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The Current and Future WTO Dispute Settlement System

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Practical problems discussing
Article 21.5 and Article 22 of the DSU

Master thesis
20 p

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Summary

To settle disputes concerning rights or obligations under WTO agreements, the WTO enforces a dispute settlement system. The WTO dispute settlement system has been in operation since 1995 and has, during this time, been the most productive of all international dispute settlement systems. The Dispute Settlement Understanding is a dispute settlement system between governments, and the use of the system is limited to members of the WTO. The WTO dispute settlement process contains four main stages, namely consultations, the panel stage, appellate review proceedings, and implementation and enforcement. I am focusing on the critical stage of implementation and enforcement and the practical problems that may arise using the remedies available in this phase of the process in this thesis.

The Dispute Settlement Understanding offers three types of remedies when a member is breaking WTO law. The withdrawal or amendment of the WTO-inconsistent measure is the final remedy. The DSU also provides for two temporary remedies which may be applied while awaiting the withdrawal or amendment or if the losing party fails to bring its inconsistent measure into compliance with WTO obligations. The two temporary remedies are compensation and suspension of concessions or other obligations. One issue arising at the implementation stage of the DSU is the relationship between article 21.5 of the DSU and article 22.2 of the DSU. Question may arise whether the compliance proceedings or the suspension of concessions proceedings has priority, if either. Past DSU review negotiations have not found a solution to this issue of sequencing yet, the discussion is continuing in the current negotiations.

The concept of compensation has not been used very frequently. There are several possible reasons why compensation as a remedy is rarely used in practice and I am focusing on three aspects in this thesis. First, compensation is voluntary, and the disputing parties have to agree on the solution. Second, the compensation must be consistent with the covered agreements. Third, the current system on compensation may not provide for effective reparation of damages suffered by the complaining party. There have been discussions from time to time to make the compensation within the DSU financial but every proposal has always been turned down.

To suspend concessions or other obligations is a remedy used more frequently than compensation. However, there are practical problems arising with this remedy as well. First, retaliation measures are trade destructive and can affect the injured party negatively as well as the losing party. Second, in particular the possibility to retaliate

is not a genuine option to smaller or developing country members. Third, these smaller and developing country members are also the ones that are most affected by the possibility to “cross-retaliate”. The discussion in this thesis shows that the remedy is not efficient for every party in every single dispute and may therefore uphold the inequality between the members of the WTO.

It was determined by the time of the introduction of the DSU that the system was to be examined and evaluated after using it for a couple of years. The negotiations are still in progress. The members were encouraged to contribute with questions, proposals, and comments concerning changes and improvements of the DSU to these special sessions. The Chairman of the Special Session of the DSU summarized the proposals and drafted legal texts which ended up in the so-called *Chairman’s text*. To me, it seems like the review of the DSU has been set aside while awaiting the negotiations in other important WTO areas. We may see the DSU as part of the overall “give and take” in the end anyway, even if this was not a desirable outcome in the beginning of the negotiations.

356¹ consultation questions have been made since the introduction of the dispute settlement system. It is important to remember that the great majority of the cases are settled through consultations or mutually agreed solutions, never reaching the full DSU process and the problems with the remedies described in this thesis. The remedies available today may not always result in the most efficient solution. However, it is important to remember that the remedies existing today are the remedies which the member states found they were willing to accept both as successful complainants and as unsuccessful defendants. From a democratic, diplomatic, and political point of view, an emergency exit like article 22 of the DSU is necessary for the practical function of the WTO dispute settlement system.

¹ Update of all WTO Dispute Settlement cases: Report WT/DS/OV/29, 9 January 2007.

Writer's preface

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Luxembourg, The Grand Duchy of Luxembourg

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Abbreviations

DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ITO	International Trade Organization
LDC	Least Developed Countries
NGO	Non Governmental Organization
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

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1 Introduction

1.1 Introduction to Topic

The creation of fair and acceptable solutions to arising problems and disputes are the things I find most important and fascinating within the concept of jurisprudence. I believe that dispute settlement is one of the central elements when practicing law, both nationally and internationally. Dispute settlement within the World Trade Organization (WTO) is particularly interesting since the outcome influences different sized countries in different ways, in an area of great global importance. Taking economic, political, and social interests into account, these voluntary systems can be hard to carry out in practice.

The dispute settlement system has been a highlight of the WTO. It has evolved a lot from its forerunner, the General Agreement on Tariffs and Trade (GATT), and it is known to be the most developed and most active system of formal dispute settlement of all international regimes.² It is safe to predict that the WTO dispute settlement system, now in its second decade, will continue to be a highlight of the organization which is why, with this thesis, I am drawing attention to this fact.

1.2 Purpose

The purpose of this thesis is to study the current WTO dispute settlement system, focusing on the critical stage of implementation and enforcement and the practical problems that may arise using the remedies available in this phase of the process. The main purpose is to pay attention to the actual effect in practice when using the remedies available and how the outcome affects different members of the organization in different ways. The purpose is also to examine the review and negotiations on the area in order to glance into the future and development of the rulings.

1.3 Method

The method in writing this thesis is to first create a background of the WTO dispute settlement system, its institutions, and its stages of procedures. It is of great importance to gain this knowledge in order to be able to see and understand the complexity of creating, using, and developing such a system. The background knowledge is mostly gathered from literature on the area, past and present WTO legal documents, and WTO official documentation and publications. The knowledge is

² Lecture with Peter Kleen, School of Business, Economics and Law at Göteborg University, 14 March 2007.

applied to real life cases for a greater comprehension on how the rules are actually affecting the members. To gather information about cases and decisions, I have studied panel and Appellate Body reports in combination with articles, research papers, and different official WTO documents.

The method is to simultaneously glance into the future of the system while looking at the history. The discussion is inspired by articles, official WTO documentation and publications, and literature on the area. The current information on the WTO's website is of course an important way to keep track of the development within the area. Of great importance for the overall work is the method of using personal contacts to gather knowledge, to apply the facts in reality, and to get feed back on my ideas and conclusions. Taking the course of *Regulating International Trade*³ during the writing process created many personal contacts with professors and experts on the subject and with young argumentative co-students. The course provided me with important discussions and views on the subject, both in lectures and in smaller study groups. A real-life perspective was provided by telephone interviews with personnel at the Swedish national Board of Trade.

1.4 Limitations

Within this thesis I will discuss the dispute settlement system within the WTO. I will primarily focus on the stage of implementation, on the remedies available within the system, and on the practical problems that may arise at this stage of the procedure. I will also pay attention to the current negotiations on the subject and the future of the WTO dispute settlement system. When discussing the dispute settlement system in practice and the problems that may occur, I will only focus on three selective areas, following my main thesis, namely the sequencing issue, the concept of compensation and retaliation as WTO remedies. The examination of the proposals in the current negotiations will not cover a number of contributions while focusing on the aforementioned issues. Though the discussion concerning the future of *The Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) will have a more general approach.

1.5 Disposition

This thesis contains ten chapters. Chapter two to six provide the reader with background knowledge concerning the WTO dispute settlement system, the institutions involved within the system, the jurisdiction of the system, the access to the system, and the process. Chapter seven further explains the stage of

³ *Regulating International Trade*, Supervisor: Per Cramér, The Department of Law, School of Business, Economics and Law, Göteborg University, Sweden, 23 January to 28 March 2007.

implementation and enforcement and the remedies available before moving on to chapter number eight, which is applying article 21 of the DSU and article 22 of the DSU in practical situations. The three last chapters of the thesis are examining the DSU review and negotiations and discussing the future of the DSU before summarizing up with some concluding comments.

2 WTO Dispute Settlement System

2.1 Introduction

The agreements between the members of the WTO provide many extensive rules concerning international trade in goods, trade in services and aspects related to trade of intellectual property. Economically, politically, and otherwise, these rules are very important for the members of the organization. Hereby, it is no surprise that the members do not always agree on what is the correct application and interpretation of the rules. Members often argue whether about if a particular law or practice of a member constitutes a violation of an obligation or right provided in a specific WTO agreement.

To settle disputes concerning rights or obligations under WTO agreements between members, the WTO enforces a dispute settlement system. Dispute settlement is a central pillar in the multilateral trading system, and it aims to bring stability to the global economy. With the means of settling disputes and the possibility of enforcing WTO law, the WTO rules-based system is striving to become more efficient, predictable, and secure. The priority is not, however, to pass judgement, but instead, where possible, to settle disputes through consultations and negotiations.⁴

The WTO dispute settlement system has been in operation since 1995 and has, during this time, been the most productive of all international dispute settlement systems. During its first ten years, more disputes had been brought to the WTO for settlement than to its predecessor, GATT, during its forty-seven years of existence from 1948 to 1995.⁵

2.2 Historic Development of the System

Even though the WTO dispute settlement system has only been used since the first of January 1995, it is not a novel system. The system is based on almost fifty years of experience in trade dispute resolution from the GATT 1947. Disputes of today as well

⁴ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm , visited on 30 January 2007

⁵ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 173.

as disputes of past times can be solved in many different ways. Essentially there are two methods⁶ to reach a peaceful resolution of international disputes:

- (i) through diplomatic negotiations between the concerned parties, with varying interference and assistance by third parties; or
- (ii) through adjudication by an independent entity, also called arbitration and judicial settlement.

There has been an increase in the importance and efficiency of international dispute settlement through adjudication over the last years. The WTO dispute settlement system is one of the main contributors of this evolution in international relations.

2.2.1 The System under GATT 1947

GATT 1947 did not provide a detailed dispute settlement system; it contained only two articles relating to dispute settlement. Neither article XXII of the GATT nor article XXIII of the GATT specifically mentioned dispute settlement or a detailed way to handle an upcoming disagreement between the members. The unsuccessful settlement of a dispute under articles XXII or XXIII was during the first years of GATT and handled by “working parties”. The working parties were composed by, and consisted of representatives of all interested contracting parties including the parties of the dispute. The working parties adopted the reports by consensus among all participants.⁷

The system of working parties was replaced by panels consisting of three to five independent experts from non-involved GATT contracting parties. The panels reported their conclusions to the GATT Council which consisted of all the members. The Council had to adopt the recommendations or rulings by consensus before it became legally binding upon the members concerned. The GATT panels created an important jurisprudence and started to follow a more rules-based and judicial style of reasoning in their reports. This system worked well during the 1950s whilst the organization was still relatively small and consisted of like-minded members which had worked together in the ITO/GATT negotiations and agreed upon the GATT 1947.⁸

⁶ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 175-176.

⁷ GATT 1947 article XXIII:2, A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 12.

⁸ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 177.

The dispute settlement system was not used frequently during the 1960s, but when the European Economic Community was established and an increasing number of developing countries became members of the WTO, the need for a dispute settlement system became essential. One problem that resulted was that the small, homogenous group of members was replaced by a new, larger organization consisting of a more argumentative generation. As a solution, a legal office was established in 1983 to help the trade diplomats with the panel reports. This created more confidence among the members, and the panel reports were used as a kind of precedent. The GATT dispute settlement system gradually changed from a power-based system of settlement through diplomatic negotiations into a system with features of a rule-based system of dispute settlement through adjudication.⁹

Even though the GATT system generally was considered effective, it had some serious imperfections which became obvious during the late 1980s and early 1990s. The most acute problem was the way key decisions¹⁰ were taken. These decisions were all to be taken by consensus of the Council. A member concerned by the conflict could block or delay a decision and paralyse the whole dispute settlement system. Panels were pressured to come to a conclusion satisfactory to all parties even if it may not have been the most convincing one. It was hard for the panels to handle disputes regarding sensitive political matters due to the assumption that the losing member would block the adoption of the report.

Another problem during this time was related to some of the agreements concluded in the Tokyo Round in 1973-1979. For example *The Anti-Dumping Code*, contained special dispute settlement procedures for disputes concerning these agreements. Confusion and disputes arose over which procedure applied to which dispute. A risk for “forum-shopping” appeared where a member might choose the agreement and the dispute settlement system most beneficial for their specific dispute.¹¹

2.2.2 The Uruguay Round

The dispute settlement system had high priority during the Uruguay Round negotiations. In 1989, halfway through the negotiations, the members agreed to implement some preliminary rules of dispute settlement. The decision was called

⁹ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 12-14, Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 177-179.

¹⁰ Examples on key decisions are: decisions on the establishment and composition of a panel, the decisions on adoption of a panel report, and the decisions on the authorisation on the suspension of concession. Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 180.

¹¹ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 14-15.

Improvements to the GATT Dispute Settlement Rules and Procedures and contained, for example, the recognition of the right of a complainant to bring a case before a panel and detailed timeframes for panel proceedings. However, no agreement was reached concerning the issue on how to adopt panel reports.¹²

The atmosphere among the members changed drastically when the *US Trade and Competitiveness Act of 1988* was presented. The act intensified and extended section 301 of the US Trade Act of 1974. Section 301 stimulated the imposition of unilateral trade sanctions against countries which the United States considered to be in violation of their obligations under GATT. The other members objected and demanded the United States change its legislation. The United States pointed out that, due to the concept of consensus decision, the GATT dispute settlement system was too weak to protect the interests of US trade. This situation encouraged the other member governments to propose a deal and they agreed to create a new and more secure system in exchange for Section 301 not being implemented by the United States.¹³

2.2.3 The Dispute Settlement Understanding

As a result of the deal concerning section 301 of the US Trade Act of 1974, an agreement was reached on the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. This was one of the most important accomplishments of the Uruguay Round Negotiations. This agreement is usually referred to as the *Dispute Settlement Understanding* or the DSU. The DSU is part of the WTO Agreement as Annex 2. An important new feature in the DSU was the elimination of any member's right to block the adoption of a report. In this new system, the panels and reports are automatically established and adopted by the Dispute Settlement Body (DSB), unless there is a consensus not to do so.¹⁴

3 The Institutions Involved in the System

The WTO dispute settlement procedure involves a number of different participants. While discussing the institutions involved in the WTO dispute settlement system one usually distinguishes between political institutions and independent judicial-type institutions. DSB is an example of the former and the Appellate Body is an example of the latter. This chapter will introduce some of the most appearing bodies participating in the process.¹⁵

¹² A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 15.

