions with respect to the sector at issue (here, all goods) is not 'practicable or effective'. Given the size of Brazil's economy, it will be more difficult for it to demonstrate that suspending concessions on imports of goods from the United States is not 'practicable or effective'[554].

On 19 November 2009, Brazil was authorised by the DSB to "suspend the application to the United States of concessions or other obligations"[555]. On March 2010, Brazil informed the

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[548] European Communities-Regime for the Importation, Sale and Distribution of Bananas, (Panel) WT/DS27/RW/USA, 12 April 1999.
[549] Decision by the Arbitrators, European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000, (herein EC-Bananas III (Ecuador) (Article 22.6 – EC).
[550] Decision by the Arbitrators, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS27/80, 26 February 2007.
[551] Decision by the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 7 April 2005.
[552] Decision by the Arbitrators, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB, 21 December 2007.
[553] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[554] Halverson Cross, K., (2008) 'WTO Appellate Body Upholds Compliance Panel's Findings in *Cotton Subsidies* Dispute', 12, (19), *International Economic Law*. *Available from*: http://www.asil.org/insights/volume/12/issue/19/wto-appellate-body-upholds-compliance-panels-findings-cotton-subsidies [Accessed: November 9, 2013].
[555] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.

DSB that "it would 'suspend the application to the United States of concessions or other obligations' under the GATT 1994 in the form of increased import duties', and under the TRIPS Agreement and/or the GATS, the form of the latter to be notified before implementation"[556].

Article 22.3 of the DSU indicates that retaliation occurs when the DSU rulings have not been complied by a WTO Member. However, in the *US-Upland Cotton* case, the DSU decided against authorising Brazil's cross-retaliation that would have "given the clear impression that the non-compliance option is freely available to WTO member countries with strong economies bolstered by the power of large MNEs"[557]. Also "it will not allow the DSU's cross-retaliation provision to be activated against such a member"[558].

4.2.2.6 Evaluation of the constraint

The potential shortcomings of WTO retaliation for developing countries have been demonstrated.[559] The inadequacies of the WTO retaliation rules for developing countries should not significantly affect developing countries' decisions to operate in the WTO dispute settlement system. However, the enforcement measures by 'retaliation rules', via the 'suspension of trade concessions or obligations', of the WTO dispute settlement system

[556] *Ibid.*
[557] *Ibid.* A huge multinational enterprise (MNE).
[558] Hoda, A., (2012), 'Dispute Settlement in the WTO, Developing Countries and India'.
[559] Footer, 2001.at 94.

might be considered "virtually meaningless"[560] that may as a result of no effectively influence against developed countries[561].

Pascal Lamy[562], the previous WTO Director General, has mentioned the effectiveness of the WTO sanctions for developing countries and he states that "the WTO system has no sanctions"[563]. Regarding developing countries, it has been argued that one of the most significant constraints limiting the participation of developing countries in the WTO dispute settlement system is the structural inflexibility of the remedies presented to poor nations to enforce a favourable decision[564]. The LDC[565] Group, in the context of the DSU review negotiations, has attributed the limit on the participation of developing countries in the WTO dispute settlement system to "the inadequacies and structural rigidities of the remedies available to poor countries"[566]. Moreover, the African Group suggested that the main dilemma of the WTO dispute settlement system is that "the means provided for enforcement of findings and recommendations [trade retaliation] are skewed against and disadvantage African Members"[567]. Therefore, there are many proposals from developing countries to

[560] *Ibid.*
[561] *See*, Article 22 of the DSU. *See also*, Articles 4.10 and 7.9 of the Subsidies and Countervailing Measures Agreement which refers DSU enforcement.
[562] Pascal Lamy was Director-General of the WTO from September 2005 to August 2013.
[563] *See*, Al Bashar 2009. *See also*, Footer, 2001.,p.98. *See*, Schwartz, W.F., & Sykes, A.O., (2002) 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 *Journal of Legal Studies* 179, p. 204.
[564] Al Bashar 2009.
[565] Less Developing countries.
[566] The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).*See, also*, Abbott, R.,(2007), 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005', at p.8. *See also*, W. Davey, (2005) 'The WTO Dispute Settlement System: The First Ten Years'."the higher ratio for the most recent period 2001-2005 suggests that developing members, after a slow start within a new system, are beginning to find it more familiar and learning it can be used to best advantage".
[567] *See*, the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).

reform the retaliation rules, including collective retaliation,[568] tradable retaliation rights[569] and the use of compensation[570].

Regarding the WTO, there were a number of Members with a reputation for non-compliance with the DSU. The example of the high profile dispute is cases brought against the EU regarding its banana import policy[571]. It has been considered that the current method for enforcement of a DSU ruling may generate an inducement for the United States and the EC to delay the duration of the dispute for several years. For example, the United States disputes with Costa Rica and Pakistan in the *textile safeguard measures* lasted for almost three years[572]. The United States blocked its market to access to those developing countries' imports for about three years without any negative consequences for it trade[573].

The DSU has to work more for developing countries because developing countries cannot effectively enforce WTO rulings, for example in [574] the *Banana* dispute[575]. Therefore, it has

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[568] Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, Negotiations on the Dispute Settlement Understanding, TN/DS/W/47, at 2 (Feb. 11, 2003).
[569] Proposal from Mexico, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/23, at 3 (Nov. 4, 2002).
[570] Communication from Ecuador, Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, TN/DS/W/9, at 3 (July 8, 2002); Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003); the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002) and Kenya Proposal, Communication from Kenya, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, TN/DS/W/42, at 2,5 (Jan. 24, 2003).
[571] Brewer, T.L., & Young, S., (1999) 'WTO Disputes and Developing Countries', 33(5) Journal of World Trade p l69-182. A similar position states by Das, B, L,. (1999) 'The World Trade Organisation: a guide to the framework for international trade', *Third World Network*, p. 397.
[572] See Report of the Appellate Body, United States-Restrictions on Imports, WT/DS24/AB/R (Feb. 10, 1997) (complaint by Costa Rica).
[573] Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[574] Ierley, D., (2002) 'Defining the factors that influence developing country compliance with and participation in the WTO dispute settlement system: Another look at the dispute over bananas', p 626.
[575] European Communities-Regime for the Importation, Sale and Distribution of Bananas, panel report, WT/DS27/ECU, adopted on 22 May 1997; appellate body report, WT/DS27/AB/R, adopted on 5 September 1997.

been observed that it is a waste of money and time for developing countries to invoke the WTO's dispute settlement procedures against developed country WTO Members[576]. So, the 'suspension of trade concessions' may be more favourable to developed country Members more than to developing countries as a means of ensuring compliance.

There is a high compliance with dispute settlement rulings by developing countries[577]. However, if retaliation is the only factor for compliance with adverse rulings that would lead to low rates of compliance particularly in those disputes where smaller or developing countries were complainants[578]. Whereas in sixty disputes, it was possible to retaliate, Members "only requested the right to retaliate in seventeen disputes"[579]. In the following parts, I will analyse constraints that lead to the limitation of participation of developing countries in WTO dispute settlement system.

4.2.2.7 Analysis of the constraint

4.2.2.7.1 Imposition of economic or political sanctions

The DSU 'retaliation rules' have been criticised[580]. Developing countries argue that they may not be able impose enough economic or political loss or even "to generate the requisite

[576] Hudec, R., (2002) 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' in Development, Trade, and the WTO, at 86-87.
[577] *Ibid.*
[578] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries". *See also,* European Communities-Regime for the Importation, Sale and Distribution of Bananas, panel report, WT/DS27/ECU adopted on 5 September 1997.
[579] See Malacrida, R., (2008) 'Towards sounder and fairer WTO retaliation: Suggestions for possible additional procedural rules governing members' preparation and adoption of retaliatory measures'. Table at Appendix B, one of the request for authorisation to retaliate is in *US-Upland Cotton*.
[580] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

pressure"[581] on larger WTO Members to encourage them to comply with the WTO dispute settlement proceedings or even to comply with rulings through retaliation rules. Indeed, retaliation rules are dependent on the size of the domestic market of the retaliating country, or countries, in relation to the non-complying country[582]. There is a large difference in domestic markets between developing and developed WTO Members[583]. The asymmetry in market size was demonstrated by the retaliation of Antigua and Barbuda (Antigua) against the United States[584]. Antigua and Barbuda (Antigua) is one of the smallest WTO Members with about 80,000 inhabitants[585]. Under the retaliation rules, Antigua and Barbuda prevented any trade coming from the United States[586]. The trade was approximately US $180 million per annum, which is less than 0.02 per cent of United States exports[587]. Therefore, it would never crash the United States economy and the United States could simply change such a relatively small volume of trade to elsewhere[588].

Similarly, Ecuador withdrew tariff concessions against the European Communities (EC)[589]. Ecuador's imports were less than 0.1 per cent of total of EC exports, which would not harm the European Community's economy[590]. Regarding to the ability of Ecuador to effectively retaliate, by withdrawing tariff concessions against the European Communities, the Arbitrators state that "Ecuador, as a small developing country, only accounts for a negligible

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[581] *Ibid.*
[582] *Ibid.*
[583] *Ibid.*
[584] *Ibid.*
[585] *Ibid.*
[586] *Ibid.*
[587] *Ibid.*
[588] Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, (herein *US-Gambling*), WT/DS285/22, 22 June 2007.
[589] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[590] *Ibid.*

proportion of the EC's exports of these products, the suspension of concessions is unlikely to have any significant effect on demand for these EC exports"[591]. Also, the arbitrators state that the objective of inducing compliance might never be achieved where "a great imbalance in the terms of trade volume and economic power exists between the complaining party seeking suspension and the other party"[592].

The Antigua and Ecuador cases show that WTO trade sanctions are an ineffective means of ensuring compliance with WTO rulings for developing countries. As some observers[593] highlight, retaliation through the suspension of tariff concessions "cannot offer a realistic option to enforce WTO obligations if performed against considerably larger economies"[594]. Also, it has been stated that the WTO "sanctioning power tends to favour large economies over smaller ones"[595]. In addition, another stated that "as a practical matter trade sanctions can probably only be adopted by developed country Members advanced developing countries"[596]. Similarly, in 2007 the WTO World Trade Report stated that:

> In applying retaliatory measures, large countries can cause economic harm to the party found not to be in compliance with its obligations . . . conversely, small

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[591] Decision by the Arbitrators, European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000. *See, also,* Argentina-Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, 14 December 1999. *See*, Altaer 2010. *See also*, Collier, P., (2007), The Bottom Billion: Why the poorest countries are failing and what can be done about it, Oxford University Press.

[592] Nottage, H,. (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries". *See also*, Decision by the Arbitrators, European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000.

[593] Nordstrom, H. & Shaffer, G. (2008) "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?".

[594] Ruse-Kahn, H, G,. (2008), 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations'.p.332.

[595] Charnovitz, S., 'Should the Teeth Be Pulled? An Analysis of WTO Sanctions', in D. L. M. Kennedy and J. D. Southwick, *Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002) 602-635 at 625.

[596] Yerxa, R,. & Wilson, B., (ed.), *Key issues in WTO Dispute Settlement The first ten years*, at 118 (Cambridge: Cambridge University press, 2005), *available from* http://www.law.ed.ac.uk/ahrc/script-ed/vol4-3/ow_review.asp [Accessed: April 25, 2011].

> countries, in view of their limited size are unable to exert sufficient pressure on larger Members to alter their behaviour[597].

Therefore, regarding the retaliation rules, developing countries may not prefer to use the retaliation methods to require any large countries to comply with the DSU rules. So, developing countries with a weak position to use the retaliation rules may be constrained from participation in the WTO dispute settlement system.

4.2.2.7.2 The opposite result

The experience of developing country with WTO retaliation demonstrates that when the developing countries can request the WTO retaliation, compliance may not be achieved. While the developing countries have imposed retaliatory measures, the concern that it is "both ineffective for, and harmful to, the relevant developing countries"[598] may remain.

On several occasions, commentators and various developing countries have argued that the 'suspension of trade concessions' might be harmful to developing countries rather than the large, non-complying WTO Members and the shortcomings in retaliation rules may "undermine the utility of WTO dispute settlement for developing countries"[599]. It is thought[600] that developing countries may harm themselves on issues of consumer and

[597] World Trade Organization (2007) "Six decades of multilateral trade cooperation: What have we learnt?" in *World Trade Report 2007*, at 284.
[598] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[599] *Ibid.*
[600] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".

economic welfare[601] by imposing retaliation rules and withdrawing tariff concessions for large developed country WTO Members.

It has been stated that the suspension of concessions are against the principles of the WTO system[602]. Also, the policy of the suspension of concessions amounts to "shooting oneself in the foot"[603]. The retaliation rules have been argued against by developing countries and some commentators. The argument appears that the retaliation rules may skew against developing countries and undermines the benefit of the WTO dispute settlement system for these countries[604]. The LDC Group, in the context of DSU Review negotiations, stated that the "lack of an effective enforcement mechanism and the potential impact of retaliatory measures for poor economies is well documented"[605]. It has similarly been stated that the reality is "developing-country Members cannot practically utilise this ultimate sanction"[606] as "they would probably suffer further injury if they adopted retaliatory measures"[607].

Some developing countries have concerns about using the retaliation rules of the DSU. The truth of this concern was apparent when Antigua and Barbuda (Antigua) attempted to retaliate against the United States and Ecuador applied for retaliation against the United

[601] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[602] *Ibid.*
[603] *See*, Bronkers, M. & Van den Brock, N., 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement' (2005) *Journal of International Economic Law* 8(1) 101-126, at 103. *See also*, Mavroidis, P., 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', (2000) *Eur. J. Int'l. Law* 11(4); 763-813;for more details, *see*, *also*, Hoekman, B. & Mavroidis, P., *WTO Dispute Settlement, Transparency, and Surveillance*, (1999), Washington: World Bank, at 6.
[604] Nottage, H,.(2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".
[605] The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).
[606] The African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).
[607] *Ibid;* Charnovitz, S.,(2002),'Should the Teeth Be Pulled? An Analysis of WTO Sanctions', at 625; Renouf, Y., 'A Brief Introduction to Countermeasures in the WTO Dispute Settlement System', in R Yerxa and B. Wilson *Key Issues in WTO Dispute Settlement* (Cambridge, Cambridge University Press, 2005) at 118; Mavroidis, P.,(2000),'Remedies in the WTO Legal System: Between a Rock and a Hard Place'.

States and the EC[608]. Indeed, Antigua and Barbuda is a small island with a small amount of natural resources. It is heavily dependent on imports, 50 per cent of which are from the United States. Therefore, restrictions would create a "disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country"[609]. So, it has been agreed that the retaliatory restrictions on goods and services that come from the United States would have "a much greater negative impact on Antigua and Barbuda than it would on the United States"[610].

In Ecuador's application for retaliation against the EC, the Arbitrator pointed out that:

> 'In situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension of concessions than for the other party'[611].

It has been stated that "perhaps the biggest disadvantage of WTO sanctions is that they bite the country imposing the sanction"[612]. Therefore, it has been observed that, in practice, developing countries may face problems when they attempt to create countermeasures[613] as the countermeasures might be an unsuccessful tool in their hands[614].

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[608] See, Bronkers, M. &Van den Brock, N.,(2005), 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement', at 103. *See also*, Mavroidis, P.,(2000),'Remedies in the WTO Legal System: Between a Rock and a Hard Place'; and for more details see Hoekman, B. & Mavroidis, P., (1999), *WTO Dispute Settlement, Transparency, and Surveillance*, at 6.

[609] Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (*herein *US – Gambling),* WT/DS285/22, 22 June 2007.

[610] Ibid. *See, also*, Charnovitz, S.,(2002),'Should the Teeth Be Pulled? An Analysis of WTO Sanctions', at 621.

[611] Decision by the Arbitrators, European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000.

[612] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System*"*; *see, also*, Charnovitz, S.,(2002),'Should the Teeth Be Pulled? An Analysis of WTO Sanctions', at 621.

[613] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System".

[614] Bagwell, K., P. Mavroidis, P., Staiger, R., 'The Case for Tradable Remedies in WTO Dispute Settlement' (Washington, DC: World Bank Policy Research Paper No. 3314, 2004), at 14-15.

Trade retaliation involving developing countries against developed (industrialised) countries has been classify by developing countries as that it is not available to them[615] and it has proven 'counterproductive' as it "would mostly harm the former, not induce compliance"[616]. Therefore, it has been argued that "countermeasures are a more or less ineffective instrument in the hands of 'smaller' players"[617] and that "there is indeed a practical problem for small countries and developing countries when they attempt to carry through with effective retaliation within the WTO system"[618].

Regarding the economic aspect, retaliation may harmful to the retaliating countries. Some scholars have stated that retaliating countries often results against them because retaliation may "increase prices for consumers and reduce general welfare in the country"[619]. The problems of retaliation as a mechanism to induce compliance may be more effective for developing countries. The retaliation may have large effects on countries that already have weak economies. Developing countries that decide to stop accessing foreign goods will make "those goods more expensive for their domestic customers"[620]. That will create a risk to their own "economic development and position in world markets"[621]. Indeed, the Consultative Board to the WTO Director-General in the Sutherland Report[622] indicated that the belief that

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[615] Bronkers, M. &Van den Brock, N.,(2005), 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement'. at 102.
[616] Pauwelyn, J., 'Enforcement and Countermeasures in the WTO: Rules are Rules - Towards a More Collective Approach' (2000) *American Journal of International Law 94*(2), pp. 335-347, at 338.
[617] *See* Bagwell *et al.* 2004 at 14-15.
[618] Mavroidis, P.,(2000),'Remedies in the WTO Legal System: Between a Rock and a Hard Place'.
[619] Spadano, L. E. F.,'Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?', (2008), 7(3) World Trade Review 511, p. 515.
[620] Spadano, L. E. F.,(2008),'Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?'.
[621] *Ibid.*
[622] The Future of the WTO: addressing the institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (The World Trade Organization, 2004), p. 54. [usually referred to as the Sutherland Report]; *see, also*, Spadano, L. E. F.,(2008),'Cross-agreement

"poorer WTO Members . . . normally cannot effectively use the weapon of retaliation' is certainly justified"[623]. However, retaliation[624] can "achieve the goal of removing the violation"[625] or at least "obtaining other equivalent trade opportunities in compensation"[626].

The analysis of WTO sanctions trade measures, suspending concessions or other obligations, is "conceived primarily as a rebalancing tool to be used"[627] when the agreed-upon balance of benefits and obligations were altered by a challenged measure "although analysts already recognized a sanction potential"[628]. However, in the WTO the suspension may be considered as "conceived primarily as a sanction, while the rebalancing idea retains vestigial influence', and the purpose of this sanction is to induce compliance with the rules"[629]. It is thought that the actual purpose of retaliation is to rebalance concessions and inducing compliance with the rules and ensure the DSB recommendations are binding[630].

The retaliation may have large effects on countries that already have weak economies when developing countries decide to stop accessing foreign goods that will make "those goods more expensive for their domestic customers"[631]. Also, that will create a risk regarding their

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retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?'.

[623] Spadano, L. E. F.,(2008), 'Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?'.

[624] Hudec, R. E., (2000), 'Broadening the scope of remedies in WTO dispute settlement', in *Weiss F,& Weiss J.* (eds.), *Improving WTO Dispute Settlement Procedures,* Cameron May Publishers, available from:http://www.peacepalacelibrary.nl/ebooks/files/HUDEC_Broadening-the-Scope-of-Remedies.pdf [Accessed: June 18, 2014].

[625] Spadano, L. E. F.,(2008),'Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?'.

[626] *Ibid.*

[627] *Ibid.*

[628] *Ibid.*

[629] *Ibid.*

[630] *Ibid.*

[631] *Ibid.*

own "economic development and position in world markets"[632]. Consequently, it is thought that developing countries may harm themselves by imposing sanctions retaliation rather than large WTO Members.

4.2.2.7.3 Lack of enforcing the WTO DSU decisions

The link between the WTO retaliation rules and the utility of WTO dispute settlement is based on one of the 'main attractions' of the WTO dispute settlement system principle, in that "it explicitly envisages remedies in the event of continued non-compliance when a country loses a dispute settlement procedure"[633]. It has been argued that the participation of developing countries in WTO dispute settlement, with an inability to effectively retaliate, is not equal to developed countries[634]. Regarding the utility of the WTO dispute settlement system for developing countries[635], there are some studies and commentaries that argue that the ability to force the retaliation rules is considered as a significant element for ensuring that the WTO Members comply with dispute settlement rulings[636]. Also, it has been found that in WTO disputes, "substantial evidence that the threat of retaliation is an important influence determining a defendant country's ability to credibly commit to liberalisation"[637]. The study found that "the successful economic resolution to disputes is influenced by the concern for

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[632] *Ibid.*
[633] Bronkers, M. &Van den Brock, N.,(2005), 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement'. at 101.
[634] *Ibid.*
[635] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries"
[636] *Ibid.*
[637] Bown, C., (2004). 'On the Economic Success of GATT/WTO Dispute Settlement', *Review of Economics and Statistics* 86, at 17.

retaliation"[638]. Another study determined that "implementation is much more likely in a developed against developing country scenario than vice-versa"[639]. The WTO World Trade Report for 2007 established that "retaliation fails to deter economically powerful countries from committing a violation against small countries"[640].

Therefore, there is a little attention to developing countries' in participation in WTO dispute settlement proceedings because they cannot impose rulings of the WTO DSU against developed countries. Indeed, regarding the retaliation rules, the important factor for limiting developing countries' participation in WTO dispute settlement proceedings is the lack of power of WTO DSU rulings. The rulings of the WTO dispute settlement can be broken in any dispute, by any large WTO Member, "if developing countries do not have the capacity to retaliate credibly"[641].

There are also studies find that the workings of the WTO DSU have many problems[642]. In addition, the position of Members in complying with rulings has been illustrated by another study[643]. The study determined that "of 109 panel and Appellate Body reports adopted, 90 per cent found violations of WTO law, and that in virtually all of these cases the WTO Member found to be in violation"[644]. Therefore, the high rate of violations with WTO dispute settlement rulings may create limitations on the utility of the WTO dispute settlement system for developing countries because developed countries are violating WTO law. So, this could

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[638] *Ibid.*at 4.
[639] *See* Bagwell *et al.* 2004 at 14-15.
[640] *See*, WTO, World Trade Report 2007, at 284.
[641] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".
[642] *See* Bagwell *et al.* 2004 at 4.
[643] Wilson, B., (2007), 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings'.p.397.
[644] *Ibid.*

lead to developing countries using the DSB less because they cannot enforce rulings of the DSU against developed countries. A study established that developed country Members "have a manifestly worse record of compliance with WTO dispute settlement system DSB rulings"[645], particularly in disputes where the complaining state was a small or developing country rather than a complaint by a developed country[646]. So, it can be expected that the smaller or developing countries will have low rates of compliance with rulings even while considering that the retaliation is a significant factor for the compliance with rulings. When economically large, developed countries are defendants and when they are not willing to comply with unfavourable rulings, that reveals the weaknesses of the WTO retaliation rules and will create limitations on the utility of the WTO dispute settlement system for developing countries.

It has been observed that developing countries may not have the freedom to decide whether to meet or not meet the terms of the DSB decision. They have weak economies and that would place the developing countries in poor position. One of the developing countries' experts has clearly stated that "developing countries do not have the luxury of choosing whether to comply or not"[647]. Robert Hudec observed that "enforcement is a more complex process than mere retaliation"[648] and he proposed that "governments comply with WTO dispute settlement rulings for a multitude of reasons of which retaliation is often not a key

[645] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".
[646] Malacrida, R., (2008) 'Towards sounder and fairer WTO retaliation: Suggestions for possible additional procedural rules governing members' preparation and adoption of retaliatory measures'.p.20.
[647] Ierley, D., (2002) 'Defining the factors that influence developing country compliance with and participation in the WTO dispute settlement system: Another look at the dispute over bananas'.
[648] Nottage, H., (2008), "Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for Developing Countries".

ingredient"[649]. Therefore, they have to accept the DSB decision to avoid retaliation from the large countries. However, it has observed that both developing countries and the least developed countries do not prefer to initiate retaliation proceedings against developed countries in the WTO dispute settlement system as a result of their economic and political weakness[650].

The difficulty of enforcing dispute settlement decisions, particularly in disputes involving developed countries, is one of the fundamental complaints of developing countries[651]. Whereas the Appellate Body rulings indicate that a WTO obligation has been violated by the defending party, the WTO cannot induce any offending party to remove the trade measure or "even pass an injunction to stop the measure from functioning"[652]. Indeed, the DSU enforces its ruling by allowing the complaining party to erect retaliatory trade barriers against the offending party that will lead the offending party to comply with the DSU ruling. However, the enforcement of the DSU through retaliation has been criticized since the retaliation creates exacerbates the problem by decreasing trade for both parties and can even be eventually counterproductive for the winning party[653]. In general, the enforcement regime "does not restore the [trade] balance lost, not does it encourage compliance, but rather tends to inflict greater injury on the complaining party"[654]. It has been considered that the developing countries are the most disadvantaged by reliance on retaliation as a result of their

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[649] *Ibid.*
[650] *Ibid.*
[651] Pham 2004.p.357.
[652] *Ibid.* p. 333.
[653] *See*, Hudec, R., (2002) 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' in Development, Trade, and the WTO,at 86-87.("In the light of past experience, the WTO's greater emphasis on retaliation as an enforcement tool would appear to be somewhat misguided .... Threats of retaliation can be useful, but they can also become counterproductive if used too forcefully or too often."). *See, also*, Pham 2004.pp.333-388.
[654] Communication from Ecuador, TN/DS/W/9, at 3 (July 8, 2002).

smaller size and fragile economies[655]. Also, developing countries will be more adversely affected where retaliation is self-defeating[656]. Therefore, developing country retaliatory countermeasures against a developed country will tend to have a relatively smaller impact than developed country retaliation[657]. It has been claimed that the economies of some developing countries "are small and therefore measures restricting their exports even if imposed for short periods will cause them serious injury,"[658] while the size and variety of a developed country's economy are better to deal with relatively insignificant retaliation by a developing country. In *Bananas* case, as an example, the WTO obligations[659] were violated by a U.S. trade measure. The U.S. easily absorbed the impact of Ecuador's retaliation and "took a further 30 months to comply with the ruling after the expiry of the reasonable period of 15 months established by the DSB and easily withstood 27 months of retaliatory measures"[660]. Therefore, the DSU retaliation for enforcement rulings may provide only prospective remedies. However, it may create a reason to violate WTO obligations "since an offending Member only has to stop violating"[661]. So, developing countries might suffer a more serious harm than developed countries. Therefore, developing countries may face a limit on the utility of the WTO dispute settlement system. When economically large, developed countries are defendants and when they are not willing to comply with

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[655] *Ibid.*
[656] Communication from the European Communities, Contribution of the European Communities and it's Members States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, at 4 (Mar. 13, 2002) [hereinafter European Community Proposal] ("It is logical that trade compensation should always be preferred to suspension of concessions or other obligations, which is only a last-resort instrument: the authorization to suspend concessions runs against a basic principle of the WTO. . . . Therefore, the use of suspension of trade concessions involves a cost not only for the defending party, but also for the economy of the complaining Member. As shown by past experience, this is especially the case when that complaining Member is a developing country."). *See*, Pham 2004.p.353.
[657] Pham 2004.p.353.
[658] The African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002). *See*, *also*, Pham 2004. p.353.
[659] WTO Panel Report on European Communities-Regime for Importation, Sale and Distribution of Bananas, WT/DS27/R/ECU (May 22, 1997). *See*, *also*, Pham 2004. p.353.
[660] Communication from Ecuador, TN/DS/W/9, at 3 (July 8, 2002). *See*, *also*, Pham 2004.p.354.
[661] Pham 2004.p.354.

unfavourable rulings, that reveals the weaknesses of the WTO retaliation rules and will create limitations on the utility of the WTO dispute settlement system for developing countries.

