Participation of developing countries in the DSM of the WTO and the reform of DSM

Dissertation for the award of a doctorate

at the Faculty of Law of the

University of Hamburg

submitted by

Li, Yifan

From Nei Mongol, China

Hamburg 2026

Frist reviewer: Prof. Dr. Stefan Oeter

Second reviewer: Prof. Dr. Anne van Aaken

Day of oral examination: 05.06.2026

Abstract

The World Trade Organization's Dispute Settlement Mechanism (DSM) is widely recognised as one of the most sophisticated and effective dispute resolution systems in international economic law. Yet its benefits have not been distributed equally. Developing members, which constitute the large majority of WTO membership, participate in the DSM at a substantially lower rate than their developed counterparts and face structural barriers that prevent them from effectively exercising their legal rights within the system. This thesis examines the causes of this underparticipation and proposes an integrated reform agenda to address it.

The thesis identifies three interconnected sets of barriers. The first concerns the inadequacy of Special and Differential Treatment (SDT) provisions in the DSU. Although SDT provisions were designed to recognise developing members' special circumstances in dispute settlement, their effectiveness has been undermined by two interrelated problems: the inappropriate interpretive approaches adopted by WTO adjudicators, and substantive deficiencies in the content of the provisions themselves. Drawing on case analysis across five disputes—including EC—Bed Linen, EC—Asbestos, and EC—Approval and Marketing of Biotech Products—the thesis demonstrates how adjudicators have systematically narrowed the protective scope of SDT provisions, eroding developing members' confidence in invoking them.

The second set of barriers concerns the WTO's remedy regime. The existing remedies—compensation and retaliation—are structurally disadvantageous for developing members. The prospective nature of WTO remedies leaves injured complainants without redress for losses accumulated during lengthy proceedings. The self-damaging effect of retaliation and the voluntary, MFN-constrained character of trade compensation further diminish their utility for smaller and economically vulnerable members. The thesis evaluates six reform proposals—retroactive remedies, financial compensation, mandatory compensation, collective retaliation, tradable retaliation, and carousel retaliation—assessing each against the dual criteria of inducing compliance and enhancing developing members' capacity to protect their trade rights.

The third set of barriers concerns domestic capacity constraints. Developing members face serious deficits in legal expertise, financial resources, and institutional infrastructure that prevent them from identifying potential disputes, conducting pre-litigation fact-finding, and sustaining complex proceedings. Drawing on the experiences of China, India, and Brazil, the thesis examines a range of capacity-building strategies, including making full use of existing multilateral arrangements, fostering public-private cooperation, cultivating domestic legal talent, and optimising government institutional structures.

The thesis concludes that meaningful progress requires addressing all three sets of barriers simultaneously. No single reform suffices: strengthening SDT provisions without reforming remedies leaves developing members exposed to the costs of non-compliance; improving remedies without building domestic capacity leaves many members unable to initiate disputes in the first place.

Zusammenfassung

Das Streitbeilegungssystem der Welthandelsorganisation (WTO) gilt weithin als eines der ausgefeiltesten und wirksamsten Mechanismen zur Beilegung von Streitigkeiten im internationalen Wirtschaftsrecht. Die Vorteile dieses Systems sind jedoch nicht gleichmäßig verteilt. Entwicklungsländer, die die große Mehrheit der WTO-Mitglieder stellen, nehmen in erheblich geringerem Maße an dem Streitbeilegungsmechanismus teil als ihre entwickelten Counterparts und stehen vor strukturellen Hindernissen, die es ihnen erschweren, ihre Rechte innerhalb des Systems wirksam wahrzunehmen. Die vorliegende Arbeit untersucht die Ursachen dieser Unterpartizipation und schlägt eine integrierte Reformagenda vor, um ihr zu begegnen.

Die Arbeit identifiziert drei miteinander verbundene Hindernisgruppen. Die erste betrifft die Unzulänglichkeit der Sonder- und Vorzugsbehandlungsbestimmungen (Special and Differential Treatment, SDT) im Rahmen der Dispute Settlement Understanding (DSU). Obwohl diese Bestimmungen darauf ausgerichtet sind, die besonderen Umstände der Entwicklungsländer in Streitbeilegungsverfahren anzuerkennen, wird ihre Wirksamkeit durch zwei miteinander verknüpfte Probleme untergraben: zum einen durch unangemessene Auslegungsansätze der WTO-Richter, zum anderen durch inhaltliche Mängel der Bestimmungen selbst. Auf der Grundlage einer Analyse von fünf Streitfällen—darunter EC—Bed Linen, EC—Asbestos und EC—Approval and Marketing of Biotech Products—zeigt die Arbeit, wie Richter den Schutzbereich von SDT-Bestimmungen systematisch eingeengt und damit das Vertrauen der Entwicklungsländer in deren Anwendung geschwächt haben.

Die zweite Hindernisgruppe betrifft das Rechtsmittelsystem der WTO. Die bestehenden Rechtsbehelfe—Entschädigung und Vergeltungsmaßnahmen—benachteiligen Entwicklungsländer strukturell. Der prospektive Charakter der WTO-Rechtsbehelfe lässt klagende Mitglieder ohne Ausgleich für Verluste, die während langwieriger Verfahren entstehen. Die selbstschädigende Wirkung von Vergeltungsmaßnahmen sowie der freiwillige und meistbegünstigungsrechtlich eingeschränkte Charakter der Handelsentschädigung mindern deren Nutzen für kleinere und wirtschaftlich verwundbare Mitglieder weiter. Die Arbeit bewertet sechs Reformvorschläge—rückwirkende Rechtsbehelfe, finanzielle Entschädigung, obligatorische Entschädigung, kollektive Vergeltungsmaßnahmen, handelbare Vergeltungsrechte und das Karussellverfahren—und misst jeden am doppelten Kriterium der Compliance-Förderung und der Stärkung der Fähigkeit der Entwicklungsländer, ihre Handelsrechte zu schützen.

Die dritte Hindernisgruppe betrifft inländische Kapazitätsdefizite. Entwicklungsländer leiden unter gravierenden Mängeln an Rechtsexpertise, Finanzmitteln und institutioneller Infrastruktur, die es ihnen erschweren, potenzielle Streitfälle zu identifizieren, vorprozessuale Sachverhaltsermittlungen durchzuführen und komplexe Verfahren aufrechtzuerhalten. Anhand der Erfahrungen Chinas, Indiens und Brasiliens untersucht die Arbeit eine Reihe von Strategien zum Kapazitätsaufbau, darunter die vollständige Nutzung bestehender multilateraler Vereinbarungen, die Förderung der Zusammenarbeit zwischen öffentlichem und privatem Sektor, die Ausbildung inländischer Rechtsexperten sowie die Optimierung staatlicher Institutionsstrukturen.

Die Arbeit kommt zu dem Schluss, dass bedeutende Fortschritte nur dann erzielt werden können, wenn alle drei Hindernisgruppen gleichzeitig angegangen werden. Eine einzige Reform reicht nicht aus: Die Stärkung der SDT-Bestimmungen ohne Reform des Rechtsmittelsystems lässt Entwicklungsländer den Kosten der Nicht-Einhaltung ausgesetzt; die Verbesserung der Rechtsbehelfe ohne Aufbau inländischer Kapazitäten lässt viele Mitglieder von vornherein außerstande, Streitigkeiten einzuleiten.

Acknowledgements

This thesis would not have been possible without the support and guidance of many people, to whom I owe a profound debt of gratitude.

My deepest thanks go to my supervisor and first reviewer, Prof. Dr. Stefan Oeter, whose intellectual rigour, patience, and unwavering encouragement shaped this thesis from its earliest stages. His insightful comments and willingness to engage with my arguments at every turn were invaluable to the development of this work.

I am also greatly indebted to my second reviewer, Prof. Dr. Anne van Aaken, for her thoughtful and incisive feedback, which pushed me to sharpen my arguments and broaden the analytical reach of this thesis. I likewise thank Prof. Dr. Eva Leora van der Zee for her participation in the doctoral examination committee and for the stimulating discussion during the defence.

I wish to express my sincere gratitude to Judith Legies, secretary to my supervisor, for her kind assistance throughout the administrative aspects of my doctoral journey. I also thank Claudia Zavala Lazo and Christiane Andresen of the Geschäftsstelle des Promotionsausschusses, Habilitationsangelegenheiten und LL.M.-Beratung at the Universität Hamburg Fakultät für Rechtswissenschaft, whose efficient and supportive guidance made the formal requirements of the doctoral process navigable.

My time as an intern at the World Trade Organization in Geneva provided an irreplaceable opportunity to observe the institution that lies at the heart of this thesis from the inside. The practical experience and perspectives I gained there have enriched this work in ways that no amount of reading could fully replicate, and I am grateful to all those who made that experience possible.

On a personal note, I owe special thanks to my dear friends Mingyang Tian and Kaige Chen, whose companionship, encouragement, and good humour sustained me through the more demanding stretches of this project.

Finally, and most profoundly, I thank my parents, Xing Li and Yuling Sun, for their unconditional love and support. Their belief in me has been my greatest source of strength, and it is to them that I dedicate this work.

Nei Mongol, China, 8 July 2026
Yifan Li

Table of Contents

List of Figures

List of Tables

List of Abbreviations

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
AI	Artificial Intelligence
ASEAN	Association of Southeast Asian Nations
BISD	Basic Instruments and Selected Documents
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CTD	Committee on Trade and Development
CTDSS	Committee on Trade and Development Special Session
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EEC	European Economic Communities
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
GNP	Gross National Product
GPA	Agreement on Government Procurement
GSP	Generalized System of Preferences
HDI	Human Development Index
ICJ	International Court of Justice

ILC	International Law Commission
IMF	International Monetary Fund
IPPC	International Plant Protection Convention
ITO	International Trade Organization
LA	Agreement on Import Licensing Procedures
LDC	Least Developed Country
MFN	Most-Favoured-Nation
MOFCOM	Ministry of Commerce of the People's Republic of China
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OMA	Orderly Market Agreement
PCIJ	Permanent Court of International Justice
RCEP	Regional Comprehensive Economic Partnership
RTA	Regional Trade Agreement
SCM	Agreement on Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
SPS	Agreement on Sanitary and Phytosanitary Measures
TBR	Trade Barriers Regulation
TBT	Agreement on Technical Barriers to Trade
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRQ	Tariff Rate Quota
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
US	United States of America

USTR	United States Trade Representative
VER	Voluntary Export Restraint
WHO	World Health Organization
WOAH	World Organisation for Animal Health
WTO	World Trade Organization

Introduction

The World Trade Organization (WTO) is a multilateral trading organization that plays a crucial role in regulating international trade and promoting economic development. Established in 1995, the WTO is responsible for administering and enforcing the rules of international trade, resolving trade disputes between members, and promoting global trade liberalization. As the successor to the General Agreement on Tariffs and Trade (GATT), the WTO built upon nearly five decades of multilateral trade governance and expanded both the scope of covered agreements and the sophistication of its institutional machinery. Today, with 164 members accounting for the vast majority of world trade, the WTO constitutes the central pillar of the international trading system. Yet its promise of inclusive, rule-based trade has not been fulfilled equally for all members. Developing members, which make up the large majority of WTO membership, continue to face structural disadvantages in negotiating rules, enforcing their rights, and capturing the gains from trade liberalization. These disadvantages are nowhere more evident than in the WTO's Dispute Settlement Mechanism, which, despite its formal equality and procedural sophistication, remains significantly underutilized by most developing members.

One of the key functions of the WTO is to provide a forum for negotiations and agreements between members to reduce trade barriers, including tariffs and non-tariff measures, and to promote trade liberalization. This has been particularly important for its developing members, as it has allowed them to access global markets and increase their participation in the global economy. The experience of some developing members, like the Four Asian Tigers and China, has demonstrated the importance of participating in international trade and the WTO for economic development. However, there are significant contradictions between the free trade theories on which the WTO is based and the actual development history of those developing members. The traditional economic and trade theories adopted by many international organizations, including the WTO, emphasize the role of the "invisible hand" of market forces in allocating resources, and they regard government intervention as detrimental and distortive. Yet the experience of these developing members consistently shows the leading role of governments in the process of economic development—their governments adopted trade restrictive measures, including high tariffs, subsidies, and quotas, to protect domestic industries at early stages of development. A closer examination of the development process of some developed members, such as the United States and France, reveals that they too adopted similar strategies at certain periods of their history. Traditional theories assume that all market participants have access to full information and possess adequate freedom to act upon it—conditions that sometimes cannot be satisfied in developing members due to political and legal constraints,[1] making it difficult to apply traditional free trade theories uniformly to the economic development of developing countries.

The infant industry protection theory proposed by Alexander Hamilton and Friedrich List in the nineteenth century further justifies the intervention of developing countries' governments in

[1]Yong-Shik Lee, *Reclaiming Development in the World Trading System* (Cambridge University Press, 2016), 19–24.

their economic and trade development, recognizing the necessity to adopt protective measures under certain conditions.[2] Modern economic and trade theory, building on continuous revisions of classical thinking, emphasizes the importance of managing trade globalization. Trade globalization is not a panacea: while it may benefit economies in aggregate, it also produces distributional consequences that can leave certain countries, industries, or individuals worse off if not supplemented by appropriate policy management.[3] The inequality generated by trade globalization can be attributed to two major causes: first, the discrepancy in political power between major powers and others in the formulation of international trade rules, leading to rules that are unfavourable to developing countries; and second, the scarcity of resources in some developing countries to redistribute the gains from international trade and remedy those harmed by it. These dynamics explain why the "invisible hand" alone is insufficient to facilitate development and why the role of international organizations and members' governments in managing trade globalization matters. These two causes together explain why a uniform set of rules cannot fit all members equally—given the vast differences in levels of economic development, institutional capacity, and resources—and provide the foundational justification for differential treatment of developing members within the multilateral trading system.

Accordingly, the special needs of developing members ought to be taken into account by the WTO in its rule-making processes, which demonstrates the importance of their active participation—especially in negotiations—to make their voice heard and their concerns addressed. From another perspective, active participation of developing members in the WTO benefits not only developing members themselves concerning their economic development through international trade, but also other members and the broader system. In the context of economic globalization, economic underdevelopment among a large number of WTO members generates regional and global instability that ultimately affects all trading nations. At the same time, the WTO has a strong political character. Like other international organizations, the WTO operates without a centralized authority above member states, and decision-making in negotiations requires members' consensus. Although the WTO applies a one-member-one-vote principle, members differ significantly in political and economic power, and major powers have greater leverage to influence negotiations.[4] Developing members, especially small and poor ones, are highly dependent on markets and aid from developed members, which can be used as leverage. Proposals from developing members that are incompatible with the interests of developed members may be easily blocked, and developing members often do not have enough resources to exchange for support from developed members. The recent practice of some developed members—most notably the trade policies of the former US administration under President Trump, which adopted unilateral measures outside the WTO framework and used the

[2] Marc J. Melitz, "When and how should infant industries be protected?," *Journal of International Economics*, vol. 66, 2005, p. 177–196.

[3] Joseph E. Stiglitz, *Globalization and Its Discontent Revisited–Anti-globalization in the Era of Trump*, W. W. Norton & Company, p. xviii–xix, 26–43, 114–115 (2017).

[4] Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (5th Edition), Cambridge University Press, p. 317–324 (2022).

consensus principle to block proposals incompatible with its own interests[5]—further illustrates the political vulnerabilities facing the multilateral trading system. The same political dynamics that affect negotiations within the WTO also shape developing members' experience in its Dispute Settlement Mechanism, as power asymmetries and resource disparities influence which members can effectively exercise their rights within the system.

Another central function of the WTO is settling trade disputes between its members. The Dispute Settlement Mechanism (DSM) provides a means to resolve trade disputes in a fair and impartial manner, promoting stability in international trade relations. Understanding the current DSM requires tracing its origins in the GATT period, during which the dispute settlement system underwent significant and contested evolution. In the early years of the GATT, Article XXIII of GATT 1947 provided contracting parties with a mechanism to seek redress when they believed that benefits accruing to them under the Agreement were being nullified or impaired. However, the process was largely diplomatic in character—disputes were referred to the CONTRACTING PARTIES as a collective body, deliberated politically, and resolved primarily through negotiation rather than adjudication. There were no dedicated procedural rules, no standing panels, and no means to compel compliance. This design reflected the original conception of the GATT as a commercial agreement rather than a legal institution, and it placed developing contracting parties in a particularly disadvantageous position, as their limited political and economic leverage meant that their concerns could be marginalized or ignored by more powerful trading partners. The introduction of a neutral working party process in the early 1950s, and subsequently a dedicated panel process, marked the beginning of third-party fact-finding and legal interpretation within the GATT framework. Yet the positive consensus principle—requiring all contracting parties to agree to establish a panel, adopt rulings, and authorize retaliation—kept the system fundamentally power-oriented and susceptible to political obstruction.[6] A respondent member could effectively block the establishment of a panel, the adoption of a ruling against it, or the authorization of countermeasures simply by withholding consent. Developing members were particularly disadvantaged in this environment: the asymmetry of political and economic power between them and major developed trading partners meant that their complaints were often blocked or ignored, and the system as a whole reflected the interests of powerful members more than those of the developing world. The Tokyo Round brought some procedural improvements through the 1979 Understanding, which codified and elaborated dispute settlement rules and introduced the panel report system in a more systematic form. However, the system retained its predominantly political character, and the positive consensus requirement remained at critical junctures. Scholars have widely characterized the GATT dispute settlement system of this period as more power-oriented than rule-oriented, with outcomes

[5]id. p. 38–39.

[6]Robert E. Hudec, *Developing Countries in the GATT Legal System* (Cambridge University Press, 2011); Robert E. Hudec, "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business," *Cornell International Law Journal* 13, no. 2 (1980): 145.

depending heavily on the relative leverage of the disputing parties rather than on the merits of legal arguments.[7]

The establishment of the WTO and the entry into force of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) marked a decisive shift toward a more rule-oriented system. The DSU unified the previously fragmented dispute settlement procedures—ending the "Code Approach" adopted after the Tokyo Round that had allowed forum shopping and had excluded developing members from key trade areas—and replaced positive consensus with a negative consensus principle in the key procedural stages, making the advancement of proceedings nearly automatic. It also established a standing Appellate Body to provide second-instance review and to address the inevitable ambiguity of WTO rules, thereby reducing the scope for individual panels to depart significantly from prior interpretations. These changes were widely welcomed as beneficial for developing members, since the reduced scope for political obstruction in theory placed weaker members on a more equal procedural footing with powerful ones. However, the extent to which the current DSM adequately serves developing members has remained a subject of sustained scholarly and policy debate. Empirical research has shown that while developing members' participation in the DSM has increased compared to the GATT period, it remains insufficient and deeply unbalanced: a small number of larger or more economically significant developing members—such as Brazil, India, China, Mexico, and Thailand—account for the vast majority of disputes initiated by the developing world, while the majority of developing members, particularly least developed countries and small economies, have initiated few or no disputes throughout the WTO's existence.[8] Statistical analyses consistently confirm that the frequency of a member's participation in the DSM correlates strongly with its share of global trade and its level of economic development, but also with its domestic legal capacity and the financial resources it can devote to litigation—factors that systematically disadvantage developing members.[9] The persistent gap between the formal openness of the DSM and the reality of unequal participation has prompted both policymakers and scholars to investigate the multiple barriers that prevent developing members from making full use of the system. These barriers—rooted in the inadequacy of SDT provisions, the design of the remedy regime, and the lack of litigation capacity—form the three main pillars of analysis in this thesis.

---

[7]Bernhard Zangl, "Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO," *International Studies Quarterly* 52 (2008): 825–854; Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Martinus Nijhoff Publishers, 1997).

[8]Gregory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press, 2010); Marc L. Busch and Eric Reinhardt, "Developing Countries and GATT/WTO Dispute Settlement," *Journal of World Trade* 37 (2007); Hunter Nottage, "Developing Countries in the WTO Dispute Settlement System," 29.

[9]Jan Bohanes and Fernanda Garza, "Going beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement," *Trade, Law and Development* 4, no. 1 (2012): [ix]–124; Henrik Horn, Petros C. Mavroidis, and Håkan Nordström, "Is the Use of the WTO Dispute Settlement System Biased?," Discussion Paper No. 2340, Centre for Economic Policy Research, December 1999; Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System," *International Interactions* 32, no. 3 (2006): 201–228.

The multilateral trading system has introduced numerous Special and Differential Treatment (SDT) provisions designed to address the special situation and needs of developing members, both in substantive WTO agreements and within the DSM itself. Across the WTO covered agreements, there are approximately 150 SDT provisions, spanning a wide range of types and degrees of legal enforceability. These provisions can be traced back to the recognition, already present in the GATT, that uniform obligations cannot be appropriate for members at vastly different levels of development, and that some degree of flexibility and preferential treatment is necessary to enable developing members to participate meaningfully in the multilateral trading system. However, the effectiveness of SDT provisions has been widely questioned in the academic literature, both in terms of their substantive content and their actual impact on developing members' trade outcomes. Alessandrini has pointed out that most SDT provisions, beyond those providing for longer compliance periods, amount to no more than best-efforts commitments by developed members, creating political expectations rather than enforceable legal obligations.[10] Stevens, classifying SDT provisions by type, argues that trade preferences remain at the discretion of individual members and that many SDT provisions—including those characterised as ancillary support—are legally unenforceable, offering developing members rhetorical reassurance rather than substantive benefit.[11] Rolland has similarly concluded that the content and practical effectiveness of most SDT provisions is "far from certain," and that the gap between the aspirational language of many provisions and their operational reality is substantial.[12] Other scholars have highlighted the structural limitations of the SDT framework more broadly: the lack of binding obligations on developed members to grant preferential treatment, the absence of effective monitoring mechanisms to ensure that SDT commitments are honoured, the failure of SDT provisions to keep pace with the evolving needs of developing members as the trading system has expanded into new areas such as services, intellectual property, and trade facilitation, and the difficulty of translating general development objectives into specific and enforceable rights.[13] Beyond these substantive deficiencies, scholars have debated the negotiating dynamics that produced the current SDT framework and that constrain its reform. The history of SDT in the multilateral trading system reflects a persistent tension between developed members' emphasis on reciprocity and non-discrimination as core principles of the trading system, and developing members' insistence that their special circumstances require asymmetric obligations and preferential access. This tension, evident in negotiations from the GATT's Part IV provisions in 1964 through the Doha Development Agenda and the 2013 Bali Ministerial monitoring mechanism for SDT implementation, has consistently resulted in SDT

---

[10] Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (Bloomsbury Academic, 2010), 174.

[11] Christopher Stevens, "The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO," IDS Working Paper 163, p. 3 (2002).

[12] Sonia E. Rolland, *Development at the World Trade Organization* (Oxford University Press, 2012), 117.

[13] Edwini Kessie, "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements," in *WTO Law and Developing Countries* 12, 14–15 (George A. Bermann & Petros C. Mavroidis eds., 2007); Frank J. Garcia, "Beyond Special and Differential Treatment," 27 *Boston College International and Comparative Law Review* 311 (2005).

provisions that are weaker and less enforceable than developing members sought.[14] A further dimension of academic debate concerns whether SDT provisions should be treated as a principle of interpretation capable of influencing the reading of other WTO rules in favour of developing members, or merely as a collection of discrete, context-specific rules whose scope is confined to their particular textual context. This question has been actively contested in both WTO jurisprudence and academic writing: proponents of an interpretive SDT principle argue that recognising an overarching development objective would give the provisions greater systemic coherence and practical impact, while critics point to the heterogeneity of SDT provisions, the resistance of WTO adjudicators to adopting expansive interpretations, and the risk that a broadly applicable SDT principle could create unpredictable distortions in the legal framework. In order to provide targeted reform proposals, this thesis categorizes SDT provisions into five groups: escape clauses, best-efforts provisions, provisions defining an objective but lacking specific implementation prescriptions, accountability provisions, and provisions using "should" instead of "shall." The feasibility and priorities of reforming these provisions—both in terms of content and interpretive practice—will be assessed in light of the political nature of the WTO and the need for members' consensus, which significantly shapes the difficulty of achieving reforms in both areas—a dynamic that has been observed across the full range of WTO reform initiatives, including SDT-related negotiations.[15]

Beyond the content and interpretation of SDT provisions, developing members face significant challenges at the implementation stage of dispute settlement. Remedies under the DSU—withdrawal of WTO-inconsistent measures, compensation, and retaliation—reflect the strong political nature of the dispute settlement process, and their current design places developing members at a structural disadvantage. The remedy framework was not designed with the specific vulnerabilities of developing members in mind; rather, it was shaped by the negotiating priorities of major trading powers and by the GATT's historical understanding of dispute settlement as a mechanism for rebalancing trade interests rather than enforcing legal obligations. Developing members have expressed sustained and specific concerns about the ineffectiveness of these remedies during the Doha Round negotiations on DSU reform, yet little progress in addressing them has been achieved.[16] Scholarly debate on WTO remedies has proceeded along two main axes. The first concerns the fundamental objective of the WTO dispute settlement system, which determines the appropriate design of remedies. One school of thought, associated with Sykes, Bello, and Schwartz, argues that the purpose of dispute settlement is to rebalance trade interests between members, and that prospective remedies—which operate from the point of compliance onwards without compensating for past losses—are appropriately calibrated to this goal by allowing a degree of "efficient breach," treating WTO obligations as flexible commitments subject

[14]Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (Zed Books, 2004); Constantine Michalopoulos, "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization," Policy Research Working Paper No. 2388, World Bank, 2000.

[15]Seung Wha Chang, "WTO for Trade and Development Post-Doha," 10 *J. Int. Econ. Law* 553, 555–557 (2007).

[16]R. Rajesh Babu, "Remedies for Violations of WTO Law: The Misplaced Notion of Effectiveness," *Asian Journal of WTO and International Health Law and Policy* 7, no. 2 (2012): 492.

to renegotiation rather than absolute legal duties.[17] The opposing view, advanced by Charnovitz, Jackson, and Shaffer, holds that the primary objective of the DSM is to induce compliance with WTO obligations, and that the prospective and limited nature of current remedies falls significantly short of this goal—particularly for developing members who suffer ongoing and accumulating losses during lengthy dispute settlement proceedings that can span several years.[18] The second axis of scholarly debate concerns the specific design of reform proposals. A substantial body of literature has analysed the merits, practical challenges, and feasibility of introducing retroactive remedies, financial compensation, mandatory compensation, collective retaliation, tradable retaliation, and the carousel method, each designed to address different facets of the disadvantage that developing members face in the implementation stage.[19] The debate on retroactive remedies raises questions about the relationship between WTO law as *lex specialis* and the general principles of the law of state responsibility, which ordinarily require full reparation for internationally wrongful acts. The debate on financial compensation engages questions of quantification, enforceability, and the risk that financial remedies might entrench the advantages of wealthier members. The debate on collective retaliation raises questions about the bilateral or multilateral nature of WTO obligations and the trade-restrictive implications of expanding the pool of retaliating members. Across all these reform debates, the feasibility of change depends critically on the nature and extent of modifications required to existing DSU provisions, and on whether such changes can command the consensus of a politically diverse membership with divergent interests.[20] The prospective nature of both compensation and retaliation means that a prevailing developing member cannot recover losses incurred during often lengthy proceedings; the voluntary nature of compensation makes reaching an agreement a political exercise; and the self-damaging effect of retaliation is particularly burdensome for smaller, more fragile economies. The feasibility of reform proposals will be analyzed against the broader context of the objectives of WTO dispute settlement and the differences between WTO law and general public international law on remedies for violations.

A further structural barrier to developing members' active participation in the DSM is their insufficient capacity to bring and pursue disputes. Although the enhanced legal character of the

---

[17]Alan Sykes, "Optimal Sanctions in the WTO: The Case for Decoupling (and the Uneasy Case for the Status Quo)," SSRN Scholarly Paper (August 6, 2009), 7–8, https://doi.org/10.2139/ssrn.1444589; Judith Hippler Bello, "The WTO Dispute Settlement Understanding: Less Is More," *American Journal of International Law* 90, no. 3 (July 1996): 416–18; Warren F. Schwartz and Alan O. Sykes, "The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization," *The Journal of Legal Studies* 31, no. S1 (January 2002): 201.

[18]Charnovitz Steve, "Rethinking WTO Trade Sanctions," *American Journal of International Law* 95, no. 4: 792–832; Carlos M. Vazquez and John H. Jackson, "Some Reflections on Compliance with WTO Dispute Settlement Decisions," *Law and Policy in International Business* 33, no. 4 (2002): 555–68; Gregory Shaffer, Victor Mosoti, and Asif Qureshi, "Towards a Development-Supportive Dispute Settlement System in the WTO," 118.

[19]Robert E. Hudec, "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective," in *Development, Trade, and the WTO*, ed. Bernard Hoekman, Aaditya Mattoo and Philip English (World Bank, 2002), 81–91; M. Bronckers and F. Baetens, "Reconsidering Financial Remedies in WTO Dispute Settlement," *Journal of International Economic Law* 16, no. 2 (June 1, 2013): 308.

[20]Geraldo Vidigal, "Re-Assessing WTO Remedies: The Prospective and the Retrospective," *Journal of International Economic Law* 16, no. 3 (September 1, 2013); PC Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place," *European Journal of International Law* 11, no. 4 (January 1, 2000): 763–813.

DSM has in principle created a more level playing field, the complex and resource-intensive nature of dispute settlement proceedings imposes demands that many developing members are structurally unable to meet. WTO litigation has evolved into a highly specialized and technically demanding process: a typical panel proceeding involves the submission of detailed written pleadings, the presentation of complex economic and scientific evidence, and the navigation of a substantial and rapidly developing body of WTO jurisprudence. This complexity is compounded by the multidisciplinary character of many disputes, which require expertise not only in WTO law but in economics, health regulation, environmental science, and other specialized fields.[21] Some commentators have argued that domestic-level obstacles—including the shortage of qualified legal professionals, the absence of dedicated government units, and the lack of effective public-private cooperation—rather than obstacles at the multilateral level, constitute the primary barriers to developing members' participation.[22] This thesis does not regard these two levels as incompatible; both must be addressed simultaneously. The enhanced legal character of the DSM, while creating a more rule-based environment, has simultaneously increased the complexity and resource demands of dispute settlement proceedings, making capacity constraints more acute for developing members.[23] The lack of capacity manifests in several interconnected dimensions: the inability to identify WTO-inconsistent measures in the pre-litigation stage; the absence of specialized legal and technical expertise required by disputes in fields such as economics, health, and environmental science; the shortage of experienced staff with practical knowledge of WTO proceedings; inadequate government institutional settings, including lack of dedicated WTO missions in Geneva and poor interdepartmental coordination; high litigation costs, which are proportionally more burdensome for developing members; and the impact of political considerations and cultural differences on members' willingness and ability to engage the DSM.[24] The academic literature on capacity building for developing members in the DSM has developed considerably in recent years, reflecting growing recognition that procedural reform alone cannot be sufficient if developing members lack the domestic resources to take advantage of improved rules. Scholars have examined the role of public-private partnerships in enabling developing members to pool resources and expertise,[25] the potential of the ACWL and WTO Secretariat technical assistance programmes to supplement domestic capacity, the importance of legal education and professional training in building a sustainable pipeline of WTO expertise, and the significance of frequent participation as a third party as a means of developing institutional

---

[21] Jan Bohanes and Fernanda Garza, "Going beyond Stereotypes," *Trade, Law and Development* 4, no. 1 (2012): [ix]–124; Kristin Bohl, "Problems of Developing Country Access to WTO Dispute Settlement," *Chicago-Kent Journal of International and Comparative Law* 9 (2009): 1–71; Chad P. Bown and Bernard Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector," SSRN Scholarly Paper (May 1, 2005), https://doi.org/10.2139/ssrn.746384.

[22] Bohanes and Garza, "Going beyond Stereotypes," 45.

[23] Gregory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press, 2010), 342.

[24] Henrik Horn, Petros C. Mavroidis, and Håkan Nordström, "Is the Use of the WTO Dispute Settlement System Biased?," Discussion Paper No. 2340, Centre for Economic Policy Research, December 1999, 2.

[25] Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Rowman & Littlefield, 2003), 20; Gregory C. Shaffer, "The challenges of WTO law: strategies for developing country adaptation," *World Trade Review* 5, no. 2 (July 2006): 179, https://doi.org/10.1017/S1474745606002746.

knowledge at lower cost than full complainant or respondent participation.[26] While the WTO Secretariat and the ACWL have provided some assistance to developing members, both have been criticized for being insufficient in quantity and scope to address the structural capacity deficit that most developing members face.[27] Reform at both the domestic and multilateral levels is needed; this thesis examines options including improvements to the assistance provided by the WTO Secretariat and the ACWL, as well as enhanced public-private cooperation and investment in domestic legal expertise at the domestic level.[28]

Against this backdrop, this thesis addresses two central research questions: what are the reasons behind the underparticipation of developing members in the WTO Dispute Settlement Mechanism, and how can their participation be more effectively promoted? It argues that the underparticipation of developing members in the DSM is attributable to three interconnected sets of problems: the inadequacy of SDT provisions—whether in terms of content or adjudicative interpretation—which undermines their incentive to participate; the deficiencies in the remedy regime, which limit the practical benefits that developing members can obtain from dispute settlement; and the lack of legal capacity and financial resources, which constrains their ability to effectively engage the DSM. These three problems are mutually reinforcing: weak SDT provisions reduce the benefits of participation, inadequate remedies reduce the returns from successful litigation, and insufficient capacity prevents members from accessing even those benefits that formally exist. Accordingly, this thesis proposes reforms across all three dimensions, with attention to both their desirability from a development perspective and their feasibility within the political constraints of the WTO system. In doing so, it seeks to bridge the gap between the normative ambitions of the existing literature and the institutional realities of a member-driven organization, proceeding on the central contention that meaningful progress in developing members' participation is achievable through a strategy that combines incremental legal reforms with sustained investment in capacity at both the domestic and multilateral levels.

This thesis provides three main contributions to the existing literature. First, it demonstrates that improving developing members' participation requires a broader perspective beyond simple rule optimization. The existing literature has largely addressed the three barriers—SDT provisions, remedies, and capacity—in isolation from one another. This thesis argues that the problems are interconnected and that reform proposals must take account of the systemic relationships between them: strengthening SDT provisions without improving capacity will leave developing members unable to invoke them; improving remedies without addressing SDT deficiencies may increase the returns from litigation in theory while leaving the underlying barriers to access unaddressed. A comprehensive and integrated approach is therefore necessary. Second, the

---

[26] Kim Van der Borght, "The Advisory Center on WTO Law: Advancing Fairness and Equality," *Journal of International Economic Law* 2, no. 4 (1999): 724; Hansel T. Pham, "Developing Countries and the WTO: The Need for More Mediation in the DSU," *Harvard Negotiation Law Review* 9 (2004): 356.

[27] Chad P. Bown and Rachel McCulloch, "Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law," *The Journal of International Trade & Economic Development* 19, no. 1 (March 1, 2010): 59, https://doi.org/10.1080/09638190903327468.

[28] Saleh Al Shraideh, *The Participation of Developing Countries in the Dispute Settlement System of the WTO* (Wolf Legal Publishers, 2013), 103–105.

reform proposals advanced in this thesis acknowledge the inevitable political nature of the WTO. Rather than proposing reforms that presuppose a depoliticized, purely judicial system—an approach that characterizes some of the more ambitious proposals in the literature—the analysis in this thesis aims to identify changes that reduce the scope for political intervention within the existing institutional framework and that are realistic enough to command the consensus necessary for adoption. This requires distinguishing between reforms that could be achieved through changes in interpretive practice by WTO adjudicators, reforms that require changes to existing DSU provisions, and reforms that would require broader institutional changes to the WTO's political structure. Third, this thesis treats WTO law as an integral part of general international law rather than a wholly autonomous legal order. By applying broader principles from public international law—including principles of treaty interpretation derived from the Vienna Convention on the Law of Treaties, principles of the law of state responsibility concerning retroactivity and full reparation, and the practice of financial compensation in other international legal regimes—to the specific problems of WTO dispute settlement, this thesis opens up a wider range of reform options than would be available within a purely WTO-internal perspective. This approach also provides a principled legal basis for reform proposals that might otherwise appear to depart from established WTO practice.

This thesis employs several complementary research methods. Doctrinal legal analysis is used to examine the text, negotiating history, and purposes of relevant WTO provisions—including SDT clauses, remedy provisions, and capacity-related rules—and to assess the interpretive approaches adopted by WTO adjudicators in applying these provisions to disputes involving developing members. The analysis draws on DSU provisions, WTO panel and Appellate Body reports, and the travaux préparatoires of the relevant agreements where available. Statistical analysis of GATT and WTO dispute data maps the patterns of developing member participation and underparticipation in the DSM across time, by region, and by level of development, providing an empirical foundation for the thesis's diagnoses and reform proposals. Comparative legal analysis draws on analogous provisions and jurisprudence from other fields of international law—including international investment law, international human rights law, and general public international law on state responsibility—as well as selected domestic law examples, to inform proposals for reform. This comparative dimension is particularly important for the thesis's treatment of remedies, where the constraints of the DSU are illuminated by contrast with the fuller reparatory framework available under general international law.

A note on terminology and scope is necessary. The term "developing members" is used throughout this thesis to refer to those WTO members that are not classified as developed members. Because there is no universally agreed definition of "developing country" in the WTO or in international law more generally, and because the WTO operates on the basis of a self-selection principle whereby members designate their own development status, the boundaries of this category are inherently contested. The self-selection principle has generated controversy, with developed members arguing that large emerging economies such as China should not benefit from developing member status given the scale of their economies and their capacity to participate fully in all WTO functions. For the purposes of this thesis, "developed members" refers to a group of approximately 40 WTO members—including all 27 EU member states, the

United Kingdom, Australia, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, Switzerland, and the United States, as well as Chinese Taipei (which renounced developing member status in 2018), Brazil (which designated itself as a developed member in 2019), and the Republic of Korea (which announced developed country status in 2019 and was recognised as such by UNCTAD in 2021)—all of which have achieved high Human Development Index scores and high gross national income per capita. All remaining WTO members are treated as developing members for the purposes of this thesis, a category that includes least developed countries (LDCs) as a distinct subgroup, following the UN definition adopted by the WTO. The thesis recognizes the significant diversity within the category of developing members, ranging from major emerging economies such as China and India to small and poor LDCs, and notes that the appropriate policy responses to the barriers identified in this thesis may differ significantly depending on the specific circumstances of the member concerned.