¹³ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 180-181.

¹⁴ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 15-16.

¹⁵ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 17.

3.1 The Dispute Settlement Body

The WTO dispute settlement system is administered by the dispute settlement body (DSB).¹⁶ The WTO Agreement states that there shall be a General Council composed of representatives, usually ambassador-level diplomats, of all the members.¹⁷ The representatives reside at the WTO base in Geneva and they act under the trade ministry or the foreign affairs ministry of the member they represent. The DSB is a political institution since the participants receive instructions from their government on the positions to take within the DSB.¹⁸ Further, the WTO Agreement establishes that the General Council and the DSB are in fact the same body; the DSB is the alter ego of the General Council. Basically, the General Council acts like the DSB when it is administering (i.e. overseeing) the dispute settlement system.¹⁹

The DSB has the authority to establish panels (the referral of a dispute to adjudication), to adopt panel and Appellate Body reports (making the adjudicative decision binding), to maintain surveillance of implementation of rulings and recommendations, and to authorize suspension of concessions and other obligations under the covered agreements.²⁰ The DSB also appoints the members of the Appellate Body.²¹

The DSB shall take a decision under the DSU by consensus. The DSB shall be considered to have decided by consensus if no member present at the meeting of the DSB when the decision is taken formally objects to the proposed decision²². Practically this means that the chairperson does not actively ask every member present whether it supports the decision or not, nor is there a vote. A member that wants to block a proposal must be alert and active during the meeting.

It is also important to observe the negative/reverse consensus that applies when the DSB establishes panels, adopts panel and Appellate Body reports, and when it authorizes retaliation.²³ Practically this means that the DSB must approve the decision unless there is a consensus against it. Hereby, a member can always prevent this reverse consensus by avoiding blocking the decision. In other words, a member that wants to block a decision needs to persuade all the other WTO members to block or

¹⁶ Article 2.1 of the DSU

¹⁷ Article IV:2 of the WTO Agreement

¹⁸ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 17.

¹⁹ Article IV:3 of the WTO Agreement

²⁰ Article 2.1 of the DSU

²¹ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 229.

²² Article 2.1 of the DSU

²³ Articles 6.1, 16.4, 17.14 and 22.6 of the DSU

stay passive. This system turns the negative consensus into a theoretical possibility of quasi-automatic nature. It also makes the DSB's real influence over WTO dispute settlement limited. But the system fills the important purpose of keeping the members informed of the disputes and it also creates a political forum for debate concerning the use of the system.

3.2 Panels and The WTO Secretariat

The quasi-judicial panels are in charge of the actual adjudication at the first instance of the dispute settlement system. The panels normally consist of three, in exceptional cases five, experts. These experts are chosen for the purpose of adjudicating a certain case. The panels are not permanent; a new panel is established for every dispute and is dissolved when the duty is completed.²⁴ The complaining party must request the DSB to establish a panel. The panel shall be established by reverse consensus at the latest at the DSB meeting following the meeting at which the request for the establishment first appeared.²⁵

A panel shall be composed of well-qualified and independent individuals, both governmental and/or non-governmental. Examples of suitable panel members are according to the DSU individuals who have presented or served a case to a panel, served as a representative of a member, or served as a representative to the council. The appointed individuals serve independently and not as representatives of the government or any organization. Nationals of the members concerned by the dispute are not suitable unless the parties agree otherwise.²⁶ Normally, panellists are retired government trade officials with legal and academic knowledge. The WTO Secretariat maintains a list of individuals suitable for the task.²⁷

The panel established must review the legal and factual aspects of the case and yield a report on its conclusions to the DSB. A panel may examine and consider only those claims that it has the authority to regard under its terms of reference.²⁸ The panel must make an objective assessment of the facts and if the panel finds the claims from the complainant legitimate and the measures or actions being challenged WTO-inconsistent, it makes a recommendation for implementation by the respondent.²⁹

²⁴ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 231.

²⁵ See article 6 of the DSU for more specific rules. See also Appellate Body Report, *EC – Bananas III*, paragraph 142.

²⁶ Article 8 of the DSU

²⁷ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 235-236. Article 8.4 of the DSU

²⁸ Article 7 of the DSU

²⁹ Articles 11 and 19 of the DSU

The WTO Secretariat is in charge of the administrative element of the dispute settlement system. The institution is also assisting the panels on the procedural and legal level in the current dispute meaning that the Secretariat takes care of the logistical and organizational preparations as well as assisting the panels with legal support, for example outlining the jurisprudence of past panel decisions.³⁰ Since the panels are just temporary institutions, the permanent WTO Secretariat provides the system with continuity, consistency, and predictability.³¹

3.3 Appellate Body

A permanent Appellate Body hears appeals concerning reports of dispute settlement panels.³² Hereby, the Appellate Body is the second and final stage of the adjudicative stage of the system. The body was established by the DSB in 1995 and consists of seven members. The members are elected for a four year term, and every individual may be re-elected once. The persons shall serve in rotation. A member of the Appellate Body must be a person of recognized authority with demonstrated expertise in law, international trade, and the subject matter of the covered agreement. The person must not be affiliated with any government. All the members need to be available at any time, and shall not participate in any dispute that may create a direct or indirect conflict of interest.³³ So far, most of the members have been senior judges, university professors, practising lawyers, or past government officials.³⁴

The Appellate Body may uphold (agrees with both the reasoning and the conclusion of the panel), modify (agrees with the conclusion but not with the reasoning), or reverse (disagrees with the conclusion) the legal findings of the panel.³⁵ In some cases the Appellate Body has gone beyond its mandate and completed the legal analysis, for example addressing the claims that the panel did not address.³⁶

4 Jurisdiction of the System

The WTO dispute settlement system has jurisdiction over consultation and dispute settlement under the covered agreements occurring between members. The cause of action for a WTO dispute needs to be found in the covered agreements listed in

³⁰ Article 27 of the DSU

³¹ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 23.

³² Article 17.1 of the DSU

³³ Article 17 of the DSU

³⁴ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 23-24.

³⁵ Article 17.13 of the DSU

³⁶ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 252-254.

Appendix 1 to the DSU.³⁷ The covered agreements consist of the WTO Agreement, the DSU, the TRIPS Agreement, the GATS, the GATT 1994, and all other multilateral agreements on trade in goods. Hereby, the DSU creates a sole, coherent dispute settlement system that may be used on any dispute arising under the covered agreements. On the other hand, some of the agreements do provide for special and more detailed rules relating to specific obligations under that agreement. In this case, the additional rules apply over the rules in the DSU to the extent there is a difference between them.³⁸

The WTO dispute settlement system distinguishes itself by a broad scope of jurisdiction as well as by an obligatory, exclusive and contentious nature. Complaining members are obligated to recourse to, and abide by the rules and understanding of the DSU.³⁹ Becoming a member of the WTO involves an acceptance of the obligatory jurisdiction of the dispute settlement system. In case of a dispute, members have to recourse to the DSU to the exclusion of any other system.⁴⁰

5 Access to the System

The DSU is a dispute settlement system between governments, and the use of the system is limited to members of the WTO.⁴¹ Each covered agreement clarifies the provisions under which a member can turn to the DSU for settlement of a dispute. Particular attention shall be paid to Article XXIII:1 of the GATT 1994. The article states the bases for the complaint, and many of the other covered agreements are referring to this article. The WTO system offers three types of complaint, which is rare in comparison to other international dispute settlement systems. The different complaints are violation complaints, non-violation complaints, and situation complaints.⁴²

The Dispute Settlement System does not require a member to have a legal interest to have access to the system. The Appellate Body stated in the *EC – Bananas III* case that a member has broad discretion in deciding whether to bring a case against another member under the DSU or not. The Appellate Body found that the United States had the right to bring a claim under the GATT 1994 even though the member did not export bananas. The Appellate Body saw the United States as a potential exporter of

³⁷ Article 1.1 of the DSU

³⁸ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 188, article 1.2 of the DSU

³⁹ Article 23.1 of the DSU

⁴⁰ Panel Report, *US – Section 301 Trade Act*, paragraph 7.43.

⁴¹ Appellate Body Report, *US – Shrimp*, paragraph 101.

⁴² Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 191-192.

bananas because of its current production, and the EC banana management might affect the US' market. The Appellate Body added that the conclusion did not mean that the factors the body had noted in this case would necessarily be conclusive in another case.⁴³

However, the Appellate Body stated the strong power of initiative of the members in the *Mexico – Corn Syrup* case. Given the largely self-regulating nature of the requirement in Article 3.7 of the DSU, panels and the Appellate Body must presume that when a member submits a request for an establishment of a panel, such member does so in good faith and, has duly exercised its judgement as to whether recourse to that panel would be fruitful.⁴⁴

Even if almost every dispute brought to the WTO directly concerns exporting or importing individuals and companies or non-governmental organizations these parties do not have direct access to the dispute settlement system.⁴⁵ Only WTO members can bring disputes under the system. There is not a harmonized view on whether non-governmental actors shall play a role in the proceedings under the DSU or not. Many WTO members have adopted internal regulations giving the private actors a possibility to bring a violation of WTO law to the attention of their government.⁴⁶

Appellate Body case law gives the panels and the Appellate Body the authority to consider written briefs from private actors. The Appellate Body and the panels have the good judgment to accept or reject these amicus curiae briefs (friend of the court briefs) but are not forced to consider them at all. Many members criticise the concept of the amicus curiae and to date there is no clear rule adopted.⁴⁷

6 The Process

The WTO dispute settlement process contains four main stages.⁴⁸ This section briefly analyzes the first three stages before moving on to a more comprehensive examination of the fourth stage in chapter number seven.

⁴³ Appellate Body Report, *EC – Bananas III*, paragraphs 132-138.

⁴⁴ Appellate Body Report, *Mexico – Corn Syrup*, paragraph 74.

⁴⁵ For example: Kodak actively supported the US claims in *Japan – Film*, Chiquita played a central role in the involvement of the United States in the *EC – Bananas*.

⁴⁶ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 202-203.

⁴⁷ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 9.

⁴⁸ See annexes 1 and 2 of this paper: Time frames and Flowchart of the WTO Dispute Settlement process.

6.1 Consultations

The DSU prefer and recommend disputing members to reach a solution through consultations at the first stage.⁴⁹ An amicable solution is more cost-effective and creates a better long-term trade relationship between the members than adjudication by a panel. Consultations also give the parties a chance to discuss the facts and the claims, and possibly avoid misunderstandings. A foundation for settlement or further DSU proceedings is created.

Any WTO member having the opinion that a benefit under the WTO agreement is being nullified or impaired by another member has the right to ask for consultations. The WTO members are required to pay sympathetic consideration to and offer adequate opportunity for consultations. The request for consultation shall be notified to the DSB, and it must be submitted in writing giving the reasons for the request and identifying the measure at issue and the legal basis for the complaint.⁵⁰

The consultations are mainly a diplomatic process with no prejudice to the rights of any member in any further proceedings. Offers made during this stage have no legal consequences to the later stages of the DSU proceedings. A member must reply to a request within ten days if not otherwise agreed. The member shall enter into consultations within thirty days after the date of receipt of the request in good faith, and with the view to reach a mutually satisfactory solution. If these time limits are not followed, the requesting member has the right to proceed directly to the establishment of a panel.⁵¹

Consultations can be requested under either article XXII of the GATT or article XXIII of the GATT. The main difference between the two legal bases is the ability for third parties to join the consultation. Consultations that are held pursuant to Article XXII of the GATT are open for other WTO members. Hereby, the choice between the two bases is a strategic one depending on if the complainant wants other parties to participate or not. Third parties may have a substantial trade interest in the dispute and may therefore want to request to join consultations.⁵²

Successful consultations leading to a mutually agreed dispute solution must be notified to the DSB and other relevant bodies. Any member may raise a point relating

⁴⁹ Article 4 of the DSU

⁵⁰ Article 4.2 and 4.4 of the DSU

⁵¹ Articles 4.6 and 4.3 of the DSU, Panel Report, *US – Underwear*, paragraph 7.27.

⁵² A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 45-47.

to the solution. Every agreed solution must be consistent with WTO law.⁵³ If the consultations between the parties fail within sixty days of the receipt of the request for consultation, the complainant may request the establishment of a panel for adjudication. Special rules apply when a developing-country is involved in the consultations. The consultations between the parties usually continue during the panel process.⁵⁴

6.2 The Panel Stage

The request for establishment of a panel starts the adjudicative stage of the process. If the parties are unable to agree on the composition of the panel, the composition will be decided by the WTO Director-General. The DSU sets out the basic rules concerning panel proceedings. Many panels find it necessary to complement the regulation with more detailed working procedures.⁵⁵

Both parties of the dispute submit written presentations to the panel. After each written submission, the panel holds a meeting with the parties where the members can speak their minds and present their points of view. In recent years, the meetings have become more formal and court-like. The panel has the authority to ask any WTO member about information in the case. Even at this stage, the developing countries have access to special treatment.⁵⁶ Any WTO member having a substantial interest in a matter before a panel and having notified its interest to the DSB, shall have an opportunity to be heard by the panel and to make written submissions.⁵⁷ The panel also has the right to seek information and technical advice about complex issues in the case from any individual, body, or expert which it deems appropriate.⁵⁸

Panel deliberations are confidential, and the reports are drafted in the light of the information provided during the proceedings without the presence of the parties⁵⁹. The panel issues an interim report containing a descriptive section, its findings and its conclusions. The parties may request the panel to review aspects in the report or to hold another meeting. The arguments of the review are included in the final report.⁶⁰

⁵³ Articles 3.6 and 3.5 of the DSU

⁵⁴ Articles 4.7, 12.10 and 11 of the DSU

⁵⁵ Article 12 of the DSU and Appendix 3 to the DSU

⁵⁶ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 261-263.