4.2.3 Conclusion

This chapter discusses and highlights the significant factors regarding the participation of developing countries in the WTO dispute settlement body. The impact of retaliation was illustrated and was demonstrated to be among the most significant constraints that limit the participation of developing countries in the WTO DSB. This part analysed the retaliation and cross retaliation rules that discourage developing countries from pursuing legitimate claims under the DSB, and assessed whether an ability to effectively retaliate is a key determinant for WTO Members' compliance with dispute settlement rulings. Also, it evaluated whether the retaliation rules undermine the utility of WTO dispute settlement for developing countries. It revealed the statistical evidence of WTO Members using the dispute settlement system, particularly when developing countries are involved.

This chapter also evaluated the experience of developing countries with retaliation and cross retaliation. First of all, it examined the cases in which countries had recourse to retaliation, in particular as regards developing countries. The analysis of the constraints facing developing countries was based on three arguments: first of all, developing countries, with small domestic markets, cannot impose sufficient economic or political losses upon the larger WTO Members to generate vital pressure to induce compliance. Secondly, retaliation ('suspension of concessions') might be more detrimental to a developing country applying retaliation rather than a developed country WTO Member targeted by it. Thirdly, WTO rulings cannot be effectively enforced by developing countries, therefore developing countries have little

incentive to use WTO dispute settlement proceedings. The above analysis leads to the following conclusion no one has found a solution for the lack of retaliation that has happened frequently in practice and has been already reported by the WTO Members as factors limiting the participation of developing countries in the DSB.

4.3 Duration of the DSB Process and Compensation

4.3.1 Introduction

The following section analyses and evaluates the duration of the DSB process and compensation method, to assess whether these features of the DSB significantly impact upon developing countries' use of the DSB. First of all, the duration of the dispute resolution process will be highlighted and the constraint will be evaluated. Also, the DSU's dispute resolution process will be described and the constraint will be analysed. It will reveal the DSU process in practice as well as the position of developing countries under the current DSU process. Therefore, the DSU process will be analysed in the different stages of WTO dispute settlement proceedings which delay litigation and therefore create a dilemma for developing countries participating in those proceedings. Secondly, compensation under the DSU, and the constraint this places on developing countries, will be analysed and evaluated, to examine the reasons why the remedy of compensation is rarely used. First of all, compensation has to be voluntary. The disputing parties have to agree on the solution. Second, compensation has to be consistent with the covered agreements. Third, compensation might not provide an efficient reparation of damages. This may affect developing countries in practice in the WTO dispute settlement proceedings.

4.3.2 Duration Dispute Resolution Process

4.3.2.1 Evaluation of the constraint

The WTO created the DSB and the dispute settlement system to hear any claims between WTO Members on the subject of concerning their right and violations of WTO rules[662]. The DSB includes all the membership of the WTO. In the DSU, if any member decides to bring a complaint against any other members, the complaining party has to raise a dispute to the DSB and request consultation. Indeed, the disputing parties have to hold in the consultation phase for a minimum sixty days[663]. However, if the consultation stage fails to solve the disputes in that time, the complaining members can request a panel to hear the dispute[664]. Hence, when the DSB receives the request for a panel, it has to take action to begin the adjudicative process. The panel will take place "unless there is a consensus among the members of the DSB, including the interested parties, not to do so"[665].

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[662] Brewster, R. (2011), *"*The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement", *George Washington Law Review* (*GEO. WASH. L. REV*).80,(102), pp. 102-158. *Available from*: http://www.gwlr.org/wp-content/uploads/2012/06/80-1-Brewster.pdf [Accessed: March 25, 2014]. *See*, *also*, Article 1.1 of the DSU, which states that 'the rules and procedures of this Understanding 'apply to consultations and the settlement of disputes between Members concerning their rights and obligations' under WTO Agreement'.

[663] The disputes parties can communicate informally without officially requesting consultations.

[664] Brewster, R. (2011), *"*The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement", *See, also*, the DSU Article 4.7. 'The complaining party may request a panel during the 60-day period'. However, the timeframe may be less in special situations, for instance if the dispute involves perishable goods; the DSU Article 4.8. 'when the responding party completely fails to engage in consultation, the complaining party can request the establishment of a panel in thirty days'; the DSU Article. 5.1. 'The consultations can continue after sixty days by good offices, conciliation, or mediation if the parties to the dispute agree'.

[665] *See* the DSU Article 6.1. Indeed, the DSB decision has to be made by reverse consensus. *See* Hudec, R. E., (1993), *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Butterworth Legal Publishers. In the 'reverse consensus', the responding member can delay the formation of the panel temporarily by objecting to the formation of the panel at the DSB meeting. Then the matter will be tabled until the next meeting, and at that point, the respondent's objection cannot prevent the DSB decision by 'reverse consensus' to begin the adjudicatory process.

After the consultation stage, the DSU has two stages for the adjudicative process to settle the dispute and the parties can settle the dispute at any of these stages[666]. The first stage is called the 'adjudication' phase. In this stage, the three panellists have to be established by the DSB. These three panellists [667] receive evidence from both sides of the dispute and make a decision under the facts and law. The panel stage is designed not to take longer than six months[668], while in complex disputes the timeline is exceeded by the panels[669]. In this stage, the initial panel decision/report is circulated to the parties and they have a chance to make suggestions or comments[670] on that report. The final report is submitted to the DSB and accepted by reverse consensus, unless there is consensus against the report[671] or any party announces that it intends to apply for appeal[672].

The second stage of the adjudicative process is the appeal. In this stage, either or both parties to the dispute can appeal the decision to the Appellate Body[673]. In this stage, the appeals process takes no longer than sixty days maximum, or ninety days in exceptional cases[674].

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[666] *See* DSU Articles 6.17.
[667] *See* DSU Article 8.5. Instead, the panel can be composed of five panellists if the parties to the dispute agree.
[668] *See* DSU Article 12.8.
[669] *See* Panel Report, *European Communities and Certain Member States-Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (30 June 2010), presenting that the request for consultation was first made on 6 October 2004, which was six years earlier.
[670] *See* DSU Article 15.
[671] *See* Bacchus, J., (2004), "Lone Star: The Historic Role of the WTO", *The Texas International Law Journal*, (TEX. INT'L L.J). 39, (21), pp. 401-414. *See, also*, Lowenfeld, A.F. (2004), "Editorial Comment, Remedies Along with Rights: Institutional Reform in the New GATT", *American Journal of International Law*, (AM. J. INT'L L), 88, (477), pp. 480 (discussing the negotiations that eventually resulted in the reverse consensus procedure).
[672] According to DSU Article 16.4, the parties of the dispute can object to the report at its first presentation to the DSB. DSU Article 16.2 appears that an objection may block the adoption of the report for one meeting as well as the panel report is either adopted or rejected at the next meeting of the DSB.
[673] DSU Article 17.1. A member of the Appellate Body shall hear appeals from panel cases. DSU Article 17.2.'The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once'.
[674] *See*, DSU Article 17.5.

However, in many cases the appeals process takes longer than ninety days[675]. The Appellate Body's decision is considered as final in the adjudication phase[676] and as a result of that, the Appellate Body does not have the power to "remand a case to the adjudicatory panel for rehearing or to make additional evidentiary findings"[677]. In the DSB, the Appellate Body report votes to adopt by the reverse consensus rule[678]. When the report of the Appellate Body decides that the respondent member violated the WTO agreements[679], the respondent has to announce its intention to comply[680]. The DSB can provide the responding member with a reasonable period of time to comply with the ruling, but not longer than fifteen months[681].

The fourth stage of the dispute resolution process is the 'compliance' phase. In this stage, the responding member reports to the DSB about the action that it has taken to apply the ruling[682]. The respondent party can claim that it is in compliance with the DSU ruling by taking action to alter the challenged the WTO agreements[683]. Indeed, the complaining party can "request a compliance panel to evaluate the sufficiency of the respondent state's actions"[684] if it disagrees with the responding action in compliance. In the compliance stage, either party or both can appeal the compliance panel's decision to the Appellate Body. When the Appellate Body finds a violation of the WTO rules, the DSB can recommend asking the

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[675] *See*, DSU Article 21.3. The contracting parties can not appeal this ruling. Dispute parties may declare its intention to comply compliance.
[676] DSU Article 17.13 states that "the Appellate Body may uphold, modify or reverse . . . conclusions of the Panel", however, it is not remanding it. See also Pauwelyn, J., (2002), The Use of Experts in WTO Dispute Settlement, pp. 325-336. (discussing the Appellate Body and remand cases).
[677] Brewster, R. (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement',
[678] *See* DSU Article 17.14. It observed that during the fifteen years of the DSB, it has not failed to adopt an Appellate Body report. *See* Bacchus, J., (2004), "Lone Star: The Historic Role of the WTO", p. 408.
[679] It can either be a violation of the WTO agreements or a 'nullification or impairment' of any member's benefits under the WTO agreement. *See*, DSU Article. 26.1.
[680] *See* DSU Article 21.3.
[681] *See* DSU Article 21.
[682] *Ibid.*
[683] *See* Pauwelyn, J., (2002), The Use of Experts in WTO Dispute Settlement, p.325.
[684] Brewster, R., (2011), The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.

respondent member to comply with the Appellate Body's decision within a reasonable period of time[685].

In the compliance stage, the DSU text provides for the compliance panel to monitor the respondent member's compliance with the DSB decision, but without providing any timeframe for compliance[686]. In fact, the uncertainty of the compliance panel timeframe has been referred to as the "sequencing problem"[687]. The WTO Members have "engaged in multilateral negotiations to resolve the dilemma for over a decade, but without resolution"[688].

In fact, the compliance stage is a significant stage when it is considered as a 'remedy stage'. After the compliance stage, when the respondent party is still in violation of the WTO agreements, the complaining party has the authority to request the DSB to authorize the suspension of trade benefits to the respondent member[689]. After the adjudication and compliance phases, the complaining party can only retaliate by suspending trade concessions to the respondent state[690]. The panel can authorise the form of the trade suspension, in the same or a different sector as the violation, but within the same agreement. Also, the panel can

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[685] The compliance panel consists of three adjudication panels and they may selected by the dispute parties.
[686] *See* DSU Article 21. Indeed, it is not clear when the compliance phase should be initiated; *See* Mavroidis, P., (2000),'Remedies in the WTO Legal System: Between a Rock and a Hard Place',. For example Article 22.2 of the DSU has recourse by the United States in *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/43 (Jan. 14, 1999).
[687] Valles, C. M., & McGivern, B. P., (2000). The Right to Retaliate under the WTO Agreement.*The* "*Sequencing Problem". Journal of World Trade*, *34*(2), 63-84.
[688] Brewster, R., (2011), The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.
[689] *See* DSU Article 22.
[690] *Ibid. See* Lester, S., Mercurio, B., Davies, A. & Leitner, K,. (2008), *World Trade Law; Text, Materials and Commentary*, Hart Publishing, Oxford. They discuss the dispute over sequencing between the European Communities and the United States. The DSB adopts the panel's ruling by reverse consensus. Also, it authorizes the complaining government to suspend trade concessions by the panel. The DSB could establish a panel to appear the limit extent and forms of the suspension.

determent the level of sanctions which nullifies or impairs the benefits of the complainant under the agreement.

To sum up, regarding the time periods of litigation in the WTO, the average proceedings is 15 months from "the date of establishment of the panel to the date the DSB considers the panel report for adoption"[691]. Appendix 2 indicates the time periods of litigation in the WTO. However, this time surpasses the general rule of the DSU's Article 20, which states that 'the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months' where the panel report is not appealed or 12 months where the report is appealed'[692]. Moreover, a minimum period of two months is required to include formal consultations for panel proceedings[693]. Also, the respondent can appeal the initial panel decision to the Appellate Body, which will add three months more to the litigation process. Indeed, the DSU process is considered to be a lengthy process for settling disputes[694].

4.3.2.2 Analysis of the constraint

Under the DSU, Article 3.3 states that 'the prompt settlement of situations [disputes] . . . is essential to the effective functioning of the WTO and the maintenance of a proper balance

[691] See Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System". Indeed, for all disputes adopted by the DSB the average number of days between the establishment of the panel and the date of consideration of the panel report for adoption may be almost 469 days.
[692] See DSU Article 20.
[693] See Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System". Pursuant to Article 4.7 of the DSU, the period between the request for consultations and the establishment of the panel is 60 days. However, pursuant to Articles 4.3 and 4.6 of the DSU, this period may be shorter, between 10 and 60 days in the exceptional circumstances when a Member does not respond within 10 days or 30 days of the receipt of the request, or the relevant Members agreed that the consultation has failed to settle the dispute.
[694] See Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System".

between the rights and obligations of Members'[695]. However, the delay in proceedings of the DSU is considered to be one of the major factors reducing litigation in the DSU, because "experience to date suggests that one problem with the WTO dispute settlement system is that in too many cases, it takes too long to resolve disputes"[696]. It has been noted, by a WTO Member in the context of DSU review, that time savings in the WTO dispute settlement procedures are desirable[697]. The delay is a major concern for WTO Members because there is no compensation for damages under the DSU during the dispute resolution process[698]. Indeed, through the DSU, WTO Members are not provided with a remedy for the "injuries incurred from the time of the violation to the authorization to suspend concessions"[699], while in the domestic litigation, the damages are "traced to and calculated from the beginning of a violation and subject to interest"[700].

There are some academic discussions that the complex cases may take longer to resolve[701]. If the case is complex naturally, the complaint takes longer to resolve, but "complexity is not entirely exogenous to the litigation strategy of the parties"[702]. There are some cases that are

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[695] See DSU Article 3.3.
[696] Nottage, H., (2009) "Developing Countries in the WTO Dispute Settlement System"; Davey,W,. (2006), "The WTO: Looking Forwards"; Davey, W., (2000), "The WTO Dispute Settlement System", *The Journal of International Economic Law* .3 (1), pp. 15-18.; Davey, W., (2005), "The WTO Dispute Settlement System: The First Ten Years", pp.17-24.
[697] Revised by Australian Proposal, Possible Time-Savings in the WTO Dispute Settlement Procedures, Special Session of the Dispute Settlement Body, JOB(07)/66, 18 May 2007, at 2.
[698] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[699] *See* the Decision by the Arbitrators, European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000.
[700] *See* Kaplow, L., & Shavell, S., (2002) "Economic Analysis of Law: Damage Measures for Breach of Contract", *Handbook of Public Economics*,3 (2) pp. 1991-1708 (Auerbach, A. J., & Feldsteineds, M., eds.) (discussing the damage).
[701] See Davey, W., (2000), "The WTO Dispute Settlement System"; Damme, I, V., (2009) Eighth Annual WTO Conference: An Overview, *The Journal of International Economic Law* 12, (1), pp. 175-193; *See*, *also*, Bown, C. & Hoekman, B., (2005),'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', pp. 861-870.
[702] Brewster, R. (2011), The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.

inherently more complex than others, although sometimes that complexity comes from the selection and presentation by the parties[703]. The respondent parties offer more defences and more documents submitted to the panel, so the case becomes a more complex dispute. Indeed, many respondent members have learned how to increase the complexity of a case to delay the time of adjudication[704]. Therefore, the respondent member benefits from the policy of a longer period of time of the DSU without "exposing itself to a higher damage award"[705] because of the gap providing no remedy for the damages sustained during the DSU proceedings. The following part analyses the DSU process in practice.

4.3.2.3 The DSU Process in Practice

In practice, it has been observed that the DSU process is often lengthy[706]. It is thought that the three separate phases of the dispute resolution make the process lengthier,[707] since it can take a year and a half for a dispute to conclude[708]. The WTO itself claims that the system of dispute resolution is a fast system, by stating that

> "The [Uruguay Round] agreement introduced a more structured process. The Agreement emphasizes that prompt settlement of disputes is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a

[703] *Ibid.*
[704] See Horlick, G., & Coleman, J., (2007), The Compliance Problems of the WTO, *Arizona journal of International Comparative Law* 24(1), pp. 141-142. ("Even assuming, charitably, that all WTO Members act in good faith to fulfill their obligations, and that they only discover they are in violation after an Appellate Body ruling, there are numerous cases where the post Appellate Body process stretches on for years. Again, this is not just one or two Members it is obvious that numerous governments are deciding to 'game the system' and string out non-compliance for as long as possible") ("And this ignores the numerous delays in litigation before the Appellate Body rulings-it is fascinating to hear lawyers for Members state openly that they are taking every delay they can").
[705] Brewster, R., (2011), *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.*
[706] *Ibid.*
[707] *Ibid.*
[708] *See* Lester, S., Mercurio, B., & Davies, A.. (2008), *World Trade Law; Text, Materials and Commentary See, also*, Porges,A,. (1994), The WTO and the New Dispute Settlement, 88 *AM. SOC'Y INT'L L. PROC,* pp.131, 134.

> first ruling, it should not normally take more than one year-15 months if the case is appealed"[709].

However, there are many cases which take longer than fifteen months to complete. For example, the *Airbus and Boeing subsidy* disputes took more than five years. The United States and the EC both filed complaints about domestic subsidies for the aircraft industries[710]. Finally, they requested a panel to hear the case. The EC's requested for a panel was in January 2006[711]. The United States' request was in May 2005. However, the initial ruling was issued by the Airbus panel on June 30, 2010, five years later[712]. The EC declared that it is intention to appeal and the WTO Appellate Body stated that it expects delays in issuing its ruling[713]. Five years after the panel was established, in January 2011, the Boeing panel issued its report[714]. Both the Airbus and Boeing cases failed to meet the time limits set out in the DSU.

Under the DSB, there are several cases that have taken over fifteen months to settle. To explain the clear statistical evidence of the overall extent of the delays under the DSU, Table 4.3 provides statistics on the process time of dispute from the adoption of a panel to the DSB's adoption of the report throughout three different periods: (1) the first five years of operation of the DSU (1995-1999), (2) the second five years (2000-2004) and (3) the third

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[709] *See* Understanding the WTO: Settling Disputes, World Trade Organization, *available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [Accessed: March 29, 2014].
[710] Pruzin, D., *EU Submits Revised WTO Request for Consultation on Boeing Subsidies*, WTO Rep. Online (BNA) (June 30, 2005).
[711] Pruzin, D., *U.S., EU Ask WTO to Appoint Panelists in Airbus-Boeing Disputes over Subsidies*, WTO Rep. Online (BNA) (Oct. 11, 2005).
[712] Pruzin, D., *WTO Panel Ruling Slams Illegal Subsidies for Europe's Airbus in Case Brought by U.S.*, WTO Rep. Online (BNA) (July 1, 2010).
[713] Pruzin, D., *WTO Signals Long Delay in Issuing Ruling on EU's Appeal Against Airbus Decision*, WTO Rep. Online (BNA) (Sept. 23, 2010).
[714] Pruzin, D., *WTO Panel Issues Final Ruling Siding in Part With EU Claims of U.S. Subsidy for Boeing*, WTO Rep. Online (BNA) (Feb. 1, 2011).

five year period (2005-2009)[715]. Also, Table 4.3 and figure 4.1 present the time process from establishing a panel to adopting the DSB's report for four types of timeframes: (1) panel with an appeal; (2) panel without an appeal; (3) compliance with an appeal; and (4) compliance without an appeal.

The DSB adopts the panel report after it is issued[716], if the parties to the dispute do not appeal[717]. However, when the parties to the dispute apply for appeal, the DSB adopts the report only after the Appellate Body report is issued[718]. This procedure applies for all stages of the dispute resolution process[719]. The DSU rules provide that when the parties do not appeal[720], the dispute should take nine months, or twelve months at the extreme, from "the establishment of the panel to the adoption of the report by the DSB"[721]. However, when the parties appeal from the panel report, it should not take longer than twelve months, or sixteen months at the extreme[722].

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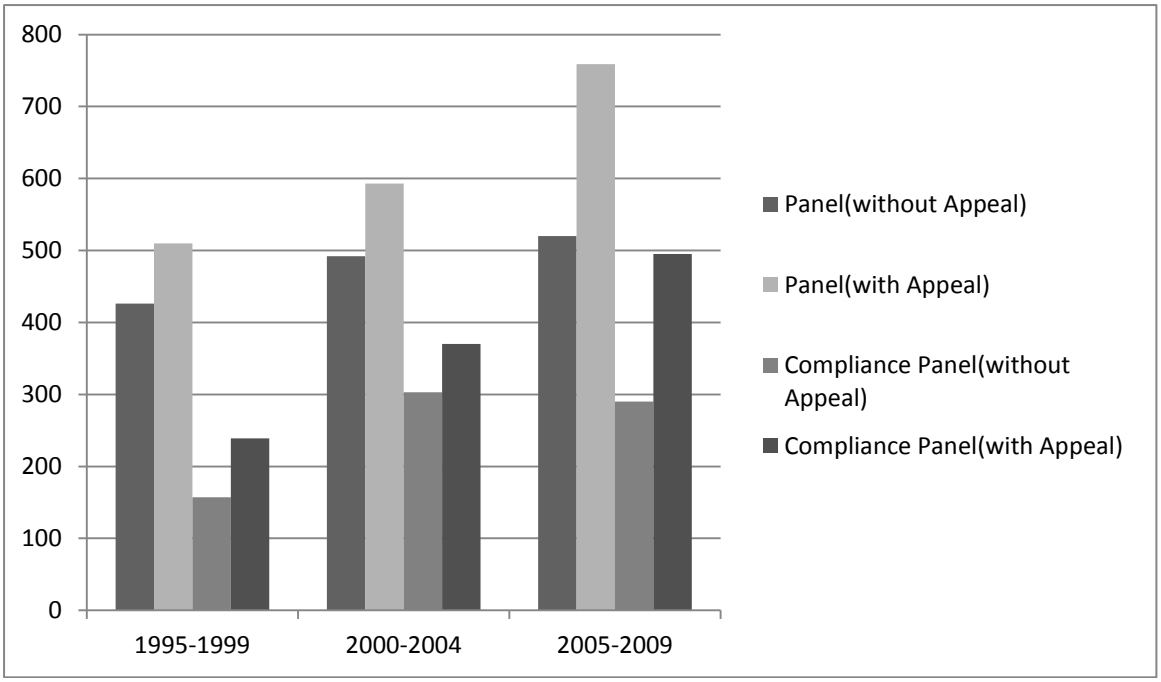
[715] Data is from WorldTradeLaw.net statistics on WTO dispute resolution.,WorldTradeLaw.net-The Online Source for World Trade Law at http://www.worldtradelaw.net/ [Accessed: March 29, 2014].
[716] See the DSU.
[717] *Ibid.*
[718] *Ibid.*
[719] *Ibid.*16 and 21.
[720] Under Article 12.8 of the DSU, the panel have to issue the report within six months of the establishment of the panel. *Ibid.* Article 12.9. 'In no case should the period from the establishment of the panel to the circulation of the report to the members exceed nine months'. *See, also, ibid,* Articles 15.8, 12.8 and 16.4. Interim review of the panel report is supposed to include in the six-month time period set out in Article 12.8. *Ibid.* Article 15.3. When the panel report issues, the report is circulated to all WTO members. *Ibid.* Article 15.2. The DSB must vote on adopting the report within sixty days of the report's circulation.
[721] Brewster, R., (2011), The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.
[722] *See* Articles of the DSU 17.5, 17.14, and 20. When there is an appeal, the DSB does not consider the adoption of the panel report. Under the DSU, Article 17.5, the Appellate Body report must be issued within sixty days of the intention to appeal by a party's announcement. The Appellate Body should not take more than ninety days to issue its report. The DSB must vote on adopting the Appellate Body's report within thirty days of the report being circulated to the members. *Ibid*. Article 17.14. The panel and appeals process, with the vote by the DSB, should take no longer than twelve months. *Ibid,* Article 20. Where the panel and the Appellate Body have taken the maximum extended time to issue their reports, three additional months and thirty additional days respectively, the process should not take longer than sixteen months to complete.

Table 4.3: Average Time for Completing Dispute Resolution Stage[723]

Average Time	Average Time for Initial Panel (without appeal)	Average Time for Initial Panel (with appeal)	Average Time for Compliance Panel (without appeal)	Average Time for Compliance Panel (with appeal)
Average Time; First Five years (1999-2003)	14.0 Months (426 Days) 13 Cases	16.7 Months (510 Days) 42 Cases	5.1 Months (157 Days) 3 Cases	7.8 Months (239 Days) 2 Cases
Average Time; Second Five years (2004-2008)	16.1 Months (492 Days) 19 Cases	19.6 Months (593 Days) 32 Cases	9.9 Months (303 Days) 3 Cases	12.1 Months (370 Days) 6 Cases
Average Time; Third Five years (2005-2009)	17.0 Months (520 Days) 9 Cases	24.9 Months (759 Days) 13 Cases	9.5 Months (290 Days) 2 Cases	16.2 Months (495 Days) 11 Cases

Figure 4.1: Average Time (days) for Completing Dispute Resolution Stages[724]



[723] See Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[724] *Ibid.*

Regarding Table 4.3, the DSU has been failing to meet the timeline for settling the dispute. Also, the DSU tends to take a long time for completing a dispute for all stages of the dispute resolution. In all three periods, the average time from establishing a panel to adopting a panel report is almost over nine months. Regarding the time period 1995-1999, the average time for adopting a panel report was almost fourteen months. The average time in 2000-2004 was more than sixteen months. In the period 2005-2009, the average time was more than seventeen months, which is approximately twice the time assigned by the DSU. The DSU also tends to have delays in the appeals process. The average times for the appeal stage in the three stages were more than twelve months. In the 1995-1999, the average times for adopting an Appellate Body report was greater than sixteen months. In the period 2005-2009, the average time was almost twenty-five months, which is more than double the time allocated by the DSU.

Regarding the compliance stage, there are delays in the time for adjudication for panels and appeals. In 1995-1999, the compliance panel report without appeal took five months on average and more than seven months for appeals that were adopted by the DSB. In the 2005-2009, the process took 9.5 months from the establishment of the compliance panel to the adoption of the panel's report, with no appeal and with appeals taking more than 16 months.

Article 21.5 does not provide for the role of the compliance panel or even when the role of compliance hearing would be served or when the compliance report can be appealed to the Appellate Body. Therefore, under Article 21.5, respondents have learned to create delays in the dispute resolution process through the increased use of compliance panels. The application of Article 21.5 as regards the use and timing of a compliance panel is still a

matter of argument[725]. It has been described as 'careless' due to it not providing the clear role of the compliance stage[726].

In the first five years of the DSU, the respondent member did not often request the compliance panel[727]. However, the requests for a compliance panel have increased over time, as have appeals of the compliance panel reports to the Appellate Body[728]. Using the compliance stage of the DSU extends the time between the violation occurring and the suspension of concessions[729]. Table 4.4 provides data on the disputes requesting compliance panels and those requesting appeals[730].