The research focuses primarily on the WTO period from 1995 to the present. Reference to the GATT period is made where relevant to trace the historical evolution of the dispute settlement system and to contextualise current arrangements, particularly in relation to the development of SDT provisions and the design of the remedy framework. The thesis focuses on developing members' participation in the formal Dispute Settlement Mechanism, encompassing the consultation stage, panel proceedings, Appellate Body review, and implementation and enforcement. It does not extend to developing members' participation in WTO negotiations, trade policy reviews, or other WTO functions, except where background context is necessary to understand the DSM and the political dynamics that shape it. Domestic-level reforms are discussed as complements to multilateral-level reforms rather than substitutes: the thesis takes the view that sustainable improvement in developing members' participation requires action on both fronts, and that treating them as alternatives understates the interconnected nature of the barriers that developing members face. It should also be noted that this thesis does not address the reform of the Appellate Body or the broader institutional crisis in WTO dispute settlement that has arisen from the blocking of Appellate Body appointments, except insofar as these institutional developments intersect with the specific issues of developing member participation. The systemic reform of WTO dispute settlement institutions is a distinct and important topic that warrants separate treatment; the focus of this thesis is on the particular set of barriers—SDT provisions, remedies, and capacity—that have been identified as the principal causes of developing members' underparticipation, and on reform proposals that could be implemented independently of or in parallel with broader institutional reform.

This thesis is structured as follows. The first two chapters build the conceptual and empirical foundation: Chapter One links international trade and the WTO to the economic development of developing members and establishes why active participation of developing members in the DSM serves both their own interests and those of the broader multilateral trading system; Chapter Two analyses the current state of developing members' participation in the DSM through statistics and case evidence, demonstrating that participation remains insufficient and unbalanced, and justifying the need for reform. Chapter Three examines the difficulties developing members encounter in invoking SDT provisions, analysing both deficiencies in the content of these provisions and inappropriate interpretive approaches by WTO adjudicators, and proposes targeted reforms. Chapter Four addresses the obstacles developing members face at the implementation stage of dispute settlement, analysing the shortcomings of the existing compensation and retaliation mechanisms and assessing proposals for reform, including retroactive remedies, financial compensation, mandatory compensation, and various forms of collective and modified retaliation. Chapter Five identifies the lack of participation capacity as an additional structural barrier and proposes reforms at both the domestic and multilateral level to address this gap, including improvements to the ACWL and WTO Secretariat assistance, enhanced public-private cooperation, and investment in domestic legal education and expertise. The thesis concludes by drawing together the findings across the three analytical pillars, underscoring the importance of a comprehensive, multi-level approach to enhancing the effective participation of developing members in the WTO's dispute settlement system, and identifying the conditions under which the reform proposals advanced in this thesis are most likely to be feasible and effective.

Part 1 Developing countries and multilateral trading system

In analysing the necessity for developing countries to actively participate in the World Trade Organization (WTO), linkage between some concepts should be established. First, the relationship between developing countries and the WTO cannot be discussed without introducing the function of international trade in fostering economic development, and that shows the importance of international trade to developing countries and the necessity for developing countries to engage in international trade. However, due to some special situations of developing countries, adjustments are needed in their road to globalization. Then, the multilateral trading system, which now encompasses most sovereign states in the world, provides rules governing international trade order after the World War II and it is a forum for its members to discuss trade-related issues. Thus, it constitutes the primary forum in which members negotiate and determine the terms on which international trade between them is conducted. Although the multilateral trading system was established by a limited number of states, after decades of development and expansion in both membership and covered scopes, it is now the most influential and irreplaceable organization in the field of international trade. Developing members played the role of rule-takers in the system at the beginning, but the recognition of their special needs and their increased impact in the system now make their voice heard and give them the opportunity to engage in the reform of the current international trade order. Thus, for developing countries that hope to benefit from international trade and have interests in engaging in international trade related rule-making process, participation in the WTO and its reform would undoubtedly represent the one of the most effective course of action available to them. Their participation can also contribute to the well function of the WTO. So, the organization should take some measures to guarantee that its developing members can take full advantage of the system.

1. International Trade and Developing Countries

Although development is a multifaceted concept and is hard to be evaluated, the distinction between developed and developing countries is mainly based on their economic development status, and their performance in international trade also varies. From a statistical perspective, the most developed countries in the world also excel in international trade, and several developing countries did achieve rapid development after engaging in international trade. However, it would be oversimplified to generalize that international trade is beneficial to the economic development of developing countries. The relationship between international trade and economic development is complicated and some special concerns of developing countries in international trade should be taken into account. Some of the characteristics of developing countries and the patterns of their engagement in international trade are also reflected in the multilateral trading system and these elements influence their participation in the organization. The WTO as a forum for its members to discuss trade-related matters and a bridge connecting developing countries to international trade should directly respond to special needs of its developing members in international trade.

1.1. The Definition of Developing Countries

Given the significant differences in levels of development among WTO members, they are conventionally classified into two broad categories: developed and developing members. These differences are reflected in the rights and obligations they bear under WTO covered agreements. However, this classification is not without controversy, because development itself is a multidimensional concept. According to the 1986 Declaration on the Right to Development, development should be understood as a people-centred process. Declaration on the Right to Development provides that “[d]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”.[29] Sen argued that development should be understood as an integrated process of expanding substantive freedoms—encompassing political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security—and that freedom serves not only as the primary end of development but also as its principal means.[30] Thus, economic growth is just one of the tools to enlarge the freedom of people, and that makes the measurement of development a complicated job. A small group of developing countries—commonly referred to as least developed countries—can be clearly distinguished from other WTO members. WTO adopted the definition and the list of least developed countries published by the UN,[31] according to which, least developed countries refer to “low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets”.[32] There are to date 46 least developed countries on the UN list, and 35 of them are members of the WTO.[33] Unlike least developed countries that are clearly defined, there is no universally agreed definition of developed countries and developing countries,[34] whether within the WTO framework or in other international contexts, because it is hard to draw the line between them.[35] The UN definition of least developed countries illustrates that a comprehensive assessment is required when determining a country's development status. Economy, environment and living standards of the nation are all relevant to development issues. But it is not easy to conduct such a comprehensive

[29] Bohanes and Garza, “Going beyond Stereotypes,” 63–66.ration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986.
[30] Amartya Sen, Development as Freedom, Oxford University Press, 1999, p. 3-11.
[31] *Least-developed countries*, World Trade Organization, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, last visited: Aug. 03, 2021.
[32] *Least Developed Countries (LDCs)*, United Nations Department of Economic and Social Affairs, at: https://www.un.org/development/desa/dpad/least-developed-country-category.html, last visited: Aug. 05, 2021.
[33] *Least-developed countries,* World Trade Organization, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, last visited: Aug. 03, 2021.
[34] *Who are the developing countries in the WTO?* World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, last visited: Aug. 3, 2021.
[35] Lynge Nielsen, *Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done*, IMF Working Paper, WP/11/31, February 2011, at: https://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf.

analysis when distinguishing developing and developed countries. However, economic growth is still central to development, and the definition and classification of different groups published by several organizations all reveal directly or indirectly the link between economic growth and development.[36] The United Nations Development Programme divides countries into four categories: low-, medium-, high- and very high human development countries. The classification is built on Human Development Index (HDI). Under these criteria, developed countries refer to very high human development countries according to Human Development Report in 2009. These countries "have achieved an HDI of 0.9 or higher".[37] Unfortunately, classification here focuses only on certain aspects of human development: "a long and healthy life, being knowledgeable and have a decent standard of living".[38] Among these three elements, a decent standard of living is closely related to the economic development of a country. Other elements, such as political freedom, human safety issues are not measured.[39] Besides, aspects beyond human development, such as environmental protection, are not captured as independent elements in this measurement framework. The classification provided by UNDP cannot accurately and comprehensively reflect the level of development of each country, and the methods adopted by other organizations share the same limitation. Based on the World Bank's classification of countries, countries can be classified into four groups, low, lower-middle, upper-middle, and high-income countries according to their gross national income (GNI) per capita.[40] GNI is one of the measures of a country's economic development. "Low and middle-income economies are sometimes referred to as developing economies."[41] And developed countries can be used interchangeably with high-income countries. The threshold adopted here reflects only economic aspects of development. As a result, the World Bank classification is similarly narrow in scope. Beyond the limitations in their respective measurement criteria, the conclusions of these organisations are further weakened by the one-sided nature of their methodologies and the limited availability of internationally comparable data.[42] Moreover, the development status of individual countries is dynamic, which adds to the difficulty of maintaining stable distinctions between developing and developed countries over time.

The difficulties of distinguishing developed and developing countries make it not easy to establish an objective and universally agreed threshold within the multilateral trading system, but in order

[36] Philipp Scheuermann, Normative Conditions to make WTO Law More Responsive to the Needs of Developing countries, Herbert Utz Verlag, 2009, p. 5-6.
[37] *Human Development Report 2009*, UNDP, 2013, at: https://hdr.undp.org/en/content/human-development-report-2009, p. 15.
[38] *Human Development Index (HDI),* UNDP, at: http://hdr.undp.org/en/content/human-development-index-hdi, last visited: Aug. 04, 2021.
[39] Lynge Nielsen, *Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done*, IMF Working Paper, WP/11/31, February 2011, at: https://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf.
[40] Nada Hamadeh, *et al.*, *New World Bank country classifications by income level: 2021-2022,* World Bank Blogs, Jul. 01, 2021, at: https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2021-2022.
[41] *World Development Indicators 2009*, The World Bank Group, 2009, at: https://openknowledge.worldbank.org/handle/10986/4367, p. xxi.
[42] Durth, Rainer, *et al.*, Neue Entwicklungsökonomik, Lucius & Lucius, 2002, p. 12.

to maintain a certain degree of stability in the application of rules in the WTO agreements, and addressing the necessity to treat members with different development status differently, the principle of self-selection is applied in the WTO. It means the classification of developing members and developed members is decided by members themselves. But the self-selection principle does not end the debates on classification. The lack of an objective threshold and excessive right of self-determination of each member has also caused some controversy. Although WTO rules permit other members to "challenge the decision of a member to make use of provisions available to developing countries"[43], which means certain provisions can only apply to part of developing members, some members still demonstrated their dissatisfaction with such self-selection principle, and proposed to introduce a graduation system that can encourages developing countries to graduate from developing status and assume all obligations under WTO agreements.[44] For the purposes of this thesis, we consider 40 WTO members to qualify as developed members - including all 27 members of the European Union (EU),[45] the United Kingdom of Great Britain and Northern Ireland (UK), Australia, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, the United States of America (US), Switzerland, plus Chinese Taipei, which renounced its developing member status in the WTO in 2018;[46] Brazil, which designated itself as a developed member in the WTO in 2019;[47] and Republic of Korea, which declared its developed-country status in 2019[48] and was recognized by the United Nations Conference on Trade and Development (UNCTAD) as a developed country in 2021.[49] This group includes most members of the Organisation for Economic Co-operation and Development (OECD).[50] All of them have achieved high Human Development Index and rank high in gross national income (GNI) per capita, which shows their relatively high level of social development. However, the rapid rise of emerging markets has added complexity to the distinction between developing and developed countries. Brazil and China can illustrate this point. Brazil, long regarded as one of the most active developing members in WTO, declared itself a developed

---

[43] *Who are the developing countries in the WTO?,* World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, last visited: Aug. 3, 2021.

[44] *EU Concept Paper on WTO Reform,* European Commission, Sept. 18, 2018, at: http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

[45] Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

[46] *Change of WTO status will be of benefit: minister.* Taipei Times, Oct. 15, 2018, at: https://www.taipeitimes.com/News/biz/archives/2018/10/15/2003702380.

[47] Ana Cristina Campos, *Chancellor: Brazil placed as great country after new status at WTO*, Agenciabrasil, March 20, 2019, at: https://agenciabrasil.ebc.com.br/en/internacional/noticia/2019-03/chancellor-brazil-placed-great-country-after-new-status-wto.

[48] *South Korea decides to give up developing country status at WTO*, The Korea Times, Oct. 25, 2019, at: http://www.koreatimes.co.kr/www/nation/2021/09/356_277676.html.

[49] *Korea promoted to developed nation by Unctad*, Korea JoongAng Daily, Jul. 4, 2021, at: https://koreajoongangdaily.joins.com/2021/07/04/business/economy/Unctad-developed-country-developing-country/20210704185600398.html.

[50] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 7-8.

member in WTO in 2019.[51] And China's status of developing member in WTO has also been questioned. Although China's GDP per capita is only about one-seventh that of the United States in 2021,[52] the latter has repeatedly stated that it does not accept China's self-designation as a developing country, and it would be unfair to other developing members for China to be considered a developing country in terms of the scale and status of its economy.[53] WTO currently has 164 members. Developed members only make up a small part of them, which means that most members are developing members. Unlike least developed countries or developed countries, the situation in developing countries varies, the range of developing countries includes countries that show diverse economic status and unbalanced development. The diverse economic status of developing countries can be proven by the fact that the success of developing countries in international trade only concentrated in a small group of countries, according to the Human Development Report issued by United Nations Development Programme, 7 of them account for 80 percent of high-technology exports among developing countries.[54] And China is now the world's largest exporter of high-technology goods.[55] While some developing countries, such as Lebanon, are suffering from food shortage, political deadlock and economic crisis.[56] The unbalanced development inside developing countries can be best demonstrated by China. China, despite its classification as a developing country, is the world's second-largest economy.[57] It has gained competitiveness in many sectors and improved its influence rapidly after engaging the World Trade Organization. But it still faces many challenges as a developing country. It suffers from energy poverty and the income per capita also qualifies it as a middle-income developing country.[58]

The reasons for the diversity and economic backwardness of developing countries are complicated. These constraints also affect developing members' capacity to engage effectively in the multilateral trading system. In order to understand the current state of developing members' participation in the WTO and to identify targeted reform measures, it is necessary to explore the reasons for the formation of these characteristics.

---

[51] *Ana Cristina Campos, Chancellor: Brazil placed as great country after new status at WTO, Agenciabrasil, March 20, 2019, at: https://agenciabrasil.ebc.com.br/en/internacional/noticia/2019-03/chancellor-brazil-placed-great-country-after-new-status-wto.*

[52] "GDP per Capita (Current US$) - China | Data," accessed April 6, 2023, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN.

[53] Executive Office of the President, *Reforming Developing-Country Status in the World Trade Organization, 84 FR 37555,* Federal Register, July 31, 2019, at: https://www.federalregister.gov/documents/2019/07/31/2019-16497/reforming-developing-country-status-in-the-world-trade-organization, p. 37555-37557.

[54] *Human Development Report 2015,* UNDP, 2015, at: https://www.undp.org/publications/human-development-report-2015, p. 116-117.

[55] Riad, N. *et al.*, Changing Patterns of Global Trade. International Monetary Fund, 2012. Figure 10.

[56] *$383 million humanitarian plan to address 'living nightmare' in Lebanon*, United Nations UN News, October 1, 2021, at: https://news.un.org/en/story/2021/10/1101962.

[57] *China's economy is now the world's second largest*, BBC News, February 14, 2011, at: https://www.bbc.com/news/av/business-12445925.

[58] Philippe Benoit & Kevin Tu, *Is China Still a Developing Country? And Why It Matters for Energy and Climate*, Colombia SIPA, Centre on Global Energy Policy, July 23, 2020, at: https://www.energypolicy.columbia.edu/research/report/china-still-developing-country-and-why-it-matters-energy-and-climate.

1.2. Developing Countries and International Trade

Although the concept of development is comprehensive—encompassing dimensions such as environmental protection and human security well beyond economic growth—economic development remains the most widely used indicator of a country's overall development status, given that poverty gives rise to a host of broader social problems. Although terrorism has often been attributed primarily to religious and political conflicts, extensive research conducted after the 9/11 attacks has revealed a complex and interconnected relationship between poverty, stability and terrorism. Alesina et al., by analyzing the relationship between poverty and government collapse in 113 countries for the period 1950 through 1982, came to a conclusion that "low growth increases the likelihood of government turnover, particularly in the case of coups d'etat."[59] Edward et al., through investigating the sample of African countries, found that the economic shock could increase the likelihood of civil conflicts.[60] Historical evidence also reveals the connection between economic instability and political extremism or armed conflict. Before the World War II, Germany's severe economic decline resulted in the collapse of its democratic system and the rise of Nazism. Thus, the outbreak of the World War II and the disaster it caused to all human beings can be attributed to Germany's economic conditions at that time.[61] The instability, such as political and civil conflicts in the society, might lead to violence, terrorism, and war. Thus, the underdeveloped economic situation or economic setbacks play a significant role in fostering instability. Terrorism and war are not just the problem of those countries, but also a threat to regional and even global development and stability. This means that not only the poor countries themselves but also the wider international community have a stake in fostering economic development in the developing world. Besides that, the Declaration on the Establishment of a New International Economic Order published by the United Nations in 1974 recognized the interdependence of all members of the world community. The Declaration further affirmed that "the interests of the developed countries and those of the developing countries can no longer be isolated from each other" and that the prosperity of the global community depends on the prosperity of each member.[62] Therefore, efforts should be made at both domestic and international level to facilitate the economic development in developing countries.

Some developing countries and economies have successfully achieved economic takeoff and overcome poverty. The most famous examples are Four Asian Tigers (including Chinese Taipei, Hongkong, China, Singapore, and South Korea), and more recently, China (Mainland). One of the common factors among the Four Asian Tigers' economic development processes is that they all actively participated in international trade. They all adopted outward development model, because exporting could provide them with broader foreign markets and increase demand for domestically produced products which was lacking at their domestic level. The profits obtained

---

[59] Alberto Alesina et al., "Political Instability and Economic Growth," *Journal of Economic Growth* 1, no. 2 (June 1, 1996): 205, https://doi.org/10.1007/BF00138862.
[60] "Economic Shocks and Civil Conflict: An Instrumental Variables Approach | Journal of Political Economy: Vol 112, No 4," accessed April 11, 2023, https://www.journals.uchicago.edu/doi/abs/10.1086/421174.
[61] Andrew J. Crozier, *The Causes of the Second World War*, History of the Contemporary World (Blackwell Publ., 1997).
[62] United Nations General Assembly, Declaration on the Establishment of a New International Economic Order, Resolution adopted by the General Assembly 3201(S-VI), May 1, 1974.

from foreign markets can be further invested into expanding production, which facilitates the further development of the industry. South Korea illustrates this point: although regarded as one of the poorest countries in the early 1960s, it dramatically transformed its economy through an export-oriented strategy. The real value of exports of the South Korea increased at an average annual rate of 27% from 1960s to 1980s. Its share of gross national product by the manufacturing sector also underwent a significant increase during this period. [63] South Korea was recognized by the UN in 2021 as the second developed country in Asia. International trade is also an important vehicle in China's economic development. The reform and opening-up policy adopted by the Chinese government in 1978 effectively fostered the development of international trade and communication between domestic and foreign firms. "From 1983 to 1998, the value of China's exports grew at an average of 14.1% per year while that of imports grew at an average of 12.55% per year."[64] Fueled by international trade, China is currently the world's second-largest economy after the US, the largest exporter of goods[65], and the second largest importer in the world[66]. From the success stories of the Four Asian Tigers and China, it could be inferred that international trade can play a significant role in fostering economic development, and promoting the comprehensive development situation in a country.

Beyond the direct development benefits for developing countries themselves, their active participation in international trade also generates significant gains for the broader global economy; the theory of comparative advantage further demonstrates the importance of developing countries to the trading system as a whole. According to comparative advantage theory, the rationale for international trade is that it is mutually beneficial for exporters and importers. Multiple globalization reports have consistently found that industrialised countries are among the biggest beneficiaries of increased globalization in terms of real GDP per capita.[67] The experience of the Four Asian Tigers not only illustrates their own development success but also demonstrates more benefits gained by developed countries through transferring labor-intensive industries to these developing countries and focusing on other industries that they have comparative advantages. The four Asian tigers seized this opportunity and then completed their industrialization through a series of industrial transformation.[68] Globalization has thus generated mutual gains—developing countries gained access to larger markets while developed countries derived benefits from trading with them. Thus, it is also for the benefits of developed countries to encourage the participation of developing countries into globalization.

---

[63] Lee, *Reclaiming Development in the World Trading System*, 16–17.

[64] Yih-Chyi Chuang & Pi-Fum Hsu, FDI, trade, and spillover efficiency: evidence from China's manufacturing sector, Applied Economics, vol. 36, 2004, p. 1103–1115, 1103-1104.

[65] Jeff Desjardins, These are the world's biggest exporters, World Economic Forum, Jun. 25, 2018, at: https://www.weforum.org/agenda/2018/06/these-are-the-worlds-biggest-exporters.

[66] David Henig & Anna Guildea, No, China Does Not Make Everything!, European Centre for International Policy Economy, March 2021, at: https://ecipe.org/publications/no-china-does-not-make-everything/.

[67] Dr. Thieß Petersen & Dr. Cora Jungbluth, *Globalization Report 2018: Who Benefits Most from Globalization?*, New Perspectives on Global Economic Dynamics, Jun. 8, 2018, at: https://ged-project.de/globalization/globalization-report-2018-who-benefits-most-from-globalization/.

[68] Akamatsu, K., *A Theory of Unbalanced Growth in the World Economy*, Weltwirtschaftliches Archiv, vol. 86, no. 2, 1961, p.196-217; Yamazawa, I., *Economic Development and International Trade: the Japanese Model*, East-West Centre, 1990.

Another common factor in the economic rise of these countries was the leading role of their governments. Their governments all determined to adopt export-oriented strategies and series of industrial policies. From 1960s to 1990s, seizing the opportunity and developing labor-intensive industries was only the starting point of economic development in these four Asian economies. What drove their sustained long-term development was a government-led process of industrial transformation. The wild-geese-flying pattern shows the transformation of these countries in their economic development. By adopting this pattern, these countries transferred the production process to less-developed countries and made themselves, the “leading geese" gradually shift away from the labor-intensive production and focus on more capital-intensive activities. Their long-term development reflects the sequence of “import-domestic production-export”, and also their advantageous products from consumer goods to capital goods, from simple articles to complex articles.[69] Four Asian tigers have succeeded in getting rid of labor-intensive industries and achieving new and sustainable developments by adjusting their economic development strategies. The Chinese government also pursued a reform and opening-up policy. Besides, in the process of promoting domestic industries, their governments also used policy tools, such as trade measures, subsidies, and research and development support, especially in the early stage of industry development. The history shows the importance of adopting trade restrictive measures in many cases. High tariffs and import quota in Viet Nam contributed to its annual growth rate of 8 percent. the historical experience of now-developed countries illustrates the same point. The United States maintained industrial tariffs of 40-50 percent from 1820 to 1931,[70] France had tariffs of 20-30 percent from 1913 to 1931, Spain had tariffs of 41 percent in 1913 and 1925.[71] The story of Japanese and Korean auto industries and Korean steel production all conform to the history of success established by almost all developed countries from the 18th century Britain onwards and they demonstrate the vital function of industry protection in today’s world. [72] However, government intervention in economic development and the adoption of trade restrictive measures both run counter to the current mainstream economic and trade theories.

The analysis of the causality between international trade and economic growth has undergone several reforms. Adam Smith firstly described it by absolute advantage theory. It is argued that countries can make benefits through international trade when they specialize in sectors where they enjoy absolute advantage.[73] Then the absolute advantage theory is replaced by comparative advantage theory proposed by Ricardo, according to which countries can benefit from

---

[69] Akamatsu, K., A Theory of Unbalanced Growth in the World Economy, Weltwirtschaftliches Archiv, vol. 86, no. 2, 1961, p. 207-209.

[70] BS Chimni, Developing Countries and the GATT/WTO System: Some Reflection on the Idea of Free Trade and Doha Round Trade Negotiations, Developing Countries in the WTO Legal System (Chantal Thomas & Joel P. Trachtman ed.), Oxford University Press, 2009, p. 24-25.

[71] Martin Khor, WTO’s Doha Negotiations and Impasses: A Development Perspective, Third World Network, 2007, p. 13.

[72] HJ Chang, Why Developing Countries Need Tariffs: How WTO NAMA Negotiations Could Deny Developing Countries’ Right to a Future, South Centre, 2005, p. xii-xiii.

[73] Adam Smith, An Inquring Into the Nature and Cases of the Wealth of Nations (3rd. Ed.), Vol. II, Liberty Fund Inc, 1784, p. 176-208.

international trade even if they do not have an absolute advantage in any sector. What matters in international trade is differences in productivity rates among countries.[74] And then the idea was widely accepted and further developed by later scholars. Now it is commonly accepted that international trade was triggered by divergency in relative international cost that caused by factor supplies.[75] When one country has a relative international cost advantage as to a given commodity compared to another country, these two countries then have an incentive to trade according to this theory.[76] When applying this theory to reality, developing countries hold a comparative advantage in labour-intensive manufacturing that is the most available factor for them and can reduce the product cost, they can specialize in these industries and export products to countries which do not have comparative advantage in producing such products. In this model, developing countries get profits from international trade, while their trading partners can redirect resources away from labour-intensive manufacturing toward sectors where they hold a comparative advantage. The classical economic and trade theories emphasize the important role of the "invisible hand" of market forces, instead of government intervention, because these theories believe that only the market itself can efficiently allocate resources, state intervention would cause economic inefficiency and trade distortion, thus should play a role only when there is a market failure. This view is now the mainstream economics. And some international organizations were established on the basis of these theories after the World War II, for example, the World Bank, the International Monetary Fund, and the WTO.[77] That can explain WTO's emphasis on trade liberalization. However, the export-oriented strategy and the trade restrictive measures mentioned above, which played important roles in facilitating economic development in these countries, are not the result of free trade, but rather the result of government intervention. The contradiction between the classical economic and trade theories and the success stories of those developing countries should be explained.

The classical theories are based on the capacity of trade players to make the optimal choice. But such capacity relies on sufficient market information and the freedom to make choices.[78] This assumption is based on research models developed in developed countries, where trade participators have both sufficient information and freedom to act. But special situations in developing countries set them apart from those developed countries. When there is no necessary information or freedom to make decisions, the efficient allocation of resources cannot be achieved solely through market forces, which is the case for many developing countries. In such situations, government-led reforms can play a more effective role. Furthermore, in the early stages of infant industry development, only the state possesses the institutional capacity to rapidly mobilise the scale of resources required—a task beyond the reach of market forces alone. It also shows the irreplaceable role of government in some cases. Besides the reallocation of

---

[74] David Ricardo, On the Principles of Political Economy and Taxation (2nd. ed.), Joseph Milligan, 1819, p. 135-168.
[75] Philipp Scheuermann, Normative Conditions to make WTO Law More Responsive to the Needs of Developing countries, Herbert Utz Verlag, 2009, p. 19.
[76] Andrea Maneschi, Comparative Advantage in International Trade: A historical Perspective, Edward Elgar Publishing, 1998, p. 2.
[77] Lee, *Reclaiming Development in the World Trading System*, 20–23.
[78] Dani Rodrik, "Industrial Policy for the Twenty-First Century," SSRN Scholarly Paper (Rochester, NY, November 1, 2004), 33, https://papers.ssrn.com/abstract=666808.

resources, governments of countries mentioned above also adopted trade restrictive measures, and that can be justified by the infant industry protection theory. This theory acknowledges the role of government in protecting the new industries from foreign competitive pressures by adopting trade restrictive measures, such as high tariffs, quotas. The necessity of protecting infant industry was first proposed by Alexander Hamilton and Friedrich List in the 19th century. They recognized that, under certain conditions, protectionism in infant sectors is beneficial. However, it must be temporary with the goal of ensuring that the industry would eventually be able to develop sustainably without continued protection. Historical experience proved that temporary protection could contribute to the maturation of these industries, and enhance their competitiveness in the international market.[79] And such protection could only be conducted by governments. For developing countries that need to facilitate the development of new industries and enhance their capacity to participate in international trade, the infant industry protection policy by their government could be effective.

Stiglitz has similarly analyzed, in Globalization and Its Discontents Revisited, the relationship between trade globalization, development, and trade policies adopted by members' governments. He acknowledged that globalization could have benefited all and facilitated development only if properly managed. While in reality, the benefit of globalization has been exaggerated while the potential risks have been underappreciated by policymakers, and trade globalization was not managed well. As a result, the inequality between major powers and smaller countries, as well as between big corporations and workers at the bottom level, is still significant. It is not globalization itself, but its mismanagement triggered discontent among the latter.[80] For instance, the rules governing trade-related intellectual property rights have in practice reinforced monopoly power within developed countries, while small and poor firms in developing countries cannot easily get patents for further innovation. The widened gap between developed and developing countries is related to the theme of this thesis. And another example is that, when international trade negotiators who were captured by the interests of big international corporations sit at the negotiation table, some domestic regulations aimed at protecting environment or public health could be regarded as transaction costs, and could be discarded by negotiators. And consumers could be damaged from a long-term point of view due to the weakening of protective regulations.[81]

More specifically, the discontent from developing country members could be attributed to two major reasons. The first one is the formulation of rules governing globalization. Trade agreements were largely set by some advanced countries. Thus, the rules should be of benefit to them and especially certain influential groups within these countries. However, developing countries could only accept these terms provided by advanced countries, or risk marginalization within the global trading system. The heavy debt burden borne by some developing countries further pressures them into accepting such terms. Therefore, the benefits globalization can bring to developing

---

[79] Marc J. Melitz, *When and how should infant industries be protected?*, Journal of International Economics, vol. 66, 2005, p. 177–196, 178.

[80] Joseph E. Stiglitz, Globalization and Its Discontent Revisited–Anti-globalization in the Era of Trump, W. W. Norton & Company, p. xviii-xix (2017)

[81] *id.* p. 26-43

countries are unevenly distributed and often conditional on domestic institutional capacity. And some trade agreements are regarded by developing countries as "a raw deal". For example, US subsidies for cotton production have depressed cotton exports from India and several African countries. Besides, the tariff structures set in the trade rules only encouraged developing countries to produce raw materials. And they could hardly obtain opportunities to pool their resources in industries that produce the higher value-added products. That hindered their transition from agricultural to industrialized economies.[82] As argued by Donatella Alessandrini, the GATT and the WTO both demonstrate the history of "active discrimination against developing countries' trade ". Although the stated objective of the GATT and the WTO was to liberalise the market and to emphasise reciprocity so that members can successfully integrate in the global trade and economy, the actual negotiation practice and the outcomes are not in line with this objective. On the contrary, the history of the GATT and the WTO shows the efforts of major powers to shape the promise and science of development, in order to allocate the resources to their advantage.[83] Although some developing countries like China and India have been given more voice in international decision-making, their strengthened power in international negotiation does not reflect the situation of other developing countries. And the dominance of developed countries' financial and corporate interests in global trade negotiation has not changed.[84] Therefore, levelling the playing field for developing countries in the negotiation process within the multilateral trading system cannot be easily achieved.

The second reason that caused discontent from developing countries is different capacity between developed and developing countries to address the inequality in trade globalization. For globalization to benefit all within a country, the government has to take measures to compensate those hurt by globalization via supporting export industries to expand production and generate more jobs, or via redistributing the revenues necessary. That requires a strong financial institution to guarantee that the inequality will not be exaggerated by trade globalization. However, many developing countries lack such institutional capacity. Thus, proportionally, there would be more citizens in these developing countries who could not benefit from globalization.[85]

According to Stiglitz, in order to reform the globalization to benefit all, there are some principles that should be followed. One of these principles requires large economies to pay more attention "to the effects of what they do on others in ways what smaller countries don't". And another principle is for countries to acknowledge that one size does not fit all. It would not be appropriate to apply same policies and rules to countries with different level of development and different governmental capacity. These two principles both reflect the difference between more advanced countries and others. Compared to advanced countries, developing countries, especially those small and poor, should be given more flexibility to close the resource and knowledge gap between them and advanced countries. For instance, they may have less capacity than advanced

---

[82] *id.* p. xxix-xxxi

[83] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission, Bloomsbury Academic, p. 205-206 (2010)

[84] Joseph E. Stiglitz, Globalization and Its Discontent Revisited–Anti-globalization in the Era of Trump, W. W. Norton & Company, p. xviii-xix (2017)

[85] *id.* p. xxix-xxx

countries to commit resources to obligations concerning climate change, and these countries may need resource support from government in other aspects more urgently. Thus, requiring them to put as much resources as advanced countries in climate change issue is unrealistic.[86]

Gallagher similarly argues that the rapid development of some developing countries in the aftermath of the global financial crisis is the result of hybrid approach adopted by their governments. These developing countries, on the one hand, recognized the importance of trade globalization, and they realized that globalisation should be complemented by appropriate institutional frameworks to benefit the whole society on the other hand.[87] Developing countries have to diversify their domestic industries for sustainable long-term development, linking emerging industries to necessary inputs such as intermediate goods markets, labour, and transportation infrastructure—tasks that the market alone cannot reliably coordinate, given uncertainty around learning costs and potential external effects. And in this instance, developing countries' governments should use policy tools to boost economic diversification.[88]

Although the WTO was established on the basis of free trade, it also recognised the special need of developing countries to maintain a degree of flexibility to protect their nascent industries—embodied, for example, in GATT Article XVIII. However, the implementation of this article faces some difficulties, and the requirement of compensation and retaliation make this article less attractive to developing countries.[89]

These dynamics—the centrality of trade for development, the indispensable role of government policy, and the mutual benefits for all parties—point to a specific institutional question that is addressed in the following section: through which mechanism developing members can most effectively engage with the global trading system to capture these benefits.

2. Multilateral Trading System and Development Issue

The significant role that developing countries play in international trade and their underdeveloped characters are also reflected in the multilateral trading system, from Havana Charter for an International Trade Organization (ITO Charter) to the General Agreement on Tariffs and Trade (GATT), then to the WTO. The treatment of development issues within the multilateral trading system shifted progressively from indifference to formal recognition. However, the barriers standing in the way of developing countries' meaningful participation remain substantial. In order to understand the current situation of developing countries in the WTO and the contribution of multilateral trading system to development issue, the interaction between them, and the reasons behind it should be analyzed.

[86] *id. p. 80-81*

[87] Kevin P. Gallagher, The Clash of Globalizations–Essays on the Political Economy of Trade and Development Policy, Anthem Press, p. 144 (2013)

[88] *id.* p. 66-67

[89] GATT, Article XVIII.

2.1. ITO Charter and Development Issue

The history of the multilateral trading system can be tracked back to proposals from some states to establish an International Trade Organization, which was a part of the Bretton Woods System. The establishment of the Bretton Woods System marked the formation of a new international order after World War II. It was proposed by the US and the UK, who reached a consensus on post-war economic order in Atlantic Charter in 1941 in accordance with the transformation in the structure of world power. And the US took the leading role in designing the post-war economic institutional framework. Besides economic benefits for US and UK, the new order also served the purpose of countering the Soviet threat. Compared to the League of Nations that established after World War I, which dealing with political affairs as well as economic issues, the new structure of world power showed a character of separation of public and economic international law.[90] The "Four Freedoms" initiated by Roosevelt in 1941 stated that the new international order should rest on four pillars, freedom of speech, freedom of worship in one's own way, freedom from want and freedom from fear. As to the nature of each freedom, freedom of want was economic, it means "economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world".[91] The United Nations was created to address the need for political issues, and the Bretton Woods System mainly focused on the establishment of economic institutions. The World Bank (successor of International Bank for Reconstruction and Development) and the International Monetary Fund (IMF) were designed to provide reconstruction loans to developing countries and help them to overcome the economic crisis. The ITO, although its main purpose was to reshape the international trade order, had a development element. It was argued that the neutral specialized organization that is based on economic rationality and with a large number of experts can better foster the economic development of the whole world.[92]

The core idea of the new economic order was free trade and open market.[93] Based on the free-trade doctrine, the non-discrimination principle can best foster the economic development both in developed and developing countries. Discrimination measures adopted by governments between products from abroad and between domestic and foreign products can distort the international trade order and impede the economic development. Thus, the needs for developing countries to take measures to protect their infant industries were regarded to be contrary to the free-trade doctrine. And the new order at the beginning did not take the special situations of developing countries into consideration. It insisted that all members should be treated equally with no differential treatment.[94] Other documents related to the new order, such as Lend-Lease Agreement and the IMF Agreement, shared the same idea. The universal terms applied to all

[90] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 24-25.

[91] Jens Pössel, A Human Rights Approach to "Sustainable Development" within the World Trade Organization, Developing Countries and the WTO: Policy Approaches (Gary P. Sampson & W. Brandnee Chambers ed.), United Nations University Press, 2008, p. 192-228, 192.

[92] David Mitrany, *A Working Peace System: An Argument for the Functionalist Development of International Organization*, International Affairs, vol. 20, iss. 1, January 1944, p. 109, 109.

[93] Amin Alavi, Legalization of Development in the WTO: Between Law and Politics, Wolters Kluwer, 2009, p. 73-74.