⁵⁷ Article 10.2 of the DSU

⁵⁸ Article 13 of the DSU

⁵⁹ Articles 14.1 and 14.2 of the DSU

⁶⁰ Article 15 of the DSU

A couple of weeks after the final report has been presented to the members concerned and translated into the three working languages of the WTO, the report is distributed to the rest of the WTO. Within sixty days after the date of the circulation, the report is adopted at a DSB meeting, unless one of the parties decides to appeal or the DSB decides by consensus not to adopt the report. As a general rule, the panel must conduct its examination within six months. However, practically a panel process lasts for over twelve months. The delay is, for example, explained by the complexity of the case, the need to consult experts, and problems scheduling meetings.⁶¹

6.3 Appellate Review Proceedings

Only the disputing parties are allowed to appeal a panel report. Third parties which have notified the DSB of a substantial interest in the dispute at the time of the establishment of the panel can make written submissions and be heard by the Appellate Body.⁶² The majority of the reports circulated are appealed to the Appellate Body.

Article 17 of the DSU is the only article specifically dealing with the structure, procedures and functions of the Appellate Body. However, several general articles can be applied on the work of this instance. *The Working Procedures for Appellate Review*⁶³ set out detailed working procedures for the Appellate Body. These *Working Procedures* handle everything from the duties of the Appellate Body to the specific deadlines for filing an appeal. Rule 16(1) of the *Working Procedures* allows, under certain circumstances, the Appellate Body to adopt additional procedures. An appellate review is initiated when a party announces the DSB in writing of its decision to appeal, and simultaneously filing a notice of appeal with the Appellate Body.⁶⁴

The Working Procedures provide for detailed rules concerning deadlines, written submissions, and oral hearings. In appellate review proceedings, all third parties have a right to file a notice of appeal and to participate in oral hearings. The DSU states that the appellate review shall not exceed sixty days counting from the day a party formally notifies its decision to appeal. The Appellate Body shall notify the DSB in written when a delay is in question. In no case shall the proceedings take more than ninety days. In practice, the procedure in most of the cases has taken more than sixty days but the majority of all cases are completed within the ninety day period. Reasons

⁶¹ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 269-270.

⁶² Article 17.4 and 17.6 of the DSU

⁶³ *Working Procedures for Appellate Review*, WT/AB/WP/7, Dated 1 May 2003.

⁶⁴ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 270-273.

for the delays have so far been the complexity of the case, delayed translations, and work overloads.⁶⁵

The appeals are limited to legal questions and may only concern issues of law covered in the panel report and legal interpretations developed by the panel.⁶⁶ Therefore, the distinction between factual and legal questions is very important at this stage. Requesting an examination of new factual evidence or re-examining already existing evidence is not allowed. Evaluating evidence and establishing facts is the job of the panels. Generally speaking, a fact is the occurrence of a certain event in time and space⁶⁷, for example, whether or not a national authority has charged a thirty percent tariff instead of a twenty percent tariff on the importation of a certain shipment of goods. In comparison, the interpretation of the expression “like products” in article III:2 of the GATT is a question of law. Mixed questions of law and facts will of course arise in disputes. The Appellate Body jurisprudence gives guidance how to handle these problems in practice.⁶⁸

7 Implementation and Enforcement

This chapter will provide the reader with a greater knowledge concerning the last stage of the dispute settlement proceedings.

7.1 Background

The stage of implementation and enforcement is a question discussed among the members since the creation of the organization. Article XXIII of the GATT contains one sentence that states: *“If the contracting parties consider that the circumstances are serious enough to justify such actions, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.”* The proposal from the Geneva Conference in 1947 contained a similar solution. The discussions during the following conferences and rounds mainly concerned details about the remedies and the hierarchy between the different remedies as final or temporary measures.⁶⁹

The negotiations ended up with a solution where the DSU offers three types of remedies when a member is breaking WTO law. The withdrawal or amendment of the

⁶⁵ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 273-277.

⁶⁶ Article 17.6 of the DSU

⁶⁷ Appellate Body Report, *EC – Hormones*, paragraph 132.

⁶⁸ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 66-67.

⁶⁹ Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 384-387.

WTO-inconsistent measure is the final remedy. The DSU also provides for two temporary remedies which may be applied while awaiting the withdrawal or amendment or if the losing party fails to bring its inconsistent measure into compliance with WTO obligations. The two temporary remedies are compensation and suspension of concessions or other obligations, also referred to as retaliation. This section will further examine the implementation stage and the different remedies available in past and present time.

7.2 Article 21 of the DSU

When the DSB adopts the panels and, when in question, the Appellate Body's reports, there is a recommendation or ruling by the DSB addressed to the losing party to bring itself into conformity with WTO law or to find a mutually satisfactory modification. Article 3.7 of the DSU states that in the absence of a mutually agreement solving the dispute, the first stage in the dispute settlement system is usually to secure the withdrawal of the WTO-inconsistent measure.

7.2.1 Development of the Rule

One problem concerning trade related dispute settlement is how to guarantee that the losing party will comply with the ruling of the judging body. A necessary condition for upholding a functional system is a losing party obeying without coercive measures being applied. Surveillance and countermeasures from other parties put pressure on the losing party to comply with the rulings which may lead to implementation.

GATT article XXIII does not mention anything either about a member complying with a ruling within a certain time, or about any surveillance of the implementation. The article only mentions the possibility for GATT contracting parties to make proposals to the disputing parties or decide in the question. GATT contracting parties can also authorize a member to retaliate. The understanding from 1979⁷⁰ was a bit more concrete in its recommendation even if it was still quite vague. It stated: *The Contracting Parties shall keep under surveillance any matter on which they have made recommendations or given rulings. If the contracting parties' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the contracting parties to make suitable efforts with a view to finding an appropriate solution.*

⁷⁰ *Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 (BISD 26S/210) p 22.*

The *Ministerial Declaration* in 1982⁷¹ further specified the rules. The Council should survey the implementation process while the losing member reported continuously to the council about its proceedings. The GATT contracting parties should make suitable efforts to find an appropriate solution, and this could include a recommendation to compensate or an authorization to retaliate. The stage of implementation was attended to even in the Uruguay round. The main discussion concerned time frames and how to solve a dispute concerning the current status and level of the implementation of the losing party. The discussions continued and resulted in more concrete rules in the *Decisions on Improvements to the GATT Dispute Settlement Rules and procedures*⁷². These rules became the foundation of the more detailed and concrete rules in the current *Dispute Settlement Understanding*.⁷³

7.2.2 Surveillance and Implementation in the DSU today

Article 21 of the DSU regulates the surveillance and implementation of recommendations and rulings. The article states that prompt compliance with recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes to the benefit of all members.⁷⁴ The first obligation of the losing party is to inform the DSB within thirty days after the adoption of the report of its intention to implement the recommendations or rulings of the DSB. If immediate compliance is not possible, the implementing member has a reasonable period of time to put the recommendation or ruling into practice. The reasonable period of time may:

- (i) Be determined by the DSB;
- (ii) Be agreed on by the parties to the dispute; or
- (iii) Be determined through binding arbitration at the request of either party.⁷⁵

Practically, WTO members often claim that prompt compliance is impracticable. In many cases this is also true since an implementation often requires an amendment or a change in domestic law and legislative changes usually take time. During the reasonable period of time, the member continues to break WTO law but the member will not face the consequences of non-implementation. A guideline for the arbitrator in determining the reasonable period of time is that it should not exceed 15 months from the date of adopting the report. The time should be the shortest period possible

⁷¹ Ministerial Declaration of 29 November 1982, *Decision on Dispute Settlement* (BISD 29S/13), p (viii) and (ix).

⁷² *Decision on Improvements on the GATT Dispute Settlement Rules and Procedures* of 12 April 1989 (BISD 36S/61) p 1.

⁷³ Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 388-393.

⁷⁴ Article 21.1 of the DSU

⁷⁵ Article 21.3 of the DSU

within the legal system of the member concerned. Particular attention should be paid to matters affecting the interests of developing country members.⁷⁶

The DSB is responsible for the supervision of the implementation of panel and Appellate Body reports. Any member can raise the question of implementation at any time in the DSB. If the DSB does not decide otherwise, the issue of implementation is placed on the agenda of the DSB six months following the date of which the duration of the reasonable period of time is determined. The question remains on the agenda until the issue is solved. The *EC – Bananas III* case, for example, has been on the DSB agenda for years. No later than ten days before every DSB meeting, the member concerned is obliged to hand in a written report to the DSB explaining its implementation status. The reports put pressure on the member to advance in implementation, and they promote transparency. The complainant and any other members, usually take the opportunity to demand full implementation when the reports are handed in. The action shows that they are continuing to follow the matter closely and with full attention.⁷⁷

7.2.2.1 Compliance Panel Procedure

When a disagreement arises whether the losing member has implemented the recommendation or ruling or not, either of the disputing parties can request an establishment of a panel⁷⁸. This can easily happen in practice and has been a recurrent issue in the *EC – Bananas III* case⁷⁹, when the losing party has decided to pass a new law or regulation believing that this accomplishes full compliance, but the complainant disagrees. This procedure is referred to as the compliance panel procedure. The DSB refers the matter, if possible, to the original panel which shall circulate its report within ninety days. The Appellate body made clear that the task of the panel is not only to decide if the implementation effort fully complies with the recommendation or ruling. The panel must also judge the new measure in its whole and its consistency with a covered agreement.⁸⁰ Therefore, the assessment can include new and different claims from the ones raised before the original panel and Appellate Body.

⁷⁶ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 75-78, Articles 21.2 and 21.3 of the DSU

⁷⁷ Article 21.6 of the DSU. A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 78-79.

⁷⁸ Article 21.5 of the DSU

⁷⁹ Seth, *WTO och den internationella handelsordningen*, pp 98-99.

⁸⁰ Appellate Body report, *US – Shrimp*, paragraphs 85-87. Appellate Body report, *Canada – Aircraft*, paragraphs 40-41.

7.3 Article 22 of the DSU

If the losing member fails to implement the recommendation or ruling by the end of the reasonable period of time, the complaining party can turn to temporary remedies. These can be either compensation or suspension of WTO obligations. The temporary remedies are not preferred to full implementation of the decision of the DSB. Compensation and suspension of concessions shall only be applied until full implementation is performed.⁸¹

7.3.1 Compensation

Compensation is usually a way to make up for something that has happened, for example a caused damage or a performed work. The concept of compensation is used in different ways both within international law and in national jurisdiction. This section will present the solution within the WTO.

7.3.1.1 Development of the Rule

As said earlier, article XXIII of the GATT does not contain any rulings about compensation. The Nordic members made a jointly proposal on the aspect in the negotiations in 1954 – 1955. The working party discussed the question and concluded that compensation should be resorted to only if the immediate withdrawal of the measure was impracticable and only as a temporary measure pending the withdrawal of the measures which were inconsistent with the agreement. The report was later accepted by the GATT contracting parties.

The special needs of the developing countries were not discussed until ten years later. Brazil and Uruguay made a proposal which gave developing countries a right to financial compensation under certain circumstances. The proposal was widely criticized and was never adopted. The understanding from 1979 adopted the report from 1954 – 1955, and the ministerial declaration from 1982 stated that the GATT contracting parties could recommend compensatory adjustment with respect to other products.⁸²

The discussions in the Uruguay round concentrated on the creation of a well functioning system. On the one hand, the negotiators had the basic thought of reparation when causing damage. On the other hand they thought of the difficulties when deciding how the damage should be calculated and who should get the power to decide in which form compensation should be granted. Many members made

⁸¹ Article 3.7 and 22.1 of the DSU

⁸² Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 418-421.

proposals, and one joint opinion was that compensation was preferred to retaliation in all disputes. It was also stated that it would be difficult for a winning party to accept compensation in an area other than the damaged one.

*The Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*⁸³ did not mention anything about the concept of compensation, meaning the short statement from 1979 was still applicable. The discussion continued, and the members finally agreed on compensation as a temporary remedy but not a legal obligation. Many members were concerned that compensation may encourage non-compliance with recommendations and rulings. It was also observed that compensation did not benefit the specific industry that was actually damaged. The observation was recognized that the possibility to use compensation as a remedy was especially important to developing countries since these members usually have limited capacity to retaliate against a stronger opponent. The discussions finally resulted in the current rules in the *Dispute Settlement Understanding*.

7.3.1.2 Compensation in the DSU Today

If the losing party does not manage to reach full compliance by the end of the reasonable period of time, it has to enter into negotiations with the winning party with a view to agree upon a mutually acceptable compensation.⁸⁴ Compensation according to article 22 of the DSU is temporary and voluntary, meaning both parties need to agree upon using the concept of compensation and the level of the compensation. The compensation must be consistent with the covered agreements.

It is generally understood that compensation is to be offered not only to the winning party but to all WTO members. Compensation does not generally mean an amount of money being paid; it rather involves a benefit offered by the respondent. For example, 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.⁸⁵ Through this construction, compensation supports free trade principles.

7.3.1.3 Compensation in Other WTO Rules

There are some other rules existing within WTO that mention compensation to other members when a member wants to change its trade policy. One rule can be found in article XXVIII of the GATT. The WTO agreements include a special interpretation of

⁸³ *Decision on Improvements on the GATT Dispute Settlement Rules and Procedures of 12 April 1989* (BISD 36S/61) p 1.

⁸⁴ Article 22.2 of the DSU

⁸⁵ Seth, *WTO och den internationella handelsordningen*, p 100.

this article⁸⁶. The article states that if a member wants to modify or withdraw a concession, it is obligated to negotiate with the other members. The negotiations may include provision for compensatory adjustment with respect to other products, but the members concerned shall endeavor to maintain a general level of reciprocal and mutually advantageous concessions as favourable to trade as what was provided for in the agreement before the negotiations. Parties of the negotiations shall be the contracting parties with a principal supplying interest.