Table 4.4: Compliance Panels and Appeals[731]

Average Time	Compliance Panel report (without appeal)	Compliance Panel (with appeal)	Percentage Appealed	Average Time for Compliance Panel (without appeal)	Average Time for Compliance Panel (with appeal)
Average Time; First Five years (1999-2003)	3	2	40%	5.1 months (157 days)	7.8 months (239 days)
Average Time; Second Five years (2004-2008)	3	5	63%	11.8 months (360 days)	12.0 months (364 days)

[725] *Ibid.*
[726] *Ibid.*
[727] *See*, Bossche, P. V., (2008). *The Law and Policy of the World Trade Organization: Text, Cases and Materials*.
[728] For more details, *see*, Mavroidis, P.,(2000),'Remedies in the WTO Legal System: Between a Rock and a Hard Place', p. 799. (He argues that the DSU should not allow compliance panels to be appealed).
[729] *See* Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[730] *Ibid.*
[731] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'

Average Time; Third Five years (2005-2009)	2	8	80%	9.5 months (290 days)	16.0 months (487 days)

Table 4.4 classifies data regarding the initial compliance panel requested by the relevant Member. This classification provides an indication as to how the member learnt the strategies of navigating the DSU. Also, they had experience with this system[732]. Indeed, members learn from previous cases, such as using the compliance panels. For example, in the EC and Ecuador *banana* dispute[733], the DSU did not received a request for a compliance panel by the EC until December 15, 1998. However, it has been suggested that this delay was not because of the lack of litigation or because the procedure was new[734]. In that time, the DSU had issued eighteen panel reports and fifteen Appellate Body reports[735]. After the EC requested the compliance panel, the DSB established four compliance panels within a year's time[736].

The other way to analyse WTO Members' use of the compliance panels is to divide it into five-year time periods. This use started from the EC request for a compliance panel in the *European Communities-Bananas (Ecuador)* dispute, and as a result of that, the WTO Members had fully understood that the "compliance panels could be part of the dispute resolution process after the EC made such a request in December 1998"[737]. Therefore, Table

[732] *See* Levy, J. S., (1994),"Learning and Foreign Policy: Sweeping a Conceptual Minefield", *International Organization* 48(2), pp. 279-312.
[733] *See* European Communities- Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III). Complainants are Ecuador, Guatemala, Honduras, Mexico and United States. Respondent is EC. The World Trade Organization 2015: Dispute Settlement**,** Dispute DS27, European Communities-Regime for the Importation, Sale and Distribution of Bananas, *available from:* http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm [viewed March 2, 2015].
[734] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[735] *Ibid*.
[736] *Ibid*; Appellate Body Report, *United States- Wheat Gluten*, 58–60, WT/DS166/AB/R (Dec. 22, 2000).
[737] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.

4.5 provides the information on using the compliance panels and the appeal process during the first five years (1999–2003) and second five years (2004–2009) of the DSU.

Table 4.5: Compliance Panel and Appeals[738]

Average Time	Compliance Panel report (without appeal)	Compliance Panel (with appeal)	Percentage Appealed	Average Time for Compliance Panel (without appeal)	Average Time for Compliance Panel (with appeal)
Average Time; First Five years (1999-2003)	3	7	70%	5.1 months (157 days)	10.8 months (329 days)
Average Time; Second Five years (2004-2008)	4	8	67%	10.7 months (325 days)	16.0 months (487 days)

Table 4.5 indicates the greater use of the compliance panels and appeals. Indeed, the average time to complete the compliance procedure increased. Table 4.5 demonstrates that the WTO Members understand that the compliance panels and appeals can be part of the DSU process and extend the time of that process. Consequently, the respondent can use these procedures to delay the process.

[738] *Ibid.* All data is taken from World Trade Law.net's, statistics on WTO dispute resolution. *Time Between Panel Establishment and Adoption of WTO Panel/AB Reports*, the World Trade Law.net-The Online Source for World Trade Law at http://www.worldtradelaw.net/dsc/database/adoptiontiming1.asp[Accessed: March 29, 2014].

Not all complaints go through the full process of the DSU. However, there are some members using the DSU process as an option to delay the settlement. There are some WTO Members that may resolve their dispute in good faith without delaying the process, but the delaying process might be attractive for some members.

Indeed, WTO Members have learned how to delay the adjudicatory phase of the DSU even before the panel and Appellate Body[739]. The members have learned that they can extend the dispute solution process by requesting a compliance panel and appeal after the adjudicatory stage. The dispute resolution process takes longer, particularly when the respondent appeals both the initial panel report and the compliance panel report[740]. For example, the WTO authorized trade retaliation in the *United States-Subsidies for Upland Cotton* dispute[741]. In this dispute, the total time between the composition of the initial merits panel and the DSB's authorisation of the trade sanction was six and half years[742].

4.3.2.4 Position of Developing Countries under the DSU Process

The length of the DSU proceedings is one of the concerns of developing countries. Several developing countries have stated that the DSU proceedings are extremely lengthy without offering expeditious solutions[743]. Also, they have argued that the capacity of DSU for litigation lengthens in each stage of the process. While Article 3.3 of the DSU recognizes that

[739] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[740] *Ibid.*
[741] Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R.
[742] The first panel was composed on 19 May 2003. The panel's decision under Article 22.6 allowed Brazil to retaliate on 19 November 2009.
[743] Torres, R. A., (2012), *Use of the WTO trade dispute settlement mechanism by the Latin American countries-dispelling myths and breaking down barriers*. Available from: http://www.wto.org/english/res_e/reser_e/ersd201203_e.htm [Accessed: March 26, 2014].

the system has to lead to a prompt and effective settlement, it is a lengthy process. Indeed, the time period of the DSU process from the request for consultations to the report of the Appellate Body normally takes a period of about 15 months. It also includes ten months for the 'reasonable period of time' to the implementation of recommendations[744]. Moreover, the complainants may wait two years for the achievement of satisfaction against a WTO inconsistent measure. The complainants may also wait a long time for the respondent party to comply with the DSU's decision[745].

The time of the WTO litigation should not limit developing countries' participation in the DSU[746], however, the length of the DSU's process has been analysed and it was found that "the delays do make the system less attractive to businesses and could in the long run lead to less and less use of the system"[747]. Indeed, developing countries are highly dependent on annual revenues for survival, but challenging a trade barrier through the WTO dispute settlement process, taking several years to settle a dispute, and having limited resources for litigating in the WTO, all leads to limitations on the participation of developing countries in the DSU[748]. As noted above, the average length of the DSU process exceeds the period time provided by the DSU, particularly during the panel stage. It has been observed that there are two situations that may lengthen the process. First, regarding legally and politically complex cases, there is a lengthening of the process when the parties to the dispute "suspend the

[744] See, the WTO website. World Trade Organization 2015: Understanding the WTO: *available from:* https://www.wto.org/ [viewed February 1, 2015].
[745] *See* DSU Article 21.5.
[746] Nottage, H., (2009)"Developing Countries in the WTO Dispute Settlement System".
[747] Davey, W., (2006), "The WTO: Looking Forwards", at 12; Davy, W,. (2007), "Compliance and Remedies", (in Ortino, F., and Ripinsky, S., eds.), WTO Law and Process, *British Institute of International and Comparative Law*, p. 72. (Davy has argued that the US, EU, Canada and Australia often delay the implementation of an adopted report).
[748] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System".

proceedings and seek to achieve a negotiated settlement"[749]. The second is when either the panel or the parties are using different official languages[750], thus requiring more time for the translation of documents[751]. For instance, there are cases where both parties are Spanish-speaking, but "the responding party has insisted on including English-speaking experts on the panel as a means of lengthening the proceedings by adding time for translation"[752]. Indeed, with more time and lack of remedies in the DSU, it will encourage many developing countries to avoid participating in the DSU[753].

Under the DSU, there is a time limit for enforcing the DSU decision[754]. Article 21 permits a member a 'reasonable period of time' for enforcing that decision[755]. The Article clarifies that the period shall not normally exceed fifteen months after the DSU adopts the decision[756]. During that reasonable period, the respondent will be under 'surveillance' by the DSU[757]. Also, Article 21 indicates that the respondent has to present the 'status report' at all procedural meetings of the DSU[758]. Thus, when the fifteen months of the 'reasonable period of time' elapse and the complaint is not satisfied with the means of the implementation ruling by the respondent, the complainant has a right to ask another panel to examine the case[759]. The time period depends on the situation and consideration by the panel, so it may be longer

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[749] *Ibid.*
[750] *Ibid.*
[751] *Ibid.*
[752] *Ibid.*
[753] *Ibid.*
[754] *See* Al Bashar 2009.
[755] *Ibid.*
[756] *Ibid.*
[757] *Ibid.*
[758] Gleason, C. P., & Walther, P. D., (2000), "The WTO Dispute Settlement Implementation Procedures: A System In Need of Reform", *Law and Policy in International Business*, 31(3), pp. 714-715.
[759] Freneau, A., (2001), "WTO Dispute Settlement System and Implementation of Decision: A Developing Country Perspective". Thesis submitted for the Degree of LLM in International Business Law, School of Law, University of Manchester. Available online at http://lafrique.free.fr/memoires/pdf/200107AF.pdf [Accessed: March 26, 2014].

"depending upon the particular circumstances"[760]. However, such a long process without a guarantee adopted for safeguarding developing countries' interests[761] will be problematic and dangerous for them[762].

Fifteen months is considered to be a long time for developing countries[763]. Certainly, the situation is dependent on the respondent to remove the inconsistent measures[764]. In practice, as noted above, while the DSU was designed to be a quick process, the DSU can take more than three years to resolve a case[765]. Therefore, the South Centre suggested that when the ruling of the DSU is for developing countries against developed counties, the implementation ruling should be under the initial panels' surveillance[766]. Also, the appeals process has to be reduced from 90-days to 30 days[767], without the imposition of any further procedural obligation[768]. So, stronger rules have to be introduced in the DSU, and the panel and appellate body should make "detailed suggestions concerning the manner of implementation"[769]. This will avoid the "deliberate delay of the proceedings by respondents"[770] and ensure that the strict timeframe is effective.

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[760] *See* Section (c) of Article 21.3 of the DSU.
[761] *See* Freneau 2001 pp.55-56.
[762] Freneau 2001 p.55.
[763] *Ibid.*
[764] *Ibid.*
[765] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'
[766] *See* Al Bashar 2009.
[767] Also, there is a proposal appears, in the DSU review negotiations, to reduce consultation period from 60 days to 30 days.
[768] *See* South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',* p. 28.
[769] *See* Al Bashar 2009.
[770] *See* Freneau 2001 p. 56.

In practice, while the DSU was designed to be a quick process, the DSU can take several years to dispute a case[771]. For example, in the *Bananas* dispute, the European Union and Ecuador[772] were expected to end the lengthy process of the DSU on 1 January 2006. In March 2007, Colombia requested consultations with the European Union[773]. However, the consultation was unsuccessful. Therefore, Colombia asked to use the good offices of the Director-General provided by Article 3.12 of the DSU[774]. Indeed, the reason for accepting the good offices of the Director-General is because it may allow for a rapid settlement of a dispute that had been taken a long time in proceedings at the WTO[775]. On 2 November 2007, after the consultations failed, the case was referred to the Director-General. The disputing parties expressed their "preference for a negotiated settlement rather than judicial proceedings"[776]. In July 2009, the Director-General provided a draft agreement for settling the dispute. On 15 December 2009, the parties, the European Union and the Latin American banana exporters, attained a settlement by two agreements[777]. In sum, it may be considered that the Latin American states escaped from the length of the DSU process. Also, they have created solutions to reduce the problem by using "the good offices of the Director-General" in the bananas case[778].

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[771] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[772] 'European Communities-Regime for the Importation, Sale and Distribution of Bananas, Understanding on Bananas between Ecuador and the European Communities', WT/DS27/60, G/C/W/274.
[773] European Communities-Regime for the Importation of Bananas-Request for Consultations by Colombia, WT/DS361/1, G/L/818, 26 March 2007. Panama requested consultations with the European Union on the banana import regime on the same arguments used by Colombia. *European Communities-Regime for the Importation of Bananas*, Request for Consultations by Panama, WT/DS364/1, G/L/822, 27 June 2007.
[774] Brewster, R., (2011), 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement'.
[775] *Ibid.*
[776] Torres, R.A., (2012), '*Use of the WTO trade dispute settlement mechanism by the Latin American countries-dispelling myths and breaking down barriers'*.
[777] The agreement with the Latin American countries is known as the "Geneva Agreement on Trade in Bananas" See WT/L/784.
[778] Torres, R.A., (2012), '*Use of the WTO trade dispute settlement mechanism by the Latin American countries-dispelling myths and breaking down barriers'*.

The party breaching the WTO may continue to cause injury during the dispute settlement process, but the remedy provided under WTO procedures is only prospective. Therefore, it is not possible to order the payment of indemnification or compensation for injury incurred during the DSU procedures even if the party wins the case. There is an agreement in the academic area for the need to improve compensation, but these suggestions have not led to actions to reform the compensation problem[779].

4.3.3 Compensation

4.3.3.1 Evaluation of the constraint

It is believed that compensation is one of the main factors for developing countries entering into the WTO dispute settlement system. Also, it is considered as one of the significant parts that may support the DSU being useful for all WTO Members[780]. Indeed, the DSU's ruling and recommendations may include compensation for the winning party when the losing party does not comply with the ruling of the DSB[781]. Indeed, compensation is considered as a remedy for developing countries attempting to make the defending party comply with the DSU's decision[782]. Also, compensation may be a remedy in case any Member fails to bring the measure into conformity[783]. However, according to Article 3.7 of the DSU, compensation is considered as a temporary measure to be offered when "immediate withdrawal of the

[779] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU, Master thesis, Göteborg University available online at http://www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566-4520B0D124E5614D/Mesut_Aydin.pdf [viewed March 29, 2014].
[780] Alotaibi 2011.pp.32-33.
[781] *Ibid.* pp.32-33.
[782] *Ibid.* pp.32-33.
[783] See Article 22. of the DSU.

measure is not possible"[784]. If a developed country fails to withdraw a measure or does not provide compensation to a developing country to "make up for the loss suffered . . . from the continuation of the offending measure" [785], this will lessen the number of developing countries entering into the WTO dispute settlement system. Also, it has been observed that the DSU decision without compensation would lead to less entering into the WTO dispute settlement system[786].

In the DSU, the first step for settling any dispute is the consultation. The complaining member can request consultations to settle the dispute amicably without entry into the formal dispute settlement procedure. If the consultation stage fails to settle a case, the disputing party can request the establishment of a Panel stage. The Panel considers the submissions of both of the parties. Its recommended remedy (if the complainant wins) is for the withdrawal of the measure in violation of WTO rules. Only if that measure is not withdrawn will other remedies be available[787]. Article 22.1 of the DSU provides that "compensation and the suspension of concessions or other obligations" [788] will be temporary measures available if the recommendations and rulings are not implemented within a reasonable period of time. It has been observed that under Article 22 neither "compensation nor the suspension of concessions or other obligations" [789] illustrate how to implement a recommendation and how to responsibly enforce conformity with the agreements. This complicates a claim for

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[784] Aydin, M., (2007), *WTO Dispute Settlement Mechanism and Developing Countries*: Lessons for Turkey. Fletcher School of Law and Diplomacy available online at http://www.ekonomi.gov.tr/upload/BF09AE98-D8D3-8566-4520B0D124E5614D/Mesut_Aydin.pdf [viewed March 29, 2014].
[785] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System".
[786] *Ibid.*
[787] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[788] *Ibid.*
[789] *Ibid.*

compensation[790]. Indeed, developing countries have difficulties claiming compensation under the DSU[791]. Since the DSU was adapted in 1995, compensation has been used rarely[792].

4.3.3.2 Analysis of the constraint

Regarding the compensation remedy, there are three obstacles still facing developing countries. First, during the period from the start of the dispute settlement process until the final stage of dispute, the withdrawal of the offending measure, may take up to fifteen months, which is considered to be a long process[793]. There is no compensation granted to the winning party, even when it is a developing country[794]. Also, there is not any consideration for the length of time during which the inconsistent measure was in place[795]. Therefore, if developing countries are the complainants, there may be negative consequences and economic harm resulting from retention of the inconsistent measures for a long time[796]. Also, the export opportunities for developing country might "suffer irreparably during this time"[797].

Second, the export loss during the fifteen months might be significant to a developing country. This can be "particularly damaging for smaller developing countries which are

[790] *Ibid.*
[791] *See,* Al Bashar 2009.
[792] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[793] Alotaibi 2011.p.20.
[794] *See* Al Bashar 2009.
[795] *Ibid.*
[796] Working Paper of South Centre, (1998), "The WTO Multilateral Trade Agenda and the South", No: ISBN 92-9162-008-4, pp. 43-44.; Zarrilli, S., (2001), "International Trade in Genetically Modified Organisms: A New Dilemma for developing countries", (in Francesco Francioni, ed.), *Environment, Human Rights and International Trade*, (Hart Publishing), pp.39-86. Available from: http://unctad.org/en/Docs/poditctncd1.en.pdf [viewed March 29, 2014].
[797] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System".

highly dependent on a limited number of export products/markets"[798]. During the DSU dispute procedure, developing countries could incur a significant export injury while there is not any rule for compensation for the injury caused, even if the WTO laws were violated[799]. Indeed, serious injury will be suffered by smaller developing countries that rely on a few exported goods, service and markets[800].

Third, the remedy for a complaining country, which might be a developing country, is to take action against the defending country through compensation. However, this action has been limited in practice[801]. Indeed, developing countries find it extremely difficult to take any compensation from developed countries because of "political considerations and the unequal economic relationship"[802]. Additionally, a developing country is always dependent on developed countries for growth and development of their economy[803]. Therefore, developing countries may not request compensation against defending developed countries[804]. It has been observed that the compensation may not be adequate for developing countries, because it is not possible to obtain retroactive compensation or punishment measures for developing countries for the economic losses that occurred before the DSB decision is made[805]. That remains true even if "the defendant corrects its action after the dispute"[806]. There is not any

[798] *Ibid.*
[799] *See* Al Bashar 2009.
[800] *See* South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',* p.24; see, also, Grimwade, N,. (2004) "The GATT, the Doha Round and Developing Countries", in Homi Katrak and Roger Strange (eds), The WTO and Developing Countries, *Palgrave Macmillan*, New York.
[801] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System".
[802] *See* Alotaibi 2011.p.33.
[803] *Ibid.* p.33.
[804] *Ibid.* p.33.
[805] *Ibid.* p.33.
[806] Persson, K., (2007) The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.

guarantee for compensation for economic losses. Moreover, compensation is not considered as "preferred to full implementation of the decision of the DSB"[807].

In practice, there are very significant reasons considered for rarely using the remedy of compensation. This part will look at these reasons. First, compensation has to be voluntary[808]. The disputing parties have to agree on the solution. Second, compensation has to be regular with the covered agreements. Compliance with the covered agreements "implies consistency with the most favoured nation (MFN) principle found in article I of the GATT"[809]. Third, compensation might not provide an efficient form of reparation for damages that are "suffered by the complaining party"[810] and does not include past effects of the measure[811].

4.3.3.2.1 Voluntary

When the losing party does not comply with the DSU ruling during the 'reasonable period of time', it is time to enter into negotiations with the winning party for compensation[812]. However, the main problem with compensation as a remedy under the DSB is that according to Article 22 of the DSU, compensation is temporary and voluntary. Therefore, it is dependent on the losing party to offer compensation to the winning party and dependent on

[807] *See* DSU Articles 3.7 and 22.1.
[808] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[809] *Ibid.*
[810] *Ibid.*
[811] *Ibid.*
[812] *See* DSU Article 22.2.

the winning party accepting the compensation offer. Both of the disputing parties have to "agree upon using the concept of compensation and the level of the compensation"[813].

Compensation also has to be consistent with the WTO covered agreements[814]. In practice, however, it has been observed that it is very difficult to reach an agreement with a non-complying party for compensation since there is not any method to enforce the non-complying member's to compensate. Also, the disputing parties have to agree to compensate with a specific amount[815] that makes it more difficult. Indeed, compensation is not only for the winning party, but also for all the WTO Members[816], so the benefit would be shared with all the WTO Members, including developed countries[817]. Also, compensation does not "mean an amount of money being paid; it rather involves a benefit offered by the respondent,"[818] meaning "the benefit can contain the lifting of trade barriers by the losing member which is equivalent to the benefit which the respondent has nullified or impaired by applying its measure"[819]. Therefore, it has been observed that freer trade principles can be supported by compensation[820], but this can cause harm for some exporter countries. Under the DSU, some developing countries have stated that it is difficult to obtain sufficient compensation[821]. Regarding the voluntary nature of the compensation "the respondent can end it at the same moment it reforms its WTO inconsistent regime, awaiting the outcome of any further action

[813] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[814] *Ibid.*
[815] *Ibid.*
[816] *Ibid.*
[817] *Ibid.*
[818] *Ibid.*
[819] *Ibid.*
[820] *Ibid.*
[821] *Ibid.*

by the complainant under article 21.5 of the DSU"[822]. Article 22.2 of the DSU provides that '[i]f no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party . . . [The complainant] may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements'[823]. However, developing countries may not able to make retaliation against developed countries. In sum up, it is very difficult to make agreement with no complying party to compensate.

4.3.3.2.2 Trade Sanction not Monetary

In general, under international law, countries breach an international obligation by adopting illegal measures and each is responsible for the legal consequences[824]. Under international law[825], the injured countries have the right to claim reparation under several forms such as restitution and compensation[826]. As regards restitution, the countries are responsible for illegal actions[827]. Therefore, they have to put the injured party in the position it was in "before the wrongful act was committed"[828]. Also, they have to ensure that "restitution is not materially impossible or does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation"[829]. Moreover, the wrongdoing party has to

[822] *Ibid.*
[823] *See* DSU Article 22.2.
[824] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[825] International Law Commission (ILC) Articles on State Responsibility. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf, [viewed March 30, 2014].
[826] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[827] *Ibid.*
[828] *Ibid.*
[829] *Ibid*; see, also, International Law Commission (ILC) Articles on State Responsibility.Article 35.

compensate for damage[830]. Indeed, compensation has to "cover any financially assessable damage"[831]. Article 21 of the DSU provides for a withdrawal of the inconsistent measures as a remedy for an illegal measure, which is considered as a prospective relief. Indeed, regarding past damages, nothing under the current WTO dispute settlement system provides explicitly for reparation for past damages.

In addition, Article 22 of the DSU has not obviously provided for compensation of damages suffered. Regarding Article 22.2 of the DSU, the arrangement of the compensation seems to be trade sanctions rather than monetary damages as compensation[832], unlike in most international legal systems. Consequently, it will only allow the 'suspension of concessions' against the offending party[833]. The winning party will not obtain monetary damages, but will obtain lower tariffs from the losing party[834]. However, as result of the restricted power of developing countries, the compensation must be monetarily beneficial rather than the 'suspension of concessions'[835].

In the DSU, the time of the DSU process is long for exporting members, particularly some developing countries that do not have many export bases[836]. The standard remedies of the DSU for requesting parties to comply with WTO obligations do not provide great incentives to the member(s) raising the dispute in the DSU. Indeed, remedies have not included

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[830] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[831] *Ibid*; *See*, also, International Law Commission (ILC) Articles on State Responsibility.Article 36.
[832] *See* Al Bashar 2009.
[833] *Ibid*; *see*, *also*, Lester, S., Mercurio, B. & Davies, A., (2008), *World Trade Law; Text, Materials and Commentary*, p.165.
[834] *See* Al Bashar 2009.
[835] *Ibid.*
[836] *Ibid.*

compensation for damages incurred or for financial penalties[837]. Without compensation, the DSU process may be less attractive for WTO Members, specifically developing countries. It has been observed that there are many WTO Members, particularly developing countries that want the WTO rules to include compensation. There are some members that have argued that the DSU prohibits compensation[838]. However, it has been determined that there is nothing that can prevent WTO Members from seeking compensation[839].

Indeed, the length of time in resolving disputes is considered to be another crucial point, since it may reduce the gains from dispute settlement remedies. It has been thought that the DSU is "far from being perfect"[840], because the time period from the consultation stage until withdrawal of the measure could be from 1-3 years. In practice, it is obvious that a huge amount of lost trade may occur within the DSU process without remedy because the WTO remedies only apply in future. So, the dispute settlement remedies are considered as "forward looking"[841], meaning remedies will not take place until the DSB's ruling is eventually given[842]. Indeed, no remedy takes place for the harm and for those who are actually injured. Also, the remedy is not relief for the actual injury. While the offending measure is withdrawn, there is no remedy that will alleviate the harm done to the WTO Members. The remedy does not go directly to benefit the affected parties; all members will benefit[843]. The

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[837] *Ibid.*
[838] *Ibid.* For more information *see, also,* Vienna Conventions on the Law of Treaties, Article 26.
[839] Hoekman, B. M., & Mavroidis, P. C., (2000), WTO Dispute Settlement, Transparency and Surveillance. *The World Economy,* 23(4).p.6. *Available from*: http://onlinelibrary.wiley.com/doi/10.1111/1467-9701.00288/abstract [Accessed: March 26, 2014].
[840] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[841] *Ibid.*
[842] *Ibid.*
[843] *Ibid.*

WTO has to find some way to compensate for actual loss by the application of the WTO inconsistent measure[844].

An example of the length of the DSU process is that the *Banana* dispute lasted more than 43 months, from 4 October 1995 to 19 April 1999 "when the DSB authorized the US suspension of concessions"[845]. The DSB "suspension authorization to Ecuador was on 18 May 2000, which made the course as long as 56 months"[846]. There are several problems with the DSU remedy. For example, in the case of *EC Regime for the Importation, Sale and Distribution of Bananas*, the European Communities did not comply with the ruling. Therefore, Ecuador had requested authorisation to 'suspend concessions or other obligations' to the EC under the GATS, the TRIPS Agreement and the GATT 1994. The amount of money was US $210m. While under the GATT, the violation was in the goods sector, Ecuador had to "request retaliation on other sectors under other Agreements"[847].

In the *Banana* case, the arbitrators stated that:

> "Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sector and/or under all agreements mentioned above combined"[848].

[844] *Ibid.*
[845] *Ibid.*
[846] *Ibid.*
[847] *Ibid.*
[848] *Ibid.*

It has been thought that the DSU has to provide for remedies to address monetary damages as compensation[849]. In the Uruguay round discussions, there was a basic notion of compensation for causing damage[850]. Members argued about the calculation of damage[851]. Also, there are many member-created proposals, but one of these proposals indicated that compensation was preferred to retaliation in all cases. Also, it stated that there are difficulties for winning parties to agree on compensation as well as agreement for the payment of the damage. So, the members finally agreed that the compensation is considered as a temporary remedy but not a legal obligation. In addition, some members are concerned that compensation might be encouraging the losing party to not comply with the DSU recommendations and rulings. Compensation is not covering the actual damage. However, using compensation as a remedy is important for developing countries since they do not have the ability to retaliate against a stronger economic member[852]. So, the DSU includes compensation as an available remedy.