[94] Robert E. Hudec, Developing countries in the GATT Legal System, Cambridge University Press, 2011, p. 27.

members equally.[95] In order to respond to the increasing productive capacity in its domestic market, the US had to expand the foreign markets to export its products, release its surplus capital, and get access to cheaper raw materials in other countries. Thus, the participation of developing countries who can provide the above-mentioned resources in the new order is crucial for the US. Therefore, the starting point to encourage the participation of developing countries in the multilateral trade system was to benefit the developed countries, rather than developing countries themselves. And that could also explain the organization's negligence of developing countries' special needs in international trade. [96]

According to the US insistence at the beginning, development issues should be addressed by other organizations that specialized in economic development, such as Development Subcommittee of the United Nations or World Bank beyond the ITO.[97] And that is the reason that the first draft of the ITO Charter proposed by US in 1945 lacked the provisions concerning the underdeveloped nature of developing countries. Developing countries then strongly opposed such policies and believed that an organization that composed of developed and developing countries should respond to the needs form both groups simultaneously. And they proposed several suggestions for improvement, which mainly focused on special and differential treatments applicable to developing countries. Then the US, although rejected most of the suggestions made by developing countries, compromised to some extent in the London Conference. Considering the necessity of the participation of developing countries, the result of negotiations to establish the ITO formally recognized the principle of economic development. This result linked the ITO Charter with development issue in the multilateral trading system for the first time. One of the objectives of the ITO was to "promote industrial and general economic development, particularly of those countries which are still in the early stages of industrial development".[98] And Article 13 of the ITO Charter also confirmed the right of developing counties to adopt protective measures aimed at protecting domestic vulnerable industries. However, these specific measures faced great difficulties in implementation. The successful implementation of these measures required the approval of both the organization and members potentially affected, and it reflected a strong political element.[99] With few exceptions, less developed countries never relied on such complicated provisions.[100] While for exceptions that were of the interests of developed countries, such as balance-of-payments exception, no prior approval required. Thus, the needs of developing countries were discriminated through procedural requirements. The core idea of ITO was the establishment of trade policies that can best benefit the US, while the requirements of developing countries were put in a secondary

---

[95] United States Department of State Bulletin, vol. 6, 1942, p. 192; Articles of Agreement of International Monetary Fund, Article 2.
[96] Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World, Princeton University Press, 1995, p. 32-33.
[97] Clair Wilcox, A Charter for World Trade, Macmillan, The Macmillan Company, 1949, p. 141.
[98] Untied Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization. Final Act and Related Documents, Chapter 1(b).
[99] Untied Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization. Final Act and Related Documents, Article 13.
[100] Kenneth W. Dam, The GATT : law and international economic organization, University of Chicago Press, 1970, p. 228.

position, and they were regarded as exceptions of mainstream economic and trade theories proposed by the US. Thus, even the ITO Charter contained special provisions that were claimed to be development-friendly, it reflected merely compromises of developed countries, and such arrangements aimed at encouraging the participation of developing countries into the new structure of international trade constructed by the US. In addition, the free-trade principle that was applied selectively according to different areas and incomprehensive in scope could also prove the dominant position of the US and its disregard for interests of developing countries. For example, the scope of application of ITO excluded the agriculture and fishery sectors. It was where the US was unwilling to change its protectionist policy, and where developing countries have comparative advantage.[101]

The importance of participation of developing countries to the new international trade order in this period reflected in the fact that their participation was encouraged to meet some needs of the economic development of developed countries. Although the ITO Charter recognized the economic development of developing countries as one of its objectives, it was not a substantial victory of developing countries. It only represented the urgent needs of developed countries to encourage more developing participators and their compromises for that purpose. In ITO Charter, the needs of developing countries are marginalized, the considerations of their special situations were regarded as exceptions to the mainstream trade theory.

The failure in establishing ITO in the Bretton Woods Conference and then the refusal from US Congress to ratify the ITO Charter led to the collapse of the new trade organization. However, the General Agreements on Tariffs and Trade (GATT) survived as an interim multilateral treaty and the pioneer of a more comprehensive organization in the future. Some development arrangements in ITO Charter were preserved, and it made the GATT a development related agreement.

2.2. GATT and Development Issue

2.2.1. From 1948 to 1955

The GATT came into force in 1948. It has 23 contracting parties at the beginning, 11 of which were "less developed countries"[102] (known today as developing countries). Both the number of developed members and developing members had increased over the next few decades. And in the 1960s, the number of developing members made up the majority.

In the first seven years of the GATT before the review session, the position of developing members in the multilateral trade regime remained unchanged compared to the ITO period. And due to the failure to establish the ITO, developing members were in a tougher situation in the

[101] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 28.
[102] Less developed countries in GATT were later known as developing countries. In order to avoid confusion, hereafter it will be called developing countries. And developing members of the multilateral trading system included both developing countries and developing economies.

system. Because GATT has never been regarded as a permanent arrangement for international trade, it contained several inherent deficiencies. It lacked an organization to support its operation, the vague language, gaps in some aspects and too many exceptions contained all impeded the effective implementation of the treaty. And most importantly, as temporary arrangement before the ITO Charter came into force, GATT did not contain all commitments made by members in the draft ITO Charter. And some special considerations for developing members in Article 13 and 15 were removed from its context. Although developing members made some achievements in ITO Charter, the post-war economic order as formulated in the GATT, together with the measures actually implemented, was more closely aligned with the original US vision than with the interests of developing members. And considering also the free-trade doctrine in industrial products, the exclusion of agricultural and fishery sectors, and the refusal of US to some development-related suggestions made by some developing countries, the political nature of GATT was laid down. Actually, the free trade theory initiated by US and the formulation of rules in trade regime were contradictory. From the late 1940s to 1980s, the GATT operated under the indisputable assumption that free trade and open market were beneficial and market distortion caused by state intervention was harmful to the economic development, all trade restrictive measures should be eliminated gradually.[103] However, the developed members-friendly exceptions and the exclusion of sensitive sectors of developed members, namely agricultural and fishery sectors, both confirmed that trade protection policies can be beneficial to economic development, at least for those developed members.[104] This rendered the free trade doctrine less credible in practice and allowed the WTO's development objective to recede progressively from the centre of the multilateral agenda.

It seemed to be a failure of developing members in international trade negotiation in this period, but at least they gained the recognition of GATT and its members in writing that the special situation of developing members and their special needs should be considered. Such consensus set the stage for active participation of developing members and laid the groundwork for special arrangements for developing members in the future.[105] Compared to the first draft proposed by the US, that sparked a debate on whether to grant developing members special considerations in international trade order, the attention during subsequent development and implementation of GATT Agreement turned gradually to figure out the extent to which special attention should be given to developing members. The participation of developing members during the first seven years of the GATT mirrored the marginal role they had played during the ITO negotiations, and the development objective in GATT could not offer any practical help to developing members. Thus, the importance of their engagement reflected mainly the needs of developed members.

2.2.2. **The GATT's first review session**

After seven years of implementation of the GATT Agreement, and the failure to reestablish an organization concerning international trade, contracting parties began to consider the future of

[103] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 55-56.
[104] Robert E. Hudec, Developing countries in the GATT Legal System, Cambridge University Press, 2011, p. 34.
[105] Robert E. Hudec, Developing countries in the GATT Legal System, Cambridge University Press, 2011, p. 33.

GATT and its potential to serve as a permanent organization.[106] It was argued in the session that "only an organization which was representative of all types of economies could effectively undertake to increase trade on a world-wide scale".[107] It was not just to encourage the participation of developing members, but also the criticism of the fact that GATT represented only the interests of developed members. In 1961, the representative of Uruguay in the Council of Representatives showed their dissatisfaction with Article XXIII in the GATT and some measures adopted by developed members. It then filed a legal complaint under Article XXIII of the GATT. The dispute has 15 developed member respondents, i.e. all developed state-membership of the GATT. Uruguay also listed almost 600 restrictions conducted by developed members in 15 markets in the complaint and claimed that these trade restrictive measures seriously confronted the export of Uruguay and resulted that Uruguay did not receive the benefits contemplated by the GATT, thus constituted a "nullification and impairment of benefits" under Article XXIII. It insisted that such an unfavorable situation Uruguay faced must be changed. The Article XXIII usually applied in cases involving a specific trade measure that could be brought back in line with the GATT rules by a certain action. It did include provisions that allowed members to bring disputes concerning overall imbalance of rights and obligations under the GATT, but it was designed to deal with the measures taken in time of the Great Depressions like the one happened in the 1930s, and it has only been applied in one case.[108] As Hudec observed, it is a showpiece litigation, Uruguay "dramatized a larger problem by framing it as a lawsuit". The drama of this litigation lies in the purpose of initiation and the number and scope of members involved. One of the purposes of Uruguay' litigation is to draw attention to the trade barriers that developing members faced in the system and called for a more equal and development-friendly trade environment.[109] Before the Uruguay dispute, developing members more frequently found themselves in the position of respondents rather than complainants, and were comparatively reluctant to invoke dispute settlement procedures to assert their own trade rights. The disappointment at the multilateral trading system spread among developing members, and their efforts to resolve trade disputes through moral suasion in the Committee on Trade and Development proved to be unsuccessful. Uruguay decided to increase the pressure on developed countries to act in accordance with the GATT rules by resorting to the dispute settlement process. However, the outcome of the case was far less significant than its ambitious initiation had suggested. The Panel required the complainant either to prove that these measures taken by developed members were *prima facie* inconformity with the GATT rules, or when the measures did not *prima facie* violate the GATT rules but also caused nullification or impairments, to submit evidence and demonstrate the ground and reasons of its initiation. Uruguay refused to clarify its position on whether certain measure was illegal and did not question the contention claimed by respondents in most cases, the Panel had to accept the claim by respondents that some measures were GATT-conforming or constituted "existing legislation", thus did not violate the GATT

[106] GATT the Ninth Session of the Contracting Parties and the Review of the GATT, 25th October 1954, p. 3.
[107] GATT the Ninth Session of the Contracting Parties and the Review of the GATT, 25th October 1954, p. 3-4.
[108] Report of the Panel on Uruguay Recourse to Article XXIII, Report adopted on 16 November 1962 (L/1923 - 11S/95).
[109] Robert E. Hudec, Developing Countries in the GATT Legal System, Cambridge University Press, 2011, p. 57-59.

rules.[110] The ruling of the Panel confirmed only a small number of measures to be GATT-illegal. Although some measures had been corrected as reported, other trade restrictive measures against Uruguay increased at the same time.[111] This dispute did draw attention to some difficulties that developing members facing in the GATT period, the nature of the system to put developing members in a more disadvantageous position remained unchanged. Developing members were willing to settle trade-related matters in the GATT system, but the asymmetry of political power of developed and developing members hindered the participation of the latter. The interests of developing members in trade negotiations did not receive enough attention and they lacked the power to pursue them.

In the first review session, some changes in terms of development were made. The first and the most significant one was Article XVIII. This article formally recognized in writing the economic development as an internal part of international trade regime and the special arrangements applied to developing members were not exceptions in GATT anymore.[112] It means that, in principle, the needs of developing members would not maintain in the secondary position. But the spirit has not been translated into practical actions after the session, and its implementation faced many difficulties. In addition, it also loosened some procedural requirements that developing members had to meet in order to take trade restrictive measures to protect their vulnerable economy and it gave developing members more flexibility in policy making. It was confirmed that contracting parties cannot formulate rules that were "one size fits all", and free trade was not always good for economic development. Considering the special needs of developing members, policy flexibility to take trade restrictive measures when necessary is more suitable. However, most of the amendments had a non-binding nature, and they maintained no more than an appearance of progress.[113]

Another remarkable change concerning developing members was the relaxation of "reciprocity" principle. This session introduced article XXVIII (bis), and it demanded contracting parties to take into account "the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes"[114]. The strict reciprocity principle insisted by many developed members before the review session held that the tariff reduction would be granted only when another member could offer a corresponding commitment for exchange.[115] While in the first review session, developed members agreed to abandon the strict reciprocity principle and turned to a more relaxed one. However, such relaxation did not grant developing members any substantial

110 Report of the Panel on Uruguay Recourse to Article XXIII, Report adopted on 16 November 1962 (L/1923 - 11S/95), para. 14-19.
111 Wilkinson, Rorden & James Scott, *Developing Country Participation in the GATT: a Reassessment*, World Trade Review, vol. 7, no. 3, 2008, p. 473–510, 491-493.
112 GATT 1947, Article 18.1.
113 Anwarul Hoda, Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices, Cambridge University Press, 2018, p. 65.
114 GATT 1947, Article XVIII(bis), 3(b).
115 Diana Tussie, The Less Developed Countries and the World Trading System: A Challenge to the GATT, Pinter, 1987, p. 23-24.

right, what was offered in this article was a consideration from developed members, and what they promised was just a *possibility* "not to insist on full reciprocity"[116] during negotiation with developing members. What developing members could gain from this article still depended on their developed trade partners, and it made the adoption of this article a kind of mercy from developed members.

Thus, developing members achieved some progresses in terms of treaty language in the first review session, while gained little from implementation of the agreement. Although the agreement once again emphasized the importance of integration of developing members into the GATT system, their secondary position in the multilateral trade regime did not change in nature, and there was no legal guarantee that their special concerns would be addressed. Such "importance" still mainly reflected the needs of developed members and their domination of the multilateral trading system.

2.2.3. **From 1964 to 1971**

GATT faced many challenges in the following years. The first one was the rapidly increasing number of developing members. Developing members learned from the experience in international trade and the GATT system that when their industries had grown to a certain level, what they need more was larger export markets to generate more revenue to invest in the development of the industry, and that can be provided by the GATT system.[117] That was the first time developing members were aware of the fact that they could make benefits from international trade by exporting their products to the global market. According to the "one country one vote" principle in the GATT decision-making process, it meant the increasing influence of developing countries in the multilateral trading regime.[118] However, in the context of almost no voting in the next few years, such an increase in influence in voting offered little changes to the relationship between GATT and developing members in practice. But the increased membership became the leverage for developing members in other forms. This development was closely related to the broader geopolitical context of the Cold War and the threat posed by the Soviet Union. While the GATT mainly operated under the international trade order initiated by the US, the Soviet Union proposed to establish a trade organization (UNCTAD) that can represent the interests of developing countries under the UN.[119] It would cause serious damages to the GATT if its developing members decided to opt out of the GATT regime, which could not fully address their concerns in their opinion and turn to UNCTAD. Thus, developing members in the GATT planned to use the UNCTAD as a forum to table their demands and push GATT to make some changes. And developed members that dominated the organization must do something to keep their developing members. However, what had been done in these years can hardly make any substantial changes to the position of developing members in the GATT system. Part IV, with a purpose of expanding trade of developing members, repeated the recognition of

[116] Robert E. Hudec, Developing Countries in the GATT Legal System, Cambridge University Press, 2011, p. 42.
[117] Jeffrey A. Hart & Joan Edelman Spero, The Politics of International Economic Relations (5th Edition), Routledge, 1997, p. 1-7.
[118] Robert E. Hudec, Developing Countries in the GATT Legal System, Cambridge University Press, 2011, p. 39-40.
[119] UNCTAD, Final Act, United Nations Document, E/CONF.46/141, 1964.

the non-reciprocity principle and added commitments from developed members, but again with a non-binding nature.[120] The Generalized System of Preferences (GSP) was introduced by UNCTAD and then two waivers in this system entered into the GATT. They were also not mandatory.[121] Although the efforts of developing members to make Part IV more functional were rejected by developed members, Trade and Development Committee that deal with development issues was established as a compromise. Part IV had not been translated into practical help to developing members, but it has been the basic principle of how the organization treated developing countries.

GATT, as the embodiment of post-war international trade order proposed by the US, had political nature, while as an international treaty that was supposed to be complied with by its members, had also a legal nature. But from the last 1960s, the legal nature of GATT had shown a decreasing trend. Seeking legal solutions to trade disputes was widely regarded as a hostile act that could jeopardise diplomatic relations with trading partners. Despite the implementation of dispute settlement procedures,[122] developing members remained hesitant to pursue legal action against their developed trade partners due to the prevailing attitudes of developed members towards such a legal method to settle trade disputes.[123]

The non-binding nature of promises from developed members made the principles and preferences more of a political issue. Whether to grant such differential treatment and to what extent they should be granted to developing members all depended on the will of developed members. And the decline of the adjudication system in GATT exacerbated the political nature of this system. Developing members, which lack the political power to bargain with developed members faced a greater barrier in the system. GATT responded little to what they needed.

2.2.4. **From 1972 to 1981**

From an economic perspective, some developing members adopted export-oriented policies and withdrawn from the original import-substitution strategy. They had overcame poverty and became the first industrialized developing countries. And it meant that developing countries began to have “a political and economic stake in the international trade regime”.[124]

However, the compromises from developing members on some trade issues were not exchanged for more development-friendly policies in developed members. Developed members have limited the effectiveness of the preference systems by using exemptions, tariff quotas and “market disruption” escape clauses. Thus, the preference system did not bring as much benefit

---

[120] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO’s Development Mission, Hart Publishing, 2010, p. 60-62.
[121] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 91-92.
[122] BISD, 14th Supplement, 1966, p. 18.
[123] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO’s Development Mission, Hart Publishing, 2010, p. 71-72.
[124] John H. Jackson, Development at the World Trade Organization, Oxford University Press, 2012, p. 61.

to developing members as they supposed to do.[125] Besides, the rise of protectionism after the Tokyo Declaration in 1973 symbolized by Orderly Market Agreements (OMAs), Voluntary Export Restraints (VERs),[126] and government aids to domestic industry in many developed countries also failed to provide developing members a more equal and development-friendly trade environment. Although developing members in 1975 won the recognition from developed members of the New International Economic Order in GATT, a resolution published by UNCTAD and proposed by developing countries to end the unfair trade relations between them and developed countries and to establish the new international trade relationship based on interdependent economy. However, their lack of bargaining power impeded the implementation of the resolution. Besides, they also sought to operationalize Part IV of GATT in Tokyo Round, and the Enabling Clause was offered as a response to them.[127] The Enabling Clause gave a permanent recognition of some special and differential treatments (SDT) to developing members. The introduction of SDT confirmed formally again that the consideration of special needs of developing members should be an integral part of the multilateral trade regime and not an exception. And the SDT gradually evolved into one of the most significant legal basis of special arrangements for developing members since then. What developing members gave in return to developed members was the acceptation of graduation system, according to which developing members promised to gradually abandon some preferential treatments with their economic improvement.[128]

Negotiations in the Tokyo Round also showed the character of fragmentation. The amendment of GATT provisions required the approval of at least two-third of all members, and developing members used this mechanism to block the new agenda and apply pressure on developed members in this way to force them to pay more attention to their special needs. Developed members then tried to make consensus among like-minded members and advance the reform of international trade rules on a smaller scale to circumvent the veto from developing members, thus the Code approach was introduced. The Code approach allowed signatories to be bound only by the Codes they agreed to sign, and the code only applied to its signatories.[129] Although all members could participate in the negotiations of all Codes, the benefits resulted from the Codes only applied to members who signed the Codes. India did not sign the Agreement on Government Procurement (one of the Codes reached in Tokyo Round), but it claimed in a case against the US that because of the existence of Most-Favored-Nation (MFN) principle in GATT, India firms should also enjoy the same treatment in this Code as those from countries that had signed the agreement. It was clarified that the MFN principle did not apply to the Code.[130] As to

[125] Gerald M. Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, Cornell International Law Journal, vol. 13, no. 2, Summer 1980, p. 239-256, 240-241.

[126] International Monetary Fund, The Rise in Protectionism, Pamphlet Series No. 24, 1978, p. 62-66.

[127] Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program,* Journal of International Economic Law, vol. 6, iss. 2, June 2003, p. 507-532, 509-510.

[128] Robert E. Hudec, Developing Countries in the GATT Legal System, Cambridge University Press, 2011, p. 39-40.

[129] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1967 Anti-dumping Code), BISD, 15th Supplement, 1968, p. 24.

[130] Robert Z. Lawrence, *Rule-making Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection,* Journal of International Economic Law, vol. 9, iss. 4, December 2006, p, 823–835, 827-828.

all the nine Codes adopted in Tokyo Round, only a few of the most advanced developing members became signatories of them. Majority of developing members were marginalized from the negotiations of these new rules.[131] Although the Code approach was an effective way to advance the trade rules, the fragmentation nature of it also exacerbates the divergence among members. Most of developing members were excluded from core issues of international trade. And the obstacles faced by developing members to effectively integrate into the GATT negotiations can hinder their process of promoting economic development through international trade. The Tokyo Round set the goal of improving the trading strength of developing countries,[132] but the adoption of Code approach was contrary to the original objective in some ways.

However, the enhancement of the legal nature of GATT during Tokyo Round was also remarkable. The rise of European Community and Japan in the late 1960s threatened the absolute competitive advantages of products from the US. In order to bring these two powerful players back into the same rules, the US had to evoke the legal nature of the organization and revive the dispute settlement function in GATT.[133] The cause was the competition among developed members, but the result was meaningful to developing members, who lacked the political power to guarantee the implementation of GATT rules by their developed trade partners. Thus, legal resolution that reviewed by impartial third parties can better level the playing field for developing members. The efforts in this field continued in the following years after the Tokyo Round, and the subsequent developments in legal aspects caused far-reaching impact on the introduction of WTO and its new dispute settlement mechanism.[134]

This period was marked by both significant hardship and notable progress for developing members. The progresses were significant, however the main object of participation in multilateral trade system was to foster the economic development through international trade, if developing members were to be excluded from the negotiation of core issues of the GATT, it would be more difficult for them the catch up in development with other trade partners. Developing members needed more positive engagement in the multilateral trade negotiation, and the GATT could not go further without considering its developing members.

2.2.5. **From 1981 to 1987**

Although the developing member group made some progresses in development issues in multilateral trade regime, this positive trend faded in the years that followed. The interests of developing members in GATT were no longer identical, and the group of developing members fell apart. Three factors led and contribute to this fact. The first one was unequal development among developing members in international trade. Some developing members that first realized industrialization began to change their trade policy and implemented a more outward-oriented

---

[131] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 93.
[132] Gerald M. Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, Cornell International Law Journal, vol.13, no. 2, Summer 1980, p. 239-256, 239.
[133] Robert E. Hudec, Developing Countries in the GATT Legal System, Cambridge University Press, 2011, p. 75-82.
[134] Ministerial Declaration, L/54242, November 29, 1982.

trade regime, while most of the developing members stuck to their original mode and it caused them to be left behind by their developing member companions.[135] The second one was liberalization of the trade regime in some developing members in order to respond to the "second oil shock". Due to the economic recession after this crisis, developed countries began to adopt protectionism, they have reduced import demand from developing countries, it made the economic situation in some oil-poor countries even worse. While developing countries that possess oil resources have achieved great wealth. Although some developing countries in Latin America and East Asia did not have oil resources, they started to introduce foreign investment on a large scale and engaged in processing trade. The considerable economic success they achieved widened the gap between them and other developing countries. Thus, the crisis enhanced the divergence among developing members.[136] And the last one was the implementation of existing GATT rules. Enabling Clause allowed developed members to treat developing members in a discriminatory way, and conducting international trade under different rules made the benefits gained by developing members obtained differences, and that exacerbated the breakup of the group of developing members.[137]

In the 1980s, scholars began to analyze whether the development principles confirmed in New International Economic Order and Charter of Economic Rights and Duties of States were recognized in national and international law. The International Law Commission of the United Nations and the General Assembly of the United Nations also published documents to reaffirm the important position of preferences and non-reciprocity in international trade law.[138] And the above research results further encouraged a number of other scholarly writings. They recognized that these non-binding principles were gradually given legal or quasi-legal influence in practice in international trade regime. Therefore, the special treatments for developing countries found its legitimacy in international trade law. And that has formed the biggest achievement for developing countries in this period.

The development issue in the following years of GATT was mainly negotiated in the Uruguay Round, this longest and the last negotiation round of GATT led to the establishment of WTO, which made the dawn of a new era of multilateral trade system and marked a change of status of developing members in this regime, and the introduction of a new dispute settlement system that has significant differences with the old one in the GATT period.

---

[135] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 94.

[136] M.J. Trebilcock, *et al.*, *Trade and Developing countries*, World Trading System: Critical Perspectives on the World Economy (Robert Howse & Petrus Van Bork *ed.*), Routledge, 1995, p. 199-232.

[137] M. Wolf, *Two-edged Sword: Demands of Developing Countries and the Trading System*, Power, Passions, and Purpose: prospects for North-South negotiations (Jagdish N. Bhagwati & John Gerard Ruggie *ed.*), The MIT Press, 1984, p. 201-230, 203.

[138] *Report of the International Law Commission to the General Assembly on the Work of its Thirtieth Session*, United Nations Document A/33/10(1978),1978, at: https://legal.un.org/ilc/sessions/30/; United Nations Document, General Assembly Resolution A/RES/34/150, 1979, at: https://undocs.org/en/A/RES/34/150.

The GATT period thus demonstrates a persistent gap between formal commitment and practical outcome. The World Bank's 1996 report confirmed this pattern empirically: larger and faster integrators achieved higher economic growth, while the least integrated developing members showed economic downturns, with the differences between the two groups increasingly significant. What this history ultimately reveals is that GATT was not designed to solve the development issue and was dominated by developed members—a structural limitation that set the agenda for the establishment of the WTO and its dispute settlement mechanism.

2.3. WTO and Development Issue

Since the establishment of the WTO, the multilateral trading system has undergone significant transformations, its relationship with developing members has also changed a lot. We can still see the shadow of GATT in the WTO today, it has a far-reaching implication on the development of international trade orders, but complicated international affairs and understanding of development issues also reshaped the system in some aspects. However, it is fair to say that WTO's contribution to development issue is limited and it can do more to benefit its poor members.

2.3.1. The Uruguay Round and the establishment of WTO

The necessity of starting a new round was recognized by GATT members after the Tokyo round. With little progresses in the Tokyo round, members believed that the GATT system must move forward, otherwise it would fall down like a bicycle.[139] Although the 1982 Ministerial Meeting failed to address this issue successfully, in 1986, supports to launch a new round negotiation and include broad initiatives prevailed, and the Ministerial Meeting held in Uruguay led to the Declaration of Punta del Este, which contained a broad framework of Uruguay Round.[140] Correlating negotiating groups were then established by members and they began to discuss issues within the framework. The establishment of a new organization was not the one of the original agendas in the Uruguay Round. However, in early 1990s, Canada proposed in its governmental proposal to establish a "World Trade Organization", and the idea was then accepted by all members.[141] The negotiations achieved a major breakthrough, the Secretariat finally got various drafts from negotiating groups, and their works formed the master-draft in the Uruguay Round - Dunkel Text. It depicted the future of a new trade organization and various agreements that regulate the international trade order under it.[142] After a long series of negotiations and enormous national approval procedures of members, agreements made in the Uruguay Round came into force, and the WTO was finally established in 1995. It marked that the old GATT system was institutionalized.[143] The Uruguay Round made many significant changes to

[139] Trien Nguyen, *et al.*, *An Evaluation of the Draft Final Act of the Uruguay Round*, The Economic Journal, vol. 103, no. 421, Nov. 1993, p. 1540-1549, 1548.
[140] WTO/GATT Ministerial Declaration on the Uruguay Round, Declaration of 20 September 1986.
[141] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 24-29.
[142] John H. Jackson, *International Economic Law: Reflections on the Boilerroom of International Relations*, American University Journal of International Law and Policy, vol. 10, no. 2, Winter 1995, p. 595-606, 599-600.
[143] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 98-100.

the old system, and these changes have impacted the attitude of developing members towards their participation in the multilateral trade regime in the following years. It should be noted that developing countries and economies actively involved in the negotiations in the Uruguay Round, and many decided to be members of the WTO. Such changes firstly reflected the development of developing countries in the last few decades. They were more active in international trade, and some of them became major exporters because of the rapid growth of their manufacturing. And they realized the importance of protecting their trade interests through actively participating in the multilateral trading system. Developing members found it strategically advantageous to negotiate in a multilateral environment, where multiplicity of powers "interacted and often neutralized each other than on a bilateral basis".[144] In addition, the attitude of developing members also illustrated the progresses made in the new system.[145]

The first and most significant one was the establishment of a new organization. The Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement) separated the institution from substantial rules. Thus, it gave the organization an opportunity to cover new issues. It not only justified the inclusion of agreements concerning agriculture, service, intellectual property rights *etc.*, but also other issues that could be regulated within the regime in the future. And among the new issues, agreements on textile and clothing, and agriculture were of great interests of developing members.[146] Because the GATT, as a commercial agreement rather than a formal organisation, was limited primarily to trade in goods and lacked the institutional flexibility to incorporate new subject areas. Besides, an organization can better address the trade issues by a unified mechanism. Members in the Uruguay Round made advantage of this nature and established a unified dispute settlement mechanism operating through a more rule-based framework in which rulings were binding, and a Trade Review System that aimed to enhance the transparency of national policies concerning international trade.[147] The institutionalization of international trade regime also offered the organization relative independence. Although WTO was still regarded as a member-driven organization, but it is undeniable that the influence from its members, especially its developed members, was reduced. And the legal authorities were given to the organization, its institutions and its staffs. With the establishment of a new organization, the legal obligation for members not to interfere the

[144] Celso L. N. Amorim, *The WTO from the Perspective of a Developing Country*, Fordham International Law Journal. vol. 24, no. 1 & 2, November-December 2000, p. 95-106, 95.
[145] Aminata M. Bamba, *The Developing Countries in the WTO*, World Economy, 1999, at: https://www.academia.edu/2356119/The_Developing_Countries_in_the_WTO?auto=citations&from=cover_page, p. 117-143, 117-118.
[146] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 7.
[147] Chaisse, Julien & Chakraborty, Debashis, *Implementing WTO Rules through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, University of Pennsylvania Journal of International Economic, vol. 28, no. 1, 2007, p. 153-186, 155-157; Arunabha Ghosh, *Developing countries in the WTO Trade Policy Review Mechanism*, World Trade Review, vol. 9, no. 3, 2010, p. 419–455, 431-436.

administration of WTO was also confirmed.[148] And the neutral third-party role of WTO could better address the concerns of its developing members.

The Code approach adopted in Tokyo Round was abandoned, and the "single-undertaking" principle was established in the new system. Although the Code approach could effectively accelerate the negotiation process by being conducted among like-minded members and avoiding veto from other members, it was a shift from the original consensus practice in the GATT, and caused the fragmentation of treaty negotiation and application. Besides, it was fairly complex to modify the legal text by introducing enormous supplementary provisions, arrangements and interpretations.[149] Developing countries in this process lost the leverage to address their concerns and were excluded from rule-making. But the previous consensus practice in the GATT period was confirmed as a legal principle in Uruguay Round. The consensus principle and single undertaking approach together guaranteed the integration of agreements application in multilateral trade regime. It means "nothing is agreed until everything is agreed".[150] By accepting the single-undertaking principle and reaffirming consensus practice, the bargaining power of developing members in trade negotiation was enhanced. And it also marked that developing members committed to follow the same rules as other members with several exceptions and conservations.[151]

From a legislative point of view, the basic assumption of WTO was against the government interference and remains the same with the old GATT theory, thus the negotiations in the Uruguay Round also adopted the understanding that the special arrangements for developing members were anomalies. And policies that run counter to this idea should be limited in scope and time. That led to the limited number of exceptions and transitional periods in the Uruguay Round negotiations.[152] After the completion of the Uruguay Round, most progresses that developing members achieved in negotiations proved to be less effective than their original expectations, and the implementation process showed that the discriminations against developing members were not eliminated. Although the efforts were made in negotiations and new agreements were supposed to address the special status of developing countries, the trade restrictive measures in developed members still impeded the competitive export from developing members, and derogated their gains from international trade. Besides that, the WTO took a more aggressive way compared to its predecessor GATT to further influence the domestic regulatory space, this has placed a higher demand on developing members to establish

[148] John H. Barton, The Evolution of the Trade Regime: politics, law, and economics of the GATT and the WTO, Princeton University Press, 2006, p. 211-213; John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 7.
[149] Bernard Hoekman, *The WTO: Functions and Basic Principles,* Development, Trade and the WTO: A Handbook (Bernard Hoekman *et al. ed.*), The World Bank, 2002, p. 41-49, 44.
[150] John Croome, Reshaping the World Trading System: A History of the Uruguay Round, World Trade Organization, 1995, p. 34.
[151] Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, Journal of International Economic Law, vol. 12, no. 4, 2009, p. 835–858, 843-844.
[152] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, 2012, p. 76-77.

corresponding international trade institutions and regulations, and has increased their burden at domestic level.[153]

2.3.2. Doha Round

Before the start of Doha Round, the situation in developing world experienced some changes. Developing members were unsatisfied with the results of Uruguay Round. Although the direct reason for the failure of the Seattle Conference was the large-scale anti-globalization demonstrations. The background and the preparation of this conference had already foreshadowed its failure. The WTO had been the target of many criticisms. It was argued at that time that the WTO failed to play a constructive role in development issues, and did not contribute to the global income distribution. According to the statistics from the UNCTAD, from 1994 to 1998, the volume of total trade of the developed countries increased by about 33%, while this number of developing countries was only 20%. When considering the differences in the total export base of developed and developing countries, developing countries have not narrowed the gap with developed countries through international trade; on the contrary, the gap between them has widened. Jawara and Kwa stated that developed members were the beneficiaries in the WTO system, while the rest of others, mainly referred to developing members have gained little.[154] The study of Subramanian and Wei also supported such a conclusion.[155] Therefore, developing members had reasons to question the achievements in the Uruguay Round. Developing members argued that the significant concessions they had made in liberalising their trade regimes had not been matched by commensurate commitments from developed trading partners. A large number of measures adopted by developed members still hindered the participation of developing members in international trade. The result of previous negotiations was regarded by developing members as more favorable to rich members. For example, rules governing trade in goods in the sector of agriculture. The rationale for treating agriculture separately from other goods was problematic. Obviously, invoking political sensitivity as a justification is unconvincing: if the agricultural sector was deemed too politically sensitive for developed members to liberalise, the same logic applied with equal force to the industrial policies that developing members had been pressured to abandon. However, in exchange for greater efficiency gains in international trade and commensurate concessions from developed members, developing members chose to bear the costs of adjustment. But the outcome fell far short of their expectations. In addition to applying the traditional trade restrictive measures in this field, developed members also introduced new concepts to justify their measures. Such as the "multifunctionality" put forward by EU and Japan.[156] The Sanitary and Phytosanitary Agreement (SPS Agreement) tells the same story. The SPS Agreement requires that members' measures in

[153] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 136-137.
[154] Jawara, F. & A. Kwa, Behind the Scenes at the WTO: The Real World of International Trade Negotiations, Zed Books. 2003. p. 293-294.
[155] Subramanian, A. & S.-J. Wei, The WTO Promotes Trade, Strongly but Unevenly, NBER Working Paper 10024, October 2003, p. 3.
[156] Celso L. N. Amorim, *The WTO from the Perspective of a Developing Country*, Fordham International Law Journal, vol. 24, no. 1 & 2, November-December 2000, p. 95-106, 96-97.

international trade in agricultural products be based on international standards, guidelines, or recommendations, which are principally developed by international standard-setting bodies such as the Codex Alimentarius Commission, established jointly by the WHO and FAO, the World Organisation for Animal Health (WOAH), and the International Plant Protection Convention (IPPC). These bodies rely on scientific expertise and their standards carry scientific legitimacy that this thesis does not seek to question. However, the composition of these bodies and the practical dynamics of the standard-setting process raise legitimate concerns about procedural equity. Developed members, with their greater technical capacity, financial resources, and institutional presence, are better positioned to participate actively in the work of these bodies, to contribute scientific evidence, and to shape the priorities and content of the standards that emerge. Developing members, by contrast, often lack the resources to engage meaningfully in these processes. India has proposed that international standards should be established with the involvement of developing countries on an equal footing, on the grounds that standards reflecting predominantly the technical realities and regulatory preferences of developed members cannot be regarded as genuinely "international" in character. This proposal was rejected by major powers. This thesis does not contend that the resulting standards are scientifically invalid. Rather, the concern is that even when standards are scientifically neutral in their content, the asymmetry in the standard-setting process and the substantial financial and technical burden of compliance can create de facto barriers to agricultural exports from developing members. Developed members, whose domestic regulatory frameworks already approximate or align with these standards, face little additional compliance cost. Developing members, who often lack the technical capacity, laboratory infrastructure, and financial resources required to meet and demonstrate conformity with these standards, face a disproportionate burden that effectively impedes their participation in international agricultural trade and can serve as a non-tariff barrier to their exports.[157]

Developing members' dissatisfaction with rules that they regarded as imbalance constituted one of the main causes of the failure of Seattle Conference. And they proposed to allow for more flexibility in applying some rules and reduce discretion enjoyed by the developed members.[158] They also allied themselves with Non-Governmental Organizations (NGOs) to question the basic assumption of WTO and invoked the reflection on the relationship between WTO and developing members. Like-minded developing members and developing members that had shared interests began to act as groups in order to increase their influences in future negotiations, while some small and poor developing countries were still excluded from the negotiations and had to accept rules made by others. In addition, the accession of China had a significant impact on the balance of power between developed and developing camps.[159]

---

[157] Jawara, F. & A. Kwa., Behind the Scenes at the WTO: The Real World of International Trade Negotiations, Zed Books, 2003, p. 45-46.
[158] Celso L. N. Amorim, *The WTO from the Perspective of a Developing Country*, Fordham International Law Journal, vol. 24, no. 1 & 2, November-December 2000, p. 95-106, 99-100.
[159] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 101.

In order to redress these imbalances in the Uruguay Round, trade ministers decided to launch a new Round (Doha Round) in 2001. The Ministerial Conference stated in 2001 that "we agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations."[160] Great emphasis on the development issue made the Doha Round a development round, and it also named "Doha Development Agenda".[161] The Doha Round is still ongoing, however, few results from Doha Round negotiations could be regarded as development friendly. The failure could firstly be attributed to the understanding of the relationship between trade and development adopted in the Doha Round. Some members by recognizing the contribution of multilateral trade system to economic development reaffirmed their insistence on trade liberalization and resistance to protectionism. They believed that the elimination of all kinds of discrimination can facilitate the achievement of economic growth. Thus, they came to the conclusion that the strict limitation of special arrangements for developing countries could not be abandoned.[162] Such understanding contributed to the fact that the proposals from developing members focusing on further and deeper SDT were rejected.[163] Instead, developed members held the view that the difficulties faced by developing countries in WTO should be resolved by expanding the scope of coverage and harmonizing the practices concerning trade.[164] These two contrary approaches taken by developing and developed members constituted one reason that paralyzed the Doha Round. Although the proposals from developed members to expand the negotiation scope received criticism from international organizations and scholars, such criticisms did not oppose the basic assumption of WTO, what they advocated was to focus on the obstacles and difficulties that developing countries faced in international trade.[165] The future course of multilateral trade regime is still pending due to the different approaches chosen by developing and developed groups.

The second reason was the increasingly divergent interests of developing members. It was argued that the divergent interests of developing members should be held more responsible for the failure of achieving any development-friendly arrangements in the Doha Round.[166] The different level of development and diverse situations in developing members made it hard to identify the interests and demands of developing members as a group. In 1999, the UNCTAD asked developing members to table the agenda with "constructive and affirmative strategy in all issues

---

[160] Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, World Trade Organization, Nov. 20, 2001.

[161] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 164-165.

[162] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 168-169.

[163] Christopher Stevens, The Future of Special and Differential (SDT) for Developing Countries in the WTO, IDS Working Paper 163, September 2002, p. 1-2; Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 102.

[164] Dani Rodrik, The Global Governance of Trade As If Development Really Mattered, UNDP Working Paper 2001, p. 2-3.

[165] The World Bank, Trade and Poverty Reduction: New Evidence of Impacts in Developing Countries, Dec. 11, 2018.

[166] Amin Alavi, Legalization of Development in the WTO: between law and politics, Kluwer Law International, 2009, p. 101-102.

under negotiations",[167] while the different and sometimes even conflicting proposals addressing different interests from developing members made it hard to achieve. Even though it is recognized that the special needs of developing countries should receive more attention and the imbalance in Uruguay Round must be redressed, the appropriate approach has not been found, it is even hard for developing member group to table a proposal that would not create controversy among themselves.