Another rule concerning compensation can be found in article XXIV of the GATT. If a number of members want to create a new customs territory, and the customs level becomes higher than before the new agreement was established, which is a prohibited measure under GATT, the group of members must negotiate with concerned members about compensation. Guidelines can be found in the special interpretation mentioned earlier. *The Agreement on Safeguards* also provides the WTO members with rules concerning compensation. The rules apply when a member wants to initiate a trade destructive measure to protect its domestic industry.⁸⁷

7.3.2 Suspension of Concessions or Other Obligations

To suspend concessions or other obligations is in fact a measure contrary to the basic principle of trade liberalization of the WTO. The measure is applied with the intention to damage another member's trade interest and coerce that member into a certain way of action.

7.3.2.1 Development of the Rule

The concept of retaliation in the WTO agreement has two bases:

1. Increasing customs and quantities restrictions can be used as a trade policy weapon to force the opponent to decrease its customs or quantities restrictions.
2. A member damaged because of inconsistent measures by another member has the right according to international law to use, under certain circumstances, prohibited measures against the law breaking party.

Article XXIII of the GATT states that if the contracting parties consider the circumstances serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations as they determine to be appropriate under the

⁸⁶ Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994.

⁸⁷ Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 428-429.

circumstances. The understanding from 1979 did not contain any further explanation, and neither did the ministerial declaration from 1982. A dominant attitude among the members was that the possibility to retaliate was a potential threat that members did not need to use as recourse, and therefore the remedy did not have any visible function in practice.⁸⁸

The concept of retaliation continued to appear indistinct. The measure was used only once⁸⁹ during the GATT regime and an obvious lack of guidelines existed. The concept of retaliation was not prioritized in the Uruguay round, and the improvement report from 1989 did not contain any rules about retaliation. After this, the question was often raised when discussions concerning compensation were on the agenda. Many members saw retaliation as a final remedy that should only be used after authorization from the GATT contracting parties. Numerous of proposals were offered from different members, but there was still no agreement on retaliation in the *Draft Final Act of 1990*. Later two outlines were drafted, and this was the first time the term “cross-retaliation” was mentioned.⁹⁰

7.3.2.2 Retaliation in the DSU Today

If the parties have not agreed on satisfactory compensation within twenty days after the end of the reasonable period of time, the complainant can turn to the DSB and ask for permission to impose trade sanctions against the losing party failing to implement the recommendation or ruling. This remedy is called suspension of concessions or other obligations under the covered agreement.⁹¹ The DSU does not mention the term retaliation but the expression is generally used when discussing and commenting international trade.

Concessions are, for example, tariff reduction commitments which WTO members have made in multilateral trade negotiations. The DSB must first give the complaining party authorization to suspend WTO obligations. The granting of the authorization must be done within thirty days of the expiry of the reasonable period of time. The approval is virtually automatic since the DSB decides on the request by reverse/negative consensus. When the request is approved, the winning party grants

⁸⁸ Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 444-447.

⁸⁹ Panel report, *The Netherlands/United states – Dairy products 1952* (BISD 1S/629). See Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 447-456 for a summary.

⁹⁰ Seth, *Tvistlösning i WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 456-460.

⁹¹ Article 22.2 of the DSU

the right to impose countermeasures that otherwise would be forbidden under the WTO agreement.⁹²

This remedy is bilateral, meaning it takes place on a discriminatory basis only against the member failing to implement recommendations or rulings. It can be taken only by members that were complaining parties, not by third parties. Suspension of concessions usually takes the form of a drastic increase in the customs duties on selected products of export interest to the offending party. An import quota on certain products from the member failing with the implementation is another example of retaliation. Retaliation puts economic and political pressure on the offending party to implement the recommendations. The remedy implies the raising of trade barriers by the winning member vis-à-vis the losing member. Therefore, this remedy is damaging the free trade principles. However, it also has the effect of rebalancing mutual trade benefits between WTO members.⁹³

7.3.2.2.1 Countermeasures

The DSU explains that retaliation should be imposed in the same sector as in which the nullification or impairment was found⁹⁴. To fulfill this purpose, the multilateral trade agreements are separated into three groups in harmony with the parts of Annex 1 to the WTO agreement, namely GATT, GATS, and TRIPS. A general principle is that if the violation occurred in the area of services, the complainant shall first seek to suspend concessions in this sector. Notice that, a WTO-inconsistent tariff on automobiles can be responded to with a tariff surcharge on furniture since both of them belong to the sector of goods.⁹⁵

If the winning member finds it ineffective or impracticable to remain within the same sector, the countermeasures can be imposed in a different sector under the same agreement⁹⁶. The option has no relevance concerning the area of goods. However, for example, when a violation occurs in the area of trademarks, countermeasures can be applied in the area of patent. There is also an option under the article for the complaining member to retaliate under another agreement. This applies if the member finds it impracticable or ineffective to remain within the same agreement and the circumstances are serious enough. The question if the circumstances are serious enough is examined and determined by the arbitrator with the current situation within

⁹² A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 81.

⁹³ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 221.

⁹⁴ Article 22.3.a of the DSU

⁹⁵ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 82.

⁹⁶ Article 22.3.b of the DSU

the disputing parties as a starting point.⁹⁷ This possibility of “cross-retaliation” allows the sanctions to be more efficient at the same time as the hierarchy in the article reduces the use of actions to spill over into unconnected sectors.

The countermeasure needs to be equivalent to the level of the nullification or impairment⁹⁸. The complainant’s response must not go beyond the level of harm caused by the losing party. The suspension of obligations is not retroactive. It only covers the period of time after the authorization was granted from the DSB not the whole time the inconsistent measure has been applied or the time for the ongoing dispute.

7.3.2.2.2 Arbitration

An arbitrator may be requested if the disputing parties do not agree on the complainants proposed form of retaliation. The issues concerned can be linked either to the subject of whether the principles governing the form of permitted suspension are respected or to the subject of whether the level of retaliation is equivalent to the level of nullification or impairment. The arbitration shall be completed within sixty days after the expiry of the reasonable period of time. The Director-General appoints the arbitrator if the original panel is not available to complete the arbitration. The complainant is not allowed to proceed with the retaliation during the time of the arbitration.⁹⁹

The arbitrator shall not examine the nature of the suspension of concessions or other obligations, but the individual/group shall determine whether the level of such suspension is equivalent with the nullification or impairment. This means that the arbitrator must calculate a proximal value of trade loss due to the WTO-inconsistent measure. The arbitrator shall also determine if the proposal is allowed under the covered agreements. The decision of the arbitrator is final, meaning the parties cannot seek a second arbitration. The DSB will be informed promptly about the outcome and then grant authorization for retaliation if this is consistent with the decision of the arbitrator.¹⁰⁰

8 Article 21 and Article 22 of the DSU in Practice

The earlier chapters of this thesis have examined the development of the dispute settlement rulings and its current formal proceedings. To gain a greater understanding

⁹⁷ Seth, *Twistlösning I WTO: Om rättens betydelse i den internationella handelspolitiken*, pp 471-473.

⁹⁸ Article 22.4 of the DSU

⁹⁹ Article 22.6 of the DSU

¹⁰⁰ Article 22.7 of the DSU

of the system, the following sections contain of an overview of the rules at the critical stage of implementation and enforcement applied in practical situations and some of the problems and questions that have arisen since the introduction of the DSU. As with all newly introduced systems, attention has been drawn to numerous different issues and practical outcomes. This work will present three main areas which have attracted the attention of different WTO actors since the dispute settlement system was introduced in 1995. The chapter is divided into the following three chapters:

- (i) Examining the relationship between article 21.5 of the DSU and article 22 of the DSU,
- (ii) Discussing the problems with the concept of compensation, and
- (iii) Observing retaliation as a remedy in practical life.

8.1 The Sequencing Issue

One issue arising at the implementation stage of the DSU is the relationship between article 21.5 of the DSU and article 22.2 of the DSU. Question may arise whether the compliance proceedings or the suspension of concessions proceedings has priority, if either. Just reading at the articles, the procedure may look straightforward, but imagine the following scenario. Suppose the respondent uses the full reasonable period of time before announcing compliance with the recommendation. If the complainant believes the regime is inconsistent with WTO policy, it has the opportunity to refer the matter to the panel. The panel must report within ninety days of that request¹⁰¹. If the respondent is not satisfied with the panel's ruling, another forty-five days could be required for the Appellate Body to consider the matter. The dilemma that may arise is that even if the panel or the Appellate Body finds the reformed policy still WTO-inconsistent, the twenty days after the reasonable period of time for a complainant to request authorization to retaliate will have expired. This interpretation of the relationship between article 21.5 and article 22 suggests there could be an endless loop of litigation.¹⁰²

8.1.1 Comments

8.1.1.1 Practical Life Examples

In the *EC – Bananas III* case, the United States stated that it had the right to request authorization to suspend concessions and other obligations against the European Communities, in spite of the European Communities' new banana regime. The new regime was adopted in response to the recommendations and rulings of the DSB. The

¹⁰¹ Article 21.5 of the DSU

¹⁰² Andersson, *Peculiarities of Retaliation in WTO Dispute Settlement*, pp 2-4.

European Communities strongly opposed the request by the United States on the ground that if the request was permitted, it would amount to sanctioning a unilateral determination by the United States that the European Communities' new banana regime was not consistent with the recommendations and rulings or not. The European Communities argued that the proper procedure was for the United States to first request an article 21.5 panel to determine whether its new banana regime was consistent with the recommendations and rulings. According to the European Communities, it was only after the ruling by the compliance review panel that the United States could have the option to turn to article 22.2. The parties finally managed to reach an agreement which allowed both requests under articles 21.5 and 22.2 of the DSU to go on simultaneously.

After this case, it became customary for the parties to reach an ad hoc agreement on the sequencing issue. The disputing parties have agreed in some cases to initiate the process under both of the articles simultaneously. The retaliation procedure has then been suspended until the finishing point of the compliance procedure. In other cases, the parties have used article 21.5 of the DSU to initiate the process before using article 22 with the understanding that the respondent would not object to a request for authorization of suspension of concessions under article 22.6 of the DSU because of the expiry of the thirty-day deadline for the DSB to grant this authorization.¹⁰³

8.1.1.2 Related Problems and Alternative Interpretation

A related problem concerns how the disputing parties are forced to act. Under article 22.6 of the DSU, the DSB has to grant authorization to suspend concessions within thirty days of the expiry of the reasonable period of time. In the meantime, if a request under article 21.5 has been made, the compliance review would not have been completed by then. If the complainant is forced to turn in a request for authorization to suspend concessions at this stage just to keep the opportunity to retaliate open, it may just trigger the process and make the situation more complicated. It could also imply that the complainant had come to the conclusion that the proposed implementing measures are not WTO-consistent. However, article 23 of the DSU states that WTO Members must have recourse to the rules and procedures of the DSU to determine whether a measure is WTO-inconsistent. Therefore, members may not decide unilaterally whether a measure is WTO-inconsistent or not.

Authors have presented an alternative interpretation to the problem. One may argue that article 22.2 of the DSU contains the possibility that the losing party does not do

¹⁰³ Yerxa and Wilson, *Key Issues in WTO Dispute Settlement: The first ten years*, pp 105-106. A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, pp 85-86.

anything at all to bring its measures into compliance with the recommendations or rulings. In this case there will be a twenty-day deadline to request for countermeasures. Further according to this interpretation, article 21.5 of the DSU deals with the situation where the losing party does something to bring its measures into compliance but the winning party does not agree with its full compliance. In this case the twenty-day request period should start at the end of the procedure of article 21.5 of the DSU if the findings are against the respondent. Using this interpretation, there is no dilemma in law. The compliance review panel should simply decide if the reform is adequate or not. If not, the complaining party can request for retaliation.¹⁰⁴

The positive aspect of this interpretation is that it clearly follows the structure of the DSU, while avoiding the possibility for parties to make unilateral decisions on whether compliance is achieved or not. The retaliatory measures would remain in place until the panel or the complainant is satisfied with the new regime. The negative aspects are that this interpretation, just like the others, leaves the possibility open for the winning party to make an ongoing series of inconsistent reforms. This may make the process long and costly and just trigger the already damaged relationship between the parties.

8.1.1.3 Brief Conclusion

The issue in short: Both deadlines run from the end of the reasonable period of time. The DSU encourage the member to act within thirty days on the basis of an arbitration report that will not be concluded for sixty days to ninety days after the complaining member is supposed to already have acted on the result. To me, this is probably just a formal mistake that may arise when complex documents are drafted and redrafted by exhausted negotiators working under incessant pressure against the clock. This little glitch in the system has had practical effects and is showing a non-flattering side of the WTO: the comparative weakness of its legislative function as compared to its adjudicating function.¹⁰⁵ Even if no member wants to keep the current sequencing glitch in the system, and even if concerned members have managed to agree on ad hoc solutions, the members collectively have still not been able to amend the DSU to correct the problem. Past DSU review negotiations have not found a solution to this issue of sequencing yet, the issue is continuing to be discussed in the current negotiations. I strongly agree with other authors and the number of members concerned by this issue that it should be formalized in one way or another. More predictability and certainty will be given to the system, while avoiding an arbitrary process.

¹⁰⁴ Andersson, *Peculiarities of Retaliation in WTO Dispute Settlement*, p 4.

¹⁰⁵ Palmeter, *The WTO Dispute Settlement System in the Next Ten Years*, p 5.