Therefore, there are many demands by developing countries on the DSU to force developed countries to pay compensation to other parties[853], to avoid cases of serious imbalance[854]. Under the DSU, the Korean proposal[855] suggests that when developing countries and developed countries have disputes and developed countries refuse to comply with DSB rulings, the panel should be able to award compensation. This would increase developing countries' confidence in the DSU. While the compensation is only voluntary and not

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[849] *Ibid.*
[850] *Ibid.*
[851] *Ibid.*
[852] *Ibid.*
[853] *Ibid.*
[854] *Ibid.*
[855] Communication from Canada, Costa Rica, Czech Republic, Ecuador, the European Communities, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela, in Ministerial Conference, Third Session, Seattle, 30 November–3 December 1999, WTO Document WT/MIN(99)8 (22 November 1999).

monetary, it could take the form of extra concessions[856] . During the Uruguay Round, some developing countries highlighted the significance of compensation for them when obligations are breached by a developed country. Nicaragua suggested that when disputes are brought by a developing country, "in the recommendations of the contracting parties compensatory means ought to be considered if the amount of damages warrants such compensation"[857].

4.3.3.2.3 Consistency with Covered Agreements of the (MFN) obligation, the DSU and provision of the WTO

Under the DSU, the other difficulty with compensation is that, in the application of compensatory measures, the principle of the Most Favoured Nation (MFN) standard must be followed by all WTO Members[858]. Compensation is authorized by the DSB, however, it will not be implemented until recommendations and rulings of the DSB are adopted within a reasonable time period (60 days)[859]. Indeed, a respondent may be able to withdraw measures within 60 days. The respondent can decide to offer restitution by compensation, though compensation will not be applied retrospectively. Therefore, there is no recompense for any harm caused by an illegal trade measure previous to or during the dispute process. Compensation is considered in the form of tariff reductions. It is not a means of monetary

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[856] Mosoti, V., (2003), "Does Africa Need the WTO Dispute Settlement System?",Towards A Development-Supportive Dispute Settlement System in the WTO, *Geneva: International Centre for Trade and Sustainable Development*. (*ICTSD*), p. 81; Kufuor, K. O., (1997), "From the GATT to the WTO: The Developing Countries and the Reform of the procedures for the settlement of international Trade Disputes", *journal of World Trade*, 13(5) pp. 139-140.

[857] *See* Al Bashar 2009.

[858] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.

[859] Read, R., (2007), Dispute Settlement, Compensation and Retaliation under the WTO, Handbook on International Trade Policy. *Available from*: https://www.google.co.uk/#q=Dispute+Settlement%2C+Compensation+and+Retaliation+Under+the+WTO+Robert+Read [Accessed: March 26, 2014].

payment. Also, compensation has to be matched with the provisions of the WTO and it has to be "consistent with the requirement of MFN treatment"[860]. The MFN treatment obligation provides that if any nation gives certain favourable treatment to another Member, that favourable treatment has to be given to all other WTO Members.

Therefore, when any party to the WTO goes through the full DSU procedure and receives a positive ruling, all of the WTO Members enjoy and benefit from that remedy. However, it has been thought that this remedy is unfair and it may be one of the reasons for not usually using compensation under the DSU[861]. It is unequal that when a party takes the long dispute settlement procedure but after has to share the compensation with all WTO Members[862]. The most favoured nation (MFN) principle creates another difficulty in practice for using compensation. Therefore, the complainant may be "asking for a larger degree of access to the market when discussing the compensation" [863] if the compensation is not only for the complaining party so, there is "no exclusive benefit for the complainant"[864]. Consequently, this remedy might be less "attractive to both of the disputing parties"[865].

According to Article 22, compensation has to be consistent with the covered agreements[866]. The major aim of compensation is to encourage the WTO Member to comply with the WTO rules. Compensation as a punitive action may cause a loss by a respondent "through the

[860] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[861] *Ibid.*
[862] *Ibid.*
[863] *Ibid.*
[864] *Ibid.*
[865] *Ibid.*
[866] *Ibid.*

removal of its preferential access to the market of a plaintiff"[867]. However, in some cases, a respondent might not withdraw an illegal trade measure while the provision of compensation is "permitted as a temporary measure pending the withdrawal of the measure that is inconsistent"[868].

Furthermore, Article 3.5 of the DSU[869] provides that 'All solutions to matters formally raised under the consultation and dispute settlement provisions . . . shall not nullify or impair benefits accruing to any Member under those agreements . . .'[870]. "But giving increased concessions to one of the Members even though compensatory, nullifies benefits to the other Members"[871]. The magnitude of compensation is "required to be equivalent to the level of harm (nullification or impairment) that is caused by any illegal measure"[872]. It must be equal to the harm of the complaint by nullification or impairment established by Article 3.5. Also, Article 3.5 provides that the disputing parties can accept the compensation and as a result of that all the WTO Members will share the compensation.

4.3.4 Conclusion

This discussion highlighted the most significant factors regarding the participation of developing countries in the WTO dispute settlement body. As we have seen, the duration of

[867] Read, R., (2007), Dispute Settlement, Compensation and Retaliation under the WTO.
[868] *Ibid.*
[869] The DSU Article 3:5'All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements'.
[870] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[871] *Ibid.*
[872] Read, R., (2007), Dispute Settlement, Compensation and Retaliation under the WTO.

the DSB process and compensation are among the most significant constraints limiting the participation of developing countries in the WTO dispute settlement body. This makes developing countries less likely to litigate their disputes under the DSB. First of all, the duration for the dispute resolution process has been highlighted and the constraint has been evaluated. Also, the constraints created by the DSU's dispute resolution process itself have been analysed. These processes create a dilemma for developing countries considering participating in WTO dispute settlement proceedings. In addition, compensation under the DSU has been analysed and evaluated, demonstrating that there is dissatisfaction with the compensation offered. The reasons considered for rarely using the remedy of compensation were highlighted: first, the voluntary nature of compensation requires disputing parties to agree on the solution; second, compensation has to be in agreement with the covered agreements; finally, compensation does not provide an efficient reparation of damages. These causes affect developing countries' practice in the WTO dispute settlement proceedings.

Chapter 5: Possible solutions to some of the constraints limiting developing country participation in WTO's dispute settlement proceedings

5.1 Reinforcement of Financial and Legal Resources

5.1.1 Introduction

The aim of this chapter is to improve developing countries' access to the DSU and to improve the DSU rules and make them work for developing countries by highlighting possible solutions to tackling some of constraints which limit developing country participation in WTO dispute settlement proceedings. This chapter will discuss and evaluate these possible solutions. This chapter will also focus on some of the WTO Members' attempts at solving some of the obstacles that face developing countries in both consultations and the DSU adjudication. Moreover, it will reveal that some of the proposals by WTO Members since the establishment of the organisation until now aimed at smoothing over the WTO dispute settlement system and creating an effective and successful system. Also, this chapter will discuss solutions for the lack of financial and legal resources. First, it will discuss funding developing and least developed countries to help them to support their legitimate claims under the DSB. Second, addressing attorneys' fees could increase developing countries' ability to participate in the dispute settlement system. Third, reform to the role of legal assistance, under Article 27.2, will improve developing countries' use of the DSU, and also assist developing countries in addressing the issue of the high cost of the DSU. Fourth, it considers that the proposal to reform the ACWL may address the high cost of WTO dispute

settlement system litigation as well as tackle limits on the participation of developing countries in WTO dispute settlement proceedings. In addition, this chapter will highlight the significant reinforcement for consultations and mediations. It is believed that using more consultations and mediation would have great benefits for developing countries and give them more effective ways to discuss solutions to their disputes. These methods are giving developing countries another chance to look for solutions. Therefore, consultations and mediation might be considered as a good method to resolve many obstacles which limit developing country participation in WTO dispute settlement proceedings.

5.1.2 Reinforcement of Financial Resources

Under the DSU, developing countries frequently face high costs associated with the DSU procedure. Indeed, the least developed and developing countries have little trade and scarcer resources with limited government budgets to fund their disputes under the high cost of litigating in the DSU procedure. Therefore, developing and least developed countries have to receive funds to help them to bring their legitimate claims under the DSB. One particular funding proposal was made by Kenya, which highlighted the need to create a dispute settlement fund with financing from the WTO budget in order to help developing countries to use the DSU[873]. Moreover, the African Group has applied for assistance in the form of "a pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and

[873] *See*, Kenya Proposal, TN/DS/W/42, at 2,5 (Jan. 24, 2003); the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002); Communication from Ecuador, TN/DS/W/9, at 3 (July 8, 2002); Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002); proposal by China, Improving the Special and Differential Provisions in the Dispute Settlement Understanding, TN/DS/W/29, at 1 & 2 (Jan. 22, 2003).

expenses entailed, [and a detailed] compilation by the WTO Secretariat of all applicable [panel and Appellate Body case] law"[874].

Indeed, financial help could be provided by the WTO budgets to assist poorer and developing countries to face the high cost in human and financial resources of the DSU process that limit developing country participation in the DSU. Also, the funds will help poor and developing countries to employ individuals and/or hire external counsels. So, the legal expertise dilemma and financial resources that matter for developing countries might be solved. The funds will also allow poor countries to train their domestic legal capacities in order to deal with the WTO laws. So, the dilemma of a lack of monetary means will be gone and developing countries will be more willing to participate in practice in WTO dispute settlement proceedings.

Developing countries will also have the ability to recognize their rights, properly defend themselves under the WTO rules and operate effectively the same as developed countries as a result of having more legal and financial expertise. Therefore, developing countries can face the high costs of WTO litigation, particularly in a panel or appellate body of the DSB. Developing countries will also have highly qualified experts and as much experience as developed countries. They will also be able to support their legal arguments in the WTO dispute as a result of the increase in skills necessary to fulfil the extensive information and documentation requirements of the WTO, with a clearer apportionment of resources between developing countries and developed countries. Also, developing countries may not need to

[874] This was highlighted by the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002). For more details, *see*, Bown, C. & Hoekman, B., (2005), 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'.p.875.

hire external professional legal experts if they can use domestic legal capacities to deal with the WTO laws. Therefore, private law firms and the related litigation costs would be less of a problem for developing countries. Hence, the number of disputes brought by developing countries in the WTO will increase.

In addition, extra funds will address the lack of expertise and knowledge of complicated WTO law. Furthermore, more funding will assist developing countries as regards the DSU requirements for preparatory work, such as preparing substantial documentation to be presented as evidence, preparing commercial and economic data, testimony and economic and technical evidence which have to take place before presenting a case in the WTO dispute settlement system. This will particularly assist developing countries to use quantitative economic analysis and utilize either econometric or non-econometric evidence in order to strengthen their argument and to meet the DSB's principles which are often extremely complicated and take a long time to litigate. Indeed, it has been observed that the disputing counterparts who have superior legal power can obtain positive decisions because they are able to tackle the issue of the complexity of WTO rules and its dispute settlement procedures[875]. Therefore, developed countries are able to deal with the expenses and disparity of a case under the DSU by their representative officials in the WTO. Developed countries have many representative officials with good experience in WTO rules. However, funding developing countries could improve the possibility for them to win their cases brought to the DSU. Developing countries can also employ enough internal staff with good experience with multilateral trading systems to handle their case under the DSU.

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[875] *See* Bown, C. & Hoekman, B., (2005), 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'.p. 875.

5.1.3 Reinforcement of Legal Resources

Developing countries have to pay attorneys' fees to bring a successful challenge to a developed country trade barrier[876]. Developing countries could be encouraged to participate in the dispute settlement system if they could reclaim these fees, which would entail "easily affordable payments from large developed countries who fail to settle a case or comply with a panel decision"[877]. The proposal of paying the developing countries' attorneys' and experts' fees has been supported by a United States Trade Representative (USTR)[878]. It has been stated that it is necessary to "consider a one-sided remedy covering litigation costs"[879]. It has also been argued that "one possibility [to address the issue of legal resource imbalances] would be to implement cost rules-that is, to require that when a developed country loses a case against one of the least-developed ones, it is required to pay at least a portion of the winner's legal costs"[880]. Moreover, Mexico submitted a proposal in which the awards of attorneys' fees should apply in all WTO cases, "regardless of the development status of the parties to the dispute"[881]. Cuba proposed is cutting the high cost of WTO litigation, particularly for developing countries, by special and differential treatment for developing countries[882]. Special and differential treatment could also extend to the issue of attorneys'

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[876] *See* Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'. Shaffer suggests that the DSU should have rules to deal with the cases. This method also has support from Bhagirath Lal Das. *See*, Das, B. L., (1998), *The WTO agreements: deficiencies, imbalances and required changes* 14 (2) (Third World Network) Zed Books.
[877] Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[878] *Ibid.*
[879] *Ibid.*
[880] *Ibid*; *see, also* Esserman, S., Howse, R., (2003), The WTO on Trial, the *Foreign Affairs*, 82, 130.
[881] Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'; See Mexico Proposal, TN/DS/W/23 (4 Nov. 2002).
[882] Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002). *See, also*, proposal by Jamaica,TN/DS/W/21, at 2 & 3 (Oct. 10, 2002); and Communication from India TN/DS/W/47, at 2 (Feb. 11, 2003); *see also*, China Proposal, TN/DS/W/29, at 1 & 2 (Jan. 22, 2003).

fees. This method of payment would be applied when the dispute arises between a developing and developed country, and the developed country has to pay the attorneys' fees when the developing country is successful in disputes, even before a panel stage[883].

There are many rationales for WTO Members paying attorneys' fees when developing countries are successful complainants under the DSU. First of all, this method creates a fair DSB system. Therefore, developing countries can obtain rights to demand paying back considerable legal expertise. It has been observed that developing countries may not able to pay attorneys' and experts' fees without obtaining payback from the developed countries when developing countries are successful in a dispute[884]. As mentioned already, developing countries cannot expect to participate and succeed in the WTO litigation procedure without hiring sophisticated legal counsel. Second, the current structure of the WTO incurs high litigation costs for developing countries and could constitute a method by which developed countries can impose more costs upon those developing states by using the "legal procedures to drag out WTO cases"[885]. One of the largest developing countries has stated that "we always try to settle a case, as it is too complicated and expensive to go to a panel"[886]. Therefore, the WTO can undertake new methods to restrain the practice of lengthening dispute settlement proceedings, which would include paying the attorneys' fees for developing countries.

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[883] *See* proposal by Jamaica, TN/DS/W/21, at 2 (Oct. 10, 2002); Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002); China Proposal, TN/DS/W/29, at 1 & 2 (Jan. 22, 2003); Communication from India TN/DS/W/47, at 2 (Feb. 11, 2003); *see also* Pham 2004.pp.333-388.
[884] *See* Pham 2004.pp.333-388.
[885] Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[886] *Ibid*; "Interview with a representative from one of the largest developing countries, in Geneva, Switz. (Sept. 13, 2002)".

It is suggested that when developing countries are successful in bringing claims against a developed country, the developing countries should not suffer from the high financial cost spent on "on U.S. and European trade lawyers to enforce their WTO rights against developed countries"[887]. Therefore, the attorneys' fees have to be addressed under the rules of the WTO to facilitate developing countries' defence of their rights[888]. Otherwise, the right of weaker members will be meaningless.

The amount of attorneys' fees can be capped, just as they are often capped in many national courts[889]. In addition, Article 22 of the DSU has already calculated the fees for the WTO arbitrators. Therefore, it should include the attorneys' fees in the legal process of the DSB.

Arguably, the "fee guidelines could be agreed upon and attached as an annex to the DSU and amended from time to time"[890]. This method of supporting developing countries reduces the high cost of the DSU procedure but has to be set out in WTO law.

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[887] *Ibid.*

[888] *Ibid*; "See Proceedings in Vindication of Civil Rights, 42 U.S.C. § 1988 (1994 & Supp. V 1999) (enacted Oct. 19, 1976) (authorizing "the court, in its discretion" to award the prevailing party "a reasonable attorney's fee as part of the costs" in any of a number of civil rights actions); and Equal Access to Justice Act, 5 U.S.C. 504 (2000); 28 U.S.C. 2412(d)(a)(2000)".

[889] *Ibid*; (reviewing alternative methods of calculating attorney's fees in class action cases before U.S. state courts, including fees based on a percentage of a total recovery and lodestar methods based on an hourly rate and a reasonable number of hours). (It occurs all the time in domestic legal systems). Capisio, M. V., Cohen, H., (eds.), (2002). *Awards of Attorneys Fees by Federal Courts, Federal Agencies and Selected Foreign Countries*. *Nova Publishers*. "Robert Rossi, Attorneys' Fees (2nd ed. 1995); and Krivacka, C., Krivacka, P., Method of Calculating Attorney's Fees Awarded in Common Fund or Common Benefit Cases–State Cases, 56 A.L.R. 5th 107 (1998) (reviewing alternative methods of calculating attorney's fees in class action cases before U.S. state courts, including fees based on a percentage of a total recovery and lodestar methods based on an hourly rate and a reasonable number of hours). *See*, Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'; Gotanda, J. Y., (1998), "Supplemental damages in private international law: the awarding of interest, attorneys' fees and costs, punitive damages and damages in foreign currency examined in the comparative and international context." *Kluwer Law International*. ("Most countries throughout the world statutorily provide national courts and arbitral tribunals with the authority to allocate costs in the award. The general practice in most countries is for the losing party to pay for all of the costs and legal fees of the winning party.").

[890] Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.

The United States, EC and other developed countries should accept that fee guidelines in WTO law to helps reduce the cost of the DSU process for developing countries. Moreover, large developing countries should have to assist other less developed or developing countries by fully or at least partially subsidising their attorneys' fees, so would lead to the DSU does not create any obstacles for "incentives for developing countries to settle or abandon legal claims simply because they cannot afford to defend themselves"[891].

Therefore, the WTO Members and the DSU rules have to find ways of structuring attorneys' fees to enhance the use of the DSB for settling disputes[892]. For instance, the DSU may set forth the fixed time period for attorneys' fee, which may be when the developed country fails during the consultation period to withdraw its illegal measure. DSU rules could also specify that if developing countries are successful in their complaints, they can recover their attorney fees if the developed country refuses to withdraw an illegal trade measure. It is thought[893] that the attorney's fees can be charged to the losing party occur when a developed country refuses to comply with the DSU ruling, after a set time period. This could occur 30 days after the rulings are established by a panel or appellate body. The amount would increase by a percentage as long as the developed country refuses to comply with the DSB rulings. The DSU panel could also determine the amount of the attorney's fees early in the dispute settlement process[894]. In addition, the WTO Members may agree with the retroactive attorney's fees. They may determine attorney's fees from the starting date of damage

[891] *Ibid.*
[892] *Ibid.*; Hylton, K. N., (1993). Fee Shifting and Incentives to Comply with the Law. *Vand. L. Rev.*, *46*, 1069 (concluding that fee shifting in favour of prevailing plaintiffs generates less litigation because of a greater incentive to comply with the law).
[893] Shaffer,G. (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[894] *Ibid. see, also,* Mexico Proposal, TN/DS/W/23 (4 Nov. 2002).

accrued. Therefore, the starting date, for instance, can be the date of the illegal trade measure by any of the WTO Members, or it can be from "the date of filing of the complaint"[895], it also can be "the date of the panel's formation"[896]. It is believed that the retrospective attorney's fees from the date of the illegal measure would be increased until the dispute is settled. Therefore, this would create a clear and strong reason for developed countries to not violate WTO agreements. Also, it is considered that this method can reduce the chance that developed countries create a long dispute procedure.

It has been thought that if the attorney's fees start at the date of the filing of a complaint, or the date of a panel's formation, then it can create a greater incentive for the parties to settle the dispute without going through further litigation. Therefore, if the dispute is not settled by a fixed date, developed countries would be put on notice that a WTO claim will result in an order to pay Attorney fees. Therefore, they would have a much greater incentive to negotiate an amicable settlement without delaying the process.

Also, the DSU could determine attorney's fees[897] from a failure to agree during the consultation period. Thus, if the developed country withdraws the trade measure during the consultation time period then no attorneys' fees would be due.

To sum up, the reimbursement of attorneys' fees might cover all or part of litigation costs as well as encouraging developing countries' defence of their WTO rights under the DSU.

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[895] Shaffer,G. (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[896] *Ibid.*
[897] Hylton, K. N., (1993). 'Fee Shifting and Incentives to Comply with the Law' (concluding that fee shifting in favor of prevailing plaintiffs generates less litigation because of greater incentive to comply with the law).

5.1.4 Reinforcement of Article 27.2

Under the DSU, developing countries are still suffering from the high cost of bringing disputes to the WTO dispute settlement system even after the creation of the Advisory Centre on WTO law[898]. Therefore, in order to ensure developing countries greater access to the Dispute Settlement Body, there are proposals trying to making changes to Article 27.2, as regards legal assistance to developing countries[899]. There are numerous developing countries that have submitted several proposals for improvement of the operation of Article 27.2. These proposals are based on the experience of developing countries with the DSU. It is believed that if these proposals are implemented that will "improve the relevance and effectiveness of the DSU from a developing country perspective"[900].

Under Article 27.2, experts will not support any developing countries before a dispute is initiated in WTO dispute settlement proceedings. However, it is believed that it is significant to provide aid with the proceedings and before raising the case under those proceedings. Also, the expert's assistance will be upon developing countries' request.

In addition, the role of legal assistance is considered to be giving advice and clarification concerning WTO law and the DSU processes, while ensuring the impartiality of the Secretariat, as is mentioned in the provision[901]. Hence, it is observed that Article 27.2 is just to meet the DSU requirements when it proscribes "the legal advisor from acting as counsel or

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[898] *See* Al Bashar 2009; *see also* Pham 2004 p.364.
[899] *See* Al Bashar 2009; "Note by the Secretariat, Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions," WT/COMTD/W/66 (16 February 2000), p.33.
[900] *See* South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',* p.31.
[901] *See* Al Bashar 2009.

helping in writing submissions, because to do so could be a breach of the impartiality requirement of the secretariat"[902]. Therefore, the Secretariat could not operate as an advocate in legal proceedings for least developed and developing countries. However, the Least Developed Country Group was trying to make changes to Article 27.2 for legal assistance to developing countries. It suggested that the legal advisors should be as counsel [903] to developing countries[904]. Therefore, the reform would remove these limitations and permit legal experts to fulfil their function as counsel. Moreover, legal assistance has to appear more helpful for developing countries in tackling the high cost of litigation and lack of legal expertise. The Secretariat's expert has to be a lawyer for the developing countries.

The most often requested improvement for Article 27.2 is raising the size of the team. At the present, Article 27.2 contains two part time legal advisers. The WTO secretariat has to employ a large number of staff with full-time jobs to help serve as legal consultants for developing countries. There are some WTO Members that have proposed amendments for Article 27.2. They have proposed that the WTO expand the Secretariat services of the Article 27.2 by increasing the number of legal experts[905]. Venezuela strongly made this suggestion when it demanded that at least five advisors have to be in an independent legal division[906]. It is believed that the number of the WTO Secretariat must be more than twenty full time legal experts. With such a structure, developing counties will receive a large and autonomous legal

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[902] *Ibid.*
[903] Pham 2004.pp.333-388; The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002); Addo, K., & Kessie, E.,'African Countries and the WTO Negotiations on the Dispute Settlement Understanding'. *Trade Policy Review*, 65.available online at http://www.ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf [Accessed: August 23, 2014].
[904] The Pakistan, Turkey and Venezuela have appeared to reform Article 27.2 of the DSU. They have appeared that it has to "re-considering the application of the concept of neutrality in relation to legal assistance under Article 27.2 of the DSU". *See* Al Bashar 2009.
[905] *See* South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism'*.p.31.
[906] *See* Al Bashar 2009.

assistance during the DSU process[907]. Also, it is believed that this method will not "affect the impartiality of the secretariat"[908]. It has been proposed that under the Article 27.2, the WTO create a Permanent Defence Counsel[909]. The role of this counsel would be to provide legal and technical assistance to developing countries at any time and in any case arising under the DSU. It is thought that a permanent defence counsel would remedy concerns about the imbalanced legal and monetary capacity of developing countries, which always presents a dilemma in the effective participation of developing countries in the WTO dispute settlement system.

It is thought that the Counsel has to be funded from the WTO budget surpluses[910]. The African Group proposed that the WTO Fund should be financed from the regular WTO budget to "facilitate the effective utilization by developing and least-developed country Members of this Understanding in the settlement of disputes arising from the covered agreements"[911]. The fund may be financed from voluntary contributions from Members[912]. Therefore, regarding the assistance to developing countries for the high cost of the DSU, it is proposed that a WTO establish a Trust Fund to make financial support available for the use of

[907] *See* Al Bashar 2009; *see, also,* Van der Borght, K., (1999). Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate, The. *Am. U. Int'l L. Rev.*, *14*, 1223.
[908] *See* Al Bashar 2009.
[909] *Ibid*; Van der Borght, K., (1999). Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate; Pakistan, Turkey and Venezuela proposal to reform Article 27.2 of the DSU. They had mentioned "setting up an independent legal unit within the Secretariat, staffed with legal advisors". Also, they have stated that the DSU has to establish an independent legal unit working with Secretariat to provide legal advice to developing members. *See* Al Bashar 2009.
[910] *See* Al Bashar 2009; Van der Borght, K., (1999), Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate.
[911] Addo, K., & Kessie, E.,'African Countries and the WTO Negotiations on the Dispute Settlement Understanding'.
[912] *Ibid.*

external specialists and lawyers[913] as advocates and advisors, in addition to supporting the Permanent Defence Counsel. Turkey has proposed that the budget of the secretariat has to "improve its ability to support the position of the legal experts and to employ full-time advisors"[914]. Moreover, the African Group requires support in the form of experts and lawyers in the preparation of cases, "the payment of fees compilation by the WTO secretariat of all applicable law"[915]. Pakistan, Turkey and Venezuela have suggested reforming Article 27.2 of the DSU[916]. They have mentioned making better use of Article 27.2 by increasing the Secretariat's budget for employing more full-time consultants who have great legal experience[917]. It is considered that the Permanent Defence Counsel might include a large range of consultancy and advisory services to help developing countries in the DSU[918]. It is believed that reform to the operation of Article 27.2 will improve developing countries use of the DSU as well as assist developing countries in addressing the issue of the high cost of the DSU.

5.1.5 Reinforcement of the ACWL

The ACWL has to provide more aid for legal advice and training for developing countries' officials on WTO (DSU) law, as well as assistance to developing countries in the preparation

[913] South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism'*,p.31; *see, also*, Freneau 2001; Pakistan, Turkey and Venezuela have suggested reforms to Article 27.2 of the DSU. They suggested "establishing a trust fund to finance strategic alliances with lawyers' offices or private firms in order to expand the scope of consultancy and advisory services available to DC members".
[914] *See* Al Bashar 2009.
[915] *See* the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).
[916] Freneau 2001; Footer, 2001.p.88.
[917] *See* Al Bashar 2009.
[918] Al Bashar 2009, "If this took place, the WTO Council could take the UN as a model; the United Nations secretariat-General requests monetary support through voluntary donations from several countries for the UN Trust Fund, which helps developing countries financially to bring cases before the ICJ".

and presentation of their trade cases in WTO disputes. However, the ACWL's defects have been mentioned[919]. While the Advisory Centre on WTO Law provides help to developing countries in tackling the high cost of WTO litigation, it cannot fully support them under the WTO dispute settlement proceedings. This part provides some proposals for reforming the ACWL.