Besides the difficulties in achieving substantive development-friendly outcomes, in recent years, the WTO faces more challenges from both its members and normal citizens. Due to the member-driven nature of the WTO, critics from members can have a significant impact on the multilateral trading system. This system has been in crisis since the end of 2019, and the reasons behind are multiple. The most important one among these is the dramatic change of attitude of the US government since the former president Trump took office. The country that shaped the international trading rules and multilateral trading system became its strongest critic. Under the critics from the US, the implementation of WTO rules at the domestic level in the US has been challenged, and the well-functioning of the WTO has been hampered. The US government has adopted a protectionism trade policy since then, and many measures taken by the US government are controversial. For instance, the initiation of national security exceptions in many trade-restrictive measures and the refusal to settle related disputes within the WTO dispute settlement system, and the block of the appointment of AB members that lead to the paralyzed appeal review proceeding. Besides that, the trade war between two major powers, US and China, triggered a spillover effect to affect other countries' trade policies and their confidence on the WTO. And the WTO witnesses the increase in the breach of international trade rules in recent years. The ability of the WTO to provide small and poor developing members with predictability and security is questioned due to the political instability inside and outside this system. Therefore, the political intervention has a substantial impact on the operation and reform of the WTO. A rule-based multilateral trading system is once again called upon by those small and poor members.[168]

The objective of the WTO is to regulate international trade after World War II, but in practice its agreements bind small and poor developing members far more effectively than they constrain major powers, who retain the capacity to act outside the WTO framework or block decisions that run counter to their interests. Therefore, getting the approval from major powers in the decision-making process is essential for WTO to function well. And that shows a strong political element within the WTO regime. From a systematic perspective, the establishment of the WTO was aimed to provide both developed and developing members with a rule-based multilateral system of negotiations to reach arrangements that could benefit all. And members were expected to formulate their domestic trade policies and practice within the WTO regime in order to provide security and predictability to trade participants. However, the deviation from this expectation by

---

[167] Gary P. Sampson, *The World Trade Organization After Seattle,* The World Economy, vol. 23, iss. 9, September 2000, p. 1097-1117, 1103-1104.

[168] Peter Van den Bossche, Werner Zdouc, The Law and Policy of the World Trade Organization: Text, Cases and Materials (5th Edition), Cambridge University Press, p. 3-4, 38-39 (2022)

some major powers seems to increase in recent years. The US and EU were criticized that they tended to solve trade related issues outside the rule-based multilateral trading mechanism and seek for bilateral negotiations when their agenda cannot get consensus from all members within the WTO.[169]

The most recent example that can reveal the political intervention on the WTO is the misuse of the consensus principle. The one-country-one-vote principle and consensus principle were designed to guarantee that small and poor members in the WTO could have an equal seating with large economies in WTO decision-making process, and to make sure a better integration of developing countries into trade globalization. However, small and poor members do not have the political power to resist for long in blocking the consensus in practice. On the contrary, the consensus principle in WTO decision-making is now also used as a tool for developed members to block key proposals. As noted above, the US has blocked the appointment of new Appellate Body members.[170]

However, the WTO still achieved some progresses in providing a more development-friendly environment to its developing members. Concerning the difficulties faced by developing members in dispute settlement mechanism caused by their lack of financial and legal resources, the Advisory Centre on WTO Law (ACWL) was established in 2001 by a group of WTO members. The main function of this center is to provide free or low-cost legal advice to developing members when so requested, and provide subsidized legal support for developing members when they are involved in a dispute as complainants, respondents, or third parties.[171] The analysis of function and evaluation of the ACWL would be carried out in a later section. Another remarkable achievement concerning development issue in the Doha Round was that a monitoring mechanism to review and analyze the implementation of SDT was established in 2013 by a decision made in Bali Ministerial Meeting.[172] All SDT provisions contained in the WTO regime are included. It can also make recommendations to relevant WTO bodies.[173] Both institutions have taken an *ex post facto* approach to redress the obstacles caused by deficiencies in the corresponding rules without modifying the rules themselves, and they have not touched the classical economic and trade theories adopted by the WTO. These limitations make clear that the current framework, while an improvement on its predecessor, remains insufficient to serve the needs of developing members—raising the question of what developing members themselves must do to change this situation.

---

[169] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission, Bloomsbury Academic, p. 203-204 (2010)
[170] *id.* p. 162
[171] Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement and the Advisory Centre on WTO Law*, The Journal of International Trade & Economic Development, vol.19, no.1, 2010, p. 33-63, 47-48.
[172] Monitoring Mechanism on Special and Differential Treatment, Ministerial Decision of 7 December 2013, WT/MIN(13)/45 WT/L/920, 2013.
[173] *Trade and development*, The World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/devel_e.htm, last visited: Nov. 01, 2021.

3. The Necessity of Developing Members to Participate in and Reform the WTO

Having established in §1.2 that international trade is vital for developing members' economic development—and that participation benefits all parties—this section examines the specific institutional question: why the well function of the multilateral trading system cannot be maintained without participation of developing members.

3.1. The necessity to participate in international trade through integrating into WTO

From the GATT to the WTO period, the membership of multilateral trade system has grown from 23 to 164, covering most of sovereign states in the world. The scope covered by its agreements has also expanded. The GATT itself only concerned trade in goods in some sectors, while the WTO annexes regulate also trade in agriculture, in textile and clothing, trade in services, trade-related intellectual property rights.[174] It means that most of the players are undertaking most of their international trade under the rules of WTO. The rules guiding current international trade are provided by the WTO framework, and no other institutions can possess such strong impact on world trade as WTO. Other regimes in the field of international trade now operate under the shadow of WTO, and they have to adjust their structure to fit the WTO-dominated context.[175] Both the size of its membership and the breadth of its coverage confirm that it is aptly named the World Trade Organization. WTO acts as the platform for its members to work together to set rules of the international trade and maintain the international trade order. Developing countries that determine to gain economic growth through international trade have to integrate themselves into the WTO. And their participation in WTO also marks their involvement in international trade and economic globalization. Besides, the far-reaching nature of rules also demonstrates the impact of WTO on international trade. WTO regulates both cross-the-border and behind-the-border trade barriers, thus have a direct impact on domestic legislation. Sometimes members have to mandate their domestic rules and establish new institutions to implement their obligations under WTO agreements.[176] As §1.2 demonstrates, developing members who remain outside the rule-making process are reduced to passive rule-takers. While things are different now, the increased influence of developing members in the WTO and WTO's focus on development issues gave smaller economies an opportunity to table their proposals and become rule-makers. Thus, the active participation of developing members in the WTO is necessary to influence the WTO decision-making process and strive for rules that can better serve their interests. So active participation in the WTO can help developing members better integrate into the work of improving the international trade order and making the WTO rules more development-friendly.

---

[174] Gary P. Sampson, The WTO and Sustainable Development, United Nations University Press, 2005, p. viii-ix.

[175] Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, Berkeley Journal of International Law, vol. 24, no. 1, 2006, p. 79-128, 80.

[176] Bagwell, Kyle, *et al.*, *Is the WTO Passé?,* Journal of Economic Literature, vol. 54, no. 4, 2016, p. 1125-1231, 1133-1134; John H. Barton, The Evolution of the Trade Regime : Politics, Law, and Economics of the GATT and the WTO, Princeton University Press, 2006, p. 125-152.

3.2. The necessity to reform WTO towards a more development-friendly organization

After more than seven decades of efforts by developing members and the multilateral trade system, the WTO has made some achievements concerning development issue. These achievements demonstrate the aspiration of developing members to actively participate in the global economy and achieve their economic growth. They also show the determination of the multilateral trade system to integrate developing members into international trade and to address the real concerns of its developing members.

However, these progresses have never challenged the underlying approach of development adopted in the immediate postwar period, which is to develop economy by absolute trade liberalization. The special consideration for developing members runs counter to this theory. Although it has been repeatedly confirmed in corresponding provisions that the specific arrangements for developing members were not exceptions of the multilateral trade regime, the discrimination against developing countries' trade has never been eliminated in practice. It could be verified by the strict limitation on the number of exceptions and length of transitional periods. The obligations concerning development issue imposed on developed members are hardly legally binding. Besides that, powerful economies pursued market access selectively, which makes their behaviors actually run contrary to the theory of trade liberalization, and the liberalization of sectors that developing members enjoy strong competitive advantages has never been totally achieved.[177] Most of the achievements are rather just impressive promises to respond to dissatisfaction from developing members than practical actions from developed members. Concerning the participation in the negotiation process, it was argued that developing members have changed from rule-takers to rule-makers in the multilateral trade regime. But due to the divergency among developing countries, it is true for only some powerful developing members, rather than developing members as a whole, other developing members still lack enough financial and legal resources to effectively participate in the WTO. And these developing members are unsatisfied with the current situation in the WTO and are making efforts to bring the development issue back to the center of negotiations. How to address the concerns of poor members should be considered in further negotiations. Although it has been long criticized that the approach adopted by WTO has no substantial changes, the understanding of development is evolving, and the call for change from developing members is being heard. The obstacles faced by developing members and their real concerns gain increasingly attention from international organizations and scholars. The Doha Development Round, although currently in stasis, reveals the increased influence of developing members in the multilateral trading system.

It should be emphasized here that developing members constitute the majority of WTO membership. Thus, the active participation of developing members and the economic development of them are an integral part of the goal of the organization. From the historical perspective of organizational development, GATT had originally only 23 members, while this

[177] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 205.

number has dramatically increased in the WTO period. If the goal of GATT was to serve its members' interests, rules in WTO agreements are now relevant to the development of almost the whole world.[178] Thus, the development issue gained more importance in the WTO than in the GATT period. In addition, "development" is one of the goals to be achieved within the multilateral trading system, the WTO set out the objective of "sustainable development", and introduced numerous SDT provisions that are hortatory in characteristic.[179] So, the positive participation of developing countries in the WTO is important for the system to achieve its development goal.

With the increasing importance of trade in international relations and the impact of WTO rules on domestic regulations, WTO members hoped that their trading partners can conduct international trade in a predictable manner, and they determined to give the rules in WTO agreements legal enforceability. And a rule-based dispute settlement system was established to undertake such a task.[180] For developing members who lack the political and economic power to hold their developed trading partners to their commitments, a mechanism that reviews the dispute based on rules rather than power can better level the playing field of international trade for them.[181] And the reform of dispute settlement mechanism is an essential part of the reform of WTO towards a more development-friendly trade organization. Therefore, how to respond to the concerns of developing countries in dispute settlement process should gain more attention.

---

[178] Gary P. Sampson, The WTO and Sustainable Development, United Nations University Press, 2005, p. viii.

[179] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime, The Failure and Promise of the WTO's Development Mission, Hart Publishing, 2010, p. 205.

[180] Gary P. Sampson, The WTO and Sustainable Development, United Nations University Press, 2005, p. ix.

[181] Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, Virginia Law Review, vol. 92, no. 2, April 2006, p. 251-288, 251.

Part 2 Developing countries and WTO dispute settlement mechanism

WTO DG Renato Ruggiero said in 1996 that dispute settlement mechanism (DSM) is the heart of WTO system.[182] And the Declaration in the same year confirmed the status of DSM as unique in international agreements.[183] When celebrating the 15th birthday of WTO in 2009, the DG Lamy highly regarded the DSM as the "crown jewel" of the WTO.[184] All these evaluations show the importance of the DSM in WTO system and its success. It is recognized that the dispute settlement system in the multilateral trading system has dual nature, namely political nature and legal nature, and it is always criticized for its strong political nature. In order to have a deeper understanding of dispute settlement in the field of international law before further exploring its relationship with development and any possible reforms, the co-exist of these two natures in dispute settlement, the interactions between them and the important roles they play in settling international dispute should first be analyzed.

1. International Dispute Settlement

The dispute settlement system in the multilateral trading system is neither a fully political nor a total legal mechanism, like those in domestic courts. The co-exist and interaction of these two elements constitute a *sui generis* DSM in the WTO. Although the political nature has always been criticized, the international nature of dispute resolution dictates that its political nature cannot be abandoned. And it is commonly accepted that the WTO is still a member-driven organization, thus the existence of the political element is inevitable in the system. While the legal nature of the system stems from the need for the well function of the system. A single-minded pursuit of legal nature in the system without considering its political nature is unrealistic, *vice versa*. So, it is essential to understand the character of international dispute settlement and the dual nature of dispute settlement system in the multilateral trade regime.

1.1. Peaceful Settlement of International Disputes

International disputes could happen between private sectors, sovereign states, or between a private party and a state. Here we discuss the international disputes between sovereign states. In fact, no commonly recognized authority can answer impartially the question: which one is right, and which one is wrong in an international dispute between sovereign states if there is no agreement reached between disputants or they do not voluntarily submit their disputes to a third party for an impartial solution. State that considers itself being treated unfairly can resolve an international dispute with another country by any means, including the threat or use of force.[185] However, the establishment of the UN and the existence of international treaties governing the

[182] *Focus, the WTO's newsletter (N. 12, August/September 1996),* World Trade Organization, 1996, at: https://www.wto.org/english/res_e/focus_e/focus12_e.pdf, p. 7.
[183] MINISTERIAL DECLARATION, WT/MIN(96)/DEC, 18 DECEMBER 1996.
[184] *WTO disputes reach 400 mark,* World Trade Organization, Nov. 6, 2009, at: https://www.wto.org/english/news_e/pres09_e/pr578_e.htm.
[185] Kelsen, Hans, *Compulsory Adjudication of International Disputes*, American Journal of International Law, vol. 37, no. 3, 1943, p. 397–406, 397

disputing matters limited the way to settle of international disputes. The triggers of inter-state disputes concerning international law can be attributed to the nature of international law. Unlike domestic law, whose legislation, interpretation and application processes are guaranteed and monopolized by state authorities. There is no centralized authority in international level, or a higher authority above the states. Therefore, the will of states who are drafters and implementers can have a significant impact on the meaning of rules in international treaties. At the same time, the ambiguity and gaps in international law are inevitable. International treaties' texts are embodiments of states' will. It is commonly accepted that not every detail is clearly regulated in international treaties. And both the will of states in explicit legal texts, and the altitudes of states reflected in the absence of some rules and the vague stipulations in treaties are meaningful in legal interpretation. The lack of clear guidance left by negotiators in international treaties can constitute gaps and ambiguities, and gaps and ambiguities might be necessary for the well function of the newly established organization or institution, like the WTO. Its effective operation is based on the legal interpretation made by a separate third party, as the quasi-judicial system in the WTO. Such gaps and ambiguities consciously left by drafters may be caused by their dissent on certain issues in negotiation proceedings. On the one hand, they have been unable to reach agreements on these issues temporarily, and planned to further discuss and formalize them in a legislative form in the future. The existing gaps or ambiguity of rules allow for a variety of ways of understanding and application. A dispute may arise when states have different understandings in interpretation and application of international law due to such gaps or ambiguity. Even interpreting the rules in an international treaty in good faith, their different culture and legal tradition might lead to divergent understandings and application. On the other hand, for the purpose of dispute settlement, it is essential for judicators to promptly fill the gaps and clarify ambiguous texts to settle the dispute at hand. In this circumstance, it could be understood as drafters have delegated the judicial institution to fill the gaps and clarity the ambiguities in the treaties when necessary in a short term before the agreement is reached among members in the future.[186] And disputes can also be triggered by the dissatisfaction from some members with the existing rules while others tend to maintain the *status quo*, considering there is no centralized authority to peacefully change the rules.[187] It is especially true for some powerful states. They are often the rule-makers, as well as the rule-breakers. They possess political and economic energies to establish the international law that favors them. But with economic development and political changes, the existing rules may no longer be as favorable to them as they once were, in this case, their rebellion against the existing rules marks their abandonment of the existing system and the need for a new order.

As to the means to settle these disputes, it is the consensus of states to maintain the security and peace after the World War II, thus methods that endanger the international order are not allowed. According to Article 2.3 of the UN Charter, members have obligations under international law to "settle their international disputes by peaceful means in such a manner that international peace

---

[186] John H. Jackson, Sovereignty, the WTO, and Changing Fundamental of International Law, Cambridge University Press, 2006, p. 184-185.
[187] Yoshifumi Tanaka, The Peaceful Settlement of International Disputes, Cambridge University Press, 2018, p. 3-4.

and security, and justice, are not endangered"[188]. And as the other side of the same coin, they shall also "refrain in their international relations from the threat or use of force" as stipulated in Article 2.4 of the UN Charter[189]. Concerning the relationship between trade and security, the peaceful settlement of international trade disputes plays an important role in international relations, and contributes a lot to the world's security and peace.[190]

The traditional means to peacefully settle international disputes can be found in Article 33 of the UN Charter. These include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"[191]. The first 6 all point to specific dispute resolution. The illustration is not exhaustive, and this article illustrates only some of traditional means. For example, the "good office" as an effective means in practice is not mentioned here.[192] "Other peaceful means of their own choice" confirms that states are also encouraged to create new methods that can best fit the nature of disputes and demands of parties to disputes. Different means to settle disputes have their own advantages and shortcomings, thus there is no hierarchy among them. Although it is hard to draw the line in practice, for reasoning convenience, these means would be classified into two categories – diplomatic/political and legal/judicial means, according to the character of each means.[193] Negotiation is a primary means in international cooperation and dispute settlement, it means a discussion between state authorities "with a view to achieving common understanding or agreement"[194]. The enquiry is mainly used in the international dispute settlement process where the dispute is triggered by states' variety perception of facts. It means elucidating facts and it could be conducted by an impartial and neutral body or a joint body consisting of the representatives of the disputants.[195] Mediation is a means to settle international disputes with the involvement of a third party. It requires the consent from parties to the dispute. The function of mediators is limited to bringing the disputants together and organizing the mediation process. They act as intermediaries and can provide advice for disputants concerning the peaceful settlement of disputes. However, their suggestions are not binding.[196] Conciliation also involves third parties. It means parties resolve international disputes by establishing a commission, either on a permanent basis or an *ad hoc* basis, to impartially examine the facts and the applicable law

---

188 United Nations Charter, Article 2.3.
189 United Nations Charter, Article 2.4.
190 Yoshifumi Tanaka, The Peaceful Settlement of International Disputes, Cambridge University Press, 2018, p. 276.
191 United Nations Charter, Article 33.1.
192 Hanspeter Neuhold, The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement, Brill Nijhoff, 2015, p. 174-175.
193 J.G. Merrills, International Dispute Settlement (6th edition), Cambridge University Press, 2017, p. 88.
194 Kari Hakapää, *Negotiation, Oxford Public International Law*, Oxford Public International Law, Article last updated: May 2013, at:https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e67.
195 Agnieszka Jachec-Neale, *Fact-Finding, Oxford Public International Law*, Oxford Public International Law, Article last updated: March 2011, at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e27.
196 Francisco Orrego Vicuña†, *Mediation*, Oxford Public International Law, Article last updated: December 2010, at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e61.

of the dispute, and make recommendation to parties that they can freely accept or reject.[197] Such recommendation is also non-binding. Arbitration is a dispute settlement method through which parties submit their dispute to private arbitrators. Different from mediation and conciliation, arbitration can provide parties enforceable resolution that can be enforced in nearly all countries of the world. It plays an important role in international dispute settlement.[198] Judicial settlement of international disputes has many in common with arbitration, it also involves impartial third parties, and disputants have an international obligation to implement the decision made by the judicial body. But it lacks the flexibility of arbitration, and the judicial body is usually permanent.[199] Thus, from the point of view of the disputant control over the outcome of dispute resolution and the binding effect of the results on parties, these methods of international dispute settlement could be divided into two groups. And it was argued that adjudication and arbitration are legal, and others are political means.[200] By applying the political means, parties retain control over the process, and the settlement is not binding on them. And legal means settle dispute on the basis of international law, and the final decision has a binding nature. Political approach means powerful party tends to influence others' conduction by using its relative political power. The results depend more on the political power of negotiators. And in this case, countries with weaker political power are placed at a systematic disadvantage. The legal approach, by contrast, reflects the primacy of legal rules over political power: disputes are reviewed objectively by a third party on the basis of agreed rules, and parties with divergent political power are placed on a more equal procedural footing. However, due to the lack of centralized authority in international level and a higher authority above the states, the political nature in settling international disputes cannot be avoided, even in legal means as we defined. Legal methods have gained rapid development these years due to its advantage in helping to develop international law and its application can further reinforce the rules of law in international relations, while the majority of international disputes are still settled through political means nowadays, considering the nature of international law.[201] As to their common goal, which is to peacefully settle international disputes, these two groups of means are not opposed to each other, and one group is not supposed to prevail over the other. They are "mutually supportive and tend to reinforce and complement each other" in practice.[202] The complication of international disputes calls for the combination of both political and legal approach. Adjudication can only solve legal disputes, and other issues can be solved through political approach. And the existence of legal approach can also promote the application of political means, for example, conducting negotiation under

---

197 Jean-Pierre Cot, *Conciliation*, Oxford Public International Law, Article last updated: April 2006, at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e20.

198 *What is Arbitration*, International Intellectual Property Organization, at: https://www.wipo.int/amc/en/arbitration/what-is-arb.html, last visited: Jan. 31, 2022.

199 Alain Pellet, *Judicial Settlement of International Disputes*, Oxford Pubic International Law, Article last updated: July 2013, at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e54.

200 Hanspeter Neuhold, The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement, Brill Nijhoff, 2015, p. 175.

201 Yoshifumi Tanaka, The Peaceful Settlement of International Disputes, Cambridge University Press, 2018, p. 22-23.

202 Laurence Boisson de Chazournes, *et al.*, Diplomatic and Judicial Means of Dispute Settlement, Martinus Nijhoff Publishers, 2013, p. 8.

the shadow of litigation.[203] Countries might be more likely to reach agreements through negotiation when they face the possibility of upcoming legal proceedings. The interlinkage between these two approaches is crucial in international dispute settlement, they interact in a variety of ways in practice.[204]

1.2. Dispute Settlement in the WTO

The development of international dispute settlement in the field of international trade is notable in particular. The DSM is now recognized as one of the most effective and the most important mechanisms in settling international disputes.[205] The dispute settlement methods in WTO demonstrate the intertwining of political and legal approaches. After decades of development, WTO offers its members multiple ways to settle trade disputes under covered agreements, including consultation, good office, conciliation, mediation, arbitration and a quasi-judicial DSM. Applying the framework established in §1.1, WTO dispute settlement demonstrates precisely this intertwining of political and legal approaches: Article 5.5 of the DSU provides that after the establishment of a panel, which is a stage of the legal means, good office, conciliation or mediation as political means to settle disputes may continue if the parties to dispute so agreed.[206] And members are encouraged to find mutually satisfied solutions at any stage of proceedings, even at panel or Appellate Body procedures.[207]

Its *sui generis* DSM consists of an *ad hoc* panel proceeding and a second-tier appeal proceeding.[208] *Sui generis* system of WTO is highly evaluated by its members as the "crown jewel”. The history of its development shows the interaction between political and legal ways to settle international disputes and the resulting influence on the participation of developing members.[209] The discussion on participation of developing members in the WTO dispute settlement system would mainly focus on their participation in the quasi-judicial system of WTO. From the GATT period to WTO period, although significant changes happened, the dispute settlement system in multilateral trading system has always dual nature like that in other international agreements. Members now agree to solve their disputes through a quasi-adjudicative approach because it is their consensus that playing by the rules is for their mutual long-term interests, such as the predictability and stability in the interpretation of rules and in policy-making.[210] The development of DSM demonstrates the change in the share of these two factors in the dispute settlement

[203] Laurence Boisson de Chazournes, *et al.,* Diplomatic and Judicial Means of Dispute Settlement, Martinus Nijhoff Publishers, 2013, p. 296.
[204] Yoshifumi Tanaka, The Peaceful Settlement of International Disputes, Cambridge University Press, 2018, p. 8.
[205] J.G. Merrills, International Dispute Settlement (6th edition), Cambridge University Press, 2017, p. 205.
[206] DSU, Article 5.5.
[207] *Consultations, The Process — Stages in a Typical WTO Dispute Settlement Case*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm#txt2, last visited: Nov. 3, 2021.
[208] Understanding on Rules and Procedures Governing the Settlement of Disputes.
[209] Pascal Lamy, *The Place of the WTO in the International Legal Order*, World Trade Organization, Jun. 15, 2008, at: https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm.
[210] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 64.

process, namely from more power-oriented to more rule-oriented.[211] In order to find the obstacles faced by developing members in settling their disputes through DSM and enhance their participation, it is essential to analyze the development of the system and its characters in each period.

2. Development of Dispute Settlement Procedure in the Multilateral Trade System

Part 1 traced how the multilateral trading system evolved in its treatment of development issues from the ITO Charter through the WTO. This Part examines the same historical period through a different lens: how the dispute settlement mechanism specifically evolved, and what that evolution meant for developing members' ability to enforce their rights. The dispute settlement system in the GATT period is the cornerstone of the current dispute settlement mechanism in the WTO. The development of GATT dispute settlement plays an important role in shaping the DSM. Many defects in WTO dispute settlement mechanism that hinder the participation of developing members already existed during GATT period. The changes made in dispute settlement proceeding can demonstrate its characteristics and the relationship between development and dispute settlement system in two periods. Thus, in order to better understand the current DSM, it is essential to have a close look at the dispute settlement system and its evolution in different stages.[212]

2.1. Dispute Settlement Procedure in ITO Charter

Although the development of dispute settlement in multilateral trade regime was considered as evolving from more power-oriented to more rule-oriented. The original design in ITO Charter tells a different story, and it was different from the practices in the early years of the GATT. The dispute settlement system in ITO Charter was rigorous, detailed and comprehensive.[213] According to the ITO Charter, when disputes occurred, members of the ITO could firstly resort to consultation or arbitration, if no settlement found, they could further refer their disputes to the Executive Board, and they could then appeal the decision made by Executive Board to the Conference. The ITO might also request legal opinions from the International Court of Justice (ICJ), and ICJ could serve as an appellate body in some circumstances.[214] The dispute settlement in ITO provided a decision-making body as a third party to review the claims. And the proposed system was designed to guarantee the compliance of rules.[215] Thus, the proposals to establish the ITO adopted a more rule-oriented approach than subsequent practices in the GATT period. Such arrangements offered developing members more protection and security. However, the collapse of the ITO caused the failure of a rigorous dispute settlement system, and the survival

[211] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 66-68.
[212] Saleh Al Shraideh, the Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 17.
[213] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 64-65.
[214] The Havana Charter for an International Trade Organization, Chapter VIII, Article 92-97.
[215] Mervyn Martin, WTO Dispute Settlement Understanding and Development, Martinus Nijhoff Publisher, 2013, p. 41-42.

of GATT under the shadow of ITO Charter led to the existence of only two articles governing the dispute settlement, namely Article XXII and XXIII. And the arrangements in dispute settlement that came into force were far from the original goal set forth in ITO Charter.

2.2. Dispute Settlement Procedure in GATT

As mentioned in a previous part, the GATT, as an interim framework before an international trade institution came into force, has many birth defects. And one of them was the lack of a dispute settlement system in the early years. Without a well-constructed legal system that can provide impartial review and coherent interpretation of the rules, provisions in international treaties are not able to play their important roles.[216] And that was one of the biggest flaws in the GATT system in the early years. Because the GATT, as an agreement governing only trade in goods, had few provisions concerning dispute settlement, the development of its dispute settlement procedure was mainly on the basis of only two articles, GATT Article XXII and XXIII, although other provisions sprinkled throughout the GATT.[217]

2.2.1. Development of Dispute Settlement Procedure in GATT

Article XXII provides:

> 1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
> 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.[218]

This article governed bilateral consultations between contracting parties, establishing a purely diplomatic mechanism for raising concerns. But paragraph 2 provided the possibility to resolve disputes before one party was ready to discuss its claim with others. And for developing members, the quick settlement of disputes can reserve their legal and financial resources, thus was of a particular importance to them.[219] And Article XXIII, according to which the evolutions on dispute settlement in the following decades happened, provided only sparse language about dispute settlement, without detailed rules and procedures. It provides:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

---

[216] John H. Jackson, The Jurisprudence of GATT and the WTO: insights on treaty law and economic relations, Cambridge University Press, 2000, p. 114.

[217] John, H. Barton, *et al.*, The Evolution of the Trade Regime, Princeton University Press, 2006, p. 68; Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 70.

[218] GATT 1947, Article XXII.

[219] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 23.

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary(3) to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.[220]

The grounds for a dispute provided in Article XXIII was “nullifications or impairment”, a more ambiguous phrase than “breach” of obligations. Therefore, the dispute settlement in GATT was not to guarantee the compliance of obligations under provisions. Instead, it aimed to maintain the balance between concessions and obligations, and it showed strong political nature.[221] It means a dispute could be invoked even the behavior of a member was consistent with its treaty obligations, and there is a possibility that even a member violated its obligations under agreement, it did not constitute “nullification or impairment” under this article. It means, a member, after presenting a *prima facie* violation, had also to prove the existence of “nullification or impairment”. And an obvious difference between GATT dispute settlement with the ITO approach was that there was no Executive Body, Conference or other specific divisions to review the disputes, and no legal opinions provided by the ICJ. When members could not reach a

[220] GATT 1947, Article XXIII.

[221] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 65-66.

mutually satisfied solution through consultation, they could refer their disputes to CONTRACTING PARTIES. This article empowered CONTRACTING PARTIES to investigate any matter, make recommendations or rulings, and authorize a contracting party or parties to retaliate.[222]

In addition to the flaw of lacking a dispute settlement institution, the lack of timeframe also impeded the effectiveness of this article. Without a predictable timeframe,[223] developing members with limited resources might be hesitant to initiate a dispute. Besides, the consensus principle adopted in CONTRACTING PARTIES' decision-making processes gave members a veto to block the procedure. Dispute settlement in these years was neither automatic nor binding in practice. The legal element in GATT dispute settlement system in early years sharply reduced compared with the original design in ITO Charter, while the political nature was enhanced. However, according to a draftsman in the preparation meeting of GATT, the focus was to make the obligations of members clear and unambiguous, so that the GATT agreement would better fit the dispute settlement mechanism in the ITO Charter.[224] The development of GATT dispute settlement practice in the following decades towards a more rule-oriented system also provided evidence to support this initial intention. Some of the flaws mentioned above have been resolved with the development, while some still reserved and passed to its successor, the WTO.

At the beginning, there was no specific division to handle the disputes arose between members. At first, disputes were handled at the semiannual meeting of the Contracting Parties, then an intersessional committee was responsible for handling disputes, later working parties that included parties to dispute were established to deal with these disputes.[225] Although disputes were settled in a gradually more specific institution, the negotiation approach was constant. All these methods reflected a strong diplomatic nature. And few cases were brought to GATT due to the dissatisfaction of members with the incomplete dispute settlement procedure.[226] A significant change occurred in 1952, a third party to review the claims was introduced into dispute settlement procedure in an Annex that confirmed the customary practice of GATT, and the negotiation nature was diminished.[227] Instead of settling disputes by representatives from members, it is better to bring these disputes to a panel, which consisted of a group of experts that were independent and did not conduct as instructed by members. The acceptance of this approach showed that members are willing to accept the facts finding and legal interpretation of a neutral third party, which is a more "arbitrational" or "judicial" approach.[228] Since then, the panel proceeding has been the usual dispute settlement procedure in GATT practice.

---

[222] GATT 1947, Article XXIII.

[223] Saleh Al Shraideh, the Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 25.

[224] Mervyn Martin, WTO Dispute Settlement Understanding and Development, Martinus Nijhoff Publisher, 2013, p. 51-52.

[225] Robert E. Hudec, The GATT Legal System and World Trade Diplomacy, Praeger, 1975, p. 66-96.

[226] John, H. Barton, *et al.*, The Evolution of the Trade Regime, Princeton University Press, 2006, p. 69

[227] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 71.

[228] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 66-67.

The dispute settlement procedure in the GATT period has been gradually codified and detailed by a series of significant decisions and understandings. In a case brought by Uruguay in 1962, the Panel confirmed that the violation of provisions constituted *prima facie* "nullification or impairment",[229] and in another case the Panel confirmed that in some circumstances, the presumption would not be rebuttable, this conclusion further enhanced the rule-oriented nature of dispute settlement. A stronger linkage between "nullification or impairment" and "violation of obligations" was established. The result of Tokyo Round formed the framework of GATT dispute settlement processes prior to the establishment of WTO by formulating separate procedures for different agreements.[230] During the 1980s, the process was supplemented to a more rule-oriented mechanism by several decisions. These include: the Decision on "Dispute Settlement Procedures" on 29 November 1982; the Decision on "Dispute Settlement Procedures" on 30 November 1984; and the Decision on "Improvement to the GATT Dispute Settlement Rules and Procedures" (1989 Improvement) on 12 April 1989.[231] The 1989 Improvement formed the final version of GATT dispute settlement procedures, and it was also the basis of the subsequent WTO dispute settlement mechanism.[232] The following discussion on the GATT dispute settlement system would be mainly based on the procedures after 1989. According to the dispute settlement system in the final years of GATT, parties to disputes should firstly try to find a solution by consultation, if no agreement on settlement was reached, they could ask for the establishment of a panel as an impartial third party to review their dispute objectively, and parties can, to a large extent, control the composition of the panel. The deliberation of the panel was not transparent. The final report then would transmit to the Council for adoption or approval.[233]

The reasons for such development are multifaceted. The first one is the initial intention in designing the order of world trade after World War II. The reason GATT lacked a comprehensive and detailed dispute settlement arrangement in the early years was the status of GATT as an interim framework concerning the reduction of trade restrictions, and the establishment of a new institution was still expected by members.[234] However, since members stopped hoping for a new institution, the institutionalization of GATT was regarded as an inevitable trend.

The second one is the criticism of the weak institutions in the final years of the GATT. Although the GATT was power-oriented, and violations of obligations might incur no sanction given that any member could veto the adoption of rulings under the positive consensus principle, the practice showed that members preferred to comply with their treaty obligations in the early

[229] Report of the Panel on Uruguay Recourse to Article XXIII, Report adopted on 16 November 1962, (L/1923 - 11S/95), p. 4.
[230] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Adopted on 28 November 1979, (L/4907).
[231] Ernst-Ulrich Petersmann, International Trade Law and the GATT/WTO Dispute Settlement System, Kluwer Law International, 1997, p. 71.
[232] David Palmer & Petros C. Mavroidis, Dispute Settlement in the World Trade Organization: Practice and Procedure (2nd edition), Cambridge University Press, 2004, p. 9-11.
[233] John H. Jackson, The Jurisprudence of GATT and the WTO: insights on treaty law and economic relations, Cambridge University Press, 2000, p. 122-123.
[234] Mervyn Martin, WTO Dispute Settlement Understanding and Development, Martinus Nijhoff Publisher, 2013, p. 42-45.

years of the GATT. The high compliance with obligations by members can be explained by economic analysis, but with no legal guarantees. The first reason is domestic political pressure. When the trade liberalization treaty begins to be implemented at the domestic level, the interests of protectionist would gradually decrease, and the interests of protectionists would gradually decrease, and their efforts to revive protectionist measures would lose their influence on domestic politics, while groups that stand to benefit from trade liberalization would exert increasing pressure to preserve the existing rules as their interests grew. And it is also true that the cost of maintaining existing rules is lower than that of changing them. The second reason is reputational cost and its impact on international relationship. The reputation is not cabined only in the field of trade, the negative impact on national image might influence the future negotiations and cooperation in other areas. Because of the consensus principle in the decision-making process, if no mutually satisfied solution was reached in consultation phase, it is easy for other members to notice the violation, and they would have a negative presumption on the respondent. And the linkage between violation and future lack of capacity to comply with other obligations would be established.[235] The last reason is the possibility of causing unilateral sanctions. Some states have statutes governing unilateral sanctions, while others may retaliate in practice without authorization from their legislation.[236] But the attitudes of members to the effectiveness of these rules changed in the final years of the GATT, the GATT system was criticized for lack of enough capacity to maintain the members' respect to the rules, and in some cases, the violation of rules became frequent and tolerated.[237] As to the implementation of rulings in GATT's dispute settlement procedure, there was less consistency. In the 1980s, only two-fifths of rulings for complainants were fully implemented by respondents.[238] When the benefits of a breach outweigh the benefits of compliance with the rules and rulings in a "toothless" system like GATT, members would choose to ignore their obligations and violate the agreements. Thus, the importance of a more rule-oriented dispute settlement system to maintain members' respect for the rules has been increasingly revealed.

In addition, from the institutional development point of view, a rule-oriented dispute settlement system can benefit the multilateral trading system, and that complements the reasons for its evolution mentioned above.[239] At the early stage of the GATT, the number of its membership was limited, and the operation of GATT relied much on its creators, thus it chose the negotiation approach to settle disputes. As membership grew and the GATT developed an increasingly institutional character, the organisation became less dependent on its founding members and more capable of sustaining a rule-based system on its own terms.[240] The economic globalization

---

[235] Andrew T. Guzman, *How International Law Works: Introduction*, International Theory 1, no. 2, 2009, p. 285–293.
[236] Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, the Journal of Legal Studies, vol. 31, 2002, p. 179-204, 194-200.
[237] John H. Jackson, The Jurisprudence of GATT and the WTO: insights on treaty law and economic relations, Cambridge University Press, 2000, p. 114.
[238] John, H. Barton, *et al.*, The Evolution of the Trade Regime, Princeton University Press, 2006, p. 69.
[239] John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, Journal of International Economic Law, Oxford University Press, vol. 1, no. 3, 1998, p. 329-351, 338.
[240] William J. Davey, *Dispute Settlement in GATT*, Fordham International Law Journal, vol. 11, no. 1, Fall 1987, p. 51-109, 61-81.

also called for a more rule-oriented route to settle international trade disputes. In the process of economic globalization, the world has been more interdependent, and the participation of citizens has also enhanced. The role played by the power and discretion of states was put under constraints. And the need for stability of obligations and the predictability of states' conducts preferred a more rule-oriented approach. The development of dispute settlement in the multilateral trading system was in line with this trend.[241]

2.2.2. Remedies in GATT Dispute Settlement System

The GATT legal system provided for three kinds of remedies under Article XXIII, the first one is an appropriate recommendation made by Contracting Parties, the second one is a ruling given by Contracting Parties, and if the circumstance is considered as serious enough, the Contracting Parties could authorize a contracting party or parties to retaliate. And the adoption by Contracting Parties (then acted through the Council) of a panel report was recognized to be a ruling.[242] Each of these results was decided through the consensus principle. So, there is a possibility that the adoption of result would be blocked by the losing party. Although this rule applied equally to all members, it had a greater impact on developing members. For developing members with limited resources, it means that the great efforts they put into dispute settlement proceedings could lead to nothing in return, and these resources could have been used in other in-demand fields. That constituted one of the reasons that hindered their participation in dispute settlement system in the GATT period.