8.2 Compensation in Practice

From a pure economic view, compensation as it is used within the WTO today, is simply trade liberalization. When for example, tariffs are reduced, economic welfare will increase in the respondent country, in the complaining country, and even in third countries which export the products whose import barriers have been lowered. Third importing countries will lose from terms of trade deterioration, but the world as a whole will be better off economically according to standard gains-from-trade theories.¹⁰⁶ From this point of view, compensation should be the most used remedy within WTO simply because trade liberalization is one of the basic ideas within the organization.

Since the introduction of the DSU in 1995, the concept of compensation has not been used very frequently. There are several possible reasons why compensation as a remedy is rarely used in practice. This chapter will examine just a few of them. First, compensation is voluntary, and the disputing parties have to agree on the solution. Second, the compensation must be consistent with the covered agreements. Conformity with the covered agreements implies consistency with the most-favoured-nation principle found in article I of the GATT. Third, the current system on compensation may not provide for effective reparation of damages suffered by the complaining party.

8.2.1 Comments

8.2.1.1 Practical Life Examples

The *Japan – Alcoholic Beverages II* case is an example of one of the few cases where the disputing parties managed to agree on compensation. The complainants claimed that spirits exported to Japan were discriminated against under the Japanese liquor tax system which, in the complainants' view, levied a substantially lower tax on “shochu” than on whisky, cognac, and white spirits. In this case, the compensation took the form of temporary, additional market access concessions for certain products of export interest to the original complainants. For example, the negotiations with the European Communities finally ended up with an agreement on an accelerated reduction of the tariff rates on whisky and brandy as compensation for the delayed implementation by Japan. Another example of when an agreement on compensation was reached is the *United States – Section 110(5) of the US Copyright Act* case. The United States and the European Communities reached the temporary arrangement that the United States should make a lump-sum payment in the amount of 3.3 million US

¹⁰⁶ Andersson, *Peculiarities of Retaliation in WTO Dispute Settlement*, pp 4-6.

dollars to a fund to be set up by performing rights societies in the European Communities for the provision of general assistance to their members and the promotion of authors' rights.

8.2.1.2 The Effect of The Sequencing Issue

The issue discussed previously concerning the relationship between articles 21.5 and 22 of the DSU also has impact on the use of compensation as a remedy. The current procedure under the articles does not guarantee a timely arbitration decision on the extent of compensation that is warranted. Hereby, the uncertainty concerning the sequencing issue does not promote a frequent use of the concept of compensation.

8.2.1.3 The Voluntary and Agreeing Part

The voluntary aspect of the remedy combined with the fact that the parties have to agree on, not only to compensate and to get compensated, but also on the specific amount thereof¹⁰⁷, makes the concept troublesome to use. In practice this has been very difficult since there is no actual way to enforce the non-complying member to compensate. Another aspect is, since the compensation is voluntary, the respondent can end it at the same moment it reforms its WTO inconsistent regime, awaiting the outcome of any further action by the complainant under article 21.5 of the DSU. Hereby, the respondent would gain greater control of how the entire procedure would continue. Article 22 of the DSU states that if no satisfactory compensation has been agreed upon within twenty days after the date of expiry of the reasonable period of time, the complainant may request for authorization to retaliate. The short time frame may put positive pressure on the parties to reach an agreement, but it can also be hard for already disputing parties to consent in less than three weeks.

8.2.1.4 Consistency with Covered Agreements

The obligation of consistency with the most-favoured-nation principle adds another difficulty to the practical use of compensation. Hereby, members other than the complainant would also benefit if compensation is offered, for example, in the form of a lower tariff. In the end this would probably lead to the complainant asking for a larger degree of access to the market when discussing the compensation than if access was able to be provided only concerning the complaining party. Even though the new openness on the market would increase economic welfare for the respondent, the political economy of trade policy is such that the political leadership of the country would lose from such unilateral reform. Otherwise there would have been no incentive to create the import barriers from the first place.¹⁰⁸ The obligation to offer

¹⁰⁷ Articles 22.1 and 22.2 of the DSU

¹⁰⁸ Andersson, *Peculiarities of Retaliation in WTO Dispute Settlement*, p 6.

compensation to all WTO members will in practice result in raised prices for the respondent and no exclusive benefit for the complainant.¹⁰⁹ This will make the remedy less attractive to both of the disputing parties.

8.2.1.5 Reparation of damages

A breach of an international obligation under general international law leads to responsibility generating certain legal consequences. The obligation to come to an end with the illegal measure is the first consequence under international law.¹¹⁰ To make an analogy, this remedy of cessation is equivalent to article 21 of the DSU, the withdrawal of the inconsistent measure. Further, the injured state has the right under general international law to claim full reparation in the form of:

- (i) Restitution in kind;
- (ii) Compensation;
- (iii) Satisfaction; and
- (iv) Assurances and Guarantees of non-repetition.

Restitution means that the state responsible for the wrongful act is obligated to re-establish the situation which existed before the wrongful act was committed, provided to the extent that restitution is not materially impossible or does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation¹¹¹. The wrongdoing actor is obligated to compensate such damage that has not been made good for by restitution. The compensation shall cover any financially assessable damage including interest and, under certain circumstances, loss of profits.¹¹² Note that this differs from article 22 of the DSU which does not explicitly provide for the compensation of damage suffered. So far, WTO remedies have concerned only prospective relief. Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate behaviour. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible state.¹¹³

Question may arise if the rules laid down in the ILC apply when there is a breach of WTO law or if the remedies provided for in the DSU are the only ones available. Most of the WTO members seem to share the view that when creating a detailed set of

¹⁰⁹ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 80.

¹¹⁰ International Law Commission (ILC) Articles on State Responsibility. See http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf, visited on 3 March 2007.

¹¹¹ ILC article 35

¹¹² ILC article 36

¹¹³ ILC article 37

rules aimed for handling breaches of WTO law, the DSU has contracting out of the general economic law on State responsibility and, therefore, also the rules concerning compensation.¹¹⁴ The interpretation seems to be correct since states may actually deviate from customary international rules. The Vienna Convention on the Law of Treaties declares invalid only those treaties which contradict a peremptory norm of international law.¹¹⁵ According to the criterion set out in the ILC draft, the DSU must be considered *lex specialis* handling these kinds of questions.¹¹⁶ On the other hand, nothing under the current WTO dispute settlement system or any of the disputes decided up to this date explicitly precludes reparation for past damages.¹¹⁷ If the concept of compensation did provide for effective reparation of damages suffered by the complainant, naturally this would make compensation as a solution more attractive to this party.

8.2.1.6 Brief Conclusion

There have been discussions from time to time to make the compensation within the DSU financial. Every proposal has always been turned down.¹¹⁸ Reasons for the rejections have, for example, been difficulties concerning calculation of the damage suffered, the politically incorrect situation where a developing country is forced to pay a huge amount of money to a much richer developed country, and the difficulties to force a sovereign state to actually pay the compensation. To me, a financial solution may make the compensation as a remedy more attractive to the complainant, but it may also uphold the inevitable difference between the country members of the WTO. The monetary damages a member with a strong economy have to pay to a weaker member or a developing country may seem trivial to the strong member, while the amount could be a financial catastrophe to the weaker member. A more suitable solution, which will be discussed more in detail later, may be a combination with the other temporary remedy; the suspension of concessions or other obligations.

8.3 Retaliation in Practice

The possibility to take action under article 22.2 of the DSU to suspend concessions or other obligations is the last option for a complaining party to put pressure on the losing party to implement recommendations or rulings. Since the first of January

¹¹⁴ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, pp 224-225.

¹¹⁵ Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, pp 766-767.

¹¹⁶ ILC article 55: *These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.*

¹¹⁷ Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, p 346.

¹¹⁸ Seth, *WTO och den internationella handelsordningen*, pp 99-100.

1995, WTO has given authorizations of suspensions of concessions fifteen¹¹⁹ times, although the members have not made use of the possibility to retaliate in all of the fifteen cases. The remedy is used more frequently than compensation. However, there are practical problems arising with this remedy as well. This chapter will discuss a few of them.

First, retaliation measures are trade destructive and can affect the injured party negatively as well as the losing party. Second, in particular the possibility to retaliate is not a genuine option to smaller or developing country members. Third, these smaller and developing country members are also the ones that are most affected by the possibility to “cross-retaliate”. Doubts certainly do exist if the suspension of concessions or other obligations is an efficient temporary remedy for breach of WTO law.

8.3.1 Comments

The suspension of concessions or other obligations is very different in nature from compensation. The remedy is, for example, easier to use since there is no need for the parties to agree. As opposed to compensation, retaliation involves the raising of trade barriers which is damaging free trade principles and works contrary to the basic principles of trade liberalization within the WTO.

8.3.1.1 Practical Life Examples

Cases where the possibility to retaliate occurred are for example the *EC – Bananas III* case, where the US enlarged customs duties on certain products to 100 percent ad valorem on annual imports covering 191.4 million US dollars of European goods, the *US – FSC* case, where the European Communities opted for retaliation measures on selected products consisting of an additional custom duty of five percent increased each month by one percent up to a maximum of seventeen percent, and the *EC- Hormones* case, where retaliation was made by the United States and Canada for an amount of 116.8 million US dollars and 11.3 million Canadian dollars a year respectively.

8.3.1.2 Negative Effects

When the complaining party chooses to suspend concessions against the respondent’s exports, the complainant is usually not helped by the retaliation in practice. It is actually on the contrary harmed because of the standard cost of protectionist

¹¹⁹ This category covers authorizations granted by the WTO pursuant to Article 22.7 of the DSU and Article 4.10 of the Subsidies Agreement. Update of all WTO Dispute Settlement cases: Report WT/DS/OV/29, 9 January 2007.

barriers¹²⁰. This may deter small or developing country members confronting a larger member from seeking a solution through the DSU. This was the case for Ecuador in the *EC – Bananas III* case, where Ecuador was authorized to apply retaliation measures for an amount of 201.6 million US dollars a year, but found it impossible to make use of this possibility without causing severe damage to its own economy.

Another problem concerning this remedy is that retaliation actually does nothing to help the specific exporting industry of the complaining party that has been denied market access in the first place. Rather, it is the importing industries of the complaining party that get temporary backing through the prohibitive tariffs imposed by the retaliation measure. On the other hand, the respondent's industries that are harmed by the retaliation are typically not the ones that have been benefiting from the WTO-inconsistent measure. Rather, they are the industries chosen by the complainant with a view to have the largest negative political impact to put pressure on the government of the respondent member.¹²¹

These aspects show that the remedy is targeting different domestic markets and individuals in a way which is difficult to motivate. This may trigger tensions not only within the internal market, but also between the disputing parties. One solution to the problem may be to introduce rules which more specifically point out the areas where the complainant has the right to take action. The right to retaliate could be more closely connected to the trade damaging area and not unilaterally chosen by the complainant. On the other hand, it is important to not wipe out the possibility for small and developing country members to cross-retaliate and to use the authorization in an efficient way. This will be discussed more in detail later in this chapter.

Another way to handle the problem is to supplement the retaliation with the concept of compensation. This would ensure that the industry or sector which in fact suffers the damage from the WTO inconsistent measure actually benefits from the retaliation. One alternative is to force the losing member to pay an amount of money equivalent to the damage caused as compensation instead of letting the complainant impose, for example, trade destructive tariffs. Pecuniary compensation would be easier to monitor and more accessible for weaker members. Problems may arise on how to distribute the compensation within the receiving country. Unless specific rules exist, principles of diplomatic protection indicate that it is up to the government in the receiving

¹²⁰ Andersson, *Peculiarities of Retaliation in WTO Dispute Settlement*, p 10.

¹²¹ Andersson, *Peculiarities of Retaliation in WTO Dispute Settlement*, pp 10-11.

country to decide upon distribution.¹²² Even cash compensation does have its problems. In the *US – Section 110(5) Copyright Act* case discussed earlier, the United States agreed to pay cash compensation to the European Communities. However, Australia argued that this form of cash compensation was discriminatory. Australia stated that its artists continued to sustain losses as a result of the WTO-inconsistent US legislation, and yet it remained uncompensated.¹²³

8.3.1.3 Stronger Versus Weaker Members

All of the WTO members are equal from the legal point of view of the DSU. However, when the remedies are applied in practice, it is of great importance which members are opposing each other. For members acting against similar members, political and economic powers as factors in achieving compliance may be manageable. In those cases, countermeasures may actually encourage compliance. In other cases where a weaker member is faced with non-compliance by a disproportionately stronger member, political powers may make compliance hard to accomplish. And even if compliance finally occurs, the sectors of the weaker member may already have been forced out of business. From this aspect, negotiation on compensation and the imposition of countermeasures are only highlighting and upholding the inevitable political and economic inequality between WTO members. It would be difficult, for example, for Chad to retaliate against United States or the European Community. Difficulties may arise since the retaliation of Chad may in turn provoke counter-retaliation in non-WTO-related fields such as development aid or fence off the domestic market of Chad from needed imports from the stronger opponent.¹²⁴ This scenario would only hurt the weaker member, not induce compliance by the stronger opponent. This is definitely not the desirable effect applying article 22 of the DSU in practice.

8.3.1.4 Cross-retaliation

To smaller and developing country members, the possibility to suspend obligations under a different agreement or a different sector can be very important in different ways.¹²⁵ First, smaller and developing countries do not always import goods, services, or intellectual property rights in adequate quantities in the same sector as those in which the violation or other nullification or impairment took place. This scenario assumes that the violation or other nullification or impairment affected exports of the

¹²² Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, p 346.

¹²³ Yerxa, and Wilson, *Key Issues in WTO Dispute Settlement: The first ten years*, p 104.

¹²⁴ Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, p 338.

¹²⁵ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 83.

complainant and that the suspension of obligations would intend to damage the imports from the respondent, as is most commonly, but not necessarily, the case. It may be hard, and sometimes impossible, to suspend obligations at a level equivalent to that of the nullification or impairment of the respondent, unless the winning party can suspend obligations under a different agreement or in a different sector.