It is suggested that the ACWL has to make more offers for training activities to delegates from developing countries, and consequently the ACWL needs a fund devoted to subsidizing the costs of such training. The ACWL has a budget to decrease "the heavy burden on the developing countries" to create "internal legal expertise"[920].

While the ACWL provides help to developing countries in tackling the high cost of WTO litigation, it cannot support them before a dispute is initiated under WTO dispute settlement proceedings[921]. However, the majority of developing countries have stated that "the cost of litigation before the WTO panels and the appellate body is prohibitively high"[922]. Therefore, it is thought that the assistance provided by the ACWL must be also offered before the disputes arise in the DSU process, which will be more helpful for developing countries.

As a result, the ACWL has a budget. It is thought that the ACWL has to employ a large number of staff with distinguished knowledge and skills to handle all cases referred to it by developing countries. The ACWL has to support all developing countries in both sides of a

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[919] *See* Al Bashar 2009.
[920] Nottage, H., (2009), "Developing Countries in the WTO Dispute Settlement System".
[921] Alotaibi 2011.p.52.
[922] *Ibid.* and see Pham 2004.p.364; Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002).("Our experience over the past seven years of the dispute settlement process has been that the cost of litigation before the WTO panels and the Appellate Body is prohibitively high.").

dispute when any developing countries bring a case against another developing country[923]. In fact, the ACWL is designed to represent and counsel developing countries to protect their rights under WTO rules, but the ACWL has not addressed all constraints which face developing countries in the WTO dispute settlement system.

By using the ACWL, the lack of expertise in WTO law amongst developing countries will be considerably less. It is thought that while the ACWL is "broadening the potential for developing country access to WTO dispute settlement"[924], the ACWL must hire full-time economic experts for its staff. Also, they will aid developing countries to make excellent decisions about bringing claims to the WTO[925]. Therefore, the job of the ACWL experts is to help developing countries analyse their options[926]. For instance, the ACWL would provide legal advice on all WTO legal matters[927]. Full-time experts can make available assistance for developing countries to "analyze dispute settlement from the standpoint of economic costs"[928].

It is considered that the ACWL should provide more than legal and economic assistance for developing countries. It should be abreast with developing countries to support their rights and obligations under the WTO Agreement[929]. Therefore, the ACWL should create the

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[923] Pham 2004.pp.333-388.
[924] Bohi, K., (2009), 'Problems of Developing Countries Access to WTO Dispute Settlement'.
[925] *Ibid.*
[926] *Ibid.*
[927] *Ibid*; *see*, Advisory Centre on WTO Law, Legal advice on all WTO legal matters, *available from:* http://www.acwl.ch/e/index.html [Accessed: August. 23, 2014].
[928] Bohi, K., (2009), 'Problems of Developing Countries Access to WTO Dispute Settlement'.
[929] Anyiwe,L., & Ekhator, E., (2013), 'Developing Countries and the WTO Dispute Resolution System: A Legal Assessment and Review', *Journal of Sustainable Development Law and Policy* Vol. 2., pp 121-138.

assistance free to the poor countries that cannot afford their right[930] and to carry complaints under the DSU.

It is essential to make sure that the cost of the DSB does not create any barriers to practice for developing countries under the DSU process. Therefore, it is observed that some of the least developing and developing countries will want to have the legal services at no cost[931]. It has been proposed that the donor countries must increase funding for a permanent Defence Counsel and the ACWL to create the services without cost to developing countries and poorer countries. These proposals are aimed at eliminating the difficulties experienced by developing countries in the DSU. These proposals can improve the DSU if there is a will by larger Members to accommodate these concerns of developing countries[932]. It is considered that these proposals to reform the ACWL may address the high cost of WTO dispute settlement system litigation as well as tackle limits to the participation of developing countries in WTO dispute settlement proceedings.

5.1.6 Reinforcement of Consultations and Mediations

5.1.6.1 Reinforcement of Consultations

The DSU offers a method that could be an alternative way to settle disputes that may be suitable in cases that arise between WTO Members, especially between developing and developed countries. The DSU can support disputing parties to solve disputes amicably by

[930] *Ibid.*
[931] Addo, K., & Kessie, E.,'African Countries and the WTO Negotiations on the Dispute Settlement Understanding'.
[932] South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',* p.31.

using consultation[933]. In practice, it has been observed that the consultations stage, an old diplomatic means of resolving trade disputes, has developed in the GATT and the WTO system [934]. The DSU successfully provides a number of provisions to encourage a consultation stage before entering into the panel stage.

In the DSU process, all parties to the dispute must enter into consultations before continuing to the panel stage. The aim of the DSU in settling disputes through consultation is the creation of a settlement which would be satisfactory for all parties of the dispute, and which conforms to DSU law. Article 3.7 of the DSU states that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute"[935]. It also states that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred"[936]. The DSU provisions are considered to be in favour of developing countries. Therefore, developing countries' position has legitimacy in pursuing consultation under Articles 4 and 12 of the DSU. Article 4.10 of the DSU appears to have a special benefit for developing countries where it provides that "during consultations Members should give special attention to the particular problems and interests of developing country Members"[937]. In fact, this article has been used in the case of '*European Communities-Trade Description of Scallops (EC-Scallops)*' [938]. Here, Chile requested the article be applied during DSB consultations, and stated that the article "had been disregarded by the Communities thus

[933] Nordstrom, H. & Shaffer, G., (2007)'Access to Justice in the WTO: The Case for a Small Claims Procedure: A Preliminary Analysis'.
[934] *Ibid.*
[935] DSU Article 3.7.
[936] DSU Article 3.7.
[937] DSU Article 4.10.
[938] *European Communitie -Trade Description of Scallops*, order by Canada WTO Document (WT/DS7), Chile WTO Document (WT/DS14) and Peru WTO Document (WT/DS12). The request was by Chile to join in consultations, ordered by Canada with the European Communities, which is included in WTO Document WT/DS7/2.

discriminating against and impairing Chile's interests in deviation from the provisions of Article 4.10 of the DSU[939].

Moreover, consultations under Article 12 of the DSU may be considered as favourable to developing countries[940]. The disputing parties may agree to create further timeframes for consultations, which Article 4.8 of the DSU states is "normally set at 60 days after receipt of request"[941] or "containing shortened timeframes for perishable goods"[942]. Article 12 allows the Chairman of the DSB to have authority to discuss with parties the creation of further time extensions and durations. For example, in 1995, Pakistan had a dispute with the United States in front of the DSB. Pakistan invoked Article 12.10 of the DSU during the consultations[943]. In the DSB meeting, the United States applied for the panel process but this action was challenged by Pakistan. It stated that the disputing parties were still "engaged in the process of Consultations"[944]. Consequently, the United States complied with Pakistan's complaint[945].

In addition, consultation avoids constraints that limit developing country participation in WTO dispute settlement proceedings in at least two respects. Firstly, a consultation operates as originally envisioned by the DSU. Article 4 provides that parties to the dispute "shall enter into consultations in good faith"[946] and that they "should attempt to obtain satisfactory

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[939] See Minutes of Meeting of the DSB, 27 September 1995, WTO Document WT/DSB/M/7 (27 October 1995). *see, also,* Footer, 2001.
[940] Pham 2004.pp.333-388.
[941] DSU Article 4.8.
[942] Ibid.
[943] Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Document WT/DS36 (1998).
[944] Ibid.
[945] See Footer, 2001.
[946] DSU Article 4.3.

adjustment of the matter"[947]. Also, Article 4.10 provides that "during consultations Members should give special attention to the particular problems and interests of developing country Members"[948]. Secondly, consultation may avoid concerns of developing countries about the diplomatic style of international trade processes in dispute settlement. Indeed, developing countries always find themselves facing power politics in disputes with developed countries in the course of WTO processes[949]. The consultation stage avoids the need to enforce DSB rulings against larger developed countries. It therefore avoids significant constraints on the utility of the WTO dispute settlement system for developing countries. It also avoids developing countries wasting money and time in invoking the WTO's dispute settlement procedures against developed country WTO Members[950]. Developing countries could thereby "attain more equal footing with developed countries in the consultation stage"[951]. Panel litigation is considered to be expensive and rigid; consultation is considered to be a good method to avoid these problems[952]. It has been observed that the current DSU system's strength is based on the consultation procedure for settling disputes[953]. Therefore, consultation has been developed in order to decrease the costs of dispute resolution and increase "the likelihood of a mutually satisfactory outcome"[954].

[947] DSU Article 4.5.
[948] DSU Article 4.10.
[949] Pham 2004.pp.333-388.
[950] Hoekman, B. M., Mattoo, A., & English, P.,(2002), *Development, trade, and the WTO* (Washington D.C., World Bank,), at 81.
[951] Busch, M. L., & Reinhardt. E., (2000), 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO disputes', *Fordham Int'l LJ*, *24*, 158.p.172.
[952] Pham 2004.pp.333-388.
[953] *Ibid.*
[954] *Ibid.*

There are many cases, especially involving developing countries, which have greatly benefited from the increased prevalence and power of consultations[955]. Indeed, the consultation stage may be an effective and beneficial method of dispute resolution for developing countries in practice. It is therefore essential to encourage this form of dispute resolution in order to continue its good work. There are a number of proposals from developing countries highlighting the need to increase the use of consultation processes in dispute settlement[956]. For example, Jamaica has encouraged WTO Members to respect their obligation to "strengthen the consultation stage"[957]. Jamaica's proposal to improve the consultation stage is a very important proposal that can lead to real improvements in practice. This proposal suggests that the consultation stage should last as long as the developing countries consider that they need it. In principle, this phase should not last longer than six months, but that depends on the complexity of the case and the preference of the developing nation. As noted above, it is better to settle a dispute at this stage, particularly for developing countries, rather than using the lengthy panel and appeal proceedings under the DSB system. Therefore, this reform would be in the interest of developing countries, if it is limited to cases involving developing countries with their consent.

[955] *Ibid.*
[956] *Ibid.*
[957] *Ibid*; Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002);Wethington, O.L., 'Commentary on the Consultation Mechanism Under the WTO Dispute Settlement Understanding During Its First Five Years', (2000) 31 LAW & POL'Y INT'L Bus. 583-588; *see, also,* Pham 2004.p.364.

5.1.6.2 Reinforcement of Mediation

The purpose of this part is to evaluate the proposal of developing countries to increase the use of mediation in all process of the DSU. Therefore, it will set out: the mediation rules; why the use of mediation must be increased by developing countries; and possible reforms that may be feasible and realistically could be adopted under that DSU to ensure that mediation works more effectively and is more widely used by developing countries.

5.1.6.2.1 The Rules on Mediation

Since mediation is described as a good way to settle disputes and increase benefits for developing countries, it is necessary to define the mediation method under the WTO[958]. Under the DSU, the mediator, which is the WTO Director-General, is an impartial third party. Indeed, this method is aimed at helping disputing parties settle a dispute[959]. In the mediation method, the mediators, considered as the third party in the conciliation process, can participate and contribute to discussions, negotiations and propose possible solutions that may or may not be accepted by the disputing parties[960].

Article 5 of the DSU provides provision in the form of good offices, conciliation, and mediation. Regarding Article 5.1, the mediation is voluntary (‘if the parties to the dispute so

[958] Under the DSU ‘good offices’, the third-party is the WTO Director-General, who may offer communication between disputing parties. Under the conciliation, the third party is impartial and carry outs an independent investigation and proposes a solution to the case.
[959] Pham 2004.pp.333-388; *see also*, Parlin, C. C., (1999), Operation of Consultations, Deterrence, and Mediation. *Law & Pol'y Int'l Bus.*, *31*, 565.
[960] Nordstrom, H. & Shaffer, G., (2007) ‘Access to Justice in the WTO: The Case for a Small Claims Procedure: A Preliminary Analysis’. *See also*, Article 5 of DSU: Good Offices, Conciliation and Mediation.

agree')[961]. According to Article 5.3, mediation might be requested 'at any time by any party to a dispute' and 'begin at any time and be terminated at any time'[962]. The disputing parties can request the establishment of a panel after the request for good offices, conciliation or mediation first, "[sixty] days after the date of receipt of a request for consultations"[963]; second, when the procedures for good offices, conciliation, or mediation are terminated[964]; or third, if the disputing parties both agree "that the good offices, conciliation or mediation process has failed to settle the dispute"[965]. The alternative good offices, conciliation or mediation 'may continue while the panel process proceeds'[966] if the disputing parties agree.

5.1.6.2.2 Mediation Practice under the DSU

In the WTO, mediation has been less used by Members,[967] particularly developing countries. It observed that the requests for the assistance of third-parties in resolving trade disputes by

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[961] DSU Article 5.1.
[962] Pham 2004.p.377; DSU Article 5.3.
[963] Pham 2004.p.377; DSU Article 5.4.
[964] DSU Article 5.3.
[965] DSU Article 5.4. 'When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute'.
[966] DSU Article 5.5.
[967] Pruzin, D., (2001), Moore Urges WTO Members to Consider Mediation Options in Dispute Settlement, 18 *Int'l Trade Rep*. 27, at 1031; Gutierrez, J., (2003), Philippines Claims Victory Over Europe Using WTO Mediation in Tuna Tariff Dispute, 20 *Int'l Trade Rep*. 24, at 1015; *See* Communication from the Director-General, Article 5 of the Dispute Settlement Understanding, WT/DSB/25, at 2 (July 17, 2001) ("I am of the view that Members should be afforded every opportunity to settle their disputes through negotiations whenever possible. Article 5 of the DSU provides for the use of good offices, conciliation and mediation, but this Article has not been used since the inception of the WTO. In light of that, I would like to call Members' attention to the fact that I am ready and willing to assist them as is contemplated in Article 5.6. It is time to make this provision operational."). *See also* Pham 2004 ("The Director-General is of the view that Members should attempt to settle disputes as often as possible without resort to panel and Appellate Body procedures. In this regard, he wishes Members to be aware of his willingness to actively support attempts to settle their disputes through use of good offices, conciliation and mediation."); Parlin, C. C., (1999), Operation of consultations, deterrence, and mediation. at 566.

good offices, conciliation, or mediation were rare, particularly mediation[968]. Mediation was not requested until April 2003, in the case of *Thailand/Philippines/E.U. canned tuna dispute of 2002*[969]. The 2000 Cotonou Partnership Agreement between the EU and certain African, Caribbean and Pacific ("ACP") countries, permitted those countries to export canned tuna shipments to the EU with free of tariffs[970]. In May 2002, Thailand and the Philippines demanded, under the DSB, that the EU reduce its tariff[971]. On 4 September 2002, after three unsuccessful consultation rounds, the disputing parties requested the WTO Director-General Supachai to assist in resolving the dispute[972]. After months of further discussions, the disputing parties reached an agreement for a solution to the dispute "whereby the EU reduced its tariff on Philippine and Thai canned tuna exports by 50%"[973].

5.1.6.2.3 Increase the Use of Mediation in the DSU

Several developing countries have requested more use of mediation in the DSU process[974]. Also, the WTO Director-General called for and urged a rise in the use of mediation[975]. In fact, it is observed that there is not any record of discouraging mediation by developed countries[976].

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[968] Pham 2004.pp.333-388.
[969] *Ibid.*pp.333-388.
[970] *See* The Thailand/Philippines/E.U. canned tuna dispute of 2002. The Cotonou Agreement, June 23, 2000, available at http://europa.eu.int/comm/development/body/cotonou/index_en.htm. [Accessed: June 18, 2014].
[971] *See* Pham 2004.pp.333-388; *See*, Gutierrez, J., (2002), Philippines, Thailand, EU Agree to Take Tuna Tariff Dispute to WTO, 19 Int'l Trade Rep, at 843.
[972] See Pham 2004.pp.333-388.
[973] *Ibid.*
[974] *Ibid.*
[975] See Communication from the Director-General, Article 5 of the Dispute Settlement Understanding, WT/DSB/25, at 1(July 17, 2001).
[976] Pham 2004. pp. 333-388; Stewart, T. P., & Burr, M. M. (1998). The WTO Panel Process: An Evaluation of the First Three Years. *The International Lawyer*, 709-735.

Mediation will increase the opportunities for negotiated settlement in the DSU negotiation stage[977]. Also, it will lead to a "decrease in the Secretariat's duties for cases at the panel stage"[978], and it is considered to be a "fairly non-transparent method of resolving disputes"[979]. On that point, it has been stated that "any requirements to make it more public could have a chilling effect on the willingness of parties to talk openly and share information"[980]. Therefore, there have been some proposals for reforms to the DSU, which attempt to address obstacles that may "prevent or discourage developing countries from using mediation more frequently"[981].

Under the DSU, there was no requirement that anyone other than the Director-General could be a mediator[982]. In general, it assumes that the Director-General could be the mediator under Article 5. Indeed, it is observed that considering the Director-General as a mediator for disputes will be good for both sides of the dispute because the Director-General has good knowledge and expertise concerning to the WTO law[983]. Also, the Director-General has authority under WTO law[984] to be a mediator. In addition, the DSU gives the Director-General support to be a mediator, giving the Director-General "an additional layer of legitimacy"[985]. In fact, it is considered that the Director-General would "have a greater

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[977] Pham 2004. pp. 333-388.
[978] *Ibid.*
[979] *Ibid.*
[980] *Ibid.*
[981] *Ibid.*
[982] *Ibid.*
[983] *Ibid.*
[984] *See* Skjelsbaek, K., & Fermann, G., (1996), The UN Secretary-General and the Mediation of International Disputes, in Resolving International Conflicts: The Theory and Practice of Mediation (Jacob Bercovitch ed.,) at 75, 77 ("The status of the mediator is also important: in general, the higher its status the more likely it is to succeed. A high-status mediator has more authority and its efforts are less easily rejected by parties skeptical about mediation. The status of an individual is a combination of the status of the agency he or she represents, his or her office or position in that agency, and his or her personal reputation.").
[985] Pham 2004.p.383.

personal and professional interest in preserving and enhancing the WTO"[986]. Also, the Director-General encourages the resolution of disputes and looks out for the interests of the disputing parties. It has been stated that there are many developing countries that demand the mediator to be "an expert in WTO law"[987].

It has been argued that mediation may be a good method for developing countries because it "offers the opportunity to be less legalistic and more equitable"[988]. Also, developing countries would desire a mediator "who is there to help Members find solutions to the [trade] problem"[989]. However, it is considered that the DSU has to allow the disputing parties to use "someone other than the Director-General or another WTO employee could also serve as the mediator"[990]. According to the DSU, other mediators could act in the DSU process. Article 5.6 states that "Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute"[991]. Therefore, the mediation method will be a good method in a case involving developing countries and they can "request a mediator from international development organizations, like UNCTAD or the United Nations Development Programme ("UNDP")"[992].

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[986] *Ibid.*
[987] Vicuña, F. O. (2002). Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation. *Disp. Resol. J.*, *57*, 64-67.
[988] Pham 2004.p.384.
[989] *Ibid.* "Interview with Anonymous Developing Country Delegate in Geneva, Switz. (Oct. 31, 2002)".
[990] *See* WTO Panel Report on European Communities-Regime for Importation, Sale and Distribution of Bananas, WT/DS27/R/ECU (May 22, 1997). at 38-39.
[991] DSU Article. 5.6.
[992] Pham 2004.p.384.

5.1.6.2.4 Proposals to reforms Mediation

It is argued that more mediation could help developing countries facing the problem of a lack of resources and the high cost of the DSU process. However, there are not many academic discussions on mediation as a possible method to solve the fundamental problems of developing countries in the DSU. However, it is thought that the mediation may be considered as a good method to address the lack of legal resources and high cost of the DSU process to developing countries[993].

The WTO has demanded proposals from WTO Members to elucidate and enhance the DSU provisions on these issues [994]. Therefore, many developing countries have proposed significant reforms to improve the DSU and to enhance the use of mediation[995]. Some developing countries [996] and the EC [997] encourage WTO Members to have recourse to mediation as a method for resolving disputes between members "in a mutually satisfactory manner and at the earliest possible stage"[998].

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[993] *See* Clough, M., (2000), WTO Dispute Settlement System-A Practitioner Perspective, The. *Fordham Int'l LJ*, *24*, 252,254 at 273. ("Conciliation, good-offices, and mediation should also be more fully explored by WTO Members."). *See also*, Diaz, L. M., & Oretskin, N. A., (2000), Mediation as a Space for Conflict Solution in International Commercial Business: The Future of the World Trade Organization 2Chi.J.Int'i 403 at 411 ("The goal of the first and second recommendations is to partially move the WTO dispute settlement system back in the direction of the original 'diplomatic' model for dispute settlement, and away from the judicial model introduced by the new DSU of the Uruguay Round. With that aim in mind, the first recommendation is that the Director General or a special standing committee of the DSB be empowered to step in and direct that the contending WTO Member states settle their differences through bilateral negotiations, through mediation or by agreeing to arbitration by an outside party.").

[994] Alotaibi 2011.pp.42-44.

[995] Pham 2004.pp. 333-388.

[996] Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003); The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002); proposal by Jamaica, TN/DS/W/21, at 1 & 2 (Oct. 10, 2002); proposal by Paraguay, TN/DS/W/16, at 1 (Sept. 25, 2002).

[997] Communication from the European Communities, TN/DS/W/1, at 4 (Mar. 13, 2002).

[998] Pham 2004.p. 365.

In the meantime, the most powerful proposals deal with the high cost of the DSU and the mediation process[999]. Some proposals suggest the improvement of mediation in the DSU process. The proposals submitted by Paraguay[1000], Haiti[1001], Jordan[1002] and the LDC Group[1003] all consider that mediation could be mandatory in disputes involving developing or least-developed countries. It is suggested that the mandatory mediation should take place before the adjudicatory procedures of the DSU that could be within the negotiation stage time and under the requests of developing countries. In other words, this can be done when developing countries need such mediation to solve disputes. So, this will not create enforcement problems, if the mediation is still subject to DSU rules. This will save time and costs and help to remain good relationships among the parties to the dispute.

In general, it has been observed that a mediated decision is always considered acceptable to the disputing parties[1004]. Also, the aim of the DSU is to settle trade disputes in a negotiated, mutually satisfactory manner. Article 3.7 of the DSU states that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually

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[999] *Ibid.*

[1000] Paraguay Proposal, TN/DS/W/16, at 1 (Sept. 25, 2002): 'In disputes involving developing country Members, and at the request of any of the parties, such procedures shall be mandatory .... Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. On no account may such procedures exceed a maximum period of 90 days. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel. If the parties to a dispute agree, and if one of the parties is a developing country Member, procedures for good offices, conciliation or mediation shall continue while the panel process proceeds... '.

[1001] Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003): 'A developed country Member shall not commence a request for the establishment of the panel before fully using the good offices, conciliation and mediation before the Director-General or the Chairman of the DSB'.

[1002] Communication from Jordan, TN/DS/W/43, at 2 (Jan. 28, 2003)'Jordan suggests that recourse to conciliation and mediation should be made mandatory in cases where a developing or a least developed country Member is concerned and should be subject to agreed upon terms of reference and specific time-frames'.

[1003] Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003).'Article 24.2 should therefore be amended by removing 'upon request by a least developed country member' to make it incumbent on the complaining party to seek the 'good offices' of the Director General'.

[1004] Pham 2004.pp.333-388.

acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred"[1005]. However, the WTO Members cannot require a large member to settle the conflict at the mediation stage. Therefore, there is less use of mediation under the DSU to resolve the case. However, several developing countries have already called for more use of mediation while no developed country has asked for mediation. Because of that the mediation process is not working very well for WTO Members. There is just one case settled by mediation[1006]. Therefore, this part attempts to make mediation stage work better for both developing developed countries.

In the meantime, mediation is recognized by members of the WTO as a preferable alternative to settling disputes between parties. One international trade scholar has said that "The various ADR methods (such as mediation, neutral expert appraisal, mini-trial) differ from adjudicatory procedures by the agreed intervention of a third-party which helps the parties to settle their dispute in a more flexible, expeditious, confidential and less costly manner"[1007]. He also says that the "voluntary, non binding and informal character of ADR proceedings ensures control by the parties over their dispute and focuses on elaborating 'win-win' solutions that save time and costs and strengthen personal and business relationships among the parties to the dispute"[1008].

Consequently, a method such as mediation may be considered a significant factor in the DSB to directly tackle the fundamental complaints and obstacles which developing countries suffer from in the DSB, such as when they cannot enforce panel decisions and cost of the DSU

[1005] Article 3.7 of the DSU.
[1006] *See* The Thailand/Philippines/E.U. canned tuna dispute of 2002. The Cotonou Agreement, June 23, 2000.
[1007] Pham 2004.p.367.
[1008] *Ibid.*

process. First of all, a mediated decision is always considered acceptable to the disputing parties, so the enforcement of the agreement would be voluntary by parties[1009]. So, a mediated decision should be binding to the disputing parties when both parties of the dispute agree on that decision.

The manner of the mediation is left to the mediator who can take into account the discretion of the circumstances of the dispute and any wish expressed by the parties. Such a method includes the power of settling the dispute. Moreover, the mediator may request all parties or one party to the disputes to attend joint meetings. Making suggestions to settle a case is not confined to the mediator only, but each party can suggest solutions. Any agreed upon solution, however, must be consistent with the WTO Agreements. Since a mediated decision must be mutually acceptable to both parties, it is much more likely that the agreement will be enforced voluntarily. Consequently, a mediation agreement would assist both disputing parties because it focuses on the fact that both parties attempt to find a way to satisfy their interests.

This avoids the difficulty of enforcing panel decisions through retaliatory countermeasures. Mediation also plays a role in verifying, monitoring and guaranteeing the decision[1010]. Second, the most important factor in the mediation is that the mediation is not costly for developing countries even for small members. It assists developing countries by avoiding the high costs of panel and appellate litigation. The cost of mediation is always less than the DSB process. Therefore, it solves a deep concern for developing countries in using the DSU.

[1009] See The Thailand/Philippines/E.U. canned tuna dispute of 2002. The Cotonou Agreement, June 23, 2000.
[1010] Pham 2004.pp.333-388.

However, the mediation method will be available if both parties are in agreement such as mediation was requested from the WTO Director-General and a request was submitted by the Philippines, Thailand and the European Communities[1011].

Increasing the use of mediation in the DSB would support the participation of developing countries in the settlement of disputes because it is an equally satisfactory way of settling a dispute between developing and developed countries. Also, mediation does not include only political opposition that may create conflicts between the members. Indeed, the mediation method considers is a compromise between "the two extremes of the diplomatic consultations stage and the adjudicatory panel stage"[1012]. Mediation is a method that does not lead to opposing reactions by developed Members[1013]. In addition, mediation may support the DSU decision by creating solutions to disputes and "initiatives for conciliation of the dispute"[1014]. Consequently, it receives special attention from the WTO Members.

It is believed that the time limit for the mediation process should be during the timeline of the DSB process. Therefore, if mediation is included within the consultation stage, it will not lengthen the DSU's proceedings. Also, the mediation could be during the adjudicatory procedures. In this stage, the mediation should be during the timeframe of the DSB adjudicatory procedures and under the request of the disputing parties. Therefore, the mediation during the DSB timeframe will not increase the time of the DSB process and will not incur more costs human resources like lawyers for developing countries.