Since the remedies to a large extent reserved and passed to the WTO, and the main development happened is the adoption of negative consensus principle in decision-making process, specific remedies and their influences on developing members would be discussed in detail in the part of WTO dispute settlement mechanism. Some specific characters existed in the GATT period would be discussed here. According to the consensus principle in adoption of panels' reports, an unadopted panel's ruling would not impose any obligations on the parties to dispute. It was recognized that the remedies offered in the GATT legal system demonstrated the nature of GATT itself, namely the reciprocal foundation and its function of balancing the concessions and obligations, instead of bringing the disputing measure into conformity with rules in the agreement.[243] The GATT did not explicitly define the legal responsibility for members that have violated their treaty obligations. And some have argued that the authorization of retaliation offered an alternative for members to rebalance the concessions and obligations, it can prove the non-binding nature of results of dispute settlement. However, the development of dispute settlement towards a more rule-oriented system and experience showed that Contracting Parties intended to confirm the obligations for parties to dispute to obey the rulings. Thus, disputants had international legal obligations to carry out the results. And like decisions under other

[241] Mervyn Martin, WTO Dispute Settlement Understanding and Development, Martinus Nijhoff Publisher, 2013, p. 51.
[242] Ernst-Ulrich Petersmann, International Trade Law and the GATT/WTO Dispute Settlement System, Kluwer Law International, 1997, p. 38-39.
[243] Sungjoon Cho, *The Nature of Remedies in International Trade Law,* University of Pittsburgh Law Review, vol. 65, no. 4, Summer 2004, p. 763-810, 766-767.

international agreements, the adopted panel reports did not have the precedent effect. It could also be supported by the fact that, in some special cases, panels consciously departed from the prior reports. But considering that panels in many instances cited the opinions in prior cases to support their conclusion, it was demonstrated that the prior reports had a strong influence on future panels, and it could be regarded as a *de facto* precedential effect. Furthermore, the adopted panels' reports could not be considered as the definitive interpretation made by Contracting Parties. One reason is that, if doing so, it could not maintain the stability of interpretation of rules once the panel in its report decided to departure from the prior opinion. Another reason is that Contracting Parties would prefer to interpret the rules by themselves that might offer a different understanding from panels' reports, thus left opportunities for future panels to make a different decision to prior reports.[244]

Therefore, as to the binding nature of the adopted report in practice, the legal element in GATT dispute settlement has been gradually enhanced through decades of development, while the strong political nature still remained. At the same time, concerning the *de facto* precedential effect, the practice of GATT was in line with the customary in international law of the time. The decision-making process is not development-friendly, and some principles and mechanisms constitute obstacles for developing members to utilize the dispute settlement system as an approach to protect their rights and interests under the GATT agreement, and it will be further discussed in a later section.

2.2.3. The Need to Reform the Dispute Settlement System of the GATT

During the 1970s to 1980s, the difficulties faced by the US in international trade and its dissatisfaction with the GATT's dispute settlement procedure led to the adoption of unilateral sanctions. The US turned to its domestic law to handle disputes in international trade. The much-debated section 301 was formulated at that time. But the US did not abandon the multilateral trading system, and it actively sought the modification of dispute settlement process in GATT to better address the issues of violation. Its idea to strengthen the system then gained supports from other members due to the fact that in some circumstances, the departure became frequent and tolerated. The lack of a well-structured legal system to guarantee members' respect for treaty obligations would let the non-compliance in the future put more political pressure on members to damage the international trade order.[245] A distorted order in international trade would damage the interests of each participant. And it was also of others' interests to constrain the unilateral sanctions conducted by powerful members.[246] Thus, they realized that some reforms should be introduced in the dispute settlement procedure, and the birth defects of this system must be addressed. Their determination could be seen in the Punta del Este Declaration

---

[244] John H. Jackson, The Jurisprudence of GATT and the WTO : insights on treaty law and economic relations, Cambridge University Press, 2000, p. 129-131.
[245] John H. Jackson, The Jurisprudence of GATT and the WTO : insights on treaty law and economic relations, Cambridge University Press, 2000, p. 114.
[246] John, H. Barton, *et al.*, The Evolution of the Trade Regime, Princeton University Press, 2006, p. 69-70.

adopted in 1986, and the modification of dispute settlement system was on the list of subjects for negotiation in the subsequent Uruguay Round.[247]

The flaws of this procedure caused that the power-oriented dispute settlement system in GATT was increasingly difficult to pursue. And there was still a long way toward a more rule-based system. The GATT dispute settlement system was criticized mainly for two reasons. The first one was the strong power-oriented nature. Due to the consensus requirement in GATT's decision-making process, parties could, by its veto, block the establishment of a panel, the adoption of the report and the authorization of retaliation.[248] There was no long-term legal guarantee to protect the interests of members under agreements. And the second was the fragmentation of dispute settlement in GATT, it sometimes caused disputes on which procedure to resort. Members tended to apply the procedure that is most favorable to them, instead of the dispute settlement procedure that was most relevant to their disputes. And it was problematic because it would be difficult for a panel under one agreement to review some issues and cite provisions under another agreement. The power-oriented GATT's dispute settlement system was criticized as "having the aim of redistributing income to the benefit of the powerful and not satisfying the balanced development requirements"[249]. As Part 1 §2.2 demonstrates, these structural features disproportionately disadvantaged developing members who lacked the political and economic leverage to enforce their rights within a power-oriented system.

2.3. Dispute Settlement Mechanism in the WTO

Members' consensus to strengthen the dispute settlement mechanism and their determination to maintain the well function of multilateral trade regime was revealed in the negotiations of Uruguay Round. And the current highly appreciated WTO dispute settlement mechanism that is regarded as the "crown jewel" of the multilateral trading system was formally established by the DSU, which was a part of the WTO agreements during the Uruguay Round.[250]

2.3.1. Development of the DSM in the Uruguay Round

The development of dispute settlement system in multilateral trade regime firstly revealed the changes in mind of members. The power-oriented approach adopted in the GATT period has been increasingly hard to pursue, and GATT lacked the institutional capacity to maintain members' respect for its rules.[251] The dynamic and instability of international political situation could not serve the need for long-term stable international trade policy. Thus, predictability and stability became the prime goal of negotiations in the Uruguay Round. Members realized that a

[247] Peter Balas, *Chairing the DSU Negotiations: An Overview*, Reform and Development of the WTO Dispute Settlement System (Dencho Georgiev & Kim van der Borght *ed.*), Cameron May, 2006, p. 15.
[248] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 71.
[249] John, H. Barton, *et al.*, The Evolution of the Trade Regime, Princeton University Press, 2006, p. 97.
[250] *Dispute Settlement System Training Module: Chapter 1, Introduction to the WTO Dispute Settlement System, 1.2 The Dispute Settlement Understanding*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s2p1_e.htm, last visited: Nov. 15, 2021.
[251] John H. Jackson, The Jurisprudence of GATT and the WTO: insights on treaty law and economic relations, Cambridge University Press, 2000, p. 114.

rule-oriented dispute settlement approach could make private entrepreneurs guaranteed for long-term business decision-making and reduce the commercial risks arose from the political and cultural differences between states. The greater effectiveness and enforceability of rights and obligations under agreements could only be achieved by introducing a strengthened and effective dispute settlement mechanism.[252] It is for their interests to create a more rule-oriented dispute settlement procedure, but they, in return, also had to be bound by such rules.[253] The rule-oriented approach could put stronger and weaker players in a more equal position in settling disputes through making decisions on the basis of rules and reducing interference of political power.[254] It was argued that strictly binding rules and procedures can prevent the stronger states from arbitrarily using their political and economic power.[255] One of the main goals of developing members in negotiations in the Uruguay Round was to "redress the strong", and enhance their ability to confront the protectionism, bilateralism, and unilateralism.[256] Although the lack of political and economic power of developing members are their inherent disadvantages, and they could not be resolved merely through multilateral trading system, the WTO could make some changes to release their obstacles and put them in a more fair atmosphere concerning dispute settlement.

The WTO dispute settlement mechanism is the successor of dispute settlement system in the GATT period. Article 3 of DSU demonstrated the relationship between them. It states: "members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947…"[257]. It also reveals in the Article XVI:1 of Marrakesh Agreement, which provides "…the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947…"[258] The dispute settlement mechanism in WTO reserved some of the practices and procedures in GATT practice, while it reformed the mechanism towards a more rule-oriented approach by including detailed and elaborate provisions and adding some new features to the old system.[259] The most significant features are the establishment of a unified dispute settlement mechanism, the elimination of the positive consensus principle, and the establishment of the Appellate Body.

---

[252] Mervyn Martin, WTO Dispute Settlement Understanding and Development, Martinus Nijhoff Publisher, 2013, p. 96.

[253] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 77.

[254] *Introduction to the WTO dispute settlement system*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm, last visited: Nov. 20, 2021.

[255] Michael Reisman & Mark Weidman, *Contextual Imperatives of Dispute Resolution Mechanism–Some Hypotheses and Their Application in the Uruguay Round and NAFTA,* The Journal of World Trade, vol. 29, iss. 3, 1995. p. 5-38, 35-38.

[256] Kessie, Edwini Kwame, *Developing Countries and the WTO Trade Organization—What Has Changed?,* World Competition: Law and Economics Review, vol. 22, 1999, p. 83–110, 98–99.

[257] DSU, Article 3.

[258] Marrakesh Agreement, Article XVI: 1.

[259] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 75.

Unified dispute settlement mechanism

The GATT dispute settlement system had a fragmentation nature. And it resulted in forum shopping.[260] This issue was addressed in the Uruguay Round and was finally solved by introducing a unified dispute settlement system. The unified dispute settlement system was established by the DSU for almost all covered agreements. According to Article II:2 of Marrakesh Agreement, the DSU that set forth in Annex 2 "are integral parts of this Agreement, binding on all Members"[261]. And Article 1.1 of the DSU confirms that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding" and "consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization and of this Understanding taken in isolation or in combination with any other covered agreement."[262] Besides the unified dispute settlement system that applies to most disputes, there are still special or additional arrangements in certain agreements.[263] And according to Article 1.2 of the DSU, when there are differences in rules and procedures between the DSU and special and additional arrangements set forth in Appendix 2, the latter shall prevail.[264] In addition, parties to the plurilateral agreements have the right to decide whether or to what extent should the DSU apply when disputes arise from these agreements.[265] Although the goal of establishing a unified dispute settlement system was not fully achieved, the dispute settlement system established by the DSU by practice gained recognition from all members as one of the success stories in WTO and the most important dispute settlement system in the field of international trade.[266]

The fragmentation of dispute settlement system actually reflected the fragmentation of GATT rules at that time. Some countries or clubs played in their own sandbox[267] and split developing members from the development of some core trade areas by adopting the fragmentation approach in the Tokyo Round negotiations. Non-negotiators could not enjoy the benefits resulted from the Codes, considering that the MFN principle only applied to members who have signed the Codes. The Code approach led to the splits among members. The Codes that ratified by some members were not likely to take into account the needs of non-signatories, in most cases the developing members. It severely affected the integrity of the GATT system and embodied the

[260] Marc L. Busch, *Democracy, Consultation and the Paneling of Disputes under GATT*, Journal of Conflict Resolution, vol. 44, no. 4, 2000, p. 425-446, 427.
[261] Marrakesh Agreement, Article II: 2.
[262] DSU, Article 1.1.
[263] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 178.
[264] DSU, Article 1.2.
[265] DSU, Appendix 1: Agreements Covered by the Understanding, (C) Plurilateral Trade Agreements.
[266] Donald McRae, *What is the Future of WTO Dispute Settlement*, Journal of International Economic Law, vol. 7, no. 1, 2004, p. 3–21, 3.
[267] Bernard M. Hoekman & Petros C. Mavroidis, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, The European Journal of International Law, vol. 26, no. 2, 2015, p. 319-343, 334.

strong political nature of the multilateral trade regime.[268] The Codes that not applied to everyone in GATT led to the dispute settlement systems that had '*à la carte*' nature. Thus, the uniform of dispute settlement system marked the determinations of members to abandon the Code approach, to bring developing members back to the development of economic globalization and to develop dispute settlement system towards a more rule-oriented one, which is of great importance to developing members. Thus, a unified dispute settlement system can benefit the developing members.

Elimination of consensus principle in dispute settlement system

As analyzed in §2.2.1, the positive consensus principle systematically disadvantaged developing members by allowing respondents to block proceedings at three critical junctures: the establishment of a panel, the adoption of rulings, and the authorization of retaliation. The DSU addressed this structural flaw decisively.

The DSU in the WTO period offers members the right to an almost automatic initiation of a panel once the complainant so requests.[269] Article 6.1 of the DSU provides that a panel shall be established unless the "DSB decides by consensus not to establish a panel", considering that at least the complainant will support its establishment, this procedure can be regarded as almost automatic. In contrast to the positive consensus principle in the GATT period, the principle applies in the WTO is called "negative consensus".[270] Article 16.4 and Article 17.14 confirm that the negative consensus principle also applies to the adoption of panels' and Appellate Body's reports. Article 22.6 applies the negative consensus principle in granting authorization to suspend the concessions or obligations. Therefore, the elimination of the positive consensus principle makes the blocking almost impossible, thus reduces the interference from political powers in judicial decision-making process. The almost automatic proceedings added judicial element in DSM, and constitute a big step toward a more rule-oriented dispute settlement system. As to developing members, the reduction of political element to some extent level the playing field for both stronger and weaker members. Their concerns about the proceeding being blocked were eliminated, and it further serves to encourage the participation of developing members in dispute settlement procedure.

Establishment of Appellate Body (AB)

Unlike the panel stage, which has already existed for decades since the GATT period, the AB was an innovation in the Uruguay Round. The elimination of positive consensus in dispute settlement system and the establishment of an AB are intertwined from a negotiating point of view.[271] In the

---

[268] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 58-59.
[269] DSU, Article 6.1.
[270] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 64-65.
[271] Bernard M Hoekman & Petros C Mavroidis, *To AB or Not to AB? Dispute Settlement in WTO Reform,* Journal of International Economic Law, vol. 23, iss. 3, September 2020, p. 703-722, 705.

negotiations of the Uruguay Round, the evolution of the dispute settlement system towards a more rule-oriented one and the abandon of the positive consensus principle could be accepted by some members only if the AB was to be established.[272] Actually, the AB was created to substitute the positive consensus principle in the old GATT legal system. At the early stage of the GATT period, the failure of establishing an independent institution made the well function of GATT highly relied on the support of its members. And the dispute settlement system also showed a strong political nature. The consensus principle applied in the adoption of a ruling could well demonstrate this birth defect. The support from all members can add some legally binding effect of the rulings. However, the increased number of GATT membership made the consensus in this procedure harder to achieve. In the last few years of the GATT, the consensus principle has been abused by members dissatisfied with rulings against them to block the adoption of panel reports.[273] The ultimately unadopted rulings could reduce the credibility and the effectiveness of the dispute settlement system, and force members to settle their disputes outside the multilateral trading system, which could lead to more unilateral sanctions inconsistent with GATT rules. At the same time, the GATT, through decades of development, gained some institutional character.[274] The political nature, or the requirement to get supports from all members became unnecessary and an obstacle to the development of the multilateral trade system. Instead, the rule-oriented approach and the abandon of positive consensus principle in adoption of panels reports was recognized as a better option for the new institution, namely the WTO.

In order to find an alternative for the positive consensus principle in the WTO dispute settlement system, while eliminating the possibility for members to block the rulings that unfavored to them, some positive effects of this principle have to be recognized and reserved. The positive consensus principle showed members' fears of some defects of international law and international dispute settlement. Unlike domestic law and courts, which are elaborate and sophisticated, international law has many defects, such as inevitable ambiguity in some rules that were drafted by countries with different political and cultural background.[275] Thus, they tended to make some reservations to avoid the adoption of rulings that were in their opinion not objective, unfair or overreaching. And the blockage was a way to express their dissatisfaction with final rulings and their needs to seek alternative procedures. The establishment of a two-tiered dispute settlement system can to a large extent avoid the legally wrong reports, provide members a possibility to revert panel rulings, and "estop losing parties from claiming, as grounds of non-compliance, that the dispute settlement rulings was unfair, erroneous or incomplete because certain arguments had not been

---

[272] Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, Texas International Law Journal, vol. 38, no. 3, Special 2003, p. 469-488, 474.
[273] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 186.
[274] William J. Davey, *Dispute Settlement in GATT*, Fordham International Law Journal, vol. 11, no. 1, Fall 1987, p. 51-109, 61-81.
[275] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 75.

addressed"[276] by having the appellate members of recognized authority to review the panel report.[277] Members' trust in AB rulings is based on the professionalism and independence of AB members guaranteed by the DSU, and the appointment proceeding of AB members, which is conducted through the consensus approach in the Dispute Settlement Body (DSB). Although not explicitly formulated in the ultimate statutory expression, the AB is an insurance policy against the loss of sovereignty in application of the negative consensus principle.[278] The establishment of AB can maximum the satisfaction of members with the results of dispute settlement procedure while prevent members from arbitrarily blocking the adoption of reports.

Besides substituting the positive consensus principle to address members' concerns about legally erroneous reports, the establishment of the AB also marked the adoption of a more rule-oriented approach in the WTO dispute settlement mechanism.

First, the AB is designed as a standing and independent body, structurally distinct from the rest of the WTO and from the parties to any given dispute. Unlike panels, which are established on an *ad hoc* basis with panelists determined by the parties in most cases, the AB is composed of seven persons "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally,"[279] appointed by the DSB to serve four-year terms with the possibility of one reappointment.[280] The DSU further provides that AB members "shall be unaffiliated with any government,"[281] and the AB Working Procedures elaborate on this requirement by prohibiting members from engaging in any activities inconsistent with their duties and responsibilities and from being influenced by any international, governmental, non-governmental, or private sector organization.[282] These institutional features collectively establish a framework of formal independence that distinguishes the AB from purely diplomatic or political modes of dispute resolution.

Although panelists are also required to be independent when performing their duties, the DSU provides no further rules to strictly guarantee their independence. Given the *ad hoc* nature of the panel stage, it is possible that some panelists, in order to be appointed again in the future, might take the preferences of the parties into consideration during deliberation—a concern that does not arise in the same way at the appeal stage, where AB members serve fixed terms and are expressly prohibited from acting in accordance with the wishes of the parties to the dispute.[283] These institutional arrangements, even where they do not directly address

[276] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 186.
[277] DSU, Article 17.
[278] Bernard M Hoekman & Petros C Mavroidis, *To AB or Not to AB? Dispute Settlement in WTO Reform*, Journal of International Economic Law, vol. 23, iss. 3, September 2020, P. 703-722, 705.
[279] DSU, Article 17.3.
[280] DSU, Article 17.1, 17.2.
[281] DSU, Article 17.3.
[282] Working Procedures for Appellate Review, Paragraph 2.
[283] Claus-Dieter Ehlermann, Experiences from the WTO Appellate Body, *Texas International Law Journal*, vol. 38, no. 3, Special 2003, p. 469–488, 473.

independence in explicit terms, collectively contribute to insulating the appeal stage from political interference and to placing stronger and weaker parties in more equal positions when resolving their disputes.
However, the independence of the AB in practice is more nuanced than its formal design suggests. The possibility of reappointment has been identified as a structural factor that may create incentives for AB members to align their reasoning with the preferences of influential members, introducing a potential constraint on decisional independence that is well documented in the broader literature on international courts and tribunals.[284] A further challenge has been raised by Pauwelyn, whose analysis suggests that AB reports are in significant part drafted by the WTO Secretariat's legal division rather than by AB members themselves, raising questions about whether the reasoning in these reports reflects the independent judgment of the appointed members or the institutional preferences of the Secretariat.[285] These concerns do not negate the significance of the AB's institutional independence as a meaningful advance in international trade adjudication, but they underscore the importance of further reforms—including the elimination of reappointment eligibility and greater transparency in the drafting process—that would bring the AB's practical independence into closer alignment with its formal design.

The existence of a formally independent and impartial AB thus marks an important step towards the depoliticization of the dispute settlement system and reflects the consensus of members to establish a more rule-oriented mechanism.[286] This rule-orientation extends beyond questions of institutional independence to encompass a second and equally significant feature of the AB: the promotion of coherence in jurisprudence. When performing their duties, AB members shall not only be independent from political interference of any state or organization; they shall also be free from personal beliefs that could influence the procedure or the outcome. Thus, Article 3.2 of the DSU states that the dispute settlement system shall provide security and predictability to the whole multilateral trading system. In order to ensure that rulings are not unduly affected by the personal beliefs of individual adjudicators and that members can predict the consequences of their measures, consistency in legal interpretation across disputes is essential.[287]

Although coherence in AB jurisprudence has itself become a bone of contention—most notably in the United States' criticism that the AB has engaged in judicial overreach by developing rules

[284]On the general relationship between reappointment and judicial independence in international courts, see Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, Political Science Research on International Law: The State of the Field, 106 *Am. J. Int. Law* 47, 72–74 (2012); Claus-Dieter Ehlermann, Experiences from the WTO Appellate Body, *Texas International Law Journal*, vol. 38, no. 3, Special 2003, p. 469–488, 475.
[285]Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?," *American Journal of International Law* 95, no. 3 (2001); see also Gregory Shaffer et al., "The Extensive (but Fragile) Authority of the WTO Appellate Body," 79(1) *Law and Contemporary Problems* 237–273 (2016), discussing the Secretariat's significant role in the drafting of Appellate Body reports.
[286]Bernard M. Hoekman & Petros C. Mavroidis, To AB or Not to AB? Dispute Settlement in WTO Reform, *Journal of International Economic Law*, vol. 23, iss. 3, September 2020, p. 703–722, 706.
[287]Mervyn Martin, *WTO Dispute Settlement Understanding and Development*, Martinus Nijhoff Publisher, 2013, p. 165.

beyond what the covered agreements provide[288]—it remains a defining and valuable feature of a rule-oriented mechanism, contributing to the long-term functioning of the organization.[289] Coherence in jurisprudence requires adjudicators to observe previous rulings when dealing with the same issues in the absence of distinguishing facts.[290] This serves an important behavioral function: previous rulings shape the expectations of members who find themselves in similar situations, offering them an opportunity to bring their measures into conformity before a dispute is formally initiated.[291] As a standing body with professional members serving fixed terms, the AB is institutionally well placed to promote this coherence by reviewing panel reports and ensuring consistency across legal interpretations. Although *stare decisis* generally does not apply in international trade law, the practice of the AB demonstrates that it has encouraged panels to follow its lead, and it has on occasion used strong language to criticize panels that failed to do so. In this way, the AB has established a system of *de facto* precedent that enhances the predictability of WTO dispute settlement and reinforces the rule-oriented character of the mechanism as a whole.[292]

The establishment of the AB can benefit developing members. The adoption of the positive consensus principle in the GATT dispute settlement system represented system's reliance on supports from its members and the strong political nature of the dispute settlement system.[293] The decisive element in the political approach to settle international dispute is the relative political strength of parties to the dispute, rather than the rules in international treaties. Unless the disputes raised between countries with comparable political and economic power, the settlement of disputes through political approach is at the cost of compromise for weaker nations in most cases. Thus in the old GATT dispute settlement system, the positive consensus principle provided members opportunity to block the adoption of rulings, then the occurrence of the blockage and the threat to block would hinder the participation of developing members who lack adequate political power and resources for litigation.[294] The introduction of an AB substitutes the positive consensus principle, and the acceptance of this mechanism means the abandon of a strong political approach adopted in the old GATT system. Thus, developing members benefit from the rule-oriented system, where disputes are settled in accordance with rules of international treaties, instead of the relative powers of disputants. The professionalism of AB

---

[288] Bernard M. Hoekman & Petros C. Mavroidis, To AB or Not to AB? Dispute Settlement in WTO Reform, *Journal of International Economic Law*, vol. 23, iss. 3, September 2020, p. 703–722, 710.

[289] John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, The Royal Institute of International Affairs, 1998, p. 64.

[290] Appellate Body Report, *US–Oil Country Tubular Goods Sunset Reviews*, WT/DS268/AB/R, adopted on 17 December 2004, para. 188.

[291] Marc L. Busch and Eric Reinhardt, *Developing Countries and GATT/WTO Dispute Settlement*, Journal of World Trade, 2007, p. 195–212, 197.

[292] James McCall Smith, *WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings*, World Trade Review, vol. 2, no. 1, 2003, p. 65–100, 92–93.

[293] Bernhard Zangl, *Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO*, International Studies Quarterly, vol. 52, 2008, p. 825–854, 831.

[294] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 38-40.

members and the independent nature of AB also enhanced developing members' confidence in the WTO dispute settlement system. The selection of members of the Appellate Body reinforces the judicial nature of the mechanism. They are experts in law, having a deep understanding of international trade and WTO.[295] Such selection criteria indicate that they are expected to deliberate in accordance with WTO rules and make rulings on their own capacity. The professionalism of AB members makes their rulings reliable and persuasive. The selection criteria guarantees that they are competent to perform their duties independently, while the DSU also formulates rules to prevent the political interference of members in the appeal stage.[296] Although the positive consensus principle still applies when appointing the new AB members, compared to the composition of panelists, the political intervention in this process is significantly reduced. Thus, the composition and the working procedure of the AB also demonstrate the rule-oriented approach of the WTO dispute settlement system. In addition, the coherence in jurisprudence reduces the litigation cost for members. Without coherence in jurisprudence, previous cases could not provide guidance for members' future behavior or provide reference for subsequent rulings. Even members find themselves in similar situations with previous cases could not accurately predict the possible result of their measures, and the outcome might be influenced by elements other than rules of international law, such as relative political powers of disputants. Thus, measures violate the rules might not be corrected in time before litigation, since the possibility that the affected member is hesitant to bring it to adjudicators because of the unpredictable result. When adopting the rule-oriented approach, the stability of WTO rules and the coherence in jurisprudence could provide predictability for all members. In these circumstances, some measures that were convicted of violation of rules in previous cases would be expected to get the same verdict in future cases. It is especially beneficial for developing members with limited financial and legal resources. They can predict the result of some measures conducted by their trade partners according to the precedent, and focus their limited resources on cases where they are likely to get favorable rulings. Therefore, the establishment of the Appellate Body and its operations would level the playing field for weaker parties, and encourage the weaker to actively participate into the dispute settlement system.

2.3.2. Implementation of Rulings and Remedies in WTO Dispute Settlement Mechanism

Compared to the GATT dispute settlement system, which contained only abbreviated language about the implementation of rulings and remedies, the DSU is much elaborate and sophisticated. That could, to a large extent, be attributed to the adoption of negative consensus principle in adoption of rulings and authorization of suspension of concessions or obligations in WTO dispute settlement procedures. The negative consensus makes the adoption of rulings and the authorization of retaliation almost automatic.[297] Thus, rules relating to enforcement and

[295] DSU, Article 17.3.
[296] Working Procedures for Appellate Review, Paragraph 2; DSU, Article 17.3.
[297] DSU, Article 16, 17 and 22.

remedies in case of non-implementation gained more importance than before.[298] And the DSU, for the first time, explicitly established provisions governing implementing procedure.

After the adoption of an unappealed panel report or an AB report, the recommendation and rulings contained become binding on disputants.[299] They should be regarded as the final resolution of the dispute.[300] And as the legal effects of adopted rulings in the GATT period, these reasoning and conclusions have a *de facto* precedent effect and could be relied upon by the panels and AB in subsequent cases.[301] Once a violation complaint is successful in a dispute, the adopted report would impose an obligation on the respondent to promptly implement the recommendations or rulings.[302] The rules governing non-violation cases can also prove the binding nature of rulings in violation cases, when provisions provide that members have "no obligation to withdraw the measure"[303] in non-violation cases, it in turn strongly implies members' obligation to implement in violation cases. The implementation could be done in two ways: withdrawing or modifying the inconsistent measures.[304] The withdrawing of measures might not be practical in all disputes, and when respondents choose to modify the measures, a reasonable period of time to bring the inconsistent measures into conformity with WTO rules might be needed. Then the disputes on the reasonable period of time could trigger an arbitration proceeding.[305] When disputants have disagreements on the existence or consistency with the covered agreements, of measures taken by respondent to comply with its obligations in recommendations and rulings, they can recourse to the dispute settlement procedure, and in most cases such disagreements are resolved by the original panel.[306] If the respondent fails to fully implement the recommendations or rulings within reasonable period of time, complainant could resort to temporary remedies, namely compensation or suspension of concessions or other obligations set forth in Article 22 of the DSU.[307] However, neither compensation nor retaliation is preferred to full implementation. The temporary nature of compensation and retaliation, and the priority of the full implementation is confirmed by Article 22.8 of the DSU, which provides that the implementation of adopted recommendations and rulings is still under the surveillance of the DSB as long as the inconsistent measure has not been removed, even compensation has been provided or the retaliation has been imposed.[308] It can also prove that the losing party has

[298] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 96.
[299] Appellate Body Report, US-Stainless Steel, WT/DS344/AB/R, adopted on 20 May 2008, para. 158.
[300] Appellate Body Report, US-Shrimp (Article 21.5 - Malaysia), WT/DS58/RW, adopted on 21 November 2001, para. 97.
[301] Appellate Body Report, US-Oil Country Tubular Goods Sunset Reviews, WT/DS268/AB/R, adopted on 17 December 2004, para. 188.
[302] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 130.
[303] DSU, Article 26.1(b).
[304] Award of Arbitrator, US-Offset Act (Byrd Amendment) (Article 21.3 (c)), WT/DS217/14 ; WT/DS234/22, 13 June 2003, para. 49.
[305] DSU, Article 21.3.
[306] DSU, Article 21.5.
[307] DSU, Article 22.
[308] DSU, Article 22.8.

a legal obligation to implement the recommendations and rulings, compensation and retaliation are just temporary remedies, the full implementation cannot be replaced.[309] While it should be noticed that the temporary nature of compensation is not applicable to non-violation cases. In non-violation disputes, there is no legal obligation for respondents to implement the rulings, and the compensation could be the final resolution of the dispute. The rules governing compensation and retaliation have been further elaborated in the DSU, especially rules governing retaliation, since its authorization by the DSB is almost automatic after the adoption of negative consensus principle.

The remedy in case of non-implementation provided by GATT was only generally explicated in Article XXIII, it set out a more flexible benchmark than DSU, and provided that the suspension shall be "appropriate in circumstances"[310], without limitations in level of retaliation or the principle to be followed during retaliation. There was a possibility that members might use such remedies punitively, imposing suspensions well in excess of the damage caused by nullification or impairment. While it is not the approach adopted in the WTO. In the DSU, the compensation should be "equivalent to the benefit which the respondent has nullified or impaired by applying its measure".[311] And the suspension authorized by the DSB shall also "be equivalent to the level of the nullification or impairment".[312] Besides, the level of compensation and retaliation in the DSU has a prospective nature. The level of nullification or impairment would only be calculated from the end of reasonable period of time, not from the beginning of the violation.

Compensation

GATT agreement contained only retaliation as remedy when non-implementation happened, while the DSU contains another kind of remedy, compensation, as an alternative. If the respondent failed to bring measures that is inconsistent with covered agreements into conformity with adopted reports within a reasonable period of time, it shall resort to negotiate with the complainant before the expiry of the reasonable period of time, in order to reach an agreement on compensation.[313] The compensation has a voluntary nature, but shall be in conformity with covered agreements.[314] It is commonly understood in international law that the term "compensation" refers to monetary payment to redress the loss suffered by one party. And it is conducted mostly in the form of payment of pecuniary considering the difficulty to

[309] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 73.
[310] GATT 1947, Article XXIII: 2.
[311] *The process — Stages in a typical WTO dispute settlement case*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm, last visited: Dec. 10, 2021.
[312] DSU, Article 22.4.
[313] DSU, Article 22.2.
[314] DSU, Article 22.1.

reinstitution. However, it is not limited to monetary payment.[315] In the WTO dispute settlement system, the compensation is offered in the form of trade benefits, such as reduction of tariffs.[316]

The introduction of compensation as an alternative to immediate and full implementation and suspension of concessions or other obligations in the DSU is of interest to developing members from some perspectives. Although the compensation is hard to be reached in negotiations and its form of trade benefit may not relief the affected sector, it might offer developing members equivalent but more significant concessions to their economies, from a more comprehensive point of view. At the same time, the monetary compensation that applied by some members in practice can be used in affected industry or in other areas that is of greater importance to developing members considering their imbalanced development.[317]

Suspension of concessions or other obligations

Suspension of concession or other obligations under the covered agreements, also known as retaliation, has existed since GATT period. The DSU states that if the respondent failed to bring the measure into conformity with the adopted recommendations or rulings within reasonable period of time, and no mutual accepted compensation agreement has been reached 20 days after that, the complainant can request the DSB to grant it the authority to retaliate.[318] It is the most serious consequence in the WTO, and it is the last resort provided to members, according to Article 3.7 of the DSU. However, it is still a temporary measure, and it cannot replace full implementation.[319] During the GATT period, the decision was made through positive consensus, which means any member could block the procedure. And retaliation has never been formally used in this period.[320] While the DSU provides that the decision of the DSB shall be made through negative consensus.[321] It makes the authorization almost automatic, and the retaliation a right of complainant. Since the adoption of negative consensus principle, the implementation of retaliation become more important, thus the DSU detailed and elaborated the rules governing retaliation. Generally, the retaliation shall be adopted in the same sector as that in which the nullification or impairment has been found. If not practical or effective, they can seek the suspension in other sector(s) under the same agreement. And when the party still considers the above methods as not practical or effective, it may seek retaliation under other agreements.[322]

---

[315] Patricio Grane, *Remedies under WTO Law*, Journal of International Economic Law, vol. 4, iss. 4, 2001, p. 755-772, 758.
[316] *The process — Stages in a typical WTO dispute settlement case*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm, last visited: Dec. 10, 2021.
[317] John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal ad Prospect*, The World as an International Organization (Anne Krueger *ed.*), University of Chicago Press, 1998, p. 161-180, 169.
[318] DSU, Article 22.2.
[319] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 141.
[320] William J. Davey, *Compliance Problems in WTO Dispute Settlement*, Cornell International Law Journal, vol. 42, no. 1, Winter 2009, p. 119-128, 124.
[321] DSU, Article 22.6.
[322] DSU, Article 22.3.

If parties to the dispute disagree on the level or one party considers the principle and procedure in suspension has not been followed, they can refer such dispute to arbitration. All these detailed arrangements enhanced the judicial character of the system and reduced the interference of political power. For developing members that cannot rely upon their political or economic power, a more rule-oriented system is fairer for them.

However, the retaliation is an unpopular remedy and has not been used in many cases due to some of its flaws. Besides the prospective nature, it has a self-damaging effect to the implementing member, and in case of cross-retaliation, the affected industries cannot get any remedy.

The evolution of suspension of concessions or other obligations in the DSU moved in the direction of favoring developing members from some perspectives. Firstly, the abandon of positive consensus and the adoption of negative consensus principle in the authorization of retaliation makes the retaliation a right for complainants and that can benefit developing members. The retaliation in the GATT period was likely to be blocked by powerful members, especially in the last few years of the GATT. And there might not be any relief in the end for the complainants who invested a huge amount of time, financial and legal resources in the litigation stage. Such possibility of an end of nothing discouraged the active participation of members. It led to a more significant impact on developing members and developing members that lacked these resources could be more hesitant than others to resort to judicial processes in this period. While the DSU abandons the positive consensus principle, and eliminates the possibility of members blocking the authorization of retaliation, thus reduces the interference of political powers in the dispute settlement proceedings. It favors the small members that lack the political resources. And the adoption of negative consensus principle in the DSU can guarantee at least one remedy for the complainants in case of non-conformity. The existence of retaliation itself as the last resort in the dispute settlement system can, in some cases, also facilitate the achievement of other mutually accepted resolutions. Therefore, the negative consensus and members' right to retaliate in the DSU is beneficial for developing members. Besides, the DSU further elaborated the rules governing retaliation and introduced the cross-retaliation in case of not practicable or effective, and that can put developing members in a more advantageous position in the imposition of retaliation. Cross-retaliation provides members the possibility to suspend concessions or obligations in a different sector or a different agreement, it can benefit developing members for a few reasons. First, the international trade of developing members is usually limited in both scale and variety. The suspension of concessions or obligations in the sector as those in which the inconsistent measures occurred may not be equivalent to the level of nullification or impairment if developing members do not import products in this sector from the targeted member or do not import in sufficient quantities. And in such circumstances, the suspension of concessions or obligations could have the possibility to be equivalent to the nullifications or impairments only if the complainants are allowed to retaliate in a different sector or in a different agreement.[323] Second, the asymmetrical trade relationship between complainant and the respondent can also

[323] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 146.

lead to the impracticable or ineffective situation set forth in Article 22.3 of the DSU.[324] The sector in which the inconsistent measures occurred might be relatively more important for the complainant, while unimportant for the respondent. In this case, the retaliation would not cause a significant impact on the economy of the respondent, and would be ineffective in inducing the compliance. On the contrary, it might harm the interests of complainant's interests.[325] However, developing members still face some obstacles in imposing retaliation against richer trading partners, and this will be discussed in a later section.

3. Dispute Settlement Mechanism and Development

It is recognized that the dispute settlement system plays an important role in achieving the development objective of the multilateral trading system, and after decades of development it now provides a more friendly forum for developing members to settle their disputes. The statistics concerning the participation of developing countries also show the progress made from the GATT period to WTO period. However, the data also indicates that the participation of developing members in the WTO dispute settlement mechanism is still inadequate and imbalanced. Thus, WTO has to do more to help its developing members in the future.

3.1. The Importance of DSM for Development

The importance of the DSM to development firstly demonstrates in its indispensable status in the multilateral trading system. As proved in previous parts, WTO is important for development and developing members' active participation can benefit their economic development. As §3.1 of Part 1 establishes, the WTO is the indispensable framework for international trade, and its behind-the-border reach means that developing members who remain outside the rule-making process must implement obligations shaped by others. The WTO, as the most influential organization in the field of international trade, is crucial for development issues.