Second, if the bilateral trade relationship is not symmetric, retaliation in the same sector or under the same agreement may be ineffective. Particularly if the respondent is a big nation, the effects of the suspension of obligations and the imposition of trade barriers may not even be visible in the trade statistics of the respondent. Third, as was the case in Ecuador discussed earlier, it may be unaffordable for a developing country member to impose trade barriers against imports following the suspension of obligations under GATT 1994 or GATS. This would reduce the supply and raise the price of these imports on which the consumers and producers in the complaining country may depend.

These three aspects demonstrate that it is important for developing and smaller countries to be able to use methods of suspending obligations which do not result in trade barriers. The TRIPS agreement is an example on how to do so. In the *EC – Bananas III* case, the arbitrators decided that Ecuador had the right to retaliate under TRIPS instead of under GATT and GATS where the EC banana regime actually existed.¹²⁶ Ecuador could now allow local wine producers to sell their red wine as “Bordeaux”, and permit local music pirates to sell unauthorized copies of some European hit recordings, though only for the Ecuadorian domestic market. By implementing intellectual property under GATT/WTO, the protection of the sector became more efficient, but it also opened up the opportunity of powerful retaliation under this agreement.

8.3.1.5 The Bilateral Form

Looking at the bilateral form of this enforcement remedy, a risk of inefficiency may occur. Imagine the following scenario¹²⁷: Two WTO members are involved in two separate trade disputes between each other. Each of them is a complainant in one case and a respondent in the other. Both of the cases are won by the complainant, meaning each of the members is a winner in one case each. Both of the members refuse to comply with the recommendation or ruling, and both attain authorization to retaliate

¹²⁶ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 83. For further discussion see the decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*.

¹²⁷ Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, pp 344-345.

against the other. The WTO-inconsistent measures have equal negative trade effect. Can in this situation, one measure be compensated by the other, and as a result can both members agree to continue their mutually inconsistent relationship? Under the current system, this is a possibility for the disputing parties. However, from the perspective of the rest of the WTO members, this solution will not be in correspondence with the principle of compliance with WTO rules as a collective good.

8.3.1.6 Collective Actions

Another problem under the current rules is that only the complaining party may impose countermeasures. That particular member may bear both the cost of the legal procedure, and the cost of the inefficient countermeasures which have been discussed earlier. A move towards a more collective action under DSU, which already exist within the concept of compensation, would make the costs multilateral. It would also be the organization, not a single member, which attempts to enforce WTO rules.¹²⁸ This would give more strength to the remedy at this critical stage of the dispute and encourage smaller and developing country members to use the procedure in a larger extent. When discussing a more collective procedure, the risk of creating the ground for a trade war must be noticed. Members may bargain with each other and create unwanted coalitions and bilateral agreements on how to act in potential disputes. This could be harmful to the basic principle of trade liberalization and the foundation of the organization.

8.3.1.7 Brief Conclusion

This remedy is trade destructive, and it may not help the winning party the needed way. It is especially hard for a small or developing member to confront a stronger party since the use of the possibility to retaliate may cause severe damage to its own economy. To me, the main problem with this remedy is the political and economic inequality between the members of the WTO. A weak member with a small domestic market may not have any possibility to use or benefit from this remedy at all. This may deter these member countries from referring to the dispute settlement system in the first place. On the other hand, if two equal parties are opposing each other, this may be a perfectly functioning method to put a powerful pressure on the opponent to implement the recommendation or ruling. The discussion shows that the remedy is not efficient for every party in every single dispute and may therefore uphold the inequality between the members of the WTO.

¹²⁸ Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, pp 344-345.

9 DSU Review and Negotiations

Even if the WTO dispute settlement system has been a success in many ways, it was determined by the time of the introduction of the DSU that the system was to be examined and evaluated after using it for a couple of years.

9.1 Background

A ministerial decision¹²⁹ made in 1994 stated that the dispute settlement rules should be reviewed by first of January 1999. The review started in the DSB in 1997, but no agreement was reached. The members expressed that the system was working satisfactorily while, at the same time, a large number of proposals for improvements were made. The discussions continued on an informal basis, and ended up in a proposal for reform to the Seattle Session.¹³⁰ An agreement on the proposal was probably not far away, but fell victim to the overall failure of the session.

In 2000 and 2001, informal discussions outside the DSB concerning amendments to the DSU continued. These efforts resulted in a revised proposal¹³¹ by fourteen WTO members chaired by Japan. Neither the United States nor the European Communities were involved. The sequencing issue was one of the topics addressed, however, the members failed, once again, to agree on the proposal. At *The Doha Ministerial Conference* in November 2001, member governments formally agreed to negotiate to improve and clarify the DSU¹³². These negotiations are still active today and take place in special sessions of the DSB. The members were encouraged to contribute with questions, proposals, and comments concerning changes and improvements of the DSU to these special sessions. The problems described earlier in this thesis are just a few of the discussion points brought to the attention of the special sessions.

The Doha Ministerial Declaration clearly states that the DSU negotiations shall not be tied to the overall success or failure of the other areas negotiated under the round. As the development and improvement of the dispute settlement system are in the interest of all members, it is inappropriate to turn the DSU into a bargaining tool in

¹²⁹ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 289: *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*

¹³⁰ See Report: WT/MIN(99)/8.

¹³¹ *Proposal to Amend Certain Provisions of the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU) Pursuant to Article X of the Marrakesh Agreement Establishing the World Trade Organization*, Submission by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela for Examination and Further Consideration by the General Council, WT/GC/W410/Rev. 1, dated 26 October 2001.

¹³² Ministerial Conference, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, dated 20 November 2001, paragraph 30.

the overall negotiations. This separation was reflected in the timeframe for the DSU negotiation which differentiates itself from the overall round. First it was scheduled to be concluded in 2003, and later in 2005. At *The Ministerial Conference in Hong Kong*, the ministers instructed the bodies, which have been reviewing the proposals, to complete the consideration of these proposals, and report periodically to the General Council. The Conference asked that clear recommendations for a decision were made no later than December 2006.¹³³

9.2 Proposals for Clarifications and Amendments

Up until the first deadline of the negotiations in 2003, the special session of the DSB met several times every year, both formally and informally. A total of forty-two proposals for clarifications and amendments to the DSU were submitted at this time¹³⁴. The proposals concerned many of the DSU rules and were submitted by both developed and developing country members. Ambassador Péter Balás, Chairman of the Special Session of the DSU at this point, drafted legal texts that ended up in the so-called *Chairman's text*¹³⁵.

The *Chairman's text* contains of a significant number of reform proposals including the sequencing issue, the enhancement of compensation as a temporary remedy for breach of WTO law, and other problems concerning the suspension of concessions or other obligations. Proposals not supported by a satisfactorily number of members were not included in the text. An example of a rejected proposal was one concerning collective and monetary retaliation. However, once again the members were unable to agree on the drafted text. Members had different opinions on whether the continuing negotiations should concern only the *Chairman's Text* or other proposals as well, and the deadlines got displaced time after time.

9.2.1 Proposals Concerning Article 21.5 and Article 22 of the DSU

This section will examine the current status of the proposals concerning the practical problems observed and discussed earlier.¹³⁶

¹³³ Report by the Chairman to the Trade Negotiations Committee: TN/DS/18. 1 September 2006.

¹³⁴ Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9, dated 6 June 2003, paragraph 3.

¹³⁵ The *Chairman's Text* can be found in Job(03)/91. The amended version can be found in the annex to Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9, dated 6 June 2003.

¹³⁶ A summarizing list of the different proposals updated 21 august 2006 through document TN/DS/W88 can be found on the website: www.law.georgetown.edu/iel/research/projects/dsureview/synopsis.html, visited on 11 April 2007.

9.2.1.1 The Sequencing Issue

Canada made a straightforward proposal simply saying that the procedures in article 21.5 of the DSU shall be completed before the procedures in article 22 of the DSU are initiated.¹³⁷ The European Communities and Japan presented two similar suggestions proposing the inclusion of an article 21 *bis* on *Determination of Compliance*.¹³⁸ According to the proposals, article 21 *bis* will state that disputes on adequate implementation measures will be heard by a compliance panel consisting of members from the original panel. The two members also proposed that article 22 of the DSU should be amended, saying that the complainant may only request authorization to retaliate after the compliance panel or the Appellate Body finds the measure still inconsistent with the WTO agreement. The proposals are suggesting a more detailed and clear procedure, and they have both been incorporated in the *Chairman's Text*. If adopted, this will solve the sequencing issue in an unambiguous and unmistakable way.

9.2.1.2 Compensation and Retaliation

There is no unified opinion among the WTO members on how to amend or clarify article 22 of the DSU. As been discussed earlier, the two temporary remedies available today have influenced the disputing parties in different ways depending on, for example, circumstances within the member state or on the relationship between the parties. The *Chairman's text* provide for a new writing. The text in short states that the complaining party may either request the member concerned to enter into consultations with a view to agree on a mutually acceptable trade or other compensation or request an authorization from the DSB to suspend the application to the member concerned of concessions or other obligations. The text also clarifies where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendation and rulings, proceedings shall be undertaken under article 21 *bis* before recourse to this paragraph.

To me, the article in the text came out a bit blurry. I get the feeling it is not actually dealing with the practical problems concerning the two temporary remedies presented earlier. The members were not completely satisfied either, and since many of the proposals were left outside the text, the discussions still continue on the area. Even if a great number of proposals were presented by the members, this thesis will only show an example of some of the more controversial suggestions which never got retained in the *Chairman's text*.

¹³⁷ Communication from Canada TN/DS/W/49, dated on 14 February 2003.

¹³⁸ Communication from Japan, TN/DS/W/22, dated on 28 October 2002, and Communication from the European Communities, TN/DS/W/38, dated on 23 January 2003.

Mexico made a proposal¹³⁹ to allow members to transfer, in reality to sell, its right to retaliate to another member. This would give the possibly weaker winning party a quicker and maybe more suitable compensation. The possibly stronger “buyer” may have a better ability to make use of the possibility to retaliate. Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe wanted to strengthen the possibility to cross-retaliate.¹⁴⁰ The group proposed that in a dispute in which the complaining party is a developing country member and the losing party is a developed country member; the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreement.

The Least Developed Countries (LDC) made a proposal¹⁴¹ saying that WTO members should clarify the provision to the effect that compensation should take the form of enhanced market access if this will prejudice other members, and that monetary compensation is to be preferred. Such monetary compensation should be equal to the loss or injury suffered, and directly arising from the offending measure. The quantification of loss or injury to be compensated should always commence from the date the member in breach adopted the offending measure. Ecuador presented a solution¹⁴² where compensation may be entirely or partly monetary.

The LDC Group stated¹⁴³ that the lack of an effective enforcement mechanism and the potential negative impact of retaliatory measures for poor economies are well documented. The LDCs presented that one solution to this handicap is to adopt a "principle of collective responsibility" akin to its equivalent under the United Nations Charter. Under this principle, all WTO Members would collectively have the right and responsibility to enforce the recommendations or rulings of the DSB. In the case where a developing or least-developed country member has been a successful complainant, collective retaliation should be available automatically as a matter of special and differential treatment. 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.

¹³⁹ Communication from Mexico, TN/DS/W/40, dated on 21 January 2003.

¹⁴⁰ Communication from Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19, dated on 20 September 2002.

¹⁴¹ Communication from Least Developed Countries, TN/DS/W/17, dated on 19 September 2002.

¹⁴² Communication from Ecuador, TN/DS/W/33, dated on 17 January 2003.

¹⁴³ Communication from Least Developed Countries, TN/DS/W/17, dated on 19 September 2002.

Kenya made a proposal¹⁴⁴ describing the principles and procedures applying to requests for collective suspension of concessions. Special rules in the proposal concentrated on developing and least-developed countries. The rules stated that where the DSB grants authorisation to members to suspend concessions or other obligations, the level of suspension for each Member authorized shall be such as to secure full compensation for the injury to the developing or least-developed country member, the protection of its development interests, and the timely and effective implementation of the recommendations and rulings.

The African group proposed¹⁴⁵ that compensation should prominently reflect the need for monetary compensation and to be continually paid pending and until the withdrawal of the measures in breach of WTO obligations. Such monetary compensation would address the loss suffered as a result of, and for the duration of, the measures in breach of WTO obligations, but without being a substitute for the withdrawal of those measures. The requirement in which the measures in breach should be withdrawn should not be affected by any provision for mandatory, monetary compensation. The group also communicated a solution for collective retaliation. There should be a provision stating that in the resorting to the suspension of concessions, all WTO members shall be authorised to collectively suspend concessions to a developed member which adopts measures in breach of WTO obligations against a developing member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits.

9.3 Brief Conclusion

While examining the proposals propounded, a trend is noticeable. The WTO members seem to be nearly unified in resolving the sequencing issue, and the problem will be solved if the *Chairman's text* on this area is accepted. Looking at the proposals concerning article 22 of the DSU, diversity between two groups of country members may be observed. Weaker members, developing country members, and the least developed countries are focusing on monetary compensation and collective retaliation as a practical solution. The group of developed countries is not following this way of thinking and does not focus at all on this kind of solutions. This aspect makes it, evidently, difficult to agree on an amendment or re-writing which will satisfy all the WTO members.

¹⁴⁴ Communication from Kenya, TN/DS/W/42, dated on 16 January 2003.

¹⁴⁵ Communication from the African Group, TN/DS/W/15, dated on 9 September 2002.

Unfortunately, it is nearly factual that negotiations within the WTO seldom reach a conclusion within the time period assigned. This is true even in the case concerning the DSU review. To date, May 2007, there is still no official recommendation for a decision on how to improve the DSU circulated.¹⁴⁶ Ambassador Ronald Saborio Soto, present (May 2007) Chairman of the Special Session of the DSU, stated¹⁴⁷ that the work of the DSB Special Session has continued to be based primarily on efforts by the members to work among themselves, with a view to present improved draft legal text to the Special Session, building on previous work. To me, it seems like the review of the DSU has been set aside while awaiting the negotiations in other important WTO areas. We may see the DSU as part of the overall “give and take” in the end anyway, even if this was not a desirable outcome in the beginning of the negotiations.