[1011] Request for Mediation by the Philippines, Thailand and the European Communities, WT/GC/66, 16 October 2002.
[1012] Pham 2004. p. 366.
[1013] *Ibid.*
[1014] *Ibid.*

It may be thought that mediation adds procedural settlement to the already mandatory consultation stage and would simply be an additional and unnecessary procedure that increases delays and prolongs the dispute settlement process. However, mediation can "encourage disputants to move from more costly dispute settlement mechanisms, like power-based contests (consultations) and rights-based contests (panel litigation) to often more favorable and preferable interest-based systems (i.e., mediation)"[1015]. Furthermore, it can decrease the Secretariat's duties at the panel stage. If, however, mediation fails or the parties to the dispute disagree, they can stop mediation and resort again to consultations or panel litigation while still saving any accumulated agreements or acknowledgements achieved during the mediation.

I believe that if disputes are settled at the mediation, this will take less time and cost less than the adjudicatory procedures. If parties to disputes do not settle their case at the mediation stage, they could apply or continue for the adjudicatory proceedings. Indeed, mediation should not apply to developing countries only, but could be extended to all WTO Members.

Under the DSU, the mediator is the WTO Director-General who is an impartial party for the WTO and both parties of the dispute. The benefit of the Director-General's mediation is the Director-General's being knowledgeable about the WTO and its law. Therefore, he may serve as a "mediator with muscle"[1016]. The role of the mediator is to assist the disputing parties independently and impartially to reach an amicable settlement of the dispute. The mediators have a duty to co-operate in good faith with the disputing parties. The WTO can appoint an

[1015] Pham 2004.p.385.
[1016] Pham 2004.p.383.

individual, an experienced, independent and impartial mediator whose nationality is different from the nationalities of the parties to the dispute[1017]. Consequently, the mediators should be characterised by independence and impartiality. The DSB has adopted provisions of conduct "designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU thereby enhancing confidence in the new dispute settlement mechanism"[1018]. Therefore, mediators are to be "independent and impartial [...] avoid direct or indirect conflicts of interest and [...] respect the confidentiality of proceedings"[1019]. Accordingly, Mediators are expected to disclose "any interest, relationship or matter that person could reasonably be expected to know and that is likely to affect or give rise to justifiable doubts as to, that person's independence or impartiality; and [avoid] any direct or indirect conflicts of interest in respect of the subject matters of the proceedings"[1020]. Besides, Mediators must not obtain any benefit that would "in any way interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties"[1021]. Moreover, the person appointed as mediator has to disclose any circumstance that might give rise to justifiable doubts as to his or her impartiality or independence that should be maintained by the mediator throughout the whole mediation. The DSU rules cover in annex an illustrative list of information to be disclosed and a disclosure form which are to be completed by all panelists, mediators, and Appellate Body members[1022]. Any parties to the dispute who find a material violation of the obligations under the rules shall so notify the

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[1017] Pusceddu, P. (2015). Mediation of international financial disputes'. *Journal of International Banking Law and Regulation*. J.I.B.L.R. 30(12), p.667.
[1018] *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* [hereinafter *Rules of Conduct*] (adopted by the DSB on Dec. 3, 1996), WTO Doc. WT/DSB/RC/1 (Dec. 11, 1996). The rules of conduct were incorporated into the working procedures for appellate review. *Rules of Conduct.* (Communication from the Appellate Body), WTO Doc. WT/DSB/RC/2 (Jan. 22, 1997).
[1019] WT/DSB/RC/1 at II.1.
[1020] *Ibid.* at III.1.
[1021] *Ibid.* at III.2.
[1022] *Ibid.* at VI.4.

DSB Chairman in writing[1023]. If any violation on the part of the mediator is discovered, this mediator will be disqualified[1024].

To sum up, compared to the adjudicatory procedures of DSU 'panel litigation', the use of mediation would have great benefits for developing countries, giving them more effective ways to discuss solutions to their disputes as well as giving them another chance to look for solutions not "only on existing law but also on considerations of equity"[1025]. Therefore, mediation might be a good method to resolve many obstacles which face developing countries in the DSU.

5.1.7 Conclusion

The aim of this chapter is to improve developing countries' access to the DSU. Also, its aim is to improve the DSU rules and make them work for developing countries. Therefore, this chapter highlighted the possible solutions that consider tackling some of constraints that limit developing country participation in WTO dispute settlement proceedings. This chapter therefore evaluated the possible solutions that are more workable for developing countries in settlement dispute system, focusing on attempts to solve some of the obstacles which face developing countries as regards both consultations and DSU adjudications, in light of their lack of financial and legal resources.

[1023] *Ibid.* at VIII.1.
[1024] *Ibid.* at VIII.8-10.
[1025] *Ibid.*

First, it discusses funding developing and less developed countries. Second, covering attorneys' fees could be a good approach for increasing developing countries' ability to participate in the dispute settlement system. Third, reform to the operation of Article 27.2 will improve developing countries' access to the DSU and will assist developing countries to address the issue of the high cost of the DSU. Fourth, the proposal to reform the ACWL may address the high cost of WTO dispute settlement system litigation as well as tackle the limitations on the participation of developing countries in WTO dispute settlement proceedings. In addition, this chapter highlights the reinforcement of consultations and mediation. Using more consultations and mediation would have greater benefits for developing countries and give them more effective ways to discuss solutions to their disputes. These methods give developing countries another chance to look for solutions. Therefore, consultations and mediation might be considered as a good method for resolving many obstacles that limit developing country participation in WTO dispute settlement proceedings.

5.2 Collective Retaliation

5.2.1 Introduction

The current 'bilateral retaliation' of the DSU has been argued against by several developing countries. The current DSU's 'bilateral retaliation' rule does not have enough authority to force developed countries to comply with the rulings of the DSB[1026]. Developing countries may not use current retaliation remedies because they may fear generating hostility between them and developed countries and because there are different trading sizes between

[1026] *See* Kenya Proposal, TN/DS/W/42, at 2,5 (Jan. 24, 2003); the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002); The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).;Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003). For more details, *see*, Bown, C. & Hoekman, B., (2005), 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'.pp.861-890.

developing countries and developed countries[1027]. It has been observed that the current 'bilateral retaliation' of the DSU allows the compliant developing country to retaliate[1028]. However, the trade size of only one developing country is not enough to create any hurt to a large sized developed country. Therefore, it has been stated that bilateral retaliation is unsuccessful and inequitable for developing countries[1029]. Hence, instead of bilateral retaliation, collective retaliation would create a stronger and greater impact on a violating country[1030]. Therefore, some developing countries have proposed[1031] that when any developing countries win a case against a developed country and the developed countries have not complied with the DSU rulings, all developing countries must take collective retaliation against developed countries.

5.2.2 The Collective Retaliation rules

The nature and object of WTO obligations are collective, in light of the main objective of the WTO: protecting collective expectations about the trade related behaviour of governments[1032]. Therefore, WTO obligations are not an individual interest, but a common interest for all WTO Members. Indeed, the WTO obligations must be indivisible. Therefore, they are unitary fundamentally in nature[1033] of the WTO. This idea has been supported by the

[1027] *Ibid.*
[1028] *Ibid.*
[1029] *Ibid.*
[1030] Vazquez, R. A., (2013), Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System, *Kobe University-Japan.* Available from: http://works.bepress.com/rodrigo_vazquez/1/ [Accessed: June 18, 2014].
[1031] Bown, C. & Hoekman, B., (2005), 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'.p.863.
[1032] Carmody, C., (2006), WTO obligations as collective, *European Journal of International Law*, *17*(2), pp,419-443.
[1033] *Ibid*.

Most Favored Nation (MFN) obligation of the GATT,[1034]which is a cornerstone of the world trading system. WTO obligations require a Member to "immediately and unconditionally"[1035] expand its most favorable trade-related "advantage, favor, privilege or immunity"[1036] to all other members. The DSU also permits any member to take a dispute against other member when it considers that a measure is in violation of the WTO agreements[1037]. The DSU allows any member to claim any dispute, not just "directly conflict with the WTO agreements"[1038] but also it might have "some indirect effect on negotiated concessions"[1039], and any other situation in which a member "may be nullifying or impairing a benefit or impeding the attainment of any objective under the WTO agreements"[1040].

The WTO obligations can be understood to be "obligations undertaken in the collective interest and owed to all members"[1041]. Therefore, concessions in the WTO may be bilaterally negotiated, but they are collectively applied. For example, in the *EC-Poultry dispute*[1042], "the Appellate body agreed with the panel that countries usually negotiate trade concessions bilaterally, but subsequently the application is multilaterally"[1043] because "the results of the negotiations are extended on a multilateral basis"[1044].

[1034] General Agreement on Tariffs and Trade of 1994, Article.I.
[1035] *Ibid.*
[1036] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'
[1037] General Agreement on Tariffs and Trade of 1994, Article.I.
[1038] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'
[1039] *Ibid*; General Agreement on Tariffs and Trade of 1994, Article.XXIII, Para.1(a)-(c).
[1040] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1041] Carmody, C., (2006), WTO obligations as collective.p.422.
[1042] *EC-Poultry*, DS69 (1997), para.94.
[1043] *Ibid.*
[1044] *Ibid.*

Moreover, the 'Theory of WTO Law', as provided by Carmody, describes the WTO agreements in three levels. First of all, the WTO agreements may form a law of expectations. Second, the WTO agreements may be considered part of a law of realities. Third, the WTO agreements might be regarded as a law of interdependence. The purpose and principle of the WTO agreements as law of expectations is the protection of expectations. Therefore, it has been recognized that one of the purposes of the WTO agreements is protection of expectations in international trade[1045]. Under the DSU, the bilaterally negotiated trade concessions are always extended on a multilateral basis and collectively applied, which leads to an integrally multilateral system. For example, WTO obligations violated by any member could affect all the WTO Members. Thus, it has been stated that "the operation of the WTO regime was designed to go beyond the boundaries of any single country or pair of countries in promoting the protection of collective expectations"[1046]. Indeed, the WTO agreements are considered as collective and an example of expectations law.

Considering the WTO agreements as the law of realities may provide some merits to the WTO obligations[1047]. The method of the law of realities gives the WTO Members some flexibility in their approach "to respond to specific situations encountered in trade"[1048]. These situations are reinforcing role of the collective. For example, WTO Members may create an obligation in advance such as in the safeguard and anti-dumping agreements. The rules of these agreements always provide "a single injury and bipolar dispute settlement"[1049]. Indeed,

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[1045] Carmody, C., (2006). WTO obligations as collective, p.424.
[1046] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1047] Carmody, C., (2006), WTO obligations as collective, pp.431-432.
[1048] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1049] *Ibid*; *see, also*, Carmody, C., (2006), WTO obligations as collective, pp.431-432.

the realities negotiated progress in advance that would be binding upon all members when accepted[1050]. Therefore, the negotiations in advance are authorization and confirmation that "the core structure of WTO obligations is collective"[1051]. All dispute settlements have to be consistent with the covered agreements. Therefore, it has been observed that the WTO agreements as a law of realities are "supplementary and assistive to the dominant task of protecting expectations"[1052].

It has thought that the WTO agreements on both methods as law of expectations and law of realities can be integration in the law of interdependence[1053]. It is observed that the WTO promotes economic relations not just for the interest of WTO Members individually, but beyond to focus on the common interest of all members[1054]. Indeed, the WTO obligations are predominantly collective[1055]. Also, it identifies WTO obligations that should "be most appropriately thought of as collective"[1056]. Therefore, the following part will provide some of the developing countries' proposals for applying collective retaliation in the DSU.

5.2.3 Collective Retaliation Proposals

In general, the idea of collective retaliation, which has been supported by several of the WTO Members and specifically by developing countries, is aiding complainant country against the

[1050] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1051] *Ibid.*
[1052] *Ibid.*
[1053] Carmody, C., (2006), WTO obligations as collective, p.433.
[1054] *Ibid.*; *see also*, Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1055] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1056] *Ibid.*

non-complying country[1057]. Indeed, the nature of current DSU's retaliation is unsuccessful and weak to deter and punish a developed country to comply with the DSU rulings that when used by only one developing country. Therefore, there are some developing countries that have provided a proposal for the DSU remedy[1058]. The developing countries argument was about collective retaliation remedies. They have agreed that collective retaliation remedies will be a useful and significant method to create harm or risk to the economy of very large markets, such as United States or the European Communities. If just one developing country sanctions imports from large countries, that will not create any significant harm or risk to the large countries' economies. To inflict a larger economic harm on developed countries, many developing countries will have to undertake collective retaliation.

Thus, the African Group has proposed that "all WTO Members shall be authorized to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member"[1059]. Regarding the African Group proposal, it thought that the collective retaliation has to be adopted in the WTO agreements[1060]. WTO law would give all WTO Members the right to adopt collective retaliation against a non-complying country to enforce any ruling and recommendation of the DSB[1061]. Indeed, it has been provided by African Group that collective retaliation must be available particularly when developing countries have successful complaints[1062].

[1057] *Ibid.*
[1058] Hudec, R. E., (2000), 'Broadening the scope of remedies in WTO dispute settlement'.
[1059] *See* Proposal by the African Group Proposal, TN/DS/W/15, at 3 (Sept. 25 2002).
[1060] *See* Al Bashar 2009.
[1061] *Ibid.*
[1062] *See* Proposal by the African Group Proposal, TN/DS/W/15, at 3 (Sept. 25 2002).

Many members support the idea of collective retaliation. The African Group has argued that the existing retaliation system of the DSU is not "practical for individual developing country Members against developed country members"[1063]. The proposal concerns the right and responsibility to enforce the recommendations and rulings of the DSB[1064]. It suggests that the collective retaliation has to be an automatic remedy, under the special and differential treatment principle, when the developing or a LDC member is successful in a dispute against developed countries. Collective retaliation may be one method which addresses limitations for developing countries on participation in dispute settlement system.

Moreover, Mexico[1065] proposed that the collective retaliation system has to be available to all WTO Members instead of cross-retaliation[1066]. The proposal is that collective retaliation has to continue in force "until its level becomes equivalent to the level of the nullification or impairment"[1067]. Also, Mexico proposed that "the right to suspend concessions or other obligations to become transferable to one or more members"[1068]. The Mexico proposal supports the idea of including collective retaliation under the DSU.

In 1999, Canada also provided a proposal[1069]. The proposal suggested adding a new article that deals with the issue of "Determination of Compliance"[1070]. The proposal provides that all

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[1063] *Ibid*; *see also*, Kenya Proposal, TN/DS/W/42, at 2,5 (Jan. 24, 2003).
[1064] The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).
[1065] Communication from Mexico, TN/DS/W/40, (Jan. 21, 2003).
[1066] Davy, W,. (2007), "Compliance and Remedies",p.35.
[1067] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.
[1068] *Ibid.*
[1069] It has been supported by many of the WTO Members. *See also*, Footer, 2001.
[1070] For Proposed Amendment of the Dispute Settlement Understanding, see Communication from Canada, Costa Rica, Czech Republic, Ecuador, the European Communities, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela, in Ministerial Conference, Third Session, Seattle, 30 November–3 December 1999, WTO Document WT/MIN(99)8 (22 November 1999).

WTO Members must co-operate on the suspension of concessions for developing country Members retaliating against developed countries[1071] as a result of economic inequality between developing and developed countries[1072]. It thought that the economy of all collective retaliation of developing countries, or all collective retaliation of WTO Members, against one developed country will be better than just one country.

India has proposed[1073] that all the WTO Members have to jointly act on the suspension of a concession against any Member violating the WTO Agreements or not complying with the DSB's recommendation or ruling. Thus, the effect of this method is the withdrawal of market access commitments via all other Members of the WTO. The former Indian ambassador Lal Das recommended that collective retaliation by all Members has to be against any country failing to comply with a dispute settlement decision, "particularly if the complaining country is a developing country and the erring country is a developed country"[1074].

This method may favour developing countries. Collective retaliation is considered as an excellent method to ensuring a good sufficient pressure to induce compliance by respondent members. For example, if the US, which has a large economy, is not complying with the DSU's recommendations or rulings, such as in the *US Gambling* case[1075], all other WTO Members, including large economic countries like the EC, China and Japan, would join the

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[1071] *See* Communication from India TN/DS/W/47, at 2 (Feb. 11, 2003); *See, also*, South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',*p.31.
[1072] Alotaibi 2011.p.40
[1073] *See* Al Bashar 2009; *see also*, India proposal, TN/DS/W/19, at 2 (Oct. 9, 2002).
[1074] Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'.
[1075] *See United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS27/80, 26 February 2007.

collective retaliation process[1076]. Hence, this method and the industries in the US will induce the US government to comply with the DSU recommendations and rulings. It has been thought that such an inducement will not come if the country alone does the retaliation for example, if "Antigua and Barbuda threatens the US with retaliation"[1077]. Indeed, retaliation by Antigua and Barbuda will not harm the US economy[1078].

The LDCs group proposed that when a developed country failed to implement the DSU ruling, a developing country should have a right to collective retaliation by several members when a developing country had brought a successful dispute against a developed country. Therefore, the collective retaliation will be taken by all WTO Members not just by only the winning developing country[1079].

Also, the benefit of collective retaliation has been mentioned. Collective retaliation can improve the DSU system and make it move from "one of bilateral action to providing a multilateral solution"[1080]. It is observed that using the "retaliation by an individual developing country Member is not a successful penalty or disincentive to a developed country member"[1081]. The African Group has supported this method[1082]. It has also been thought that such a method could be a significant means of encouraging compliance and advantageous to all the WTO Members.

[1076] Al Bashar 2009.
[1077] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1078] *Ibid.*
[1079] Al Bashar 2009.
[1080] *Ibid. see, also,* Pauwelyn, J., (2003), Limits of Litigation: Americanization and Negotiation in the Settlement of WTO Disputes, Ohio State Journal on Dispute Resolution 19, 121. pp. 131-132.
[1081] Pham 2004 p.363.
[1082] *See* the African Group Proposal TN/DS/W/15, at 3 (Sept. 25 2002).

The collective retaliation remedy has also been proposed by Kenya[1083]. The proposal states clearly that the multiple countries have to collectively retaliate "when at least one developing country wins a case against a developed country"[1084]. Therefore, 'all WTO Members shall be authorized to collectively suspend concessions to a developed Member that adopt measures in breach of WTO obligations against a developing Member'[1085]. Indeed, such proposals could "provide genuine leverage to inducing compliance, a move beneficial to all WTO Members, and not just 'compensation' to the one or few that brought the case"[1086]. Therefore, the next part will analyse collective retaliation.

5.2.4 Analysis of Collective Retaliation

It is observed[1087] that, by the perspective of developed countries, developed countries may be comfortable with membership in the DSU when they are defendants because they can hurt others member but other members cannot hurt them. This result is from the power of developed countries. Indeed, they have strong economic and politic power which may lead to nullification and impairment of the DSU rules.

Collective retaliation method may create powerful coalitions of developing countries[1088]. It is suggested that collective retaliation has to be available to weak economic members of the

[1083] *See* Kenya Proposal, TN/DS/W/42, at 3 (Jan. 24, 2003).
[1084] *See* Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003); The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002); Proposal by the African Group Proposal, TN/DS/W/15, at 3 (Sept. 25 2002).
[1084] Pham 2004.p.363.
[1085] *Ibid. See, also,* the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).
[1086] *See* Delich, V., (2002). 'Developing Countries and the WTO Dispute Settlement System'.
[1087] Pham 2004.pp.333-388.
[1088] *See* Hudec, R. E., (2000), 'Broadening the scope of remedies in WTO dispute settlement'; Krishnamurhy, P. (2012). Effective Enforcement: A Legalistic Analysis of WTO Dispute Settlement. *Northwestern Interdisciplinary Law Review*,5 (1). *Available from*:

WTO. Also, it is suggested that collective retaliation should be a preferential treatment for developing countries, as well as "a remedial treatment to make retaliation substantively equal to developed countries"[1089]. Thus, the introduction of the substantive equality theory to the DSU can touch upon the basics of the Dispute Settlement System. It can also go beyond the special and differential treatment[1090] for developing countries. Developed countries have not experienced obstacles with the current DSU retaliation since they have diversified and large markets, which permit them to successfully retaliate. Therefore, the proposal of collective retaliation is mostly for the weaker of the WTO Members to ensure the weaker members are at the same trade level as the large members. The proposal of collective retaliation may seek to change the existing unilateral retaliation system "which might seem to generate some conflict to a certain extent with the bilateral elements of the WTO agreements"[1091]. Hence, the collective retaliation proposal has to be examined in light of the DSU fundamentals and taking into the nature of WTO obligations to recognize its "compatibility with the current system"[1092]. Indeed, that will occur by including the collective retaliation method under the DSU rules.

Under the DSU, it has been suggested that any member that has measures inconsistent with the WTO obligations will not be permitted to bring forward any complaint unless it first complies with its obligations[1093]. Thus, it thought that this method will reduce measures

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http://heinonline.org/HOL/Page?handle=hein.journals/nwilr5&div=10&g_sent=1&collection=journals#197 [Accessed: June 23, 2014].

[1089] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.

[1090] *Ibid.*

[1091] *Ibid.*

[1092] *Ibid.*

[1093] Persson, K., (2007), 'The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU'.

inconsistent with the WTO rules. Therefore, it is suggested that the collective retaliation must be included in the WTO regime.

Regarding India's proposal, which provides that all the WTO Members have to take joint action on the suspension of concession[1094], it has been observed that this proposal "perpetuates retaliation"[1095]. While the current retaliation is a trade restriction, "collective retaliation is even more trade restrictive"[1096]. Indeed, the collective retaliation method is intended to create member compliance with the DSU rulings. It is suggested that the first stage of the collective retaliation is the threat of retaliation against a non-complying country. However, if the non-complying country is still not complying with the DSU rulings, developing country Members have to act collectively to create trade pressure to make a member comply with the DSU rulings. Hence, collective retaliation could be a significant method for enforcing the DSU rules.

It is thought that it may be difficult for a small or developing countries to ask a stronger, large, member to join collective retaliation[1097]. Also, it has been thought that the collective retaliation remedy may not be efficient if it is used by a few WTO Members with a small market, since they might not have "any possibility to use or benefit from this remedy at all"[1098]. Therefore, this may deter developing countries from using the dispute settlement system. However, the solution of these issues is by including collective retaliation rules under

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[1094] Against any Member violation of the WTO Agreements or not comply with the DSB's recommendation or ruling. The effect of this method is by withdrawal of market access commitments by all other Members of the WTO. Communication from India TN/DS/W/47, at 2 (Feb. 11, 2003).
[1095] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1096] *Ibid.*
[1097] *Ibid.*
[1098] *Ibid.*

the DSU. These rules have to oblige all the WTO Members, especially the large economic powers, to collectively retaliate with small or developing countries.

The WTO should require all the members to take action against a non-compliant member if the WTO wants the DSU to work. Also, the WTO should provide for this method of enforcing DSU obligations even though some members will not have suffered from the particular violation of the WTO obligations by another member.

This is because any member could suffer from the problem of non-enforcement of a WTO ruling in the future. To encourage use of the collective retaliation process, any member that refuses to be part of the collective retaliation, to enforce the DSU ruling regarding any dispute between WTO Members, would not have the option to request collective retaliation from other WTO Members when it has a dispute with larger countries and is trying to enforce a DSB ruling. So, when there is a case between two members and the loser does not comply with the DSU ruling, all the WTO Members have to invoke collective retaliation to enforce the DSU ruling. However, if any of the WTO Members does not participate in collective retaliation, they will not be able to request collective retaliation from the WTO Members when they win a case and need collective retaliation from the WTO Members to enforce the WTO ruling.

The mere existence of this possibility of collective retaliation would at least create a threat of a more effective sanction for violation of WTO rules, even for large developed countries. It is thought that collective retaliation would create a greater impact on a violating country.

In addition, the method of collective retaliation may be considered as a perfect method to put powerful pressure on the opponent to implement the recommendation or ruling of the DSU[1099]. The LDCs have presented a "principle of collective responsibility"[1100] which has to be adopted under the DSU[1101]. Thus, by this approach all WTO Members have a right to implement the recommendations or rulings of the DSB by collective retaliation. It is argued that "collective retaliation should be available automatically as a matter of special and differential treatment"[1102] …"in the case where a developing or least-developed country member has been a successful complainant"[1103]. Therefore, "in determining whether to authorize collective retaliation or not, the DSB should not be constrained by quantification on the basis of the rule on nullification and impairment"[1104].

Indeed, the collective retaliation proposal is not likely to succeed[1105] as some of the industrial, developed countries, have "strongly resisted this proposal"[1106]. There are some developed countries creating some pressure on the WTO to not accept the developing countries' proposals[1107]. Developed countries were not supporting the developing countries' proposals for collective retaliation to be included in the DSU, because they are comfortable with the current DSU, also because they "can hurt developing countries, but where others cannot really hurt them"[1108].

[1099] *Ibid.*
[1100] *Ibid.*
[1101] *Ibid.* It is the equivalent under the United Nations Charter.
[1102] *Ibid.*
[1103] *Ibid.*
[1104] *Ibid.*
[1105] Hudec, R., (2002) 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' in Development, Trade, and the WTO' at 86-87.
[1106] *Ibid*.
[1107] *Ibid*.
[1108] Alotaibi 2011.p.41. *Also, see* The three arbitration rulings establishing shorter deadlines are *Indonesia - Certain Measures Affecting the Automobile Industry* WTO Documents WT/DS54/15, DS/55/15, DS59/13, and

The collective retaliation remedies "require the willingness of WTO Members to adopt and implement such proposals in reality, whereas in this case, especially, the readiness of developed countries to support developing countries in enforcing a favourable decision appears to be absent"[1109]. Therefore, the proposal was unsuccessful due to a lack of support by developed countries[1110]. Whereas developing countries have asked the WTO to accept the collective retaliation proposal, for reaching an equality of pain when legal violations have been taken by large countries against developing countries, the WTO was not adopted and rejected the proposal. It observed that the WTO has not even considered or discussed the proposals of developing countries for collective retaliation remedies. However, it is strongly believed that the proposal should be requested by the WTO Members, especially by developing countries, since this system would create the essential pressure to induce compliance by developed countries' with dispute settlement rulings in cases where only one developing country, with a small domestic market, cannot inflict enough economic or political losses in economy of the larger WTO Members to comply with those rulings.

It has been stated[1111] that if developing countries never use the existing retaliation remedy that may be because of that the existing retaliation is ineffective. Also, the LDCs Group[1112] indicated that lack of an effective enforcement mechanism and the potential negative impact

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DS64/12 (7 December 1998); *Australia -Measures Affecting the Importation of Salmon*, WTO Document WT/DS18/9 (23 February 1999).

[1109] Al Bashar 2009.

[1110] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'; Hudec, R. E., (2000), 'Broadening the scope of remedies in WTO dispute settlement'.

[1111] *Ibid. See, also*, Hudec, R. E., (2000), 'Broadening the scope of remedies in WTO dispute settlement' p.372.

[1112] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU; *see, also,* The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).

of current DSU retaliatory measures for poor economies[1113] are reasons for not using the DSU. Finally, developing countries might fear angering developed countries[1114]. Therefore, it observed that many proposals of collective retaliation have been made by developing countries, and it is considered that the collective retaliation method is attractive for developing countries. Therefore, it is considered that the better method for making the members comply with the DSU is using collective retaliation. This method will remove the fear that developing countries have of developed countries and also create an incentive for developing countries to use the DSU process.