The DSM as a quasi-judicial mechanism in the WTO plays an important role in achieving the development objective and maintaining the well function of the WTO, so it also makes contributions to developing countries' economic development. The importance of the DSM in the WTO can be tracked back to the nature of international disputes and the role of law in international relations, which is the difficulty to interpretate international law.[326] Although the Ministerial Conference and the General Council have the exclusive authority to interpret rules in covered agreements, their decisions shall be taken by a three-fourths majority of the members,[327] which is hard to be achieved. In this circumstance, a dispute settlement mechanism is needed to fill the gaps of rule interpretation, clarify the rights and obligations of members under agreements and guarantee the prompt settlement of disputes. It can provide a forum for

[324] DSU, Article 22.3.
[325] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 146-147.
[326] Yoshifumi Tanaka, The Peaceful Settlement of International Disputes, Cambridge University Press, 2018, p. 3-4; World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 2.
[327] Marrakesh Agreement, Article IX: 2.

members to discuss their matters of disputes and to adopt an interpretation of certain rules that are binding on disputing members.[328] The reports and conclusions of panels and the Appellate Body can provide guidance for members and enterprises in their future decision-making.[329] Therefore, dispute settlement mechanism in the WTO, as recognized in the Article 3.2 of the DSU, "is a central element in providing security and predictability to the multilateral trading system"[330]. It was regarded as perhaps the most significant achievement of the Uruguay Round negotiation. Since the last decades of the GATT, the importance of dispute settlement system as an essential part of international trade order has been recognized by members, and members have gradually come to the conclusion that the tendency toward a more rule-oriented dispute settlement system is necessary.[331] Dispute settlement mechanism is essential for the well function of the WTO, and its effective operation is also important for the achievement of economic development of all WTO members, including developing members.

Second, the dispute settlement mechanism favors developing members in some aspects, and that makes it an effective tool especially for developing members to protect their trade interests in the WTO. The evolution of dispute settlement system into a more rule-oriented system enhanced developing members' confidence in the WTO. As established in §2.3.1, the three major institutional reforms of the WTO DSM—the unified dispute settlement mechanism, the elimination of positive consensus, and the establishment of the AB—collectively shifted the system toward a more rule-oriented approach that levels the playing field for developing members and offers them a rules-based alternative to political means of dispute resolution.

Besides, dispute settlement system in multilateral trading system offered some special arrangements for developing countries. As developing countries represent a majority of representatives in the WTO and in other international organizations, issues concerning them have been recognized and perceived by these institutions in recent decades, and that underlined the need for more attention on their concerns and needs. And such needs are also recognized in the process of dispute settlement in the WTO. For developing members, an effective dispute settlement mechanism should be able to address their lack of capacity, treat developed and developing members differently to make the access more equal for all members.[332] Thus, the DSU gives special attention to the difficulties faced by developing members in the dispute settlement process. Generally, the DSU offers developing members more flexible time frame, the possibility to apply accelerated procedure designed for them and legal assistance. Such special and differential treatments cover almost all phrases of dispute settlement, from consultation to the implementation stage. In addition, the least developed countries are entitled to more

---

[328] David Palmer & Petros C. Mavroidis, Dispute Settlement in the World Trade Organization: Practice and Procedure (2nd edition), Cambridge University Press, 2004, p. 15.

[329] John H. Jackson, The Jurisprudence of GATT and the WTO: insights on treaty law and economic relations, Cambridge University Press, 2000, p. 129-131.

[330] DSU, Article 3.2.

[331] John H. Jackson, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs, 1998, p. 59-62.

[332] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 7-12.

favorable provisions. Developing members can receive legal assistance from the Geneva-based ACWL at relatively lower cost.[333] All these SDT and other preferential treatments for developing countries try to relieve the burdens on them and address their concerns. The effectiveness and shortcomings of the DSM could be illustrated through changes in developing countries' participation in the dispute settlement system from GATT to the WTO period, and it would be analyzed in a later sector.

When the trade rights of developing members can be effectively protected in dispute settlement system, they can better fulfill their obligations in the future with the confidence that they can fully defend their interests in this system.[334] So it is recognized that active participation of developing countries in the DSM is important for both the well function of the WTO and the developing members themselves.

3.2. The Participation of Developing Countries in Dispute Settlement Procedures

From GATT to the WTO, the multilateral trading system and its dispute settlement procedures underwent a series of evolutions and changes, and many of these factors led to the alteration of developing countries' participation in the DSM. It can be inferred from the data that developing members' participation have been improved from the GATT to the WTO period in some aspects, but when another benchmark is applied to measure their engagement, it could be seen that several barriers are still in their way. So, the WTO and its dispute settlement system did not do enough for developing members.

3.2.1. Developing Members' Participation in GATT's Dispute Settlement System

GATT's dispute settlement system was complimented for the frequent use by its members. Compared with the EC Court of Justice and the European Court of Human Rights, where disputes between governments were rarely raised, GATT had numerous disputes initiated by its members and a large number of submitted panel reports.[335] However, the relative success of GATT dispute settlement in international law does not represent the success of developing members in using this system. On the contrary, the participation of developing members in dispute settlement in the GATT period was not adequate. GATT's dispute settlement process had undergone several significant evolutions, and that led to a large divergent between the first and last version. The participation of developing members was also influenced by these changes. But generally speaking, during the 48 years of GATT, developing members had seldom used GATT dispute settlement system to protect their trade interests. According to the statistics from Moon, the

---

[333] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 176-182.

[334] Niall Meagher, *Representing Developing Countries in WTO Dispute Settlement Proceedings: from WTO law and developing countries*, WTO Law and Developing Countries (George A. Bermann & Petros C. Mavroidis *ed.*), Cambridge University Press, 2007, p. 213-226, 214-215.

[335] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 87-88.

share of disputes initiated by developing members is less than one-third of all disputes in the GATT period.[336] In the midst of an already small amount of disputes launched by developing members, most disputes were dominated by several frequent developing users, like Brazil, India, Mexico and Thailand.[337] In the history of GATT, five most frequent complainants were responsible for two-thirds of the consultations, among them only Brazil belonged to the developing group at that time. As to the five most frequent respondents, none of them was a developing member.[338] Thus, most of the developing members did not fully engage in dispute settlement system in GATT, the situation was even worse when considering their sharply increased number in membership during this period. The low level of participation of developing members in this period could be explained by the power-oriented nature of dispute settlement process and the inadequate help provided to developing countries.

The political nature of dispute settlement in GATT period

As to the political nature of the system, obstacles faced by developing members mainly reflected in the system's reliance on political methods, the adoption of positive consensus principles in decision-making process and the lack of capacity of developing members to retaliate. First, the emphasis on political dispute settlement methods was not of the interest of developing members. In the first few years of the GATT, the lack of elaborate provisions governing dispute settlement made political approach a preferred option for members. Even after decades of development, some legal elements had been added in the dispute settlement proceedings, the weak panel procedure did not attract enough attention, and members' reliance on negotiation and consultation still existed.[339] Negotiation or consultation mainly depend on the political and economic power of disputants, rather than the rule of law. Emphasis on negotiation and consultation tends to favor members with better negotiating positions.[340] Moreover, the focus on political methods could extend the political pressure to areas other than the disputed issues. And developed members could put more pressures on developing members through suspending the monetary aid or reducing the preferential trade arrangements offered to developing members and then consolidate the position of each party. That is also detrimental to developing members.[341]

The positive consensus principle in the decision-making process constituted another obstacle faced by developing members. As analyzed in §2.2.1, this principle allowed respondents to block proceedings at three critical junctures—the establishment of a panel, the adoption of rulings,

[336] Don Moon, *Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data*, International Interactions, vol. 32, no. 3, 2006, p. 201-228, Table 3 of 9.
[337] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, 2012, p. 142-143.
[338] *GATT Disputes: 1948-1995, Volume 1*, World Trade Organization, 2018, at: https://www.wto.org/english/res_e/booksp_e/gatt4895vol1_e.pdf, p. 18-20.
[339] Kenneth W. Dam, The GATT: Law and International Economic Organization, University of Chicago Press, 1977, p. 20-23.
[340] William J. Davey, *Dispute Settlement in GATT*, Fordham International Law Journal, vol. 11, no. 1, Fall 1987, p. 51-109, 72-73.
[341] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 36-37.

and the authorization of retaliation—systematically disadvantaging developing members who lacked the financial and legal resources to absorb such delays. Statistics show that the number of blocking and delaying the process increased dramatically in the last few years of the GATT, and were mainly in cases involving the strongest members: the US and the EC. It shows that blockage and delay were more viable for strong states.[342] Developing members were left in a dilemma. While for developed member complainants, the threat to block the proceedings would result in their departure from the rules of agreement and the use of unilateral sanctions. Unlike developing members that rely on a fairer atmosphere provided by a more rule-oriented dispute settlement system to address the non-conformity measures of developed members, developed members possess enough political and economic power to bring the disputed measure back into conformity. Thus, they can settle disputes by political methods beyond multilateral trade system. [343] And that undermined the effectiveness of GATT's rules and the members' participation in dispute settlement system. It also caused damage to both interests of developing members and the well function and development of multilateral trading regime.

Even the situation is serious enough and the Contracting Parties authorized one party or parties to retaliate, this remedy might not be so effective for developing members. According to the de-centralized nature of international law, the last resort of remedies remains political, and has a self-enforcement character. There is no institution above states to guarantee the implementation of retaliation, and the effectiveness of retaliation relies on the political and economic powers of disputants. Due to the divergency in economic powers and developing members' limited sectors in international trade, retaliation authorized to developing members can hardly lead to a substantial impact on developed members.[344] And it should be emphasized that the retaliation is the last resort to offer remedies. If it also failed in helping developing members and protecting their interests, developing members then had no other methods to rely upon. It means their damages would be irremediable under the multilateral trade regime.

The inadequacy of help provided to developing members

Two ways to make the dispute settlement system more development-friendly should be resorted simultaneously. The first one was to enhance the legal nature of the system. It encouraged the participation of developing members by putting stronger and weaker members in a more equal position and reducing the interference of political and economic power that developing members lacked in the dispute settlement procedures. However, it cannot address all obstacles faced by developing members. Second, as to developing members' situation in international trade, besides a more development-friendly atmosphere, attentions should also be paid to their special needs. Thus, they need some special and differential arrangements in dispute settlement system to release their burden and barriers.

---

[342] Hudec, Robert E, Enforcing International Trade Law, Salem, NH: Butterworth Legal Publishers, 1993, p. 287-386.
[343] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Martinus Nijhoff Publishers, 1997, p. 91.
[344] Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, World Trade Review, vol. 1, no. 2, 2002, p. 123–134, 129-130.

It was argued that the underlying reason of some obstacles mentioned above was the underdeveloped nature of developing countries. The divergency in development, in most cases, was the result of complex historical and political reasons.[345] Even the international trade itself could not eliminate such inequity in political and economic resources between developed and developing countries, not to mention the GATT as an international trade regime governing only trade in goods. But taking into account the close connection between international trade and development, the special situation of developing countries was an unavoidable issue of the multilateral trade regime. Although it is essential for developing countries themselves to improve the ability to engage in international trade, and enhance their financial and legal resources, the GATT that reshaped the international trade order after World War II could take some measures to encourage their participation.[346] Besides significant improvements happened in the negotiations of Uruguay Round, that fundamentally changed the strong political nature of dispute settlement system, such as elimination of positive consensus principle, some special arrangements were also designed in the GATT period to release the barriers faced by developing members and to help them to participate in the dispute settlement system more easily. However, their existence failed to provide substantial help to developing members, and they did not change the fact that developing members have seldom used the system.

The first and the most importance document in GATT period addressing the needs of developing members in utilizing the dispute settlement system was the 1966 Decision[347]. It recognized that the divergency of economic situation of developing and developed members put developing members in a disadvantageous place in settling disputes and might damage the trade and economic development of developing members.[348] The Decision stipulated some special arrangements for developing members in cases involving them and developed members. Such as the introduction of good office as a neutral third party that can put more political pressure on developed members. Another improvement in 1966 Decision was stipulated in Paragraph 6, according to which, panels "shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected Contracting Parties"[349]. But it has a soft law nature and is hard to be implemented.

The 1979 Understanding[350] inserted special and differential treatments into the GATT system.[351] But SDT contained also has a soft law nature, and it mainly repeated the context of 1966 Decision.

---

[345] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 41-43.
[346] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 44.
[347] The Decision on Procedures under Article XXIII, GATT BISD, 14S/18, 1966.
[348] Decision on Procedures under Article XXIII, GATT BISD, 14S/18, 1966, Preamble.
[349] Decision on Procedures under Article XXIII, GATT BISD, 14S/18, 1966, para. 6.
[350] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Adopted on 28 November 1979 (L/4907).
[351] Mervyn Martin, WTO Dispute Settlement Understanding and Development, Martinus Nijhoff Publisher, 2013, p. 66.

The subsequent 1982 Declaration[352] and 1984 Decision[353] contained only general improvements of dispute settlement procedure, and special needs of developing members were not addressed. The 1989 Improvement[354] obliged members to notify the Council any mutually agreed resolutions in dispute settlement proceedings.[355] This obligation can limit the solution that was unfavorable to developing members or inconsistent to the GATT rules. It detailed the provisions governing technical assistance provided to developing members and made such help more available.[356]

It is not hard to conclude that as to the helps provided to developing members, the 1979 Understanding, the 1982 Declaration, the 1984 Decision and the 1989 Improvements were mainly repetition of what has been achieved in 1966 Decision, the improvements of special arrangements for developing members were limited in both number and nature. Even the 1966 Decision played only a limited role in helping developing members to better participate in the dispute settlement system. Thus, the consideration of developing members' special circumstances was not adequate in the GATT period.

Some of the above-mentioned obstacles were overcome in the reform of dispute settlement mechanism in Uruguay Round, while some reserved and passed to the successor of GATT, the WTO. The latter retains some obstacles that hinder the effective participation of developing members, and they will be analyzed later.

3.2.2. Developing Members' Participation in DSM During the WTO Period and Some Statistics

The scope of developing members has undergone some changes in recent years, considering Chinese Taipei, Brazil and the Republic of Korea announced to give up their developing members' status in the WTO one after another.[357] Due to the fact that when they classified themselves as developing members in the WTO, they were entitled to some special arrangements in settling disputes. It is reasonable to treat them as developing members before their announcements, and developed members after that. The group of developing members also includes the least-developed country members. Representation is defined here as the ability of a member to enhance its economic welfare through the dispute settlement system.[358] Formal disputes in the WTO are initiated through the request of consultation. Consultation is the first phase of the

352 Ministerial Declaration Adopted on 29 November 1982, L/5424, 29 November 1982.

353 Decision on Dispute Settlement Procedures of 30 November 1984, GATT BISD, 31S/9, 1984.

354 Improvements to the GATT Dispute Settlement Rules and Procedures, Decision on 12 April 1989, BISD 36S/61.

355 Kofi Oteng Kufuor, *From the GATT to the WTO – The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes,* Journal of World Trade, vol. 31, iss. 5, 1997, p. 117 – 145, 130.

356 *Dispute Settlement System Trading Module: Annex III, Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a3s1p1_e.htm, last visited: Nov. 25, 2021.

357 Chinese Taipei renounced its developing member status in WTO in 2018; Brazil decided to be designated as a developed member in WTO in 2019, and Republic of Korea announced to be developed country member in 2019.

358 Kent Jones, The Doha Blues: Institutional Crisis and Reform in the WTO, Oxford University Press, 2010, p. 124.

dispute "whereby the complaining member invites the member whose measures are being challenged to discuss the disputed matter, with a view to resolving it without recourse to further litigation"[359]. After the request of consultation, the dispute between a complaining and a responding party would get a case number starting with "DS", and all processes of such a case would be documented in detail as a dispute in the WTO system. Thus, the participation of developing members in the DSM is counted through their participation in formal consultations and subsequent proceedings and started from DS 1, Malaysia—Prohibition of Imports of Polyethylene and Polypropylene, ended in DS 607, European Union — Measures Concerning the Importation of Certain Poultry Meat Preparations from Brazil. The statistics contain all disputes from the entry into force of the WTO on 1 January 1995 to the end of 2021. The figures in the WTO official website show the participation of members in dispute settlement proceedings in three forms, as complainants, as respondents, and as third parties.[360] However, the statistics here do not apply the definition of participation in a broad sense, it instead excludes the form of third parties, in other words, only acting as complainants or respondents in disputes could be documented here. And the statistics will primarily focus on participation as complainants, because active participation in filing cases is the most direct measure of representation.[361] Although third parties have a substantial interest in concerning disputes, and they are entitled to certain substantial rights in dispute settlement proceedings, for example, they shall have the opportunity to be heard and can write submissions to panels and the Appellate Body, their opinions should also be reflected in the dispute settlement reports,[362] it is still undeniable that the proceedings of dispute settlement are mainly driven by the disputants, not third parties. The level of participation in the form of disputants and third party have significant differences. The formal consultation and the establishment of a panel is requested by a complaining party or parties, only parties to a dispute have the right to appeal a panel report, and remedies like compensation and retaliation can only be conducted between parties to the dispute, not third parties.[363] Complainants and respondents have to invest a lot of time, financial, and legal resources in dispute settlement procedures. While it is much easier to join in as third parties, the only effort they should make is simply notifying their substantial interest in disputes and requesting to join, active participation is not required for the third parties.[364] Developing members often join in disputes launched by others as third parties, therefore participation as a third party would not be taken as a fair measure to evaluate their participation in the DSM. Respondents are also disputants and as mentioned, they invest huge amount of resources in dispute settlement procedures, and have the right to appeal a panel report to the Appellate Body. However, the initiation of a dispute, the request to establish a panel and the request to implement retaliation could only be conducted by complainants, and compared to that, the role of respondents in most circumstances is to respond passively. Only when they have a different

---

[359] *Dispute settlement activity — some figures*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm, last visited: Dec. 27, 2021.
[360] *Dispute settlement activity — some figures*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm, last visited: Dec. 27, 2021.
[361] Kent Jones, The Doha Blues: Institutional Crisis and Reform in the WTO, Oxford University Press, 2010, p. 124.
[362] DSU, Article 10 and 17.4.
[363] DSU, Article 4, 6, 17 and 22.
[364] DSU, Article 4, 6 and 17.

opinion on the conclusion of the panel, can they take positive action to appeal. Thus, to the extent to which members participate as complainants can better reflect their willingness and capacity in protecting their trade rights and interests under WTO in the dispute settlement mechanism.[365]

From the establishment of the WTO, a total of 607 disputes were initiated by members. Some cases have multiple complainants. In order to save litigation resources in the DSM, when different members request to establish panels related to the same matter, a single panel would be established when feasible.[366] Statistics here follow the approach taken by H Horn, PC Mavroidis, H Nordström,[367] Chad P. Bown and Rachel McCulloch[368] in their tallies. We divide these disputes initiated by multiple members to independent bilateral disputes to eliminate redundancy when double counting some cases and to reflect the participation of each complaining party, because member can initiate separate disputes when they choose to, and each of the multiple complainants have to determine individually whether to participate in the dispute settlement process. For example, DS 16 was initiated by Guatemala, Honduras, Mexico and the US against the EC (the predecessor of the European Union), it is divided into four bilateral disputes, and three of them was initiated by developing members (Guatemala, Honduras and Mexico). Thus, 607 disputes are counted as 635 independent bilateral disputes. The advantages of each statistical approach would be analyzed in the following part. Figure 1 presents the number of

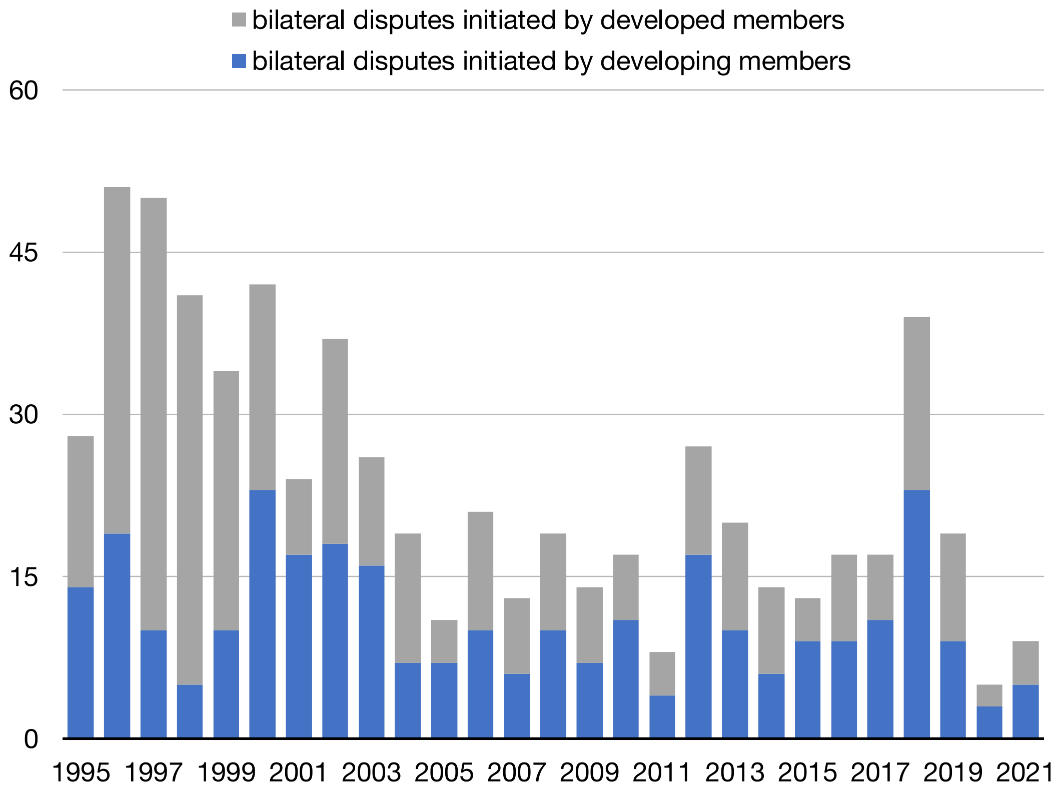
[365] Roderick Abbott, Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005, ECIPE Working Paper, No. 01/2007, p. 6-7.

[366] DSU, Article 9.

[367] H Horn, *et al.*, Is the use of the WTO dispute settlement system biased?, Centre for Economic Policy Research, Discussion Paper No. 2340, 1999.

[368] Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, The Journal of International Trade & Economic Development, vol. 19, no. 1, 2010, p. 33-63.

Figure 1: Bilateral Disputes Initiated by WTO members

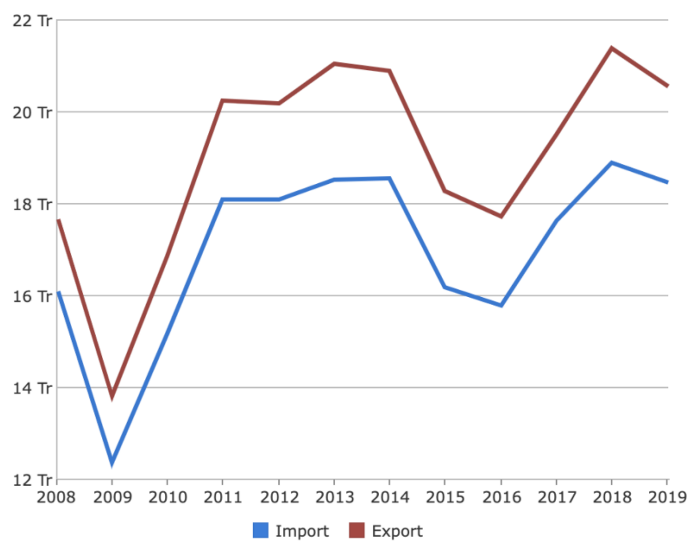


bilateral disputes per year and the number of disputes initiated by developed members and developing members.

Statistics here show that the utilization of all WTO members of the dispute settlement is on an overall downward trend. Member initiated 352 bilateral disputes during the first ten years of the WTO (1995-2004), constituting over half of the total number of disputes in the 27 years of the WTO's operation. Members' participation in DSM in the next 17 years suffered a sharp decrease. When taking the increase of WTO membership after 2004 into account, the decrease of participation of WTO members in the dispute settlement mechanism becomes more obvious. It was argued that from the institutional perspective, the overall reduction trend of the number of bilateral disputes initiated per year could mainly be attributed to two factors. The first one is that the conclusion of the Uruguay Round left some unresolved issues in the WTO. More specifically, the Uruguay Round made significant changes to the old GATT system, however the conclusion of this round is not perfect, it left some issues open to debate after the establishment of the WTO. Members made efforts to settle these negotiating issues through the judicial approach, and that explains the heavy initial use of dispute settlement mechanism in the early years of the WTO and the subsequent downward trend. Another element that contributes to this trend is the unfamiliarity of members to the new system. In some instances, members initiated disputes without following through, and in other cases, members re-initiated dispute concerning the same matter as a previous one. All these behaviors of members show that they were learning about the new mechanism and tried to make the best use of it.[369] This opinion could also be supported by the change of developing members' performance in the DSM. And it would be analyzed later. It was also suggested that the trend of members' participation in DSM was closely related to the "acceleration of export growth that began around 2001"[370]. The rapid export growth around the world made it harder for members to calculate their loss in international trade that might be caused by the imposition of a trade restrictive measure by others, and further reduced their possibility of winning in dispute settlement. Thus, they might be reluctant to initiate disputes during this period. It seems to be right when focusing only on the number of disputes initiated between 1995-2006, however, this theory cannot explain the relationship between export and number of disputes in the following years. Statistics from the World Bank in Figure 2 presents the world import and export volume by year (from 2008 to 2019).[371]

There is a sharp increase of export volume between 2009-2011, the increase happened during 2016 to 2018 is also remarkable, however, according to the numbers in Figure 1, members' participation in DSM between 2009-2011 is relatively stable, and the number of disputes in 2018 reached even the highest since 2001. Thus, the comparison between two sets of data from the World Bank and the WTO during 2008-2019 does not show a strong correlation between the export volume and WTO disputes. The change curves of the two data sets do not show regularity.

Figure 2： World Import and Export Volume by Year



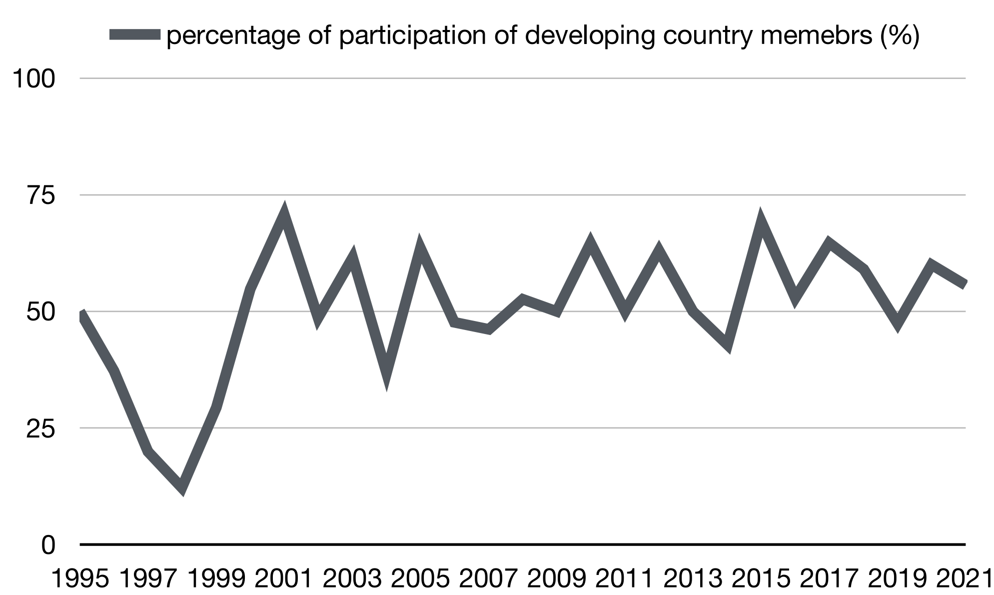
[369] Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, The Journal of International Trade & Economic Development, vol. 19, no. 1, 2010, p. 33-63, 37.
[370] Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, The Journal of International Trade & Economic Development, vol. 19, no. 1, 2010, p. 33-63, 37-38.
[371] *Imports/Exports*, World Integrated Trade Solution, at: https://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/2003/Summary, last visited: Jan. 4, 2022.

But it cannot be ruled out that the export volume can affect the number of disputes, it is fair to say that it does not constitute the decisive factor.

Figure 1 also presents the number of bilateral disputes initiated by developing members and developed members in the WTO per year. Among them 296 were initiated by developing countries, representing about 46.6% of the total number. And 339 of them were initiated by developed members, accounting for 53.4%. Although the total number of disputes initiated by developed and developing members is comparable, it should be noticed that there is a huge gap in quantity of membership of these two groups. There are 40 developed members, while 124 developing members in the WTO. When considering the membership of developing countries, which makes up about three quarters of all WTO members, the number of disputes they initiated is relatively low. On average, each developing member has initiated 2.4 disputes, and each developed country has initiated 8.5 disputes. Thus, developing members' participation in the DSM is lower.

The absolute number of disputes by year is influenced by many complex factors, and it might go beyond the scope of our research, while analysis by participation rate is more revealing. Another remarkable point in Figure 1 is the significant reduction in the proportion of disputes initiated by developed members. The first five years of the WTO (1995-1999) witnessed that disputes initiated by developed members are overwhelming in number, except the year 1995, in which developing members and developed members initiated the same number of bilateral disputes (14 vs. 14), developed members launched vast majority of disputes in each of the subsequent 4 years (1996-1999). 146 cases were initiated by developed members during this period, they constitute 71.6% of all 204 bilateral disputes. This trend was ended by the data in 2000. In this year, the disputes initiated by developing members (23) for the first time surpassed those initiated by developed members (19) in number. And from 2000 to 2021, developing members initiated more disputes than developed members in 13 of all 22 years. Figure 3 shows this change.

Figure 3： Percentage of Participation of Developing Country Members



The percentage of developing members' participation has been relatively stable since 2000. The average of participation rate of developing members between 1995 to 1999 is only 29.8%, while this number increases to 55.1% in the next 22 years. Although early years of the WTO shows members' heavy initial use of the dispute settlement system, the number of cases initiated by developing members is limited, it mainly presents the positivity of developed members. The number of cases after 2000 has declined, but the percentage of participation of developing members during this period is higher than in the previous years. The comparison of developing members' participation between the dispute settlement systems in the GATT and WTO period is also feasible from this perspective.

As mentioned in the part of the development of GATT's dispute settlement system, the dispute settlement in the GATT period was developed through several decisions and understandings, from two general provisions to a relatively complete system. The final version was formed by 1989 Improvement, and it was the basis of the dispute settlement system in the WTO. It is hard to regard the dispute settlement procedures in the GATT period as a whole, because there are huge differences between its first version and the final version. Strictly speaking, the comparison of dispute settlement systems in the GATT and WTO period is between the dispute settlement system from 1989 to the end of the Uruguay Round and the mechanism after the establishment of the WTO. In order to make the statistics in the GATT period and the WTO period more comparable, the comparison of the level of developing members' participation would also focus on these two periods. When collecting statistics for the GATT period, the same statistical criteria as those in the WTO period should be adopted, but three main differences in these two systems should be noted. First, statistics from the adoption of 1989 Improvement to the end of Uruguay Round refers to disputes initiated during this period, disputes initiated before 1 May 1989 but settled after this date would not be calculated, disputes initiated within this period but settled after the introduction of WTO would be counted. Second, some disputes did not start with the request of consultation but the request of establishment of a panel according to the record in the WTO data center, thus the stage firstly documented in the reports or awards would be regarded as the initiation time of disputes. Third, an arbitration between Canada and EC concerning the rights in GATT Article XXVIII was also calculated as a dispute in the GATT dispute settlement system, and it was recognized by the WTO, thus different from disputes in the WTO period, disputes in the GATT period also include this arbitration. Therefore, according to the document code, there were 29 disputes initiated during this period, 8 were initiated by developing members, and 21 were initiated by developed members. Disputes initiated by developing members represent only a small part, about 27.6% of the total number. From this point of view, developing members' participation in the GATT dispute settlement system is not sufficient. And the data from the WTO period is more positive. But when dividing them into bilateral dispute pairs, we get 45 bilateral disputes and 24 of them were launched by developing members, accounting for over half of all disputes.[372] Thus when counting the number of bilateral disputes, developing members' participation seems comparable to data in the WTO period, and

[372] *Dispute settlement reports within the framework of GATT 1947*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm, last visited: Jan. 29, 2022.

developing members' participation in the GATT and WTO period does not show obvious difference. The reason why these two sets of data lead to wildly divergent conclusions is that during GATT period, three cases were initiated by multiple developing members. The EEC-Banana I[373] and EEC-Banana II[374] were both initiated by 5 developing members: Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela. The US-Tobacco case had even more complainants, it was initiated by 9 developing members: Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand, Venezuela and Zimbabwe. These three cases can be divided into 19 bilateral country pairs, and their existence has significant impact on the statistical results. While in the WTO period, in all 296 bilateral disputes, only 24 were divided from disputes with multiple developing member complainants, accounting for only 8% of the total number. Although dividing disputes into bilateral country pairs can avoid double counting of some disputes and reflect the participation of each developing members in the dispute settlement system, another approach that calculate disputes by their document code, as WTO document and Hudec did also have some advantages. It is more in line with the reality of initiation and can reflect the unique behavior patterns of developing members when initiating disputes in this period. If do not separate these disputes into bilateral unions, and count by dispute code, the role of the WTO dispute settlement mechanism in encouraging the participation of developing members is then brought to the fore.

Besides, developing members' participation in disputes with multiple complainants can also reveal some characters of them. Developing members were more likely to initiate disputes as a group in the GATT period, and they tended to initiate disputes as a sole complainant during the WTO period. And the distribution of time in which developing members initiated disputes with others can also be illustrative. There were 10 disputes that were launched by multiple complaints covering developing members after the adoption of 1989 Improvement, and the initiation time of them was listed in the Table 1.

Table 1： Disputes with Multiple Developing Member Complainants Initiated after the adoption of 1989 Improvement

Year	**1992**	**1993**	**1995**	**1996**	**1999**	**2000**	**2001**
Document Code/Case Number	DS32/R	DS38/R; DS44/R	DS16	DS27; DS35; DS58	DS158	DS217	DS234

Table 1 shows that all these cases concentrated in the GATT period and the early WTO period, and developing members have never initiated any dispute as a group since 2002. It was proven by the data from the WTO dispute DSM that the decline of this number was not because that members who have initiated disputes as a group have not participated in the DSM since then. Those members who initiated disputes in Table 1, except Zimbabwe, have all initiated disputes in the WTO as sole complainants. Thus, the decline indicates that the form of developing members' participation has changed as they become familiar with the new system. This change can illustrate something. Being one of a group of complainants in a dispute can reduce political

373 Panel report, EEC - Member States' Import Regimes for Bananas, DS32/R, adopted on 3 June 1993.
374 Panel report, EEC - IMPORT REGIME FOR BANANAS, DS38/R, 11 February 1994, not adopted.

pressure on members and alleviate members' shortage of financial and legal resources.[375] Therefore, the form of developing members' participation during the GATT period reflects on one hand, the power-oriented nature of GATT's dispute settlement system. Members acting as a group could gather more political power against developed respondents, and the political element in GATT's dispute settlement system placed a higher demand on the comparative political power of disputants. A relatively fair outcome can only be obtained when the disputants are of the comparable political strength. While the new DSM in the WTO is more rule-oriented, its requirements on members' political power are greatly reduced, thus developing members do not have to act as a group to obtain comparable political power as their powerful respondents in the dispute settlement mechanism. From this point of view, the WTO encouraged more developing members to engage in dispute settlement as a sole complainant. In addition, the downward trend also demonstrates that legal and financial help offered to developing members in the WTO legal system can encourage developing members to initiate disputes act independently. After years of exploration and familiarization, developing members gradually realized that the WTO provided them with a fairer dispute settlement mechanism, and those improvements in the new system changed the form of their participation.

During the GATT period, the initiation of disputes and the participation as disputants are both dominated by developed members. Developing members, instead of being disputants and positively initiating cases by themselves, they have mainly participated in this system as observers.[376] While the data in the WTO is more optimistic. Firstly, the disputes initiated by developed and developing members in the WTO are comparable (339:296). The initiation of disputes is no longer dominated by developed group, developing members represent a significant proportion of the complainants. Especially after 2000, the average of participation rate of developing members per year is over 50%. They were more actively engaged in the dispute settlement system as complainants. However, it is argued that these numbers could be misleading in some aspects. For example, the main developing member users are not changed, the most frequent users of the dispute settlement procedures in the GATT period are Brazil, India, Mexico and Thailand. They continued to be active in the WTO. And the increase could be the result of the accession of big developing countries, like China.[377] So it is also important to further explore the participation among developing group. Table 2 presents the number of bilateral disputes developing members participated as complainants or respondents, and the number of bilateral disputes they initiated.

---

[375] Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, Journal of Legal Studies, vol. 34, June 2005, p. 557-598, 579.

[376] Huang Zhixiong(黄志雄), *Dui Fazhanzhong Guojia Canyu GATT/WTO Zhengduan Jiejue Huodong de Falv Fenxi(发展中国家参与 GATT/WTO)[The Analysis of the Participation of Developing Countries in the Dispute Settlement Process of the GATT/WTO]*, Law Review, vol.6, 2001, p. 87-95, 89; Sonia E. Rolland, Development at the WTO, Oxford University Press, 2012, p. 140-142.

[377] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, 2012, p. 142-143.