10 Discussion: The future of the DSU

10.1 Complaint Statistics

It is not possible to with explicit sureness determine the future volume of cases brought to the WTO. It is, however, possible to see a trend during the past twelve years (1995 through 2006, inclusive). According to this trend, the case load will be low. During this time period, 356¹⁴⁸ consultation questions have been made. This shows an average of slightly less than thirty cases per year. However, last year there were only fifteen requests compared to twelve in 2005, nineteen in 2004 and twenty-six in the year of 2003. The greatest number of consultations occurred in 1997 when fifty requests were made.¹⁴⁹ One can only speculate why the trend has been downward since 1997. Certainly there were disputes in the pipeline in the beginning awaiting the introduction of the new system. Obviously this was the case for Singapore¹⁵⁰ who filed the first request for consultation on the tenth of January, 1995 almost immediately after the system was introduced. Naturally, this accumulation no longer exist, or is at least not as great anymore, and does therefore not contribute to the current and future number of requests.

One possible way to interpret this statistic is that members are now complying with WTO obligations when applying new measures. It is impossible to document how many measures were not adopted because of WTO obligations, but it is probably not

¹⁴⁶ Telephone interview with Elin Hjulström, Swedish National Board of Trade, 9 March 2007.

¹⁴⁷ Report by the Chairman to the Trade Negotiations Committee: TN/DS/19, 4 May 2007.

¹⁴⁸ Update of all WTO Dispute Settlement cases: Report WT/DS/OV/29, 9 January 2007.

¹⁴⁹ These data are taken from the Chronological List of Dispute Cases on the WTO web site, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. Visited on 5 April 2007.

¹⁵⁰ *Malaysia – Prohibition of Imports of Polyethylene and Polypropylene*, WT/DS1/1 (13 January 1995).

unreasonable to assume that the obligation to comply has been a factor. On the other hand, a real life episode shows that policy makers are not always influenced by WTO obligations. Running up for election in the United States in 2002, control of the Senate was one of the questions in the pipeline. Both parties made WTO inconsistent promises to the agricultural interest in key states which resulted in the *2002 Farm Bill*. Later in the *United States – Subsidies on Upland Cotton* case¹⁵¹, both the panel and the Appellate Body found the bill to be in serious non-conformity with WTO requirements.¹⁵² This way of acting, to solve the political problem now and worry about the WTO later, will probably always contribute to the case load. One can only hypothetically speculate about the future. The development is much depending on the outcome of the Doha Round. It is possible that new commitments will create a backlog in the form of existing measures that may be inconsistent with obligations contracted in the round.

10.1.1 Burdening the System

There is a danger in members overburden, and therefore undermine, the dispute settlement system. This may be the outcome of the inability of the members to agree on rules concerning politically sensitive areas within international trade. Since its introduction, the WTO dispute settlement system has been tested when it comes to public health (*EC – Hormones* and *EC – Asbestos*), environmental protection (*US – Shrimp*), taxation (*US – FSC*), and foreign and development policy (*EC – Bananas III*).

Even if the system has been a grand success, the duty to settle disputes becomes harder and more laborious as the WTO is drawn deeper into politically controversial areas. One may see the dispute settlement system as “substantively and politically unsustainable”¹⁵³, as the members may only obey its rulings if its powers are curbed. Another danger is to rely too much on the system instead of finding political solutions. Claus-Dieter Ehlermann, a former Chairman of the Appellate Body, noted that the system is threatened by a dangerous imbalance between the WTO’s efficient judicial arm and its far less effective political arm.¹⁵⁴ The members of the WTO must improve the ability of the political institutions to handle the sensitive issues

¹⁵¹ Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267R, and Corr. 1, adopted 21 March 2005 as modified by the Appellate Body Report, WT/DS267/AB/R.

¹⁵² Palmetier, David, *The WTO at 10: Governance, Dispute Settlement and Developing Countries - The WTO Dispute Settlement System in the Next Ten Years*, p 3.

¹⁵³ Bafield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade organization*, pp 211-222.

¹⁵⁴ Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, p 299.

confronting the multilateral trading system, instead of burdening the dispute settlement system.

10.2 Sovereign Member States: The Bilateral Form

Speculations concerning the WTO dispute settlement system being the future most efficient instrument to remove trade barriers are hard questions without simple answers. Generally within international law, the answers depend on the expectations of the system. If the basis for the system is sovereign and independent member states, one may applaud the WTO dispute settlement system for its grand success and efforts. If the basis for the system is one hundred percent implementation and compliance, one may be amazed looking at all the times the WTO members are breaking the rules. Compared to the European Union, the dispute settlement system within WTO lacks the principle of direct effect, and the use of a prosecutor bringing action against a member. Within the WTO, the member governments bring action against each other, and there is no option for an individual actor to refer a WTO inconsistent measure to any national or international court. Looking into statistic, the rules within the European Union are conformed to in a much larger extent.¹⁵⁵

From a diplomatic point of view, a political barrier exists when a sovereign state is about to bring action against another sovereign state.¹⁵⁶ This bilateral basis of the WTO dispute settlement system may cause difficulties in practice, even in the future. There is a risk that the complainant will be treated defectively by the respondent as revenge for its action, or the respondent may bring counter-action against the complainant in another trade area. There is probably always at least one area within a member state which is applying WTO inconsistent measures. The majority of the states use some kind of trade barriers to protect its domestic market, and a complaint may draw unwanted attention to its own inconsistent measures.

Another political barrier to compliance may be the opinion of the voting inhabitants of a member state. A WTO inconsistent measure is usually implemented as a result of pressure from the domestic market and its inhabitants.¹⁵⁷ A democratic government is therefore, when forming its political agenda, divided by the will of its voters and the obligation to comply with an international agreement. All of these reasons will affect the willingness to use the dispute settlement system against another member state even in the future, and many prohibited trade barriers will probably never be brought to the attention of the DSB.

¹⁵⁵ Seth, *WTO och den internationella handelsordningen*, p 106.

¹⁵⁶ Seth, *WTO och den internationella handelsordningen*, p 107.

¹⁵⁷ Seth, *WTO och den internationella handelsordningen*, p 109.

10.3 Sovereign Member States: The Safety Valve

Taking the earlier discussion in this thesis into consideration, the DSU and the remedies available may not be used in an expected way today. On the other hand, maybe the remedies are used exactly in the expected way, and the upcoming decision on reviewing the DSU may not change the rules very much in the end. Because of the grand success of the system, the rulings will probably remain basically the same¹⁵⁸. Article 21 of the DSU will most likely be re-written, and this will solve the sequencing issue. Article 21.5 of the DSU will probably take priority over article 22 of the DSU in the future. Problems are more likely to appear concerning article 22 of the DSU. It will be a difficult task to unify the members and redefine the article to achieve a stricter and more obligatory use of the remedies since this may not be the desirable outcome in the end. Hence, just like its predecessor, GATT, the WTO is more a balance of negotiated concessions, not primarily a set of legal rules. Therefore, actions taken under the DSU are not as much targeting the breach of obligations but the upsetting of the negotiated balance of benefits among the members.

When examining, and sometimes criticising, the dispute settlement system and the remedies available, one has to remember that the system once was created to bring non-complying members into compliance, not to make commercial or damaged interests whole. Criticisms tend to compare the international legal system of WTO dispute settlement with any ordinary national legal system. Examining the dispute settlement within WTO, one can not overlook the fact that WTO applies to governments. These governments are both establishing and controlling the activities of the system. Robert Hudec once said that governments are not simply litigants, they are complex institutions known the world over for their inability to behave like rational beings.¹⁵⁹ To me, this sentence captures the difficulties at the stage of implementation within the WTO dispute settlement system, and it also explains why the rules look like they do today.

The remedies available today may not always result in the most efficient solution. However, it is important to remember that the remedies existing today are the remedies which the member states found they were willing to accept both as successful complainants and as unsuccessful defendants. A voluntary system like the WTO will simply never be more than its members want it to be. The fact that developing countries and weaker members are having a hard time taking advantage of

¹⁵⁸ Lecture with Peter Kleen, School of Business, Economics and Law at Göteborg University, 14 March 2007.

¹⁵⁹ Palmetier, David, *The WTO at 10: Governance, Dispute Settlement and Developing Countries - The WTO Dispute Settlement System in the Next Ten Years*, pp 8-9.

some of the benefits of the system is not the reality only within WTO law; this applies to almost all international law generally.¹⁶⁰

It is noteworthy that approximately 150 governments agreed to subject themselves to a compulsory jurisdiction of tribunals whose decisions are legally binding. The reasons for doing this are many. Among them are probably motives like confidence in the system and the competence of those who administer it, the limited subject matter jurisdiction, namely commerce and trade, and remedies that have been justified as a way of rebalancing concessions and agreed obligations. The WTO is sometimes said to be undemocratic and a threat to national sovereignty.¹⁶¹ Negotiations are held behind closed doors where no private actors have the right to participate. The influence over the organization is in practice determined by active participation among the members which may seem unfair to small and developing country members and private actors. This criticism also concern the dispute settlement system. The DSU was a key reform in WTO dispute settlement. It made all legal claims subject to compulsory adjudication by a third party, set deadlines for the process, made legal rulings automatically binding, made trade retaliation available in cases of non-compliance, and created an Appellate Body to make sure that the legal rulings by the first level panels were legal correct.¹⁶²

One important aspect in this discussion is if it is, from a democratic point of view, correct that a small group like the Appellate Body, consisting of seven persons, should have the authority to determine the outcome in sensitive political questions in an area of great global importance. My conclusion is that I see the current ruling in article 22 of the DSU as the central rule which legalizes the dispute settlement system in relation to national sovereignty. The current ruling also makes the system work in the end. The WTO as an organization is based on a voluntary thought with sovereign governments as creators and members. The WTO dispute settlement system presumes that the members voluntarily implement the recommendations and rulings; compensation and retaliation are just measures which may pressure the respondent to full compliance. There are simply no jailhouses, police men, or prosecutors available, only the will of the members involved in the system.

From a democratic, diplomatic, and political point of view, an emergency exit like article 22 of the DSU is necessary for the practical function of the WTO dispute

¹⁶⁰ Palmeter, David, *The WTO at 10: Governance, Dispute Settlement and Developing Countries - The WTO Dispute Settlement System in the Next Ten Years*, p 9.

¹⁶¹ See http://www.kommers.se/templates/standard2_939.aspx, visited on 6 May 2007.

¹⁶² Bafield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade organization*, pp 211-212.

settlement system. The members were not ready by the time of the creation of the system, and they may never get ready to leave the total power over global trade to the panels and the Appellate Body. The article keeps the door open for sovereignty, and is, therefore, legalizing and upholding a successful system.

11 Concluding Comments

11.1 Weaker and Developing Country Members

While writing this thesis, the relationship under the DSU between stronger and weaker members especially caught my attention. It is generally agreed that the mere existence of a compulsory multilateral settlement system is itself a particular benefit for weaker members and developing countries. A system to which all members have access and in which decisions are made on the source of interpretation of rules instead of on the basis of economic power empowers weak economies and developing countries. In short: A system like this puts David and Goliath on the same level. From this point of view, a weak party will always benefit more than a strong member from any judicial system, since a strong member would always have other means to defend and impose its interests in the absence of a law enforcement system. Such a view have been criticized by some as being too formal and theoretical.¹⁶³

In one's defense it must be noticed that, in practice, the WTO dispute settlement system has, since its introduction, offered many examples where developing countries have prevailed over large and strong nations. On the other hand, it is important to remember that a system does not always work as well in practice as in theory. It is obvious that a developing member wanting to utilize the WTO dispute settlement system is faced with considerable burdens, this thesis is just pointing out few of the observations made during the years of the existence of the DSU.

One important challenge for developing countries, especially to the smaller ones, is that the country often does not have a sufficient number of specialized human resources who are experts in the details of the essence of WTO law or in the dispute settlement proceedings. The panels and the Appellate Body are creating a growing body of jurisprudence, which makes it difficult for trade officials all over the world to handle both the essence and the procedural aspects of WTO law and the latest developments in different areas. It is almost impossible for a small trade delegation to assign one of its few trade officials to a dispute, and at the same time keep record of the whole breadth of WTO matters. One single dispute could force a delegation to

¹⁶³ A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 109.

spare an official for up to two years. *The Advisory Centre on WTO Law* created in 2001 is giving legal training and advice to developing countries. These countries are now more actively using the dispute settlement system than during the 1990s.¹⁶⁴

As has been pointed out earlier in this thesis, it may also be challenging for a small member to undergo the economic harm from another member's trade measure for the entire period of the dispute settlement procedure. Even if the measure is found to be inconsistent with WTO rules, the withdrawal may not occur until two or three years after filing the complaint. Even though these difficulties may occur, developing countries have been quite active within the system. However, the truth is that in the majority of the WTO disputes so far, both the complainant and the respondent have been a developed country.¹⁶⁵

The fact that the majority of the members of the WTO are developing countries could lead to the conclusion that developed countries use the dispute settlement system in a disproportionate way. Although, this conclusion leaves out the fact that developed countries account for most of the world-wide trade. These countries often have trade relationships in all sectors of goods and services to a large volume of trade in quantity and value. Naturally the risk for frictions and disputes concerning these members will increase. The trade volume in question may not always justify the substantial investment of time and money necessary for the dispute for any party concerned by the procedure.