5.2.5 Conclusion

Collective retaliation addresses the problem of enforcing rulings of the DSB, which is considered a factor limiting participation in WTO dispute settlement proceedings. The collective retaliation method is a good method for developing countries to make developed countries comply with DSB rulings. Also, it would enhance the DSU process since it would bring benefits all members of the WTO.

The collective retaliation method has the strongest effect for creating member compliance with the DSU rulings because it includes and permits "the formation of coalitions of members"[1115] to create and "constitute a valid threat to the non-complying members to end their unlawful" [1116] behaviour. Also, it provides "a collective character to the existing

[1113] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1114] *Ibid. See also*, Hudec, R. E., (2000), 'Broadening the scope of remedies in WTO dispute settlement' p.372.
[1115] *Ibid.*
[1116] *Ibid.*

retaliation remedy" [1117] . However, the proposal concerning collective retaliation was rejected[1118]. Indeed, any violation of the agreements impairs the interest of all other members. Therefore, there is a reason to include collective retaliation in the DSU. Also, it is considered that the collective retaliation might be the better resort to remedy to induce compliance. It is thought that this method will give equal protection for all the WTO Members particularly smaller states[1119]. It is considered that the WTO obligations are consistent with the proposal of the collective retaliation. Therefore, it will be great to include such as this development of international law under the DSU[1120].

This chapter tries to highlight some factors that may be considered possible solutions to constraints limiting developing country participation in WTO dispute settlement proceedings. Also, this chapter tries to evaluate the possible solutions that are important in making the WTO Dispute Settlement system work better for developing countries in settling disputes between themselves and developed countries. The retaliation and cross-retaliation are key constraints causing a lack of developing countries entering into the WTO dispute settlement system. However, collective retaliation is considered to be a process that tackles the practical impact of developing countries entering into the WTO dispute settlement system and using only the current retaliation and cross retaliation rules of the DSU. Therefore, this part provides collective retaliation in some subparts. First of all, it provides the retaliation rules

[1117] *Ibid.*
[1118] Persson, K.,(2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1119] Korotana, M. S., (2009). Collective Retaliation and the WTO Dispute Settlement System.10(1) *The Estey Centre Journal of International Law and Trade Policy*,pp 196-208.
[1120] Vazquez, R. A., (2013), 'Improving Remedies at the WTO Dispute Settlement for Developing Countries-A Compatibility Study of Three Main Proposals with the Current System'.

(Evaluation of Collective Retaliation). Second, it presents collective retaliation proposals. Third, it analyses collective retaliation. Finally it offers a conclusion and recommendations.

5.3 Reinforcing the Dispute Resolution Process and Financial Compensation

5.3.1 Introduction

The aim of this chapter is to improve developing countries' access to the DSU and to improve the DSU rules and make them work for developing countries. Therefore, this chapter will highlight the possible solutions to tackle some of constraints that limit developing country participation in WTO dispute settlement proceedings. This chapter will also focus on some of the WTO Members attempts to solve the obstacles which face developing countries in both consultations and the DSU adjudication. Moreover, it will examine some of the WTO Members' proposals to smoothen the WTO dispute settlement system and make that system more effective and successful.

5.3.2 The WTO DSU and improving the participation of developing countries

Indeed, making the WTO system more able to protect developing countries interests' and extend their participation in dispute settlement proceedings are the most important issues for

developing countries. Indeed, since the WTO dispute settlement process was established, it has been improved in many ways[1121]. The DSU has two methods for settlements of any dispute; non-adjudicative and adjudicative. Both methods could be improved, for example as regards the appeal provisions, the rules of implementation, the compulsory nature of DSB decisions, the requirement for a reasoned decision and the well-established interpretation of rules[1122]. In addition, the WTO dispute settlement process has been improved as regards the non-adjudicative procedures[1123]. The biggest success as regards improvement of the WTO's non-adjudicative procedures is considered to be the conciliation mechanism, "due to a closer link between conciliation and adjudication"[1124]. Indeed, the non-adjudicatory procedures of the WTO are tinged with an adjudicative character. In the WTO's non-adjudicatory proceedings, "if their [the parties'] negotiations reach an impasse, the judicial process would automatically take over" [1125] which makes "a catalyst in promoting successful negotiations"[1126].

5.3.3 Proposals for DSU Reforms

This section evaluates many proposals and recommends those proposals that might be beneficial for developing countries. These proposals seek to improve compliance with DSB rulings, enhance the timeframe of the DSU and improve financial compensation in the WTO

[1121] Nordstrom, H. & Shaffer, G., (2007). 'Access to Justice in the WTO: The Case for a Small Claims Procedure: A Preliminary Analysis'.
[1122] *Ibid.*
[1123] *Ibid.*
[1124] Alotaibi 2011.p.36.*see also* Bagwell *et al.* 2004.p.4.
[1125] *Ibid.*pp.36-37.
[1126] *Ibid.*p.37.

dispute settlement system. Therefore, it will argue for reforms in both the adjudicatory and non-adjudicatory stage of the DSU.

5.3.4 Reinforcement consultations

Consultations might avoid many constraints which limit developing country participation in WTO dispute settlement proceedings. The DSU has mentioned the consultations stage as an excellent method that may be a favourable option for some WTO Members for settling disputes that may arise between WTO Members, especially between developing and developed countries[1127]. Indeed, the DSB supports disputing parties using the conciliation method to solve disputes amicably[1128]. Therefore, the consultations stage, the old diplomatic means of resolving trade disputes[1129], has improved under the DSU. The DSU rules encourage a consultation stage before entering into the panel and appeal stages. Therefore, all the disputing parties must enter into the consultations stage before entering into the adjudicatory phase process of the DSU. Indeed, the purpose of a consultation stage is to settle disputes by satisfactory settlement for all parties of the dispute which conform to DSU provisions. Therefore, Article 3.7 of the DSU provides that 'the aim of the dispute settlement mechanism is to secure a positive solution to a dispute'[1130]. It also provides that 'a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'[1131].

[1127] *Ibid.*p.45.
[1128] Nordstrom, H. & Shaffer, G., (2007)'Access to Justice in the WTO: The Case for a Small Claims Procedure: A Preliminary Analysis'.
[1129] Alotaibi 2011.p.44.
[1130] DSU Article 3.7.
[1131] *Ibid.*

It is also observed that the DSU provisions may be in favour of developing countries[1132]. DSU Articles 4 and 12 set out special rules for developing countries during the consultation stage. Article 4.10 provides that 'during consultations Members should give special attention to the particular problems and interests of developing country Members'[1133]. Indeed, this article has been used by Chile in the case of '*European Communities-Trade Description of Scallops (EC-Scallops)*'[1134]. During DSB meeting consultations, Chile requested this article be stated because the article "had been disregarded by the Communities thus discriminating against and impairing Chile's interests in deviation from the provisions of Article 4.10 of the DSU"[1135].

The further timeframes for the consultations stage can be created by the disputing party's agreement. Indeed, the timeframes for the consultations stage is provided for by Articles 4.7 and 4.8 of the DSU, which state that the stages are normally set at '60 days after the date of receipt of the request for consultations'[1136] or containing shortened timeframes for 'perishable goods'[1137]. Article 12 of the DSU gives the Chairman of the DSB authority to "discuss with parties the creation of further time extensions and durations"[1138]. In 1995, for instance, Pakistan had a dispute with the United States. In this dispute, according to consultations stage,

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[1132] Alotaibi 2011.p.45.
[1133] DSU Article 4.10.
[1134] *European Communitie -Trade Description of Scallops*, order by Canada WTO Document (WT/DS7), Chile WTO Document (WT/DS14) and Peru WTO Document (WT/DS12). The request was by Chile to join in consultations, ordered by Canada with the European Communities, which is included in WTO Document WT/DS7/2.
[1135] Footer 2001; *see also,* Minutes of Meeting of the DSB, 27 September 1995, WTO Document WT/DSB/M/7 (27 October 1995).
[1136] DSU Article 4.7.
[1137] DSU Article 4.8.
[1138] Alotaibi 2011.p.45.

Pakistan applied Article 12.10 of the DSU[1139]. In the DSB meeting, "the United States applied for the panel process but this action was challenged by Pakistan"[1140]. Pakistan has stated that the disputing parties were still "engaged in the process of Consultations"[1141]. Therefore, the United States complied with Pakistan's complaint[1142].

Moreover, the consultation might avoid concerns of developing countries about "the diplomatic style of international trade processes in dispute settlement"[1143]. In the DSB processes, it is true that developing countries often face the political power of developed countries. Therefore, the consultation stage is considered as a method which may avoid the political power as result of that the consultation stage is enforced originally by the DSU. Also, Article 4 of the DSU states that '[Parties to the dispute] shall enter into consultations in good faith'[1144] and 'Members should attempt to obtain satisfactory adjustment of the matter'[1145]. Also, 'during consultations Members should give special attention to the particular problems and interests of developing country Members'[1146]. So, the consultation stage may avoid some constraints that limit developing country participation in WTO dispute settlement proceedings in some respects. Furthermore, the consultation stage may avoid the "need to enforce DSB rulings against larger developed countries as well as avoiding the use of ineffective retaliation rules"[1147].

[1139] Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Document WT/DS36.(1998).
[1140] Alotaibi 2011.p.46; *see also* Footer 2001.
[1141] Alotaibi 2011.p.46; *see, also,* Pakistan-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Document WT/DS36.(1998)
[1142] Footer 2001.
[1143] Alotaibi 2011.p.46; *see also,* Footer 2001.
[1144] DSU Article 4.3.
[1145] DSU Article 4.5.
[1146] DSU Article 4.10.
[1147] Alotaibi 2011 .p.46; *see also,* Footer 2001.

Also, it will avoid the high cost of the DSU process. Therefore, it will avoid developing countries wasting money and time in the dispute settlement procedures against developed countries[1148]. Panel and appeal litigations are expensive and inflexible, so the consultation stage is a good method for avoiding these problems. In the consultation stage, developing countries will "attain more equal footing with developed countries in the consultation stage"[1149]. It is observed that the strength of the current DSU system for settling disputes is based on a consultation procedure[1150]. Thus, the consultation stage has been developed in order to reduce the costs and time of dispute resolution process and increase "the likelihood of a mutually satisfactory outcome"[1151]. Thus, it will avoid significant constraints in the utility of the WTO dispute settlement system for developing countries.

The consultation stage will avoid the delay of time in the ligation process of the DSB. So, the consultation stage should be extended more than 60 days if the case needs more time. In addition, it will avoid the time period that the DSU process normally takes to settle dispute, a period of about fifteen months as fifteen months is the time limit for dispute under the DSU. Also, it includes ten months for the 'reasonable period of time' for the implementation of recommendations[1152]. Moreover, the complainants will wait at least two more years for the achievement of a satisfaction against a WTO inconsistent measure[1153]. In addition, more than this time would be required for compliance under Article 21.5, which adds a couple of years

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[1148] Hoekman, B. M., Mattoo, A., & English, P.,(2002), *Development, trade, and the WTO*.p.81.
[1149] Busch M. L., & Reinhardt E., (2000), 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes'. p.172.
[1150] Pham 2004.pp.333-388.
[1151] *Ibid.*
[1152] See the WTO website. World Trade Organization 2015: Understanding the WTO: *available from:* https://www.wto.org/ [viewed February 1, 2015].
[1153] Pham 2004.pp.333-388.

for action to enforce the DSU decision[1154]. Therefore, the consultation stage will avoid many cases that take up time in the adjudication stages. Consultations will avoid using the panel and Appellate Body to delay the adjudicatory phase. It will also avoid the delays in the dispute resolution process through Article 21.5 for the compliance stage.

It is important to encourage the consultation stage for dispute resolution in order to continue its work. Indeed, some developing countries make proposals to increase the use of consultation processes in dispute settlement. For instance, "Jamaica has encouraged WTO Members to respect their obligation"[1155] to "strengthen the consultation stage"[1156]. Jamaica's proposal to improve the consultation stage has been highlighted from time to time by other members because of the significance of consultation for developing countries in practice.[1157]

So, stronger rules have to be introduced in the consultation process of the DSU, such as reform of the strict timeframe, to include more time for dispute settlement in the consultation stage. That will help avoid the "deliberate delaying of the proceedings by respondents"[1158] in the adjudication stages. To conclude, the consultation stage may be considered one of many methods that might alleviate a number of constraints that limit developing country participation in WTO dispute settlement proceedings.

[1154] DSU Article 21.5.
[1155] Alotaibi 2011.p.47.
[1156] *See* proposal by Jamaica, TN/DS/W/21, at 2 (Oct. 10, 2002); Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002); and Communication from India TN/DS/W/47, at 2 (Feb. 11, 2003)
[1157] Al Bashar 2009.
[1158] *See* Al Bashar 2009. *See also*, Freneau 2001.

5.3.5 Reinforcement of the adjudicatory phase process of the DSU

5.3.5.1 Introduction

There are several cases demonstrating the effect of delay in the DSU adjudication while parties may suffer injury during the dispute settlement process. Indeed, there are some WTO Members that have learned how to delay the adjudicatory phase of the DSU, as the remedy provided under WTO procedures is only prospective. Therefore, the disputing party may cause injury during the DSU procedures, as it is not possible to order the payment of indemnification or compensation for the injury even the party won the case[1159]. Therefore, this part analyses the possible enforcement of financial compensation under the DSU.

In practice, WTO Members choose the current remedy, trade compensation, when a respondent member "failed to withdraw or make corrections a WTO inconsistent measure"[1160]. However, the trade compensation is not obtained until both the complainant and respondent agree to the compensation, but this is usually difficult to achieve as it takes a long time, so this method might be lead to punishment of industries in both complainant and respondent Members.

Regarding the DSU practice, academic literature has discussed the possibility of providing for a less lengthy process and retrospective damages under the DSU[1161]. Indeed, the DSU is only concerned with prospective remedies. The DSU focuses on "a balance of rights and

[1159] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1160] *Ibid.*
[1161] *Ibid.*

obligations with WTO remedies to preserve future trading opportunities rather than to redress past injury"[1162]. It has recommended that the DSU provide both prospective and retrospective remedies[1163]. Therefore, any member's violation of WTO law carries an obligation to both "stop the illegal act and to provide reparation for the damage suffered by the injured party"[1164]. It has been stated that "reparations must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed"[1165]. Thus, as long as the Member is not complying, the more financial compensation it will pay. This will create an incentive for the offending country to comply early on with the DSU process as well as to comply with the rulings and recommendations of the DSB. The retrospective damage through financial compensation will "remove all the present incentives for delay in the dispute settlement process especially on the implementation and enforcement"[1166]. Also, it will be a deterrent against probable violations by members and allow "more appropriate compensation for nullification and impairment suffered by the offended WTO Member"[1167].

5.3.5.2 Proposals for Financial Compensation

Financial compensation and reparation of the injury have been recommended to be introduced into the DSU. This idea has been supported by many proposals in the on-going

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[1162] *Ibid.*
[1163] such method has provided in the Customary International Law and Draft Articles of the International Law Commission.
[1164] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1165] *Ibid. See, also,* Altaer 2010.
[1166] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1167] *Ibid.*

DSU negotiations. Some developing countries have made several proposals directly dealing with tackling the obstacles of developing countries trying to enforce DSB decisions and reparations of injury during the delay process of the DSB. Some developing countries have considered that financial compensation is one of the main factors in enforcing panel and appellate body decisions, repairing injury and lessening delay in the process of the DSB. Therefore, they have indicated many proposals that financial compensation might be used as a remedy to overcome obstacles to enforcing DSB decisions and the reparation of injury during the DSU process. Indeed, the aim of developing country proposals for financial compensation is to address the economic harm which those countries suffer from WTO violations. Therefore, when the developing countries suffer economic harm, they would be able to invoke a remedy of financial compensation[1168]. Thus, many developing countries have made proposals[1169] that if a panel ruling finds that in a dispute between developed countries and developing countries, a developed country has breached the WTO obligations, developing countries should receive financial compensation and the financial compensation should be "continually paid pending and until the withdrawal of the felonious measures"[1170].

It has been argued that financial compensation should be paid when any dispute arises between a developing and developed country. In cases where a developing country is successful in the dispute, the developed country should have to pay the financial compensation[1171]. The sum of the financial compensation "should be equal to the loss or

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[1168] *Ibid.*
[1169] Such a Proposal was made by the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002); Communication from Ecuador, TN/DS/W/9, at 3 (July 8, 2002); China Proposal, TN/DS/W/29, at 1 (Jan. 22, 2003). and Kenya Proposal, TN/DS/W/42, at 2 (Jan. 24, 2003).
[1170] Pham 2004.pp.333-388.
[1171] *See* Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002); Jamaica proposal TN/DS/W/21, at 2 (Oct. 10, 2002); and Communication from India TN/DS/W/47, at 2 (Feb. 11, 2003).

injury suffered and directly arising from the offending measure"[1172], and continue until the refusing developed country complies with a DSB panel ruling. However, the sum should not be continued after the nonconforming measure is removed[1173].

5.3.5.3 Proposals to establish clauses on Financial Compensation under the DSU

Regarding the present compensation method of the WTO, which is considered not in favour of developing countries, the Sutherland Report[1174] provides that in the current practice, compensation is just applying for extra market access, rather financial payments[1175]. The Report states that "[t]o allow governments to 'buy out' of their obligations by providing 'compensation' or enduring 'suspension of obligation' also creates major asymmetries of treatment in the system. It favours the rich and powerful countries which can afford such buyouts while retaining measures that harm and distort trade in a manner inconsistent with the rule of the system"[1176]. The report highlighted that the financial compensation "must be exercised to be sure that monetary compensation is only a temporary fallback approach pending full compliance, otherwise 'buyout' problems will occur"[1177]. It provides that this method will be helpful for poorer and developing countries "to allow monetary compensation

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[1172] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU; *see, also,* The LDC Group proposal, TN/DS/W/17, at 1&4 (Sept. 19, 2002).
[1173] *See* proposal by Jamaica, TN/DS/W/21, at 2 (Oct. 10, 2002).
[1174] The Future of the WTO: addressing the institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (The World Trade Organization, 2004), p. 53. [usually referred to as the Sutherland Report].
[1175] *See* Al Bashar 2009; *see, also,* The Sutherland Report p.53.
[1176] Al Bashar 2009.
[1177] *Ibid.*

from the party required to comply with a dispute settlement report, to substitute for compensatory market access measures by the winning aggrieved disputant"[1178].

In addition, the present compensation of the DSU has been classified by Mexico[1179], which stated that the current compensation may not be enforced legally and used by members prospectively. Therefore, it has to apply the principle of retroactivity under the DSU[1180]. Therefore, if a dispute arises between developing countries and developed countries, the payment of retrospective financial damages, has to be required. Also, it has been suggested that the retrospective financial damages can be decided by the WTO panel and/or the DSU can include a clause that creates guidelines for the award of such damages[1181].

It has been argued that the DSU should be modified to provide that the developed country should have to pay prospective damages "in the form of monetary fines as of the end of the implementation period"[1182]. There are some developing countries that support this method such as Pakistan, which has supported such an adaptation of WTO remedies[1183]. A proposal from Chile suggested that this remedy has to be included in the WTO context[1184]. In addition,

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[1178] *Ibid.*
[1179] Mexico Proposal, TN/DS/W/23 at 5 (4 Nov. 2002). *See* Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'; Also, see Bronkers, M. &Van den Brock, N.,(2005), 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement' at 122.
[1180] Mexico Proposal, TN/DS/W/23 (4 Nov. 2002).
[1181] Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.
[1182] *Ibid*; Steinberg, R., (2002), 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 Int'l Org. 339. However, no prospective monetary damages would be due if developed country comply with the adopted panel or Appellate Body ruling during the implementation period.
[1183] Communication from Pakistan, Preparations for the 1999 Ministerial Conference -The Dispute Settlement Understanding (DSU), WT/GC/W/162 (Apr.1,1999), p.4; ("It would be useful to clarify that the term 'compensation' used in Article 22 includes grant of financial compensation to the complaining party by the country which has been found to be in violation of the rules."). *See* Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.
[1184] *Ibid.*

financial compensation has been supported by the Least Developed Countries (LDC) proposal[1185]. Also, it argues that the quantification for compensated loss or injury should "commence from the date the member in breach adopted the offending measure"[1186]. Moreover, Ecuador made a proposal[1187] for full or partial financial compensation. Furthermore, the African group proposal[1188] suggested that compensation has to "prominently reflect the need for monetary compensation"[1189] and be continually paid "until the withdrawal of the measures in breach of WTO obligations"[1190].

Indeed, the United States has supported this remedy for U.S. bilateral trade agreements with Chile and Singapore[1191]. Also, in this proposal, the notion of financial compensation has been supported by EC[1192]. Consequently, the financial compensation method will address the loss suffered as a result of the measures in breach of WTO obligations as well as the loss suffered during of the DSU process[1193]. However, it has been thought that the financial compensation

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[1185] The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).
[1186] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1187] Communication from Ecuador, TN/DS/W/33, (17 January 2003).
[1188] *See* the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).
[1189] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1190] *Ibid.*
[1191] *See*, *e.g.*, the U.S. Trade 8 (Oct. 25, 2002). The U.S. responded to a proposal from Chile. See Chile looks forward for financial sanctions, as enforcement system, inside U.S. Trade13 (Oct. 11, 2002). Chile was proposing that the money would be placed in an escrow account that can be automatically released upon a legal judgment. With both Chile and Singapore, the U.S. was concluded the Free Trade Agreements. See U.S. and Chile Conclude Free Trade Agreement, USTR Press Release, Dec.11, 2002) and U.S. Reports a Final Deal for Singapore Trade Pact, N.Y. Times C19 (Jan.17, 2003). Regarding to the agreement's dispute settlement provisions which include enforcement through financial penalties, see Summary of the U.S.-Chile Free Trade Agreement, at 9 (Dec. 11, 2002), USTR Trade Facts, Free Trade with Chile, and Trade Facts, Free Trade with Singapore, America's First Free Trade Agreement in Asia, at 9 (Dec. 16, 2002), available at http://www.ustr.gov/ (last visited May.18, 2014). Indeed, provisions which have included in the Chile-US FTA, (Article 22.15(5) and 22.16) and Singapore-US FTA, (Article. 20.6(5) and Article. 20.7) came into force in 2004.
[1192] Communication from the European Communities, TN/DS/W/1, at 2 (Mar. 13, 2002).
[1193] *See*, Malaysia proposal, in Minutes of Meeting, TN/DS/M/15, (4 June 2004), pp.2-3. Malaysia has expressed and concerns that the DSU settlement of disputes process is a lengthy process and make the measures

must not replace the withdrawal of measures. Therefore, the withdrawal of measures should not be affected by any provision for financial compensation[1194].

It has been observed that unpaid monetary compensation can be increased by a particular procedure when a developed country refused to bring its inconsistent measures under a DSB decision within a specific time[1195]. So, the time limit of executions can be also fixed by classified in the clause[1196]. Also, the punitive rate of the financial compensation may reduce developed countries' non-compliance with WTO rules. Indeed, it can be simply provided that the developed country could avoid payment of a punitive rate by acting in full with the DSU ruling[1197].

Indeed, it has been suggested that the financial compensation fines have to increase over time and it will be as long as the member suffers during the delay process. Therefore, with this method the balance among WTO Members would be restored and it would encourage compliance in the DSU[1198]. It has been thought that to eliminate violating measures by any member, payment of financial compensation has to be independent of the DSU obligation. Also, the punitive rate has to be classified regarding some aspects, such as an amount has to be decided with regard to "the effect of that measure on the trade of the developing

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inconsistent remain until the adoption of the AB report. The lengthy process would be causing severe damage to the interests of the complainant, especially a developing country.

[1194] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.

[1195] *See* Al Bashar 2009.

[1196] Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.

[1197] Al Bashar 2009; *see also*, Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.

[1198] Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.

country"[1199] and the punitive time duration of violating measures will continue until recovery through the elimination of the inconsistent measure[1200]. When a developed country is not complying with a ruling, the payment of retrospective fines as financial compensation would improve the ability of the developing countries to bring pressure to bear in settlement negotiations as well as improve their capacity to pay for the legal protection "of their interests under the covered agreements"[1201].

However, in the WTO, there is a huge imbalance in power and economic standing between the WTO Members[1202]. The larger members, who have greater economic power, may easily avoid their obligations by paying financial compensation fines while there are many developing countries have not enough money for paying financial compensation fines. So, it thought that the financial compensation has to be "according to the economic strength of the offending member"[1203], so the fine will be minimized for poorer members[1204]. Also, it has been thought that the payment of fines may simply be an alternative for developing countries, so they can accept or reject the financial compensation depending on their interest[1205].

[1199] *See* Al Bashar 2009.
[1200] *See* Communication from Pakistan, Preparations for the 1999 Ministerial Conference (Apr.1,1999); Proposal by Mexico, Improvement and Clarifications of the Dispute Settlement Understanding, TN/DS/W/91, (16 July 2007), pp.2-5. *See also*, Summer, D. A., (2006), 'Reducing Cotton Subsidies: The DDA Cotton Initiative', in Kim Anderson and Will Martin, Agriculture Trade Reform and the Doha Development Agenda, *Palgrave Macmillan & World Bank*, pp.283-285.
[1201] Al Bashar 2009.
[1202] Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.
[1203] Al Bashar 2009.
[1204] *Ibid*; *see also*, Davey, W, J.,(2005), 'The WTO Dispute Settlement System: How Have Developing Countries Fared? ', Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 05-17, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=862804 (last visited March 17, 2014).
[1205] Davey, W, j., (2004), 'Reforming WTO Dispute Settlement', Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 04-01, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=495386 (last visited March 17, 2014).

The rules on financial compensation can be set out in a clause in the DSU binding for all members. Indeed, the International Centre for the Settlement of Investment Disputes (ICSID) has been using the same method to ensure that the "the monetary award given by ICSID tribunals will be awarded"[1206]. Therefore, if the same method is used by the DSU that would limit many conflicts between a developing and a developed country specifically when the developed countries are the offending party[1207]. In practice, this method of financial compensation can be applied, for example in the *US Copyright* case. In that case, the US and EC finally appeared to reach a mutually acceptable temporary agreement. The US "made a payment to a specific private body in the EC as a temporary arrangement during implementation"[1208]. Regarding the US Copyright case, there is commentary that the financial compensation was acceptable in principle[1209]. In the *United States-Section 110(5) of the US Copyright Act*[1210], financial compensation is, in fact, possible under the WTO[1211]. The case presented that the DSU recognized that the remedy of financial compensation can be recognize under the covered agreements[1212]. Also, the case showed that the financial compensation can be calculated. It had classified the level of nullification and impairment, which was suffered by the European Communities due to the United States' inconsistent legislation implemented[1213]. Therefore, the amount identified which has to be paid by the United States[1214]. Therefore, it has been advanced that the DSU has to make changes and

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[1206] Al Bashar 2009.
[1207] *Ibid; see, also,* Porges, A,. (2003), 'Settling WTO Disputes: What do Litigation Models Tell Us?',
[1208] Persson, K., (2007), 'The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU'.
[1209] *Ibid*.
[1210] Award of the Arbitrators, *United States-Section 110(5) of the US Copyright Act*, Recourse to Arbitration under DSU Article 25, WT/DS160/ARB25/1, 9 November 2001.
[1211] Persson,K,.(2007) The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1212] *Ibid*.
[1213] *Ibid*. It was by arbitration proceeding.
[1214] *Ibid.*

accept financial compensation under the DSU, particularly for lengthy processes causing damage during the DSU process. Indeed, the African Group's proposal supports the retrospective financial compensation method: in cases brought by developing countries against developed countries, the date of retrospective financial compensation is computed "from the date of the adoption of the measure found to be inconsistent until the date of its withdrawal"[1215]. So, the DSU shall permit the least-developed or developing country Member and any other Members to request financial compensation[1216] and retrospective computation of nullification or impairment[1217]. Indeed, it has been suggested that the retrospective calculation of the financial compensation may be from the date which damages occurred. Therefore, the starting date could be the date of imposition of the illegal trade measure[1218] and as a result of the amount of damages accrued could be huge before parties even enter into settlement consultations process[1219]. Therefore, such a starting date might eliminate the incentive for developed countries not to violate WTO law and to manipulate a delay in the DSU procedures and instead give developed countries an incentive to settle the dispute in an amicable negotiate as they notice that they will pay retrospective damages if the matter is not settled. Thus, it might be favourable for developing countries.