Table 2：Developing Members' Participation in Bilateral Disputes as Complainants and Respondents

Developing Members	Number of disputes it participated	Number of disputes it initiated
China	69	22
India	56	24
Brazil (when still developing country)	49	33
Argentina	43	21
Mexico	40	25
Republic of Korea (when still developing country)	39	21
Indonesia	27	12
Chile	23	10
Thailand	18	14
Turkey	18	6
Russian Federation	18	8
Ukraine	13	9
Guatemala	12	10
Colombia	12	5
Philippines	11	5
Peru	10	4
Pakistan	9	5
Panama	9	7
Dominican Republic	9	1

Honduras	8	8
Costa Rica	8	7
Ecuador	6	3
Chinese Taipei (when still developing country)	6	6
Bolivarian Republic of Venezuela	5	3
South Africa	5	0
Viet Nam	5	5
Qatar	5	4
Egypt	4	0
Malaysia	3	2
Nicaragua	3	1
Morocco	3	0
United Arab Emirates	3	2
Kingdom of Saudi Arabia	3	1
Hongkong, China	2	2
Trinidad and Tobago	2	0
Uruguay	2	1
Armenia	2	0
Republic of Moldova	2	1
Tunisia	2	2
Cuba	1	1

Singapore	1	1
Sri Lanka	1	1
Antigua and Barbuda	1	1
Bangladesh	1	1
El Salvador	1	1
Kingdom of Bahrain	1	0
Kazakhstan	1	0
Kyrgyz Republic	1	0

According to the data in Table 2, a total of 48 developing members have participated as complainants or respondents in WTO dispute settlement mechanism so far (including Brazil, Republic of Korea and Chinese Taipei when they still belonged to the developing group). After excluding Brazil, South Korea and Chinese Taipei who announced to give up their developing member's status in the WTO, 45 of current developing members have participation experience in the DSM. And the rest 79 have never engaged in the WTO dispute settlement system as complainants or respondents. While 38 of 40 current developed members, in other words, 95% of them have initiated or responded in at least one WTO dispute.[378] Thus, developing members' participation in the DSM is insufficient and unbalanced, it concentrates in small amount of members, and the rest of others were absent in dispute settlement in the WTO. The situation is even worse when focusing on the number of current developing members who have initiated at least one bilateral dispute. Table 2 shows that 8 developing members have only participated in DSM as respondents, and have never initiated any dispute. Therefore, only 37 current developing members have acted as complainants in WTO disputes, and this number is less than 30% (29.8%) of all current developing members in the WTO. If members who have initiated at least 5 bilateral disputes in the DSM could be classified as frequent users, there are 18 frequent users in current developing members,[379] and the 203 disputes they launched account for 86.0% of all disputes initiated by developing members. That is to say, 14.5% of developing members initiated 86.0% of all bilateral disputes with developing member complainants. It is not deniable that all these frequent users have more developed economies in developing group, or at least in their regions. The divergency also exists between the least developed members and other developing members

[378] All 27 members of the EU, UK, Australia, Canada, Japan, New Zealand, Norway, US, Switzerland, Brazil, Republic of Korea and Chinese Taipei have participated in at least one WTO dispute, while Iceland and Liechtenstein have no involvement experience.

[379] China (22), India (24), Argentina (21), Mexico (25), Indonesia (12), Chile (10), Thailand (14), Turkey (6), Russian Federation (8), Ukraine (9), Guatemala (10), Colombia (5), Philippines (5), Pakistan (5), Panama (7), Honduras (8), Costa Rica (7), Viet Nam (5).

concerning the initiation of disputes. There are 46 least developed countries on the UN list,[380] 35 of which are WTO members.[381] However, only Bangladesh has initiated one dispute in the WTO. The absence of other least developed members acting as complainants in disputes also indicates the unbalance of developing members' participation in the DSM. From this perspective, the WTO has not made significant progress compared with the GATT period in stimulating more developing members, especially the relatively poor members, to participate in dispute settlement.

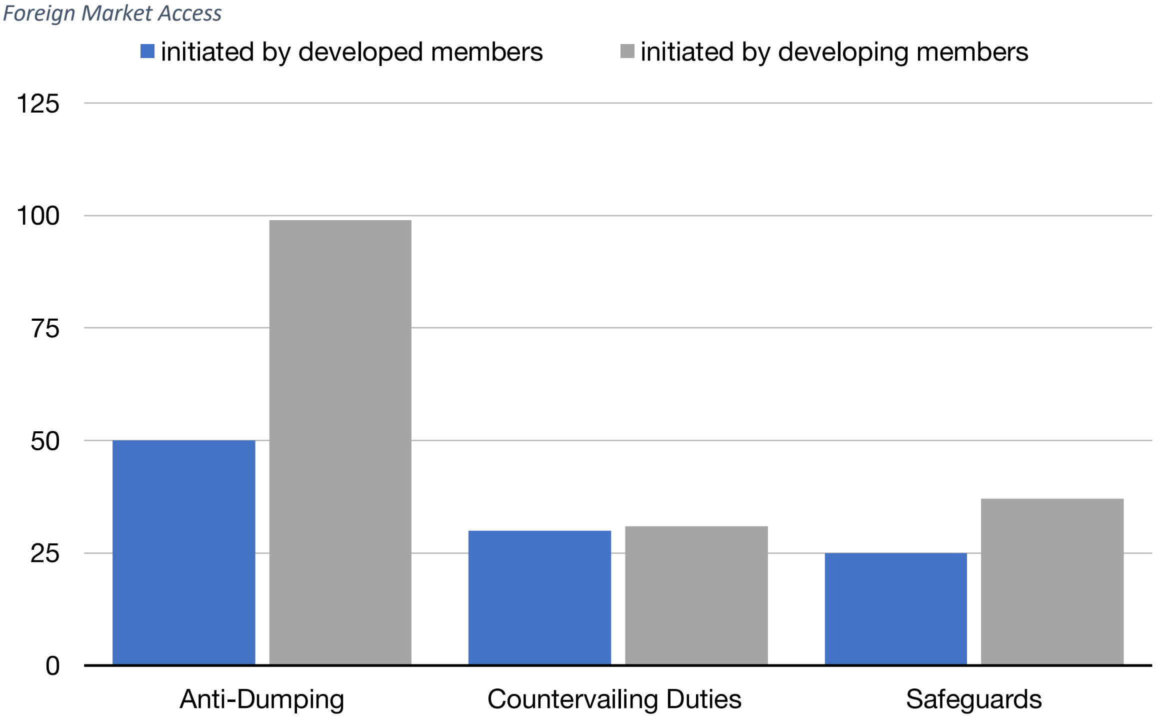
Besides the number of disputes initiated by developing members, the causes of lost foreign market access under these disputes can also reflect the participation of developing members from another perspective. Here we introduce the indicator of "observability" to classify the causes of developing members' lost foreign market access in disputes launched by them to see the impact of observability of causes on the initiation of disputes and analyze the reason behind it. Anti-dumping and countervailing duties are classified here as the most observable causes, and safeguard measures are regarded as the next most obvious trade restrictions due to responsibilities of governments when implementing these measures.[382] According to Article 5.5 of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), government of the exporting member concerned shall be notified by the authorities of the importing member before the latter proceeding to investigation.[383] And if the initiation of anti-dumping investigation could be justified by the authorities of the importing member, "the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given".[384] In addition, any preliminary, final determination, the imposition of provisional measures, and the conclusion or suspension of an investigation shall all be publicly notified to the members concerned. Similar obligations also exist in rules concerning countervailing duties in the Agreement on Subsidies and Countervailing Measures (SCM).[385] Thus, authorities of importing members have the responsibility under Anti-Dumping Agreement and SCM to positively notify the exporting members. Governments of exporting members are released from collecting information concerning the anti-dumping actions or countervailing measures taken by importing members when initiating related disputes. Therefore, anti-dumping and countervailing duties are the most obvious causes of lost foreign market access. Although the Agreement on Safeguards (Safeguard Agreement) does not require the authorities of importing members to directly notify the members concerned, they are obliged to issue reasonable public notice and hold public hearings. Their findings and reasoned conclusions shall also be published. In addition, their decisions and

[380] *UN list of least developed countries*, UNCTAD, at: https://unctad.org/topic/least-developed-countries/list, last visited: Jan. 16, 2022.
[381] *Least-developed countries*, World Trade Organization, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, last visited: Jan. 16, 2022.
[382] Chad P. Bown & Rachel McCulloch, *Developing countries, dispute settlement, and the Advisory Centre on WTO Law*, The Journal of International Trade & Economic Development, 19:1, 33-63, 45.
[383] Anti-Dumping Agreement, Article 5.5.
[384] Anti-Dumping Agreement, Article 12.1.
[385] SCM, Article 22.

conclusions shall be immediately notified to the Safeguard Committee. They also have obligations under the Safeguard Agreement to "provide adequate opportunity for prior consultations with those Members having a substantial interest".[386] So it is also easy for members to get information about safeguard measures taken by their trade partners. In the above cases, complainant have minimal difficulties in gathering information when initiating related disputes in the DSM, and the threshold for noticing WTO-inconsistent measures is low. While trade restrictive measures like border measures might be obvious to exporting firms, but not to the government of the exporting members, such WTO-inconsistent measures are harder to be found when there is a lack of effective information flow between public and private sectors. As to the imposition of subsidies or failure to protect intellectual property rights that do not directly impact the international trade, the difficulties to find WTO-illegal actions would be much more difficult for complainants.

Figure 4 shows the participation of developed and developing countries in bilateral disputes with obvious reasons, and presents the impact of observability of causes of lost foreign market access to the initiation of disputes.[387] In this figure, we try to prove that members with limited legal and financial resources face difficulties in gathering WTO-illegal information when the observability of causes is low, and would be more likely to initiate disputes with high observability. The comparison presented above indicates that developing members are more inclined than developed members to initiate disputes with high observability of causes, especially in anti-dumping and safeguard cases. Among all 149 anti-dumping disputes, 99 were initiated by

Figure 4: Participation of Developed and Developing Members in Bilateral Disputes by Observability of Causes of Lost Foreign Market Access



[386] Safeguard Agreement, Article 3, 12.
[387] *Disputes by agreement*, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm, last visited: Jan. 17, 2022.

developing members, accounting for almost two-thirds of the total number. And developing members launched 37 of all 62 safeguard cases, making up 59.7% of the total. While situation is different as to disputes that demand stronger capacity to collect information. For example, participation of developing members as complainants in subsidies cases, which have a low observability, is relatively low. There are 82 bilateral subsidies cases in the WTO. 57 were initiated by developed members, and 25 were initiated by developing members, constituting only 30.5% of all disputes.

From developing members’ perspective, they have initiated 296 bilateral disputes in the DSM since the entry into force of the WTO. Among them, the number of disputes with most obvious causes and disputes with high observability (anti-dumping cases, countervailing duties cases and safeguards cases) is 148, that means half of disputes with developing member complainants do not require complainants’ high competence to collecting WTO-illegal information. While in all 354 disputes initiated by developed members, disputes with high observability of causes of lost foreign market access account only for 24.9% of the total number, this percentage is much lower than that of developing members. In disputes with higher demands on members’ ability to collect WTO-inconsistent information, developed members have performed better than developing members.

The divergency between developed and developing members in types of disputes they initiated, and preferences of developing members to initiating disputes show that the observability of causes of lost foreign market access do impact members’ participation in the DSM, and prove that developing members’ lack of capacity of collecting information hinders their participation as complainants in disputes with lower observability of causes of lost foreign market access.

This trend should be highly commended. However, developing members’ participation is insufficient when using the participation rate as a benchmark. Thus, the participation of developing members has been unbalanced since the GATT period, and the WTO did not make much progress in this regard. Therefore, the increased level of developing members’ participation should not make the difficulties they are now facing be ignored. Their insufficient and unbalanced participation shall be addressed and the way to better level the playing field for developing members must be found, because the active participation of developing members in the DSM is important for both developing members themselves and the DSM, even the WTO as a whole. It should be noted that, although DSB reports only bind the parties involved in the dispute, when a measure taken by one member affects multiple members of the WTO, the most influential affected member may bring the measure to the DSM. If the complainant receives a favourable ruling from the WTO adjudicators and the ruling is adopted, the removal of the WTO-inconsistent measure can benefit other affected members as well. In such cases, other affected members can benefit from "free riding" without having to invest significant resources in the lengthy DSM proceedings. This free riding can lead to the inactive participation of some developing members in the DSM. Therefore, no reform may be needed to encourage these developing members’ participation if they can benefit from other approaches. However, it is important to note that some developing members have expressed difficulties in utilizing the DSM, and their concerns and needs should be heard and addressed.[388]

3.3. The Necessity to Reform the DSM

When classifying the least developed members as a branch of developing members, 124 of the 164 WTO members are developing, they constitute a majority of the membership. According to the consensus principle and the "one country one vote" principle when the consensus is not possible in WTO decision-making process[389], the big share of developing members in the WTO gives them a voice, and they can veto the proposals that they dislike. This makes interests and concerns of developing countries matter in the WTO. The fact that Doha Round also has a name called "Doha Development Agenda" indicates the importance of developing members in the system and reflects the priority of negotiations concerning development.[390] One important part of the Doha Development Agenda is a comprehensive review of the DSM, and most radical proposals for reforming the DSM were from developing members who were supposed to be the beneficiaries of this mechanism.[391] It is not surprising to see the dissatisfaction from developing group, because since the establishment of the WTO and the DSM, disappointment with the failure of the DSU's incompetence in providing a level playing field for all members and the fact that developing members were put in a disadvantageous position in settling disputes has spread among developing group. Not only developing members, also economists and political scientists have noted that the DSM is a part of the unbalanced system in the WTO and developing members have not benefited from the system as much as they could.[392]

It is important for developing members to engage in the DSM, and their active participation in the reform of DSM is also significant. Because the involvement of developing members in the DSM is not only determined by their own efforts, supports from the institution is also essential. And developing members should actively submit their proposals concerning the way to enhance the development element of the DSM. Although developing members can decide whether new rules will be adopted or not in the decision-making process, and could block the proposals that are unfavorable to them. The WTO rules could also evolve through other ways, for example, through the decisions and conclusions in panels' and Appellate Body's reports. The Appellate Body is now unable to review appeals due to its ongoing vacancies, while as the final authority on disputed legal issues and an independent quasi-adjudicative institution, it has a mandate to make decisions on some procedural issues without agreements of all members. And its decisions have altered some procedural rules in the history, like the inclusion of private counsel. Although

---

[388] Leslie Johns and Krzysztof J. Pelc, Free Riding on Enforcement in the World Trade Organization, Graduate Institute of International and Development Studies, Center for Trade and Economic Integration, Working Paper Series, Working Paper CTEI-2017-04, p. 2.

[389] *Whose WTO is it anyway?* World Trade Organization, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm, last visited: Jan. 25, 2022.

[390] Sandra Polaski, The Future of the WTO, Policy Outlook: Trade, Equity, and Development Project, Carnegie Endowment for International Peace, September 2006, p. 1.

[391] James Smith, *Inequality in international trade? Developing countries and institutional change in WTO dispute settlement*, Review of International Political Economy, vol. 11, no. 3, August 2004, p. 542–573, 543.

[392] Kent Jones, The Doha Blues: Institutional Crisis and Reform in the WTO, Oxford University Press, 2010, p. 119-120.

procedural issues are regarded as neutral aspects of due process, if it does not consider the different situations of members and respond to some special needs, it can also cause distributional consequences and bias against the interests of developing members.[393] The current stagnant status of the Appellate Body has created greater uncertainty about developments of WTO law through judicial approach. Thus, developing members should take more active measures to reform the dispute settlement system in the Doha Development Agenda. In order to make the DSM more development-friendly, firstly, barriers that impeded the participation of developing members in the DSM and the reasons behind it shall be pointed out, then solutions shall be found.

During the ongoing Doha Round, although members have agreed that the WTO system, especially the DSM, needs to be reformed, and they have submitted several proposals to reform the system, they could not agree on how to improve the current mechanism. The reasons are as follows: (1) Many members just view the system as running well, so their opinions are that no fundamental changes should be imposed on the current mechanism, these members proposes only minor alternations to the system, while others are expecting a radical reform; (2) Some members are conservative, they are not willing to take risks to enhance the judicial characteristic of the DSM, while others thought the enhancement of the judicial element in the DSM is imperative and is in line with the trend of international dispute settlement development; (3) The negotiation itself is difficult. Developing members in the WTO are diversified in development level, they also have diversified interests in international trade and in dispute settlement. So, they have sometimes put forward different, and even opposite proposals. There are also different opinions between developed and developing members that make the negotiation even harder.[394] However, developing members share some common demands in the system, and negotiations concerning these issues could benefit them all.

[393] James Smith, *Inequality in international trade? Developing countries and institutional change in WTO dispute settlement*, Review of International Political Economy, vol. 11, no. 3, August 2004, p. 542–573, 544.
[394] George Akpan, *Developing Countries and the Reform of the WTO Dispute Settlement System: expectations and realities*, Developing Countries and the WTO (Gary P. Sampson & W. Bradnee Chambers *ed.*), United Nation Press, 2008, p. 255-279, 274-276.

Part 3 SDT provisions and their reform

SDT provisions in the WTO agreements are designed to provide developing members with help in the multilateral trading system. They directly link to the development issue and have the function of encouraging developing members to participate in the world trade and multilateral trading system in a more equal way with developed members. Whether developing members can benefit from these provisions can influence their participation in the WTO. SDT provisions' impact on developing members' behavior is also reflected in developing members' participation in the DSM. From a theoretical perspective, the existence of SDT provisions relating to dispute settlement should help developing members in the process of protecting their rights under the WTO agreements. However, it was argued in the Doha Round Declaration that help provided by SDT provisions is not enough to encourage the participation of developing members in the DSM, thus improvements should be made.[395] Before analyzing the difficulties developing members face in using the SDT provisions in the DSM, a basic understanding of current SDT provisions is necessary.

1. An Introduction of SDT provisions in the WTO

SDT within the context of the multilateral trading system, pertains to certain provisions that offer specific arrangements directly to developing members and more favorable treatments developing members can get from developed members.[396] It contains both a better access to international market and the right to protect its infant industries.[397]

1.1. The Development of SDT Provisions in the WTO

The history of SDT can be tracked back to the negotiations in Havana Conferences in 1947. Some developing participants held different opinions with the US concerning the development issue in the latter drafted suggested Charter for the ITO. Developing participants, mainly Latin American countries challenged the assumption in suggested Charter that trade liberalization established on the most favored nation principle would automatically lead to economic development in developing countries, and criticized that the suggested Charter served the interests of developed countries at the expense of developing members. Thus, they insisted that developing members

---

[395] The Doha Round, The World Trade Organization, at: https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#declaration, last visited: Mar. 28, 2022; Doha WTO Ministerial Declaration of 22 December 2005, WT/MIN(05)/DEC, para. 35.

[396] Special and Differential Treatment Provisions, World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, last visited: Mar. 05, 2022.

[397] John Whalley, "Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries," *The Economic Journal* 100, no. 403 (1990): 1319, https://doi.org/10.2307/2233979.

need special treatments in the new system to address their special concerns.[398] After a series of compromises, the final version of ITO Charter contained a provision (Article 13) that permitted special governmental assistance in the form of trade-restrictive protective measures in specific circumstances to “promote the establishment, development or reconstruction of particular industries or branches of agriculture”[399]. It was the first SDT provision in the multilateral trading system. However, the Havana Charter had never come into force, and as the interim rules governing the international trade on goods, the GATT at first did not recognize developing members as a separate group and it contained no provision concerning the special rights or obligations of these countries. Although there was huge divergency in level of development among GATT members, the fundamental principle of the newly established system was to implement the same rules uniformly for all contracting parties. The arrangements in the early years of GATT 1947 were closer to the initial idea of the US. However, soon after the inception of GATT 1947, developing countries renewed their concerns, identified specific difficulties they faced in the multilateral trading system, and asked for more favorable treatments. This proposition gradually gathered supports from Asian and African countries as the success of decolonization in these regions, and countries regained their independence joined developing countries group.[400]

The negotiation in the Review Session from 1954 to1955 made some textual changes to loosen the original rules in GATT 1947. The rewritten Article XVIII was the first attempt in GATT to address special needs for developing members. It confirmed that, to attain the objective of this agreement, some trade restrictive measures in developing members are allowed. Article XVIII (A) grants developing members sufficient flexibility in their tariff arrangements to achieve the effect of protecting some particular industries, provided that agreement on compensation is reached. Otherwise, developing member using this provision is expected to face retaliation; Article XVIII (B) allows developing members to impose quantitative restrictions for balance-of-payment purpose with less onerous conditions than those set forth in Article XII; Article XVIII (C) provided that when no measure consistent with any provisions in this Agreement can be found, developing members that plan to apply governmental assistance to protect a particular industry can resort to this section, subject to a negotiated agreement. Otherwise, those developing members would face compensation or retaliation.[401] Sections A and C both contain compensation and retaliation, thus they should not be regarded as rights for developing members. Therefore, Section B is the only SDT provision in this article.

Developing members’ another achievement in the Review Session is Article XXVIII: bis (3). It states that although negotiations on customs duties should be taken on the basis of reciprocity, it should also take full account of “the needs of less-developed countries for a more flexible use

[398] Fatoumata Jawara & Aileen Kwa, Behind the scenes at the WTO: the real world of international trade negotiations: lessons of Cancun, Zed Books, p. 46 (2004).
[399] Havana Charter for an International Trade Organization, Article 13.
[400] Fatoumata Jawara & Aileen Kwa, Behind the scenes at the WTO: the real world of international trade negotiations : lessons of Cancun, Zed Books, p. 46-47 (2004).
[401] GATT, Article XVIII.

of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes"[402]. In other words, it implies that full reciprocity should not be insisted on by developed members in negotiations with developing members.[403] However, this principle was not crystalized in the text of the Agreement until the introduction of Part IV in 1965. The amendments in the Review Session confirmed that developing countries need help to achieve their development objective. But the most significant change was merely at the level of principle, due to the lack of effectiveness of those provisions in practice.

Under great pressure from developing members, Contracting Parties in their Twelfth Session agreed to appoint a Panel of Experts to investigate the trend in international trade in both developed and developing countries. Their report demonstrated that the newly established international trade order failed to help the trade in developing countries develop as rapidly as that of developed countries, and it identified some special difficulties that developing countries faced in international trade.[404] This report also pointed out that trade barriers in developed countries contributed significantly to such discrepancy. Thus, an Action Program was adopted to address these issues.[405] After Contracting Parties' discussion in their Thirteenth Session, a committee, also known as Committee III, with the mandate to explore measures that can expand export earnings and diversify the economies in developing members was established.

Then, the UNCTAD contributed to another improvement in the field of SDT. The existence of UNCTAD threatened the importance of GATT to developing countries, and the UNCTAD conference held in the spring of 1964 caused the GATT to rethink its relationship with developing members. To secure GATT's position in international trade for developing members, amendments to the GATT 1947 to demonstrate its commitments to the interests of developing members were needed. This effort finally transformed into the new legal text of the Agreement.[406] The first substantial amendment concerning trade and development in the GATT period was the introduction of 1965 Protocol, especially Part IV. This part added three articles into the original text–Article XXXVI, XXXVII and XXXVIII. Article XXXVI confirmed that there is a need to "provide in the largest possible measure more favourable and acceptable conditions of access to world markets for" products that are of interest of developing members, to diversify the structure of their economies, and to enhance correlation between developing members and international leading agencies.[407] In addition, paragraph 8 of this article states that the reciprocity principle should not be expected in trade negotiations between developed and developing members. In other words, developing members are not expected to make commitments that are inconsistent with their level of development.[408] It is the first formal

---

[402] GATT, Article XXVIII: bis (3).
[403] GATT, Article XXVIII: bis (3).
[404] PART IV TRADE AND DEVELOPMENT, Decision of 29 November 1957, 6S/18.
[405] T.n. Srinivasan, "Developing Countries in the World Trading System: From GATT, 1947, to the Third Ministerial Meeting of WTO, 1999," *The World Economy* 22, no. 8 (1999): 1055, https://doi.org/10.1111/1467-9701.00247.
[406] Robert E. Hudec, Developing countries in the GATT Legal System, Cambridge University Press, p.64 (2011).
[407] GATT, Article XXXVI: 4,5,6 and 7.
[408] GATT, Article XXXVI: 8.

statement in GATT of the principle of non-reciprocity. Article XXXVII illustrates some special treatments provided by other members. It also requires members to consider the impact of their trade policy instruments on developing countries.[409] Article XXXVIII calls for members' joint actions to "provide improved and acceptable conditions of access to world markets" for products that are of particular interest to developing countries and explore better trade policies.[410] From the literal perspective, although the language in Part IV is more legalistic and the word "shall" instead of "should" used many times, the commitments made by developed members in the negotiation still lack effectiveness. The commitments in Part IV put almost no specific mandatory legal obligations on developed members to achieve any concrete result, and this part lacks objective criteria to determine whether these commitments are fulfilled. Therefore, promises and preferences provided for in Part IV are argued to be a more political issue, rather than typical rights offered to developing members. In terms of content, it was argued that Part IV was just a repeat of texts of the Action Program, it added nothing but formulated Action Program in a permanent form in the GATT 1947.[411] And the non-reciprocity principle in Article XXXVII only makes sure that developing members will not be asked to offer anything beyond their means, but cannot guarantee that they can get anything for free from developed members.[412] Thus, it has only limited effectiveness for developing members.

Developing members' difficulties in the process of dispute settlement also received some attention. The 1966 Decision is the first document concerning developing members' special needs in using dispute settlement system in GATT. It recognizes the divergency between developed and developing members not only influences the behavior of developing members in international trade but also affects their ability in settling disputes with developed members in the multilateral trading system. Thus, some special arrangements for developing members in dispute settlement are needed.[413] The 1966 Decision introduced good office as an alternative for developing members to settle disputes with developed members.[414] If they could not reach a satisfactory settlement, developing members could refer the matter to the Director-General, and use his or her good office to facilitate the settlement.[415] The introduction of good office could put some moral pressure on developed members. The traditional methods in the GATT system to settlement disputes are consultation and panel proceedings. The consultation as a political method to settle international disputes highly depends on the comparative political power of disputants. The huge divergency between developing and developed members made the developing members lack the leverage in this procedure. Thus, stronger members might, in this stage, use their political and economic power to intimidate the weaker to accept the solution unflavored to them. The weak and costly panel procedure also pushed developing members to settle their disputes through political means. While the good office introduced a third party into

409 GATT, Article XXXVII.
410 GATT, Article XXXVIII.
411 Robert E. Hudec, Developing countries in the GATT Legal System, Cambridge University Press, p. 64(2011).
412 Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p.75 (2012).
413 1966 Decision, Preamble.
414 1966 Decision, para. 1-4.
415 Decision on Procedures under Article XXIII, GATT BISD, 14S/18, 1966, para. 1.

dispute settlement, and it offered developing members a third option besides power-oriented consultation and weak panel stage. The good office can to some extent reduce the political intimidation of developed members. Developed members in such circumstances might be hesitant to act as those who carry out threats against small and weak members. The adoption of good office also helped developing members to settle dispute in an earlier stage, reduce the cost of their financial and legal resources and relieve the heavy burden on them resulted from panel procedure. Thus, not only the involvement of impartial third party in dispute settlement but also the early settlement can benefit developing members. Although no legal obligations resulted from good office, the need to maintain the international reputation of developed members would, to some extent, help developing members settle dispute in a more equal footing.[416]The 1966 Decision also states that "the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected Contracting Parties".[417] It was regarded as the response to the special needs of developing members. Although this provision used "shall" and looked like a legally binding obligation, it was not implementable in practice considering the lack of detailed context. It is hard to determine to what extent should the consideration be regarded as compliance, and under what circumstances were such considerations inadequate or would be regarded as a violation. The lack of enforceability of this provision demonstrated its soft law nature,[418] and it deterred developing members from getting any benefit from invoking them.[419] Although it should be commended that Paragraph 6 expanded the consideration to a wider scope, such obligation to consider could hardly in practice be translated into substantial benefits for developing members due to its vague language.

The GSP arrangement, as an important part of preferential treatments for developing members, was first established by the second UNCTAD Conference in 1971.[420] Although not directly stipulated in the GATT text, the GSP arrangement was granted a ten-year waiver under Article XXV and subsequently became a permanent feature of the system. Under the GSP, developed countries agreed to offer tariff reductions to selected products originated in developing countries. However, the special treatments developing members can get from GSP are determined by

---

416 Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, 2013, p. 47-48.
417 1966 Decision, para. 6.
418 There is no universally accepted definition of soft law. Some scholars distinguish soft law and hard law by determining whether there are precise or clear obligations to constrain the behaviors of members. And in their opinion, soft law are those contain only imprecise obligations, under which a wide range of activities could be considered complaint. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, Journal of Legal Analysis, vol. 2, iss. 1, 2010, p. 171–225, 174.
419 Jiang Zuoli(姜作利), *Shixi WTO Teshu Chabie Daiyu Guize "Yinghua" de Helixing(*试析 *WTO* 特殊差别待遇规则*"*硬化*"*的合理性*) [An Analyze on the Justification of "Hardening" of the WTO Special and Differential Treatment Rules]*, Journal of Shandong Normal University, vol. 60, no. 4, 2015, p. 68-89, 69-70.
420 Generalized System of Preferences, UNCTAD, at: https://unctad.org/topic/trade-agreements/generalized-system-of-preferences, last visited: 20. 03. 2022.

preferences-granting members on a voluntary basis, and they are revocable.[421] Because the specific GSP is regulated outside the GATT system, it cannot be directly modified in the multilateral trading system.

Article XVIII, XXVIII: bis, Part IV and applicable GSP covered by Article XXV in the GATT formed the main SDT structure before the Tokyo Round. The then existing SDT provisions brought only limited benefits to developing members. Therefore, developing members in the negotiations of the Tokyo Round intended to enhance the effectiveness of these special and differential arrangements, and make sure such arrangements can better address their real concerns in the multilateral trading system.[422] One of the most significant achievement regarding development in the Tokyo Round was the Framework entitled "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries", also known as Enabling Clause. It serves as a permanent legal basis for the GSP in the GATT text. It covers derogation to the non-discrimination principle between developed and developing members, and among developing countries. Besides, it also recognises LDCs as a distinct group requiring additional preferential treatment.[423] However, it also introduced the concept of "graduation" as a concession to developed members, which caused debates on the SDT to date. According to paragraph 7 of the Enabling Clause, developing members are expected "to participate more fully in the framework of rights and obligations under the General Agreement" with their progressively improved economic development and situation in international trade. The GSP that confirmed by Enabling Clause are like previous SDT provisions, not binding in any sense in the GATT. The voluntary nature and the threat to graduate added the uncertainty of preferences offered to developing members. Such characters give preference-granting developed members leverage to negotiate with developing member recipients in the field of trade and others, and it can be used as a mechanism to reshape developing members' policies as requested by developed members. The establishment of the GSP seems to grant developing members a better access to international market, but there are actually gains and losses simultaneously for developing members.[424]

After completion of the Tokyo Round, the 1979 Understanding made some changes to the previous dispute settlement system. It provides that when a dispute involved both developed and developing members, the developing members can in the establishment of panel, appoint a panelist from developing world.[425] Panelist from developing members could have a better understanding of developing members' special situations and could better address the demands of developing members. It confirmed that special consideration should be given to developing members' situation during consultation, conciliation, in reports of panel and working parties and

---

[421] Development: legal provisions, World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm, last visited: 20. 03. 2022.

[422] John Whalley, *Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries*, 100(403) The Economic Journal 1318-1328, 1321 (Dec., 1990)

[423] Enabling Clauses.

[424] John Whalley, Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries, 100 (403) The Economic Journal 1318-1328, 1322 (Dec., 1990).

[425] The Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Adopted on 28 November 1979 (L/4907), para. 6(ii).

during surveillance of implementation.[426] It recognized the obstacles faced by developing members in almost every stage of dispute settlement. However, it again had a soft law nature, and lack enforceability in practice. Thus made no substantial improvement to encourage the participation of developing members. The 1979 Understanding also provided developing members with opportunities to get access to Secretariat's technical assistance, which responded directly to the lack of resources of developing members in dispute settlement procedure. It aimed at enhancing their capacity to better engaged in the dispute settlement proceedings. The technical assistance was further developed in 1989 Improvements and detailed in the last few years of the GATT system. But 1979 Understanding has a limited effectiveness. First, it lacks enforceability in practice; and second, it mainly repeats the content in the 1966 Decision. The subsequent 1982 Declaration, 1984 Decision and the 1989 Improvements have the same defect, they made no significant improvement to what had been achieved in the 1966 Decision. This trend had continued until the preparation work of the Uruguay Round.

The Punta del Este Declaration that established the framework of a new negotiation round contained some especial arrangements for developing members. But those elements lacked novelty compared to previous provisions. It reaffirmed the special needs of developing countries and stated developing members should be treated differently considering the possible disruptive effects on their international trade. And it reconfirmed that full reciprocity should not be expected from developed members when negotiating with developing members.[427] But all these statements and subsequent provisions resulted from them after the completion of the Uruguay Round did not escape from the previous limitation on effectiveness. During the Uruguay Round, developing members made unprecedented commitments than ever. Such outcomes can be attributed to two main reasons. One is that developing members' attitude towards trade protectionism has changed dramatically. The rapid development of the global supply chain has made the maintenance of high tariff more costly for developing members and they have realized that their trade policies should be changed.[428] The other one is the adoption of the single-undertaking approach in the Uruguay Round. Unlike the Code Approach, the single-undertaking ensured that developing members could no longer be excluded from core negotiating areas. However, the Uruguay Round also contained some proposals from developed members that were not supported by developing members at the beginning. In order to get commitments from developed members, developing members had to make some compromises and accept proposals that were not of their interest. With the expansion of coverage of the multilateral trading system, SDT provisions also expanded to fields like TRIPS, TRIMS, services and dispute settlement. SDT provisions resulted from Uruguay Round are regarded as the extra help or compensation for developing members for accepting disciplines in the new negotiation round, and they aim at relieving the adjustment cost faced by developing members in this process.[429]

---

[426] The Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Adopted on 28 November 1979 (L/4907), para, 5, 21-24.

[427] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p.75 (2012).

[428] Paola Conconi and Carlo Perroni, "Special and Differential Treatment of Developing Countries in the WTO," *World Trade Review* 14, no. 1 (January 2015): 67–68, 72, https://doi.org/10.1017/S147474561400041X.

[429] John Whalley, "Special and Differential Treatment in the Millennium Round," SSRN Scholarly Paper (Rochester, NY, May 1, 1999), 13, https://doi.org/10.2139/ssrn.165809.

As introduced in Part 1 §2.3, the ACWL provides developing members with free or low-cost legal assistance outside the WTO framework; its coverage is narrower than DSU SDT provisions, covering only its own member states, which means it cannot be analyzed on the same basis as SDT provisions in the DSU.

A recent improvement in the field of SDT provisions is that a Monitoring Mechanism to analyze and review the implementation of SDT provisions was established in accordance with the Bali Ministerial Declaration in 2013. The establishment of such a mechanism was first proposed by African Group in 2002. It is a response to developing members' request to enhance the precision, effectiveness and operability of SDT provisions. [430] This mechanism also plays a role in guaranteeing the well function of SDT provisions.

1.2. The present SDT provisions in the WTO

The outcome of the Uruguay Round formed the current structure of SDT provisions in the WTO agreements. After decades of development, there are 155 SDT provisions in the latest version of the WTO agreements and decisions.[431] The WTO Secretariat has classified all these provisions into six categories using the typology it developed in 2001. They include:

1. Provisions aimed at increasing the trade opportunities of developing country Members;
2. Provisions under which WTO Members should safeguard the interests of developing country Members;
3. Flexibility of commitments, of action, and use of policy instruments;
4. Transitional time-periods;
5. Technical assistance;
6. Provisions relating to LDC Members.[432]

The typology adopted by the WTO Secretariat mainly focuses on the function and objective of each provision. However, this classification overlaps and is somewhat arbitrary.[433] For example, the last type is based on their applicable objects, the classification criteria adopted here is different from the previous ones. Thus, provisions relating to LDC members may contain provisions that have the same function and objective as those of previous types. When calculating the number of provisions of each type of SDT provisions in the WTO agreements, this typology may cause double counting. Besides that, even if certain SDT provisions fall into the same category, they can vary widely in the application effects. This typology sidesteps the ongoing debate over the legal status of these provisions—a question that lies at the heart of

---

[430] Briefing note: Monitoring Mechanism, World Trade Organization, at: https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_monit_mecha_e.htm, last visited: Mar. 23, 2022.
[431] Vineet Hegde and Jan Wouters, "Special and Differential Treatment Under the World Trade Organization: A Legal Typology," *Journal of International Economic Law* 24, no. 3 (September 1, 2021): 555, https://doi.org/10.1093/jiel/jgab033.
[432] Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/258, Mar. 2, 2021, para. 1.5.
[433] Andrew D. Mitchell & Tania Voon, *Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?*, 15 GLOB. GOV. 343, 345 (2009).

scholarly disagreement about SDT. When considering the effectiveness of SDT provisions and discuss how to improve these provisions, the WTO Secretariat's typology cannot provide much help. Instead, some scholars in their analysis summarized these provisions in accordance with the language used in these provisions and the legal status of them.

Alessandrini, by analyzing some WTO agreements, pointed out that most SDT provisions, besides those provide for longer compliance period, are developed members' best efforts commitments.[434] Stevens classified all SDT provisions in accordance with their different applicable groups and legal enforceability into three types: modulation of commitments, trade preferences, and ancillary support.[435] Modulation of commitments allows for more flexible application of commitments by developing members. For example, the TRIPS Article 65 and 66 requires members to implement provisions of this agreement within one year after the entry into force of the Marrakesh Agreement, while developing members were granted a four year longer extension compared to developed members, and LDCs as a special group of developing members have a transition period of ten years.[436] Such modulations are provided directly by the Agreement, and they are normally legally enforceable; Trade preferences are better trade conditions offered to developing members. They are at the discretion of each member and recognized by the 1979 Enabling Clause. Members like EU and US have GSP in their own legislation. The legal enforceability of these provisions is more problematic due to the possibility that some rules in the GSP may contravene provisions in WTO agreements; The third type is ancillary support. Steven describes them as "wholly unenforceable".[437] This group contains provisions like GATS Article 4 which requires member to take certain actions to facilitate the participation of developing members in world trade, and GATT Article XXXVII:3 (a) that requires developed members to make every effort to maintain the trade margins at equitable levels in some cases.[438] Rolland also doubted the legal value of SDT provisions and regarded its content and effectiveness in practice as "far from certain".[439] She took one step further and analyzed the characteristics of different SDT provisions in more detail. The subsequent analysis will mainly adopt this typology. She classified most SDT provisions according to their drafting pattern into four groups:

1. Escape clauses,
2. Best efforts provisions,
3. Provisions defining an objective but devoid of specific implementation prescriptions, and
4. Accountability provisions.[440]

Compared to the typology used by Stevens, Rolland further subdivided the category of ancillary support provisions into best efforts provisions and provisions defining an objective but devoid of

---

[434] DONATELLA ALESSANDRINI ET AL., DEVELOPING COUNTRIES AND THE MULTILATERAL TRADE REGIME: THE FAILURE AND PROMISE OF THE WTO'S DEVELOPMENT MISSION 174 (2010).
[435] Christopher Stevens, *The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO*, IDS Working Paper 163, p. 2-4 (2002).
[436] TRIPS, Article 65 and 66.
[437] Christopher Stevens, *The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO*, IDS Working Paper 163, p. 3 (2002).
[438] GATT, Article XXXVII:3(a).
[439] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p. 117 (2012).
[440] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p. 117-138 (2012).

specific implementation prescriptions, based on differences in their drafting characteristics. Although she applied escape clauses to replace modulation of commitments and trade preferences in Stevens' paper, the latter two kinds of provisions are still subdivided under the concept of escape clauses and are regarded to have some differences. So, the typology applied by Stevens and Rolland has many similarities.