11.2 The Future

What shall the future WTO dispute settlement system, and especially the remedies available in case of non-compliance, look like then? I think it almost impossible to give a straight answer to this question at this very moment. I am not even sure anything at all should be done in the area. It is not a matter of course that there is a need for, or even a possibility to, change the current rulings, at least not when discussing article 22 of the DSU. As discussed previously in this thesis, article 22 may work as an emergency exit for the members of the organization. This is how far the members were willing to go when creating the system, and I strongly believe that a change or an amendment not accepted by the majority of the members could bring severe damage to the very foundation of the dispute settlement system. On the other hand, obviously there is a need for reviewing and discussing the system, as already has been done for many years. The members are contributing with a great number of

¹⁶⁴ Kommerskollegium, *Handelspolitisk lägesrapport 2006*, pp 7-14.

¹⁶⁵ Update of all WTO Dispute Settlement cases: Report WT/DS/OV/29, 9 January 2007.

opinions and proposals, which definitely shows that the users of the system call for some kind of development.

One must also have in mind two additional difficulties in the process. First, the proceedings in the Doha round must be noticed. It has been said that it is not desirable that the negotiations on the dispute settlement system are part of the overall “give and take” in the round. I agree with this point of view, but I also find it difficult to reach a satisfactory result in the DSU negotiations if the overall session in the round is not succeeding in the end. The DSU review has almost been put on hold while awaiting the outcome in other areas in the round, which creates a risk for a total failure or at least, as it looks today, an endless delay. In one’s defence, a remarkable observation is that even if the Doha round was suspended in 2006, fifteen consultation questions were made this year. This leads to the conclusion that even if the overall negotiations in the round are standing still, the dispute settlement system continues to function in practice, showing important strength and confidence in the system.

A second difficulty to bear in mind is the inherent inequality between the members which is reflected even in the negotiations. I have pointed out this opinion several times in this thesis, but I think it is worth mentioning again. There is an obvious inequality between, for example, the European Communities and Burkina Faso. One is strong and big; the other is weak and small. Members like these two turn to the dispute settlement system for different reasons and with different expectations. Naturally, they also have different proposals on how to improve the system, which makes it hard to find a solution satisfying to every single member of the organization.

11.3 Is Financial Compensation the Solution?

The current system of WTO remedies provides the members with a choice between trade compensation and retaliation. It has been presented in this thesis that these remedies do not always meet the expectations of the organization and its members. The member violating WTO law will not always remove the violation, compensation is rarely agreed on, and retaliation works contrary to the trade liberalization goal of the WTO and hardly benefits either party. Another problem is that the current system does not provide for effective reparation of damages suffered by the members and private actors concerned.

These problems are more urgent for small and weaker trade nations and developing country members since their economics often are small and unable to stand up against the stronger law-breaking opponent. The negative effects of such countermeasures on their domestic market may be disastrous. From my point of view, financial

compensation could be considered as an alternative remedy for those smaller and weaker WTO members for whom neither retaliation nor the present concept of compensation are practical alternatives. Authors¹⁶⁶ have frequently been discussing the subject and the developing countries¹⁶⁷ are proposing it as a solution in the current negotiations.

I would like to pay attention to the *United States – Section 110(5) of the US Copyright Act* case presented earlier while analyzing this alternative. Even if confusion does exist, the case shows that financial compensation under the WTO is in fact possible. For clarification, one could amend the DSU to ensure that financial compensation is a recognized remedy available under all the covered agreements. The *US Copyright* case also shows how and by whom the financial compensation may be calculated. An arbitration proceeding was set up to determine the level of nullification and impairment suffered by the European Communities as a result of the inconsistent legislation implemented by the United States. The same figure was used as the amount to be paid by the United States.

In the future, the financial compensation could be calculated based on the amount of lost profits as well as lost trade starting from the beginning of the violation. One prerequisite for a successful system is that the amount of the compensation is strict enough to make the violating member comply with recommendation and rulings of the DSB rather than pay the large amount of money and go on with the violation. The compensation may, for example, be increasing until the inconsistent measure is removed. Monetary compensation is by its nature more likely to induce better compliance.¹⁶⁸

In the beginning, only LDCs or poor developing countries may have recourse to the financial compensation. These weak trade nations should only be able to request the compensation against the developed countries. Using this solution, the politically incorrect situation where a developing country is forced to pay a huge amount of money to a much richer member will never occur. Another benefit is that, unlike the current remedies, financial compensation does not create a wrong allocation of burden and benefits. The money could, if it is good used by the winning government, be used

¹⁶⁶ See for example Eleso, *WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries* and Bronckers and van den Broek, *Financial Compensation in the WTO – Improving the Remedies of WTO Dispute Settlement*.

¹⁶⁷ See chapter 9 of this thesis.

¹⁶⁸ Eleso, *WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries*, p 40.

to ameliorate the losses suffered by a particular sector and the member using the remedy will not risk harming its own domestic market by using countermeasures.

I think it is important for all the WTO members to retain the right to choose between the traditional remedies and the new concept of financial compensation. Hence, when a member thinks retaliation would be more effective, for example when the dispute concerns a sensitive area or when trade compensation may actually provide an efficient remedy, the member may still choose to prefer this option. My conclusion is that financial compensation is probably best introduced as an option to be added to the current remedies available. The analysis of the proposals communicated in the current negotiations shows little support for mandatory or exclusive monetary compensation among the developed countries. This is a fact that cannot be neglected since the overall success in the Doha round, and therefore probably including the DSU review, much depends on strong trade nations like the United States or the European Communities.

11.4 Final Thoughts

As mentioned earlier, 356¹⁶⁹ consultation questions have been made since the introduction of the dispute settlement system in 1995. It is important to remember that the great majority of the cases are settled through consultations or mutually agreed solutions, never reaching the full DSU process and the problems with the remedies described in this thesis. The WTO system is the only bilateral dispute settlement system functioning today, and it is very advanced compared to other international dispute settlement system¹⁷⁰. The system is often one of the main reasons for countries to become members of the WTO, knowing that a well functioning dispute settlement system is an opportunity even for small and weaker countries to make their voices heard. A well functioning system also encourages the members to bring additional areas under the mandate of the WTO, relying on the fact that a satisfactory dispute settlement system exists in case of future conflicts.

However, the discussion in this thesis shows that the dispute settlement system may not be as successful in practice as it is in theory, especially when it comes to the remedies available. It seems that the new rules, in some areas, were not paired with a strong enough enforcement mechanism. Many of the disputes brought to the WTO have been almost impossible to solve when it comes to non-compliance. This problem often occurs when the dispute concerns politically sensitive areas with many

¹⁶⁹ Update of all WTO Dispute Settlement cases: Report WT/DS/OV/29, 9 January 2007.

¹⁷⁰ Lecture with Peter Kleen, School of Business, Economics and Law at Göteborg University, 14 March 2007.

interested parties, like the *EC – Bananas III* case which has been going on for years. In practice, the legalization of disputes within WTO generally stops where noncompliance starts.

Finishing this thesis, I started to doubt on the efficient effect in practice of the current remedies available for a breach of WTO law. Examining all the problems discussed earlier, a serious doubtfulness with the enforcement system was observed. Over the years, authors have frequently been questioning the question if the status of WTO law gives the members the option to choose to compensate in one way or another, or to obey recommendations or rulings¹⁷¹. Even if the DSU leaves no doubt that compensation and suspension of concessions are temporary remedies and not alternatives to the final implementation, this is not always accomplished in practice.

According to the rules, members are not supposed to choose to apply these remedies instead of complying with the recommendation or rulings. It is obvious that unless a member loses more by keeping its inconsistent measure intact than following the recommendation or ruling, there is no incentive for the member in question to comply. Instead of looking at the nullification or impairment, the level of compensation and retaliation could be focusing on the profit made by the wrongful act.

Pascal Lamy, once the European Communities' Commissioner responsible for international trade and today the Director General of the WTO, perfectly captured this problem by saying: "As long as you pay the penalties, you can go on as you are."¹⁷² This sentence shows that the current remedies sometimes are inefficient, and they do not always guarantee a satisfactory solution between the disputing parties. A strong member, like the United States or the European Communities, can always pay or bargain its way out of the dispute, forever avoiding full compliance with the recommendation or rulings. Being better off breaking the rules instead of acting in accordance with them is not the desirable outcome of any legal system.

Certainly, stronger sanctions can promote compliance. On the other hand, the importance of sanctions in inducing compliance is to me probably overstated in any legal system, and particularly in the context of the legal system for dispute settlement in a voluntary organization like the WTO. One of the main reasons, as far as I can see, is the fact that governments are simply not individuals. Even in a democratic state, the

¹⁷¹ See for example Jackson, *The WTO Dispute Settlement Understanding – Misunderstanding on the Nature of Legal Obligation* and Bello, *The WTO Dispute Settlement Understanding: Less is More*.

¹⁷² Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, p 808.

inhabitants are not always pleased with the laws, feeling that they have little or no stake at all in the legal system. The majority of the inhabitants obey the rules to a large extent, even if they strongly disagree, out of fear of sanctions.

Governments are not individuals, and the members avoid complying with WTO rules by avoiding compliance or withdrawing their membership. The governments join the organization voluntarily and may also depart at any time. At least this is true concerning strong trade nations like the United States or the European Communities which do not suffer as much as a smaller trade nation from the remedies or the loss of trade partners. The problem is that this action will threaten the organization as a whole. The members cannot simultaneously have the system and attain its benefits, while disobeying and undermining it. Even developed country members do have a strong interest in preserving the WTO system, and this is an incentive to limit the use of the informal flexibility that the system offers these stronger trade members.

The important lesson to learn is that a dispute settlement system within a voluntary organization like the WTO can never be more than its members want it to be. Therefore, any potential future changes of the DSU must fall within the interest of the majority of the members and stay on a level which a member can accept both as a successful winner and as an unsuccessful loser.

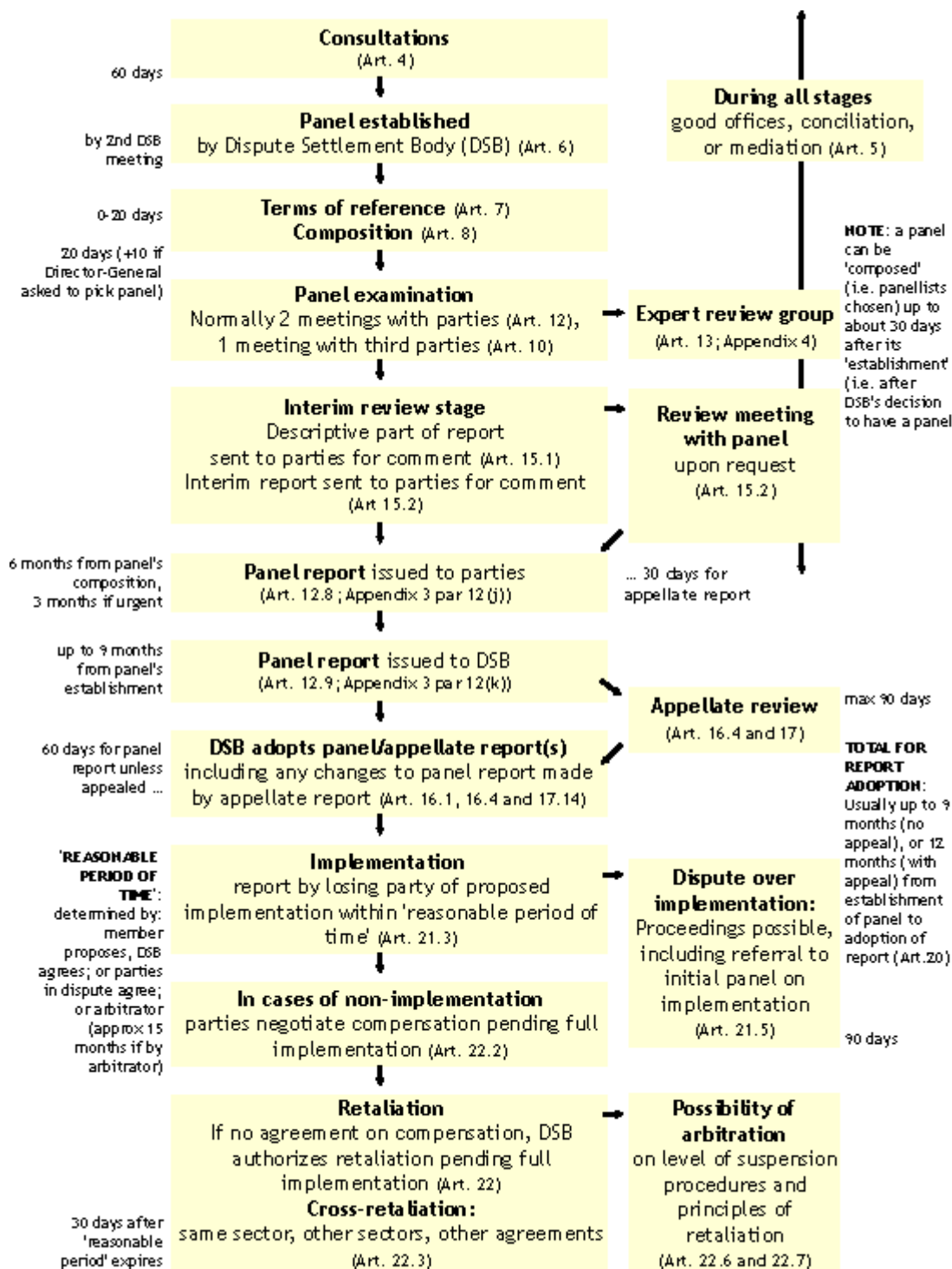
12 Annexes

12.1 Annex 1: Timeframe – settling a dispute¹⁷³

How long to settle a dispute?	
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)

¹⁷³ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, visited on 24 February 2007

12.2 Annex 2: The Panel Process¹⁷⁴



¹⁷⁴ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm, visited on 24 February 2007

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