Indeed, the determination of the correct level of financial compensation for damages may be controversial and opposed by developed countries[1220]. It could easily become a highly contentious matter. Therefore, a more practical and less controversial approach to the

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[1215] Aydin, M., (2007), *WTO Dispute Settlement Mechanism and Developing Countries*: Lessons for Turkey.
[1216] *See* The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002).
[1217] Mexico Proposal, TN/DS/W/23 (4 Nov. 2002).
[1218] Shaffer, G., (2003), 'How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.
[1219] *Ibid.*
[1220] Hoekman,B,M & Mavroidis,P,C,.(2000),'WTO Dispute Settlement, Transparency and Surveillance'**.** at 6.

problem would be to delegate some of the DSU enforcement task to an independent 'special prosecutor'[1221], strengthen surveillance and outsource which has to "defend developing country interests, identifying potential violations rapidly"[1222] and "allowing these to be addressed in a timely fashion"[1223]. Also, regarding how to quantify the amount of compensation, "economic experts would have to work in close co-operation with panels"[1224] to address the amount of compensation. It can be determined that the amount of damages by the initial WTO panel, as Mexico has proposed, and can be addressed early in the dispute settlement process[1225]. The DSU could "define the modalities for a panel's determination of the amount of retrospective damages"[1226]. Also, the amount of the harm and any consequent compensation involved in the case should be made as early as possible on in the dispute settlement process[1227].

The financial compensation method reduces the effects of the violating measure. Also, it induces compliance to WTO obligations[1228]. Article 22:4 of the DSU provides that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification of impairment". This Article can be applied in calculating the value of financial compensation. Using this method would "fully compensate

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[1221] *Ibid.*
[1222] *Ibid.*
[1223] *Ibid.*
[1224] A Working Group Report,(2002), 'Enhancing the WTO'S Dispute Settlement Understanding', *The Federal Trust for Education and Research*, London, available online at http://mayapur.securesites.net/fedtrust/filepool/FedT-DSU-DEC2002.pdf (last visited March 17, 2014).
[1225] See Mexico Proposal, TN/DS/W/23 (4 Nov. 2002).
[1226] Shaffer, G., (2003), How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies'.
[1227] A Working Group Report,(2002), 'Enhancing the WTO'S Dispute Settlement Understanding'.
[1228] Shepherd, J., Sokolova, M. V., & Wakjira, W. N., (2012). Effective Compliance in the DSU: The Mechanics of Monetary Compensation as a Form of Reparation, *Trade and Investment Law Clinic Papers, Centre for trade and economic integration, Graduate Institute, Geneva*, p. 42. *Available at* http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/Final%20Memo%20-%20DSU%20Review%20-%2008062012.pdf [Accessed: November 13, 2015].

the complainant for the loss suffered as a result of the violation of WTO obligations by the respondent and to act as a retrospective remedy"[1229]. This method has the advantage of being useful in implementing rulings and recommendations of the DSU, and inducing compliance in the current WTO practice.

Under the DSU, it is the WTO Member that is the receiver of the financial compensation while the specific industry or company that was harmed by the WTO-inconsistent measures is the recipient of the financial compensation. Therefore, the DSB panel ruling for financial compensating has to mention to companies or private traders that benefit from repairing the damage of the measure. Further, the distribution of the financial compensation by the Member government should be monitored by a WTO organisation (e.g. the panel) to avoid the failure of distribution mechanisms [1230]. Therefore, the WTO can ensure the distribution of the financial compensation to the recipient that was affected by the WTO inconsistent measures[1231].

Academic literature has discussed the possibility of providing for retrospective damages under the DSU. For example, Bronckers and Broek have argued in favour of retroactive financial compensation that "[r]etroactivity in financial compensation would introduce a

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[1229] Eleso, A. A., (2006). WTO dispute settlement remedies: monetary compensation as an alternative for developing countries. *Bepress Legal Series*, 1378. *Available at* http://law.bepress.com/cgi/viewcontent.cgi?article=6321&context=expresso [Accessed: November 13, 2015].

[1230] Shepherd, J., Sokolova, M. V., & Wakjira, W. N., (2012). Effective Compliance in the DSU: The Mechanics of Monetary Compensation as a Form of Reparation, *Trade and Investment Law Clinic Papers, Centre for trade and economic integration, Graduate Institute, Geneva*, p.61. *Available at* http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/Final%20Memo%20-%20DSU%20Review%20-%2008062012.pdf [Accessed: November 13, 2015].

[1231] Shepherd, J., Sokolova, M. V., & Wakjira, W. N., (2012). Effective Compliance in the DSU: The Mechanics of Monetary Compensation as a Form of Reparation, *Trade and Investment Law Clinic Papers, Centre for trade and economic integration, Graduate Institute, Geneva*, p.61. *Available at* http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/Final%20Memo%20-%20DSU%20Review%20-%2008062012.pdf [Accessed: November 13, 2015].

significant disincentive against foot-dragging, which is now perceived to be a major problem in the dispute settlement mechanism. As the DSU proceedings can take a long time, some Members are seen to exploit this to maintain WTO illegal measures[1232]. Retroactivity more accurately remedies the injury suffered by private traders by providing reparation for the period when the injury actually occurred[1233]. They also have supported the proposal of financial compensation. First of all, they revealed that this method is not trade restrictive. Second, it assists to redress injury. Third, it encourages efforts to induce compliance. Fourth, "it can be a disincentive to foot dragging in the implementation and enforcement process"[1234]. Fifth, "it can add an element of fairness"[1235] and finally "it is in line with general public international law"[1236]. Authors have discussed the reform of the DSU system and have provided suggestion for financial compensation[1237]. Firstly, the DSU has to improve the compensation remedy and create a particular provision for financial compensation as a remedy. Secondly, a financial compensation provision has to contain compensation for the damages caused. Thirdly, the financial damage remedy has to be "retroactive to the time of violation"[1238]. Fourthly, it has to be financial compensation for each type of violation. Fifthly, the victim has the right to accept the new financial damage remedy or choose trade compensation. So, the financial compensation will be within the sovereign discretion of each Member[1239].

[1232] *Ibid.*
[1233] *See* Al Bashar 2009; *see also*, Bronkers, M. &Van den Brock, N.,(2005), 'Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement'. at. 122.
[1234] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1235] *Ibid.*
[1236] *Ibid.*
[1237] *Ibid.*
[1238] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.
[1239] *Ibid.*

Moreover, financial compensation is compatible with the objective of the WTO system which is the rebalancing between WTO Members' negotiated rights. Another WTO objective is inducing compliance with WTO obligations. Financial compensation offsets the damage suffered as a result of the unlawful measure[1240], and can contribute to achieving WTO objectives by inducing compliance and ensuring "compensation to defendants regardless of their size – thereby correcting the current asymmetry between large and small countries"[1241]. Therefore, the financial compensation structure could be complimentary to the DSU rules[1242]. One prerequisite for a successful system is that the amount of the financial compensation has to be strict enough to make the violating Member comply with the DSB recommendations and rulings.

In addition, it is thought that developing countries and LDCs ought to be "allowed to claim financial compensation for an initial period of time"[1243]. It has been observed that the financial compensation should be included in all covered agreements of the WTO. Therefore, it has been stated that the financial compensation has to be preferential treatment for developing countries[1244]. Hence, if the dispute involves the developed as the offending party,

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[1240] Vazquez Martinez, R. A. (2015). Improving Remedies at the WTO Dispute Settlement for Developing Countries. *International Development Law Organization*, (16), 1-23. *Available at* http://faculty.georgetown.edu/mlb66/JWT.pdf[Accessed: November 13, 2015].

[1241] Lawrence, R. Z., (2003). Crimes and Punishments? An analysis of retaliation under the WTO. *Institute for International Economics, Washington DC*. *Available at* http://hks.harvard.edu/fs/rlawrence/Crimes%20and%20Punishments%20Final%20June%2025.pdf [Accessed: November 13, 2015].

[1242] Shepherd, J., Sokolova, M. V., & Wakjira, W. N., (2012). Effective Compliance in the DSU: The Mechanics of Monetary Compensation as a Form of Reparation, *Trade and Investment Law Clinic Papers, Centre for trade and economic integration, Graduate Institute, Geneva*, p 42. *Available at* http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/Final%20Memo%20-%20DSU%20Review%20-%2008062012.pdf [Accessed: November 13, 2015].

[1243] *Ibid.*

[1244] *Ibid.*

the financial compensation has to be applied[1245] that would deter developed countries from adopting inconsistent trade measures against their developing country counterparts[1246]. This method of financial compensation will also help the smaller and poor countries who suffered from the delays and limited compensation. The delay and suffering continues during the period in which measures violating the WTO remain in force. In addition, fewer disputes will reach the DSB[1247]. Also, financial compensation can be a method for helping developing countries trying to enforce DSU decisions, which is considered as a matter limiting their participation in WTO dispute settlement proceedings.

While the idea of financial compensation has been agreed and supported by many countries, it has been observed that it "will not take place in the immediate future, because of the great hostility of developed nations"[1248]. Therefore, as a result of the opposition from developed countries[1249], there are some scholar's judging that such a reform may not come about in the near future. However, one of the most significant changes in the DSU has to be to include financial compensation[1250]. Developing countries also have to create more support for retrospective damages and financial compensation. That will help reduce the incentive of the disputing parties to delay the implementation of the DSU process and make "parties reaching an agreed solution as early as possible"[1251].

[1245] *See* Al Bashar 2009; *see also*, Working Paper of South Centre, (1998), "The WTO Multilateral Trade Agenda and the South", No: ISBN 92-9162-008-4, pp. 44-45.
[1246] *See* Al Bashar 2009.
[1247] *See* South Centre, (1999), '*Issues Regarding the Review of the WTO Dispute Settlement Mechanism',* p.28.
[1248] Al Bashar 2009. *See also*, Pham 2004.p.355. *See also,* Bossche, P. V., (2008), 'The Law and Policy of the World Trade Organizations: Text, Cases and Materials'.
[1249] *See* Hudec, R., (2002) 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' in Development, Trade, and the WTO.at 86-87.
[1250] *Ibid.*
[1251] Al Bashar 2009.

Ecuador's paper "offers to strengthen compensation mechanism instead of using retaliation as a last resort, provided that compensation does not become a way of paying in order to maintain a situation of non-compliance"[1252]. The other recommendation is that the financial compensation has to work with the existing remedies of the DSU, not replace them. So, it will seek to extend the framework of the DSU remedies. Therefore, the financial compensation would be commendable and acceptable, especially for developing countries that they may like to obtain "a tangible cure in the event of any violation against them"[1253]. The DSB should provide for some specific rules for financial compensation in the DSU [1254]. Finally, the financial compensation ought to not be the only method considered by the contracting parties for enforcing panel recommendations[1255].

5.3.6 Conclusion

To sum up, the aim of this chapter is to improve developing countries accessing to the DSU as well as improve the DSU rules and make them work for developing countries. Therefore, this chapter highlighted the possible solutions, which are considered to be tackling some of constraints that limiting developing country participation in WTO dispute settlement proceedings. This chapter, therefore, examines and evaluates the possible resolutions, which are considered the main factors and more significant methods in the DSU to be more workable for developing countries in settlement dispute system. Also, this chapter focuses on

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[1252] Aydin, M., (2007), *WTO Dispute Settlement Mechanism and Developing Countries*: Lessons for Turkey

[1253] Persson, K., (2007), The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU.

[1254] Persson, K., (2007), 'The Current and Future WTO Dispute Settlement System; Practical problems discussing Article 21.5 and Article 22 of the DSU'.

[1255] *See* Al Bashar 2009; *see, also,* Kufuor, K. O., (1997), "From the GATT to the WTO: The Developing Countries and the Reform of the procedures for the settlement of international Trade Disputes", p. 139.

some of the WTO Members' attempts to solve some of the obstacles facing developing countries in the both consultations and the DSU adjudicatory. It discusses the time and compensation of DSB. These proposals can be sought to improve compliance with DSB rulings, enhance the timeframe of the DSU, and seek to augment the improvement of the financial compensation in the WTO dispute settlement system. Therefore, it argues for reforms in both adjudicatory and non-adjudicatory stage of the DSU. First of all, it has discussed the reinforcement of consultations that might avoid many constraints, which limits developing country participation in WTO dispute settlement proceedings. Second, the retrospective damages for financial compensation may remove all the present incentives for delay in the dispute settlement process, especially on the implementation and enforcement of the DSU rulings.

Chapter 6: Conclusion and Recommendation

6.1 Conclusion

In conclusion, this thesis has attempted to demonstrate the most vital concerns which limit developing country participation in the WTO's dispute settlement proceedings. In addition, some specific points have been suggested as possible solutions, which could tackle those constraints. This thesis has included various chapters. The first chapter provided the introduction. The second chapter has three parts. The first part demonstrates the environment that produced the international trade organisation. The second part reviews the GATT and gave details of the GATT principles as well as the GATT tariff negotiating rounds. Also, it brief provided information about the development of the GATT and its member accession. It also offered basic information about the progress of increasing international free trade, which was encouraged by multinational negotiations and agreements. The third part presented a brief review about the WTO and the environment, which produced the WTO as well as presenting brief information about the development of the WTO. It also included a number of the WTO articles that created a participating role in WTO proceedings and possibly leads to accession under the WTO. Therefore, it highlighted and evaluated articles that indeed are key factors for countries entering into the WTO.

Chapter three defined the term 'developing countries' and the definitions of that term as classified under the GATT and WTO. This chapter also has provided the classification of the term 'developing countries' in the World Bank, the United Nation and the United Nation Statistics, and in the International Monetary Fund. Also, chapter three has obvious analysis and classifies the concept of 'developing countries' in order to make clear principles for defining the notion of developing countries.

In chapter Four, a number of significant constraints which limit developing country participation in WTO dispute settlement proceedings have been analysed and discussed. The first part of chapter 4 highlights the most significant factors regarding the participation of developing countries in the WTO dispute settlement body. The lack of financial and legal resources was illustrated and considered among the most significant constraints that limit the participation of developing countries in the WTO dispute settlement body. Thus, the part analysed the internal resources of developing countries, which cannot afford the cost of pursuing legitimate claims under the DSB, which also makes litigating their dispute under the DSB less enjoyed by developing countries. Furthermore, the internal expertise of developing countries was analysed and evaluated. Some developing countries do not have the ability to recognize their rights and properly defend themselves under the WTO because of the lack of legal expertise who can deal with WTO dispute settlement proceedings. The WTO law and the DSU provisions demand legal and financial resources, which makes the high cost of the different stages of WTO dispute settlement proceedings a dilemma for developing countries considering participating in WTO dispute settlement proceedings. Indeed, DSU Article 27.2 and the ACWL tackled the lack of financial and legal resources of developing countries in the dispute settlement proceedings. However, it is observed that neither Article 27.2 nor the ACWL tackle the high cost of litigation and the lack of legal expertise. It is worth mentioning that none of the solutions of assistance from a WTO Secretariat consultant, outside legal counsel, the ACWL attorneys or Article 27.2 has addressed one of the most significant goals of a developing country: to train its own lawyers to a level of expertise and self-sufficiency, and to be able to represent itself in DSU proceedings.

The second part has also discussed and highlighted significant factors regarding the participation of developing countries in the WTO dispute settlement body. The retaliation

was illustrated and considered a significant constraint, which limited the participation of developing countries in the WTO dispute settlement body. Therefore, the part analysed the retaliation and cross retaliation rule, which meant developing countries could not afford to pursue legitimate claims under the DSB. This also makes developing countries less likely to litigate their dispute under the DSB. Therefore, that part tried to analysis whether there is an ability to effectively retaliate, which may be considered as a key determinant for WTO Members complying with dispute settlement rulings. Consequently, the part examines the operation of the developing country with the WTO retaliation, which may include limitations placed on them via the lack of retaliatory force in taking recourse to these procedures against developed countries on the one hand and the threat of developing countries from disputes on the other. It also evaluates and analyses the retaliation rules undermining the utility of WTO dispute settlement for developing countries. It reveals the statistics of WTO Members using the dispute settlement system, particularly for developing countries involved.

The chapter also evaluated the experience of developing countries with retaliation and cross-retaliation. Also, this part evaluated the constraint affecting developing countries' decisions to operate with the WTO dispute settlement system. The analysis of the constraint is based on three arguments. First, developing countries, with small domestic markets, cannot impose sufficient economic or political losses within the larger WTO Members to generate vital pressure to induce compliance. Secondly, the retaliation, 'suspension of concessions', might be more detrimental to a developing country rather than a developed country WTO Member. Thirdly, the WTO rulings cannot be enforced by developing countries, therefore developing countries have little incentive in the WTO dispute settlement proceedings.

The third part of chapter 4 casts light on and highlights the significant factors regarding the participation of developing countries in the WTO dispute settlement body. The duration of the DSB process and compensation were illustrated and considered among the most significant constraints limiting the participation of developing countries in the WTO dispute settlement body. Thus, this part analysed the lengthy process of the DSU, which limits the participation of countries in the DSB, particularly developing countries. This makes it less likely for developing countries to resolve their disputes under the DSB. First, the duration of the dispute resolution process has been highlighted, and an evaluation of the constraint has been emphasized. The DSU's dispute resolution process has been described. It appears that the DSU process creates a dilemma for developing countries in participating in WTO dispute settlement proceedings. In addition, compensation under the DSU was analysed and evaluated, as was the constraint this offers. The section considered current dissatisfaction with the compensation scheme. Thus, the reasons considered for rarely using the remedy of compensation were highlighted. First of all, the voluntary of compensation when disputing parties have to agree on the solution. Second, compensation has to be regular with the covered agreements. Third, compensation is not providing efficient reparation of damages.

6.2 Recommendation

Chapter 5 mentioned the most significant potential solutions for tackling the constraints on developing country participation in WTO dispute settlement proceedings. Those solutions try to make the WTO system more workable for developing countries in settling disputes. In addition, the chapter tried to demonstrate the significance of reforming the DSU. Therefore, it recommends that the proposals appearing in chapter 5 should use in actual practice in the DSB. Indeed, while the dispute settlement system has been considered successful for

developing countries, but there are still a number of significant procedural needs reforms that the DSU dispute settlement system must consider. Those reforms have been included in part 1, 2 and 3 of chapter 5. Part 1 discusses the solution for a lack of financial and legal resources. Part 2 illustrates the notion of collective retaliation. Part 3 discusses the time and compensation of the DSB. Those are considered to be processes that tackle the key practical constraints on the ability of developing countries to enter into the WTO dispute settlement system. Increasing the use of those methods could be understood as the main way of achieving a system that works for and to benefit of developing country interests. If the WTO takes measures that are included in chapter 5 that would improve the DSU effectively as well as improve developing country use of the WTO DSB. It is recommended that developing countries work towards establishing those methods in practice by making agreements between all the developing countries. This will make them more powerful in supporting their proposals in the WTO.

In addition, some constraints on developing country participation in the WTO dispute settlement proceedings remain, and developing countries need to face this weakness in the WTO. All developing countries should push for the development of the WTO dispute settlement system to make it more adjudicative and enforceable when dealing with their concerns. The possible solutions presented in this thesis for tackling the constraints on developing country participation in the WTO dispute settlement proceedings should be taken into consideration.

Part 1 of chapter 5 shows that the aim of these recommendations is to improve the DSU rules and make them work for developing countries. Therefore, this part highlighted the possible solutions that are intended to tackle some of constraints that limit developing country

participation in WTO dispute settlement proceedings. This part, therefore, illuminates and evaluates the possible resolutions that consider the main factors and more significant methods in the DSU to be more workable for developing countries. This part also focused on some of the WTO Member attempts at solving some of the obstacles facing developing countries in both the consultations and the DSU adjudication. Moreover, it indicates some of the WTO Member proposals to smoothing out the WTO dispute settlement system to create an effective and successful system since the establishment of the DSU until to date. Therefore, this part discusses the solution for a lack of financial and legal resources. First of all, it suggests a fund for developing and less developed countries. Second, paying attorneys' fees, when developing countries are successful complainants under the DSU, could be a good approach for developing countries' ability to participate in the dispute settlement system. Third, it is believed that reform to the operation of Article 27.2 will improve developing countries' use of the DSU as well as assisting developing countries to address the issue of the high cost of the DSU. Fourth, it considers that the proposal to reform the ACWL may address the high cost of WTO dispute settlement system litigation as well as tackle limits on the participation of developing countries in WTO dispute settlement proceedings. In addition, this part highlights the significant reinforcement for consultations and mediations. It believes that using more consultations and mediation would have great benefits for developing countries and give them more effective ways to discuss solutions to their disputes. Also, these methods give developing countries another chance to look for solutions. Therefore, consultations and mediation might be considered as good methods to resolve many obstacles which limit developing country participation in WTO dispute settlement proceedings.

Part 2 illustrates the notion of collective retaliation, which undertakes the problem of enforcing rulings of the DSB that are considered a factor limiting participation in WTO

dispute settlement proceedings. The collective retaliation method is considered a good method for developing countries to make developed countries comply with the DSB rulings. Also, it provides real pressure to encourage the DSU process as well as provides benefits to all members of the WTO. The collective retaliation method has the strongest effect in encouraging members to comply with the DSU rulings because it includes and permits the formation of cooperation between members to create and represent a true threat to the non-complying members to end their illegal behaviour. Indeed, the collective retaliation method induces compliance to restoring the legal status. Also, it provides a cooperative character to the existing retaliation remedy. In addition, it is thought that the collective retaliation is based on a multilateral agreement that, indeed, any violation on the agreements impairs the interest of all other members. Therefore, there is a reason to include collective retaliation in the DSU. Also, it is considered that the collective retaliation might be the last resort to remedy the violation and to induce compliance. It is thought that this method gives equal protection to all the WTO Members, particularly to smaller states. Therefore, it will be great to include developments such as this in the DSU. Indeed, this part tries to highlight some factors that may be considered possible solutions to constraints limiting developing country participation in WTO dispute settlement proceedings. This part tries to evaluate the possible solutions that are important in making the WTO DSU work better for developing countries in settling disputes between themselves and developed countries. The retaliation and cross-retaliation are key constraints causing a lack of developing countries entering into the WTO dispute settlement system. However, collective retaliation is considered to be a process that can tackle the practical concerns of developing countries entering into the WTO dispute settlement system. Therefore, this part provides collective retaliation in some subparts. First, it provides the retaliation rules and an evaluation of collective retaliation. Second, it presents collective retaliation proposals. Third, it provides an analysis of collective retaliation.

The aim of Part 3 is to improve developing countries access to the DSU as well as to improve the DSU rules and make them work for developing countries. Therefore, this part highlighted possible solutions that consider tackling some of constraints that limit developing country participation in WTO dispute settlement proceedings. This part, therefore, evaluates the possible resolutions that consider the main factors and more significant methods in the DSU to be more workable for developing countries in the dispute settlement system. This part also focuses on some of the WTO Members' attempts to solve some of the obstacles that face developing countries in both consultations and the DSU adjudicatory. Moreover, it reveals some of the WTO Members' proposals to smooth the WTO dispute settlement system and create it effective and successful system. It discusses the time and compensation of the DSB. These proposals can be sought to improve compliance with DSB rulings, enhance the timeframe of the DSU and to seek the improvement of the financial compensation in the WTO dispute settlement system. Therefore, it argues for reforms in both the adjudicatory and non-adjudicatory stage of the DSU. First of all, it discusses the reinforcement of consultations that might avoid many constraints that limit developing country participation in WTO dispute settlement proceedings. Second, the retrospective damages by financial compensation may remove all the present incentives for delay in the dispute settlement process, especially on the implementation and enforcement of the DSU rulings. The purpose of this thesis is to make developing countries have more participation in WTO dispute settlement proceedings. Therefore, the aim of reforming the DSU is tackling the constraints on developing country participation in WTO dispute settlement proceedings. Those solutions try to make the WTO system more workable for developing countries in settling disputes. Moreover, they will make developing countries effectively operate the same way as developed countries. Therefore, it recommends that those proposals appearing in this thesis should be used in actual practice by establishing them in the DSB.

Appendix 1: WTO Membership under Article XIV

Country	WTO Membership
Angola	1 December 1996
Benin	22 February 1996
Bolivia	13 September 1995
Botswana	31 May 1995
Burkina Faso	3 June 1995
Burundi	23 July 1995
Cameroon	13 December 1995
Central African Republic	31 May 1995
Chad	19 October 1996
Colombia	30 April 1995
Congo	27 March 1997
Cuba	20 April 1995
Cyprus	30 July 1995
Democratic Republic of the Congo	1 January 1997
Djibouti	31 May 1995
Dominican Republic	9 March 1995
Egypt	30 June 1995
El Salvador	7 May 1995
Fiji	14 January 1996
Gambia	23 October 1996
Grenada	22 February 1996
Guatemala	21 July 1995

Guinea	25 October 1995
Guinea Bissau	31 May 1995
Haiti	30 January 1996
Jamaica	9 March 1995
Lesotho	31 May 1995
Liechtenstein	1 September 1995
Madagascar	17 November 1995
Malawi	31 May 1995
Maldives	31 may 1995
Mali	31 May 1995
Mauritania	31 May 1995
Mozambique	26 August 1995
Myanmar	1 January 1995
Nicaragua	3 September 1995
Niger	13 December 1996
Papua New Guinea	9 June 1996
Poland	1 July 1995
Qatar	13 January 1996
Rwanda	22 May 1996
Sierra Leone	3 July 1995
Slovenia	30 July 1995
Solomon Islands	26 July 1996
St Kitts& Nevis	21 February 1996
Switzerland	1 July 1995

Togo	31 May 1995
Trinidad & Tobago	1 March 1995
Tunisia	29 March 1995
Turkey	26 March 1995
United Arab Emirates	10 April 1996
Zimbabwe	3 March 1995

Appendix 2: How long to settle a dispute?[1256]

These approximate periods for each stage of a dispute settlement procedure are target figures-the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.	
60 days	Consultations, mediation, etc.
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)

[1256] The World Trade Organization (2011), *The World Trade Organization*. 'How long to settle a dispute?' *Available from:* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [Accessed: November 12, 2013].

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