Escape clause

Escape clauses are provisions that provide policy flexibility to developing members. They are drafted to respond to the difficulties developing members face in international trade and in the process of fulfilling treaty obligations. Their content consists principally of exceptions to, or authorised derogations from, general treaty obligations, or of more favourable treatment accorded to developing members. For example, GATT Article XVIII recognizes developing members' difficulties in economic development, more specifically, protecting infant industries and balance-of-payment issue, and it provides them with additional facilities in these fields.[441] Such flexibility contained in Article XVIII can be construed as escape clause. The fourth type in the WTO Secretariat typology is designed to address difficulties of developing members in implementing treaty obligations. These members have to make greater efforts in this process compared to developed members to adjust their trade policies and establish corresponding institutions. Technical assistance provisions provide help to developing members to relieve their shortage in legal resources, thus also fall into escape clauses. Although Enabling Clauses are not directly stipulated in the agreement, they also recognize some preferences offered by developed members to certain products imported from developing members. These preferences help developing members gain a better access than other members to developed members' markets and constitute exceptions to the MFN principle of the GATT.[442] Thus they belong to Escape Clauses.

Rolland then subdivided these escape clauses into two categories.[443] Some of these escape clauses are stipulated in the WTO agreements. Taking provisions providing for a longer transitional period as an example. The TRIPS Article 65.2 states that "[a] developing country Member is entitled to delay for a further period of four years the date of application",[444] the right of developing members is clearly defined here, and the specific period of time is also described. This provision leaves little room for interpretation, thus it can hardly cause any controversy in practice. Another example is SCM Agreement Article 27 concerning subsidies in developing members. The language in this provision is clear and straightforward. The term "shall" demonstrates that members have legal obligations under this article, and specific content of obligation follows.[445] For developing members, these escape clauses are the easiest to rely on because they contain explicit legal obligations, and more favorable treatments for developing members are directly guaranteed by the WTO agreements. And developing members that are

[441] GATT, Article XVIII.
[442] Differential and more favourable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979 (L/4903).
[443] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p. 118 (2012).
[444] TRIPS, Article 65.2.
[445] SCM Agreement, Article 27.

entitled to these treatments are also the one to implement these provisions. They take an active part in implementing these provisions. However, such clauses are limited in number in the WTO regime, mainly because of the difficulties in negotiating these provisions.

Some escape clauses are permissive in nature. It means what special and differential treatments developing members can get by using them are not regulated in the WTO agreement; they are left to the discretion of other members instead. For example, the Enabling Clause paragraph 1and 2 impose no legal obligations on members to offer any preferential treatments to developing members by using the word “may” in paragraph 1, a word that has no legal enforceability. And the special arrangements stipulated in paragraph 2, such as Generalized System of Preferences, are beyond the WTO agreements, and they are self-defined and implemented by developed members.[446] Members that offer such preferential treatments, instead of developing members, are the one to take actions. Thus, developing members are in a passive role in the implementing process to accept what is provided by developed members. Although documents referred to in paragraph 2 also explicitly regulate the content of such preferences and the legal obligation of grantors, these provisions can cause more complex legal controversies than those directly defined in agreements on whether the preferential treatments offered by some members are consistent with related agreements, as the disputes in DS246 between EC and India.[447]

Best efforts provisions
Compared to escape clauses which are the combination of words like “shall” to demonstrate that a legal obligation was imposed to members, and clearly defined content of obligation that is specific enough for adjudicators to determine whether this obligation has been fulfilled, best efforts provisions carry the outward form of a legal obligation—employing mandatory language and specifying a nominal content of obligation—yet lack the clear implementation criteria that would allow adjudicators to determine whether compliance has been achieved. The word “shall” and content of obligations in best effort provisions are usually connected with the phrase like “make every effort”, “to the fullest extent possible”, “give active consideration” that leave gaps in the issue of to what extent the requirements are considered being satisfied. GATT Article XXXVII:3 can illustrate this character. It states:

> The developed contracting parties shall:
> (a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;
> (b) give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;
> (c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet

[446] Differential and more favourable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979 (L/4903), para. 1&2.
[447] EC—Tariff Preferences, DS246.

> particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.[448]

Paragraph (a) used the word "shall" to impose a legal obligation on developed members, and it provides that the obligation is to "maintain trade margins in equitable levels" in some circumstances. However, the criterion of implementations is not full and complete fulfillment but to "make every effort". It is not clear what kind of effort, or how much effort is required in this paragraph, thus whether developed members have satisfied such requirements is hard to determine. Paragraph (b) and (c) have the same defect, and that impairs the enforceability of obligations contained. From a legal point of view, such phrases are not clear, and WTO adjudicators in dispute settlement proceedings lack objective criterion to make decisions. Thus, developed members have legal obligations to implement this article, however, the extent of implementation is unclear.[449]

Provisions defining an objective but devoid of specific implementation prescriptions

As described in the classification, these provisions only contain a development-related objective, such as Article 10.4 of the SPS Agreement, which provides that "members should encourage and facilitate the active participation of developing country Members in the relevant international organizations",[450] and GATT Article XXXVI:2, which states "there is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties"[451]. From the linguistic point of view, these provisions neither supposed to impose any legal obligation on members by using the word like "shall", nor do they directly grant developing members any right. That means these provisions have no legal enforceability. And from a content perspective, they lack the description of specific obligations. For example, the requirement in Article 10.4 of the SPS Agreement is too general to be regarded as an implementable obligation for members. There is more than one way to achieve this objective, and this article alone is not enough to provide any guidance to members. Therefore, it is hard to say what actions these provisions require members to do.

Accountability provisions

Some of the SDT provisions contains reporting and notification obligations. They are usually combined with other major obligations or rights. For example, GATT Article XXXVII:2(a) states that

> Whenever it is considered that effect is not being given to any of the provisions of subparagraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.[452]

---

448 GATT, Article XXXVII.
449 Frank J. Garcia, *Beyond Special and Differential Treatment,* 27 Boston College International and Comparative Law Review, 311 (2005).
450 SPS Agreement, Article 10.4.
451 GATT, Article XXXVI: 2.
452 GATT, Article XXXVII: 2(a).

The requirement of reporting, subjects and objects of the report and the content of the report are clearly defined with little room for interpretation. Thus, it is not hard to determine whether this obligation has been fulfilled. While it is not always the case. There might be cases that some of other elements other than the report requirement itself are not clear enough. For example, DSU Article 12.11 requires panels to report

> the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures when one or more developing members are parties to the dispute.[453]

This provision contains no description of how to take account of relevant provisions, and the omission of this element impairs the effectiveness of this SDT provision. There are also cases that the ambiguity of the obligation is caused by the report requirement itself. For example, the subjects or objects of report are not clear. Thus, unlike the preceding three categories, whose legal effect (whether clear or ambiguous) is relatively consistent across provisions of the same type, the enforceability of accountability provisions varies considerably from one provision to another. When discussing the implementation effects of accountability provisions, these provisions will be treated separately. For provisions that combine reporting obligations with other requirements, the enforceability of the reporting obligation depends on the wording of that obligation itself. The remaining obligations within the same provision will be treated as separate SDT arrangements for the purposes of this analysis. However, the existence of accountability provisions has an impact on the implementation of other obligations in the same provision. In Article 12.11 of the DSU, the main obligation is to take account of relevant provisions (main obligation), and the accountability obligation is to report such consideration. In this case, the reporting obligation can to some extent monitor the implementation of the main obligation.

Provisions with “should”

Besides the four types of provisions classified by Rolland, a new type should be added here, that is, provisions using “should” instead of “shall”. Treaty drafters usually use “shall” to create legal obligations and to indicate that certain obligations are mandatory.[454] While the word “should” can also be found in some SDT provisions. Unlike “shall” that has a clear meaning and does not cause legal ambiguity in the legal sense, the meaning of “should” is more complex. The AB in Canada — Aircraft case elaborated on the meaning of the word “should” contained in the DSU. It stated that

> Although the word ‘should’ is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used ‘to express a duty [or] obligation’. The word ‘should’ has, for instance, previously been interpreted by us as expressing a ‘duty’ of panels in the context of Article 11 of the DSU. Similarly, we are of the

[453] DSU, Article 12.11.

[454] “Shall,” LII / Legal Information Institute, accessed September 19, 2022, https://www.law.cornell.edu/wex/shall.

view that the word 'should' in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative sense.[455]

Thus, the use of "should" leads to two different legal effect, one is legally binding, the other is exhortative. However, there is no indication of the meaning of this term in different articles. The AB in Canada—Aircraft case distinguished the different meanings of "should" in Article 11 and Article 13.1 of the DSU, but there lacked any detailed reasoning in its ruling, and it did not provide members any method to determine the meaning of "should" in other provisions. The legal effect of the term "should" was left uncertain. Some SDT provisions also contain the term "should", thus, whether these provisions are legally enforceable in practice is under doubt. For example, Article 21.2 of the DSU stipulates "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."[456] Whether the term "should" creates a legal obligation is not clear, the adoption of any view will cause the counterargument from the other point of view. If it is regarded to have legally binding effect, it should have the same meaning as "shall". Then, this provision can be categorized as best effort clauses. And it raises another question, why not just use "shall", the term with little ambiguity? If it is regarded as merely exhortative, it does not have the appearance of a legal obligation, thus cannot be regarded as best effort clauses. It should be analyzed as a separate category. However, why does the soft law use the same wording as some hard law as Article 11? The same dilemma also arises in Article 4.10 of the DSU. Thus, due to the uncertainty of the legal effect of "should", provisions with such wording will be regarded as a separate category.

The DSU regulates dispute settlement methods and proceedings in the WTO. As one of the WTO agreements, it also recognizes developing members' difficulties in participating in the system and especially in the process of settling their disputes. Thus, it also contains some SDT provisions. Because SDT provisions in the DSU directly influence the behavior of developing members in the dispute settlement proceedings, the analysis of these provisions is meaningful to developing members, and the modification of these provisions is essential to help developing members better participate in the DSM. There are 11 SDT provisions in the DSU. Part of them is from documents regarding dispute settlement proceedings in the GATT period, such as 1966 Decision, 1979 Understanding, 1982 Declaration, 1984 Decision and the 1989 Improvements. And the Uruguay Round also added some new SDT provisions into the DSU, namely Article 3.12, 4.10, 8.10, 12.10, 12.11, 21.1, 21.7, 21.8, 24 and 27.2.[457] SDT provisions in the DSU cover many stages of dispute settlement, including consultation, panel procedures, implementations, and so on. Following the classification mentioned in the previous part, SDT provisions in the DSU can be categorized into escape clause, best effort provisions, accountability provisions and provisions with "should".

455 Appellate Body Report, Canada – Aircraft, WT/DS70/AB/R, adopted on 20 August 1999, para. 187. See also Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB/R, adopted on 24 March 2006, para. 51.
456 DSU, Article 12.2.
457 Saleh Al Shraideh, the Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, p. 154 (2013).

The introduction of SDT provisions and the classification under their characters play an important role in providing basic ideas on how to improve these provisions. Before helping developing members find ways to utilize SDT provisions more effectively in the DSM and motivate their participation in WTO dispute settlement system, the problems and difficulties they face in using these provisions should be pointed out first.

2. Difficulties Developing Members Face in Using SDT Provisions in the DSM

It has been confirmed by members that developing members have not gained as much benefit as they supposed to from invoking SDT provisions, and there remains much scope for improvement concerning the SDT provisions. Regarding the difficulties developing members face at the substantive level, adjudicators' inappropriate interpretation of SDT provisions undermined developing members' confidence in the DSM, and developing members sometimes face difficulties in invoking SDT provisions to support their claims; and at the procedural level, the lack of effectiveness of SDT provisions in the DSU failed to provide developing members with a more equal position with their developed counterparts in dispute settlement proceedings. Thus, it is essential to figure out in what circumstances have developing members encountered difficulties in utilizing SDT provisions in the DSM. This part illustrates various kinds of difficulties in conjunction with representative examples.

2.1. Difficulties Concerning Substantive SDT Provisions

Substantive SDT provisions provide developing members with more favorable trade conditions in international trade. If disputes regarding developing members' rights under these provisions were arisen, members can invoke substantive SDT provisions to guarantee the exercise of rights and implementation of obligations. If developing members' utilization of substantive SDT provisions in the DSM cannot lead to their desired results, or the reasoning provided by adjudicators causes a negative impact on the utilization of developing members in future disputes, their enthusiasm of invoking these provisions in the DSM to protect their rights and interests will gradually be dampened. And that has a significant impact on developing members' participation in the DSM. Thus, developing members' difficulties in using substantive SDT provisions in the DSM hinder their participation in the DSM, and these difficulties should be addressed. Such difficulties can be attributed to the act of WTO adjudicators on the one hand, namely the interpretation adopted in the DSM; and, developing members' own act, on the other hand.

2.1.1. Ignoring SDT provisions or some elements in SDT provisions

As established in §1.1, the effectiveness of SDT provisions varies significantly by type: provisions with clear obligations are more enforceable, while best efforts clauses and objective-defining provisions leave wide room for interpretation. However, it cannot be ruled out that adjudicators may ignore some development elements in their rulings and result in damage to the rights and interests of developing members. In the DSM, only WTO adjudicators have the authorization to adopt judicial interpretation on disputed provisions. Thus, in disputes regarding these provisions, whether developing members can enjoy corresponding special treatments partly depends on their interpretation.

The WTO adjudicators, in some cases, refrained from ruling on SDT provisions. In the United Kingdom—Dollar Area Quotas case, the US challenged the maintenance of quantitative restrictions adopted by the UK. These measures limited the imposition of certain products imported from the US and other dollar area countries. They were originally adopted on the grounds of exchange control and currency reservation but were then maintained to protect the economic interest of the developing Commonwealth Caribbean countries.[458] The US claimed that these measures violated Article XI and XIII of the GATT and requested that these measures be eliminated. The UK had never denied that its measures were inconsistent with the above two articles of the GATT. However, the arguments from Caribbean countries and territories asserted that this measure should be read in the context of the GATT as a whole and it could be justified by Part IV of the GATT concerning the special needs of developing Commonwealth Caribbean countries. Thus, the quantitative restrictions in this dispute could not be regarded as a violation of the GATT. The Panel in this case did not rule on this claim, it did not determine whether Part IV could justify these measures. Instead, it requested "parties concerned to actively seek a mutually acceptable solution to the problem".[459] The interpretation of Part IV is the core of this case, while the refusal of the Panel to rule on this point put the legal status of Part IV unclear. A provision without clear legal effects cannot offer developing members any protection in the dispute settlement system. Thus, the ruling in this case impaired developing members' confidence in adjudicators and discouraged them from invoking Part IV to defense them trade rights and interests in subsequent cases.

WTO adjudicators in some disputes circumvented the interpretation of some SDT provisions by stating that these disputes were solved under other provisions, thus it was unnecessary to address the development arguments. For example, in the *US—Steel Safeguards* case, China raised the dispute under GATT and Safeguards Agreement. Among its arguments, China claimed that measures adopted by the US violated Article 9 of the Safeguards Agreements, which provided developing members with differential and more preferential treatments. This claim has not been addressed by the AB in its ruling, because the AB asserted that it had found the violation on other grounds.[460] Thus, the AB did not respond to the contested issue concerning whether China was entitled to special treatment under this article. Although it is argued that the omissions

[458] Panel report, United Kingdom—Dollar Area Quotas, L/3891 - 20S/236, adopted on 30 July 1973, p. 1.
[459] Panel report, United Kingdom—Dollar Area Quotas, L/3891 - 20S/236, adopted on 30 July 1973, p. 6.
[460] Appellate Body report, US—Steel Safeguards, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, adopted on 10 November 2003, para. 508-513.

are resulted from the application of the principle of judicial economy.[461] And it was confirmed that WTO adjudicators did not have to examine every and each claim made by complaining member, and they only have the obligation to address issues that were necessary to settle the dispute.[462] However, the content of provisions on which the AB's decision are based (Article XIX:1(a) of the GATT and Article 2.1, 3.1 and 4.2 of the Safeguards Agreements) do not prevent the application of Article 9 of the Safeguards Agreements. It is important to determine whether an issue is necessary to settle disputes and to bear in mind the aim of dispute settlement. "To provide only a partial resolution of the matter at issue would be false judicial economy."[463] The ignorance also showed WTO adjudicators' reluctance to make a legal interpretation of SDT provisions. Although WTO adjudicators then changed such practice in several cases, and gave some interpretation on Part IV and other SDT provisions to some extent, their reluctance to give legal effect to SDT provisions has not changed. They refrained from making these provisions enforceable by ignoring some development elements in the provisions concerned.

One example is EEC—Apples I case[464]. The EEC in 1979 initiated a consultation with Chile in order to achieve a voluntary restriction on quantities of apple imported from Chile. After the breakdown of their negotiation, the EEC then proposed a quantity adjustment. However, the proposed 4,2000 m.t. was also regarded by Chile as insufficient and was ultimately rejected by Chile. The EEC then, in the absence of a mutual agreement with Chile concerning the import quantity, issued a Regulation to suspend the free circulation into the EEC of Chile apples, then two amendments relaxed policies in the Regulation, and allowed the importation of approximately 4,2000 m.t.[465] In this dispute, the complaining party Chile invoked Part IV of the GATT. And it asserted that the EEC's adoption of quantitative restriction violated developed members' commitments under Article XXXVII: 1(b) and 3(c).[466] The disputed part of this article provides:

> 1. The developed contracting parties shall to the fullest extent possible — that is, except when compelling reasons, which may include legal reasons, make it impossible — give effect to the following provisions:…
>
> (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; …

and

> 3. The developed contracting parties shall:…
>
> (c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet

---

[461] Appellate Body report, US—Steel Safeguards, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, adopted on 10 November 2003, para. 10.173-10.174.

[462] Appellate Body report, US—Wool Shirts and Blouses, WT/DS33/AB/R, adopted on 25 April 1997, p. 18.

[463] Appellate Body report, Australia—Measures Affecting Importation of Salmon, WT/DS18/AB/R, adopted on 20 October 1998, para. 223.

[464] Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980.

[465] Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980. para. 2.3-2.4.

[466] Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980. para. 3.29.

particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.[467]

Besides, the principles and objectives of Part IV stipulated in Article XXXVI: 1(a), 1(b), 2 and 3 should also be taken into consideration. It claimed that the EEC had not to its "fullest extent possible" taken Chile's developing status and special domestic difficulties into consideration, nor explored "all possibilities of constructive remedies" before the adopting the quantitative restriction measure.[468] While the EEC contended that "it had done all it reasonably could have done to avoid suspending imports from Chile in 1979"[469]. And it tried its best to achieve a mutual agreement with Chile by rising the initial proposed quantity to 4,2000 m.t.[470] Thus, it had implemented its obligation under Part IV of the GATT.

The Panel first confirmed that the measure taken by the EEC did affect the export interests of Chile, thus its adoption fell within the scope of application of this Article XXXVII: 1(b). However, the Panel considered that the EEC had taken certain actions, such as the initiation of a consultation with Chile. On this basis, the Panel found that the EEC had made serious efforts "to avoid taking protective measures against Chile". The reasoning taken by the Panel in this dispute is short and inadequate. First, it did not test whether the requirement stipulated in Article XXXVII: 1(b) was satisfied. It did not dispute that Chile was a developing member, and apples export was of special trade interest to Chile. It then considered the quantitative restriction measure taken by the EEC caused a negative impact on Chilean export interest. The Panel asserted that the EEC had made efforts to refrain from implementing quantitative restriction on apples from Chile, such as consulting with Chile. However, this article also requires developed members to refrain "to the fullest extent possible" from introducing non-tariff trade barriers. And the provision further explains this requirement, "to the fullest extent possible" means "except when compelling reasons, which may include legal reasons, make it impossible". Thus, if a trade restrictive measure was argued to be inconsistent with Article XXXVII: 1(b) of the GATT, the Panel should take the test in accordance with the following subsequence:

1. Whether the EEC had introduced or increased the 'incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties';
2. Is there compelling reasons, including legal reasons can justify the adoption of this measure.[471]

However, the Panel did not take this method, and the requirement of compelling reasons was ignored by the Panel. The Panel in its ruling simply equated actions taken by developed members with efforts to the fullest extent. Such interpretation did not give meaning to every term of the provision and constituted a significant defect.

Second, according to the explanation of "to the fullest extent possible" provided by Article XXXVII: 1(b), its article actually requests developed members not to introduce or increase trade barriers

[467] GATT, Article XXXVII.
[468] Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980. para. 3.30-3.35.
[469] Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980. para. 3.36.
[470] Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980. para. 3.37.
[471] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p. 148 (2012).

on products that are of particular export interest to developing members when there is no compelling reason. Thus, only two circumstances can be considered as meeting the requirements in this article. The first one is, no such trade barrier is introduced or increased by developed members. The second one is, trade barriers that affect particular export interest of developing members is introduced or increased. However, such measures can be justified by compelling reasons. In EEC—Apples I, the logic by which the Panel did not find that the EEC's measure violated this article does not fall under either of the above. It considered that although the EEC ultimately adopted trade restrictive measure against products from Chile, it made efforts to refrain from doing that. The interpretation is a misunderstanding of Article XXXVII: 1(b). The Panel misinterpreted the legal obligation imposed by this article and reduced the obligation of developed members. Besides that, the interpretation taken by the Panel in this dispute confuses two kinds of obligations, namely taking actions and reaching certain results.[472] The obligation under Article XXXVII: 1(b) is not to introduce or increase trade barriers that affect export interest of developing members when no compelling reason exists. It regulates the results. While the initiation of a consultation with the affected member is an obligation to take actions. These two obligations should not be regarded as having the same meaning. Thus, the actions of the EEC cannot be used as a defense that it had implemented its legal obligation under this article.

Although the wording of Article XXXVII: 1(b) has an appearance of best efforts clause as it requires developed members to its fullest extent possible implement their substantive legal obligations. It actually provides clear and specific criteria for implementation by further explaining the relatively ambiguous wording. Thus, Article XXXVII: 1(b) grants developing members more favorable treatments straightforwardly, and it offers adjudicators of multilateral trading system a definite methodology to test the relationship between members' conduct and treaty obligations. Even in this situation, the rights of developing members cannot be guaranteed by the dispute settlement system, let alone developing members' confidence of invoking SDT provisions with more ambiguous wording in the dispute settlement system.

The misinterpretation of Article XXXVII: 1(b) is not an isolated case. A decade later, the Chile initiated another dispute against the EEC on the similar ground as EEC—Apples I. In this new EEC—Dessert Apples case[473], Chile presented more technical and complete argument than before. The EEC argued that Part IV did not require developed members to give more favorable treatments to developing members; it allowed members to do so, and whether to grant such special treatments is at the discretion of granting members, in this case, the EEC itself.[474] The ruling of this dispute suffers from the same defects as the ruling of EEC—Apples I. Panel of EEC—Dessert Apples also clarified the relationship between Part IV and other GATT provisions. The Panel recognized that commitments made by contracting parties under Part IV "were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III". Therefore, measures taken by developed members should firstly be consistent with the requirements set forth in Part I-III, then

[472] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p. 148 (2012).
[473] Panel report, EEC—Dessert Apples, L/6491 - 36S/93, adopted on 22 June 1989.
[474] Panel report, EEC—Dessert Apples, L/6491 - 36S/93, adopted on 22 June 1989, para. 8.5.

such measures should also be examined under Part IV. In the meantime, the Panel adopted a similar understanding as the EEC concerning the nature of such commitments in Part IV in its statement. They both admitted that such measures were "permitted", not "required". The explanation of "to the fullest extent possible" and the right of developing members under this article were ignored again.

2.1.2. Reluctance in giving ambiguous provisions legal enforceability

It is argued that when the wording of SDT provisions is ambiguous, the WTO adjudicators are often in their interpretation reluctant to develop any standards or methodologies that favor developing members and can be invoked in future cases. [475] While WTO adjudicators are willing to receive the development argument when the SDT provision concerned contains a well-defined obligation in many cases. For example, Article 9.1 of the Agreement of Safeguards reads

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[476]

The wording of this provision is mandatory, and it contains clear criteria for implementation. It leaves little room for interpretation. Although this provision has been ignored as a whole in the *US—Steel Safeguards* case, both the Panel and the Appellate Body in US—Line Pipe case confirmed in their rulings that this provision was legally enforceable, and they considered that

> the line pipe measure has been applied against products originating in those developing countries whose imports into the United States are below the de minimis levels set out in Article 9.1. And, consequently, we uphold the Panel's findings in paragraphs 7.180 and 7.181 of its Report, that the United States acted inconsistently with its obligations under Article 9.1 of the Agreement on Safeguards.[477]

While WTO adjudicators' attitude towards SDT provisions with ambiguous wording is different. They are reluctant to make these provisions more enforceable. And their attitudes towards these provisions had led to the lack of effectiveness of some SDT provisions, the heavier burden of proof for developing members and even the reluctance of developing members to invoke these SDT provisions.

The panel report of EC—Bed Linen illustrates the impact of judicial interpretation on the effectiveness of some SDT provisions. This dispute concerned the EC's anti-dumping measure against bed linen products from India. India, as the complaint of this dispute, invoked Article 15

[475] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, 2012, p.139.
[476] Safeguard Agreement, Article 9.1.
[477] Appellate Body report, US—Line Pipe, WT/DS202/AB/R, adopted on 15 February 2002, para. 133.

of the Agreement on Implementation of Article VI of the Anti-Dumping Agreement. This Article reads

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. *Possibilities of constructive remedies provided for by this Agreement shall be explored* before applying anti-dumping duties where they would affect the essential interests of developing country Members.[478] (Emphasis added)

India in this dispute argued that the first and the second sentence of this article should be read separately. The first sentence set up only an objective, and it did not impose any legal obligation on members. While the second sentence included a specific obligation for members which was to explore “possibilities of constructive remedies”. Thus, the legal effect of these two sentences should be different.[479] In Indian opinion, the obligation to explore possibilities was on the EC. And India claimed that the EC had failed to “explore possibilities of constructive remedies” before imposing of anti-dumping duties, and the EC did not respond to detailed argument from India exporters regarding this article. India asserted that its status as a developing member was ignored by the EC, and its special situation in the bed linen industry was not taken into account before the adoption of anti-dumping measures. Thus, the EC violated Article 15 of the Anti-Dumping Agreement.[480] While the EC did not dispute the Indian understanding of Article 15 that the second sentence imposed a legal obligation on developed members, it also recognized the developing status of India and the importance of bed linen industry to the economy of India. It asserted that it has completed their obligation imposed by this article by giving “special consideration to the possibility of accepting undertakings from their exporters”. It then claimed that since no undertaking was provided by exporters from India within the required time, the EC was not able to consider any “possibilities of constructive remedies”. Therefore, it claimed that the lack of constructive remedies should be attributed to the inaction of Indian exporters, and the EC had no obligation to actively explore the possibilities.[481]

The dispute concerning Article 15 of Anti-dumping Agreement focused on the understanding of the obligation to explore the possibilities of constructive remedies. The second sentence of this article has only an appearance of mandatory legal obligation. It contains an obligation, and the word “shall”, while lacks detailed and clear criteria for implementation. Thus, it is a best efforts clause according to the typology mentioned above. And such provision leaves room for interpretation in the DSM. The Panel in its reasoning stated that

> the concept of "explore" clearly does not imply any particular outcome. We recall that Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case.

and

[478] DSU, Article 15.
[479] Panel Report, EC — Bed Linen, WT/DS141/R, adopted 12 March 2001. para. 6.220.
[480] Panel Report, EC — Bed Linen, WT/DS141/R, adopted 12 March 2001. para. 6.219.
[481] Panel Report, EC — Bed Linen, WT/DS141/R, adopted 12 March 2001. para. 6.222.

> Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.[482]

The Panel ultimately found that the EC had failed to fulfil the obligation imposed by Article 15 of the Anti-Dumping Agreement due to its pure passive action, and it, to a certain extent, clarified the ambiguous language in this provision. The Panel emphasized firstly that the provision imposed an obligation on developed members and pure passive action of the EC constituted a violation of Article 15. It then confirmed that the obligation to explore possibilities of constructive remedies excluded the obligation to "provide or accept any constructive remedy that may be identified and/or offered". Nothing in the panel report formulated specific standards or methodologies to guarantee the rights of developing members. The Panel's interpretation of this article did little more than what was stipulated by its content, leaving the language ambiguity and the obligation of developed members uncertain. Through careful drafting, the Panel exempted developed members not only from actually adopting any concrete remedy, but also from providing any viable alternative. While what developing members can get from using this provision is developed members' consideration with an open mind the possibilities of such a remedy. Therefore, developing members can expect nothing from invoking this provision.[483] Here, the interpretation taken by the panel took an dual standard. It clearly exempted certain obligation of developed members but did not clearly confirm any concrete benefit for developing members. Therefore, developing members' enthusiasm for invoking this provision in the DSM was affected by the ambiguous language and the attitude of WTO adjudicators.

The application prospect of this article is not clear. To what extent can the requirement under this provision be regarded as being satisfied is still a hanging matter to this day due to the lack of detailed legal interpretation taken by WTO adjudicators. This problem is not confined to Article 15 of the Anti-Dumping Agreement. Most of best efforts clauses have the same defects. Why are WTO adjudicators reluctant to develop clear standards and methodologies that would be useful in the future, and what exactly should best efforts clauses bring to developing members are worth in-depth study.

While in the EC—Asbestos case from the same period, the Panel applied a different interpretation on SDT provisions. Article 12.2 of the Agreement on Technical Barriers to Trade(hereinafter TBT Agreement) requests developed members to "give particular attention to the provisions of this Agreement concerning developing country Members rights and obligations and shall take into account" the special needs of developing members in implementing this agreement.[484] The wording of these provisions, such as "give particular attention" and "shall take into account", demonstrates that this provision is a best efforts clause, with only the appearance of mandatory nature, while lacking the explicit standards for implementation. Brazil in this case

[482] Panel Report, EC—Bed Linen, WT/DS141/R, adopted 12 March 2001. para. 6.233.
[483] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, p. 182 (2013).
[484] TBT Agreement, Article 12.2.

claimed that the France's ban on the trade and use of a product was so restrictive that it seriously damaged the trade rights and interests of Brazil as a developing member and Zimbabwe as one of the least-developed members in the WTO. It argued that when developing its technical regulations, France did not take into account the special needs of developing members and least-developed members, and it did not offer developing members with special treatments, thus it was in breach of Article 12.2 of the TBT Agreement.

If the approach in EC—Bed Linen is applied here, the requirement to "give particular attention" and to "take into account" during the development of its regulations impose no obligation on France to actually adopt a regulation that offers special treatments to developing members. It should not mean any concrete outcome. However, the panel in this case considered France's ban violated Article 12.2 on the ground that "it adopted an outright ban that advantages French producers of substitute fibres and products to the detriment of Brazil's chrysotile and chrysotile product producers (and to Zimbabwe's detriment as well)."[485] The basis of Panel's conclusion is that the content of France's regulation impaired the Brazil's producer in these industries. Although the panel in this dispute did not clarify any explicit standards or methods for implementation, nor did it stated when the requirements under this article could be regarded as satisfied. According to its interpretation, Article 12.2 does impose an obligation on developed members to document its consideration of developing members' special needs in its legislation concerned. And this interpretation is different from the reasoning in the panel report of the EC—Bed Linen case, which did not clarify what action or concrete outcomes best efforts clause should lead to. Although the conclusions and recommendations made by panels or the Appellate Body only bound the parties to this specific dispute, subsequent panels and the Appellate Body do not have the obligation to follow the reasoning in previous rulings. However, reasoning in previous rulings can create legitimate expectations for member states. Thus, they were frequently cited in the subsequent cases by panels and parties to the disputes. The analysis and reasoning in previous cases constituted non-bound precedents.[486] However, the opposite approaches applied in these two cases from the same period cannot provide members with specific guidance in the future. And whether best effort clauses like Article 15 of the Anti-Dumping Agreement and Article 12.2 of the TBT Agreement can be read as imposing a legal obligation on developed members to adopt specific measures that favor developing members is open to interpretation in the future. At the same time, opposite approaches impair the credibility of WTO adjudicators, and that also discourages the participation of developing members in the DSM. It should be noted that the interpretation in this case is contrary to those in most disputes concerning best effort clauses, and the practice shows that WTO adjudicators are reluctant to clarify the extent of compliance.

The interpretation by WTO adjudicators not only impacts the effectiveness of SDT provisions in practice, it can also affect developing members' burden of proof when invoking SDT provisions. This point can be illustrated by the EC—Approval and Marketing of Biotech Products case. The SDT provision concerned in this dispute is Article 10.1 of the Agreement on the Application of

[485] Panel report, EC—Asbestos, WT/DS135/R, adopted on 5 April 2001, para. 4.23.
[486] Appellate Body Report, Japan—Alcoholic Beverages II, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 04 October 1996.

Sanitary and Phytosanitary Measures (hereinafter SPS Agreement). It reads "[i]n the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members"[487] The Panel in this case stated that

> the obligation laid down in Article 10.1 is for the importing Member to "take account" of developing country Members' needs. The dictionary defines the expression "take account of" as "consider along with other factors before reaching a decision". Consistent with this, Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead, or may lead, to a decrease, or a slower increase, in developing country exports.[488]

It refused to provide explicit guidance or clarify the standards for implementation of these SDT provisions. Rather, the Panel left the wording of this provision ambiguous and ineffective in practice. Furthermore, it considered that Argentina failed to prove that the EC had not considered the special needs of developing members in applying its approval legislation. The submission of Argentina suggested that between June 1999 and August 2003, the EC had not afforded Argentina any preferential treatments, and there was no reference in the EC approval legislation to the special needs of Argentina as a developing member. Besides that, Argentina also argued that there was no indication that can prove the EC's consideration of developing members' special needs during the entire period of applying the general *de facto* moratorium on approvals. The Panel surprisingly considered all these arguments as insufficient. It asserted that the obligations under Article 10 did not request developed members to achieve a specific result in its legislation, nor did they require developed members to document how it had considered the special needs of developing members in applying its approval legislation.[489] It determined that

> it is conceivable that the European Communities "took account" of Argentina's needs when adopting and applying its general de facto moratorium on approvals, but ultimately determined that applications concerning products of export interest to Argentina warranted no special and differential treatment.[490]

Argentina in its submissions proved that there was no document or indication that could show EC's consideration of the special needs of developing members. If this is not enough to establish a *prima facie* case of Article 10.1, and as stated by the Panel, the consideration had not to be documented, then what kind of evidence should developing members present to protect their trade right under this article? The Panel in this dispute did not give an answer. This dilemma is ultimately caused by the absence of clear criteria in this provision. Article 10.1 only requires developed members to take into account the situation of developing members, while it does not provide the forms of consideration, or when the consideration can be regarded as satisfying the

[487] SPS Agreement, Article 10.1.

[488] Panel report, EC—Approval and Marketing of Biotech Products, WT/DS291/R; WT/DS292/R; WT/DS293/R, adopted on 21 November 2006, para. 7.1620.

[489] Panel report, EC—Approval and Marketing of Biotech Products, WT/DS291/R; WT/DS292/R; WT/DS293/R, adopted on 21 November 2006, para. 7.1624.

[490] Panel report, EC—Approval and Marketing of Biotech Products, WT/DS291/R; WT/DS292/R; WT/DS293/R, adopted on 21 November 2006, para. 7.1621.

requirements under this article. WTO adjudicators simultaneously refrain from making it more enforceable for developing members. It, instead, adopted an interpretation that was unfavorable to developing members. If according to the opinion of the Panel, "take account" should be understand as a mental activity as it does not to be recorded in any written form, developing members will never be able to ascertain what considerations were passing through the minds of developed members' legislators, nor can they document every oral deliberation in the legislative process. The interpretation adopted by the Panel in this dispute obviously did not consider the obstacles that developing members face in collecting relevant evidence, and it increased the difficulties for them to protect their rights under this article. Thus, such understanding impaired developing members' confidence in invoking this SDT provision in the DSM. And it further affected their enthusiasm for participating in the DSM.

Furthermore, according to Article 31 of the Vienna Convention, the interpretation of an article should be consistent with its object and purpose.[491] Although from the textual perspective, "take account" means "consider along with other factors before reaching a decision" and does not mention whether to document such consideration in written form. It should be noticed that Article 10.1 of the TBT Agreement uses the word "shall", it should be understood as imposing a mandatory obligation on developed members. The Panel in this case release developed members from documenting its efforts in considering the special needs of developing members, which means only when there is evidence suggests that developed members explicitly refuse to take account the needs of developing members, can developing members' right under this provision be protected. Otherwise, developing members can hardly submit sufficient evidence requested by adjudicators to establish a *prima facie* violation. Such understanding makes it easy for developed members to escape their obligations under this provision and makes it hard for developing members to protect their rights. Thus, the interpretation does not comply with the purpose of this article, which is to impose a mandatory obligation on developed members and guarantee the special needs of developing members to be considered.

Besides that, the interpretation of Article 10.1 of the TBT Agreement has the similar defect as that in EC—Bed Linen. In other words, the Panel in this case refrained from making ambiguous SDT provisions more enforceability. It gave no clear guidance to developing members as to how to invoke this provision appropriately and what specific measures they can expect from developed members. Instead, the Panel only exempted certain obligation of developed members, but did not clearly confirm any concrete benefit for developing members.

And last, developing members face difficulties in collecting evidence in disputes concerning SDT provisions with ambiguous wording. The provision itself does not provide any guidance as to the specific form or the extent of consideration. It grants developed members large discretion in implementing this provision, while causes obstacles for developing members as complainants to find the violation. Variety of forms and ambiguity of the degree of fulfillment make the evidence collection an overwhelming work. When considering the limited resources and ability of developing members, establishing a *prima facie* violation becomes even harder. The Panel in this

---

[491] Vienna Convention, Article 31.

dispute did not clarify the burden of proof that would be used in future disputes beyond finding the evidence submitted by Argentina as insufficient.

As to whether the consideration needs to be documented, the Appellate Body in China—GOES case made an opposite decision to that of EC—Approval and Marketing of Biotech Products. Although the "consideration" obligation in this dispute is not from a SDT provision, it is helpful in clarifying the meaning of "consideration" in WTO agreements concerning the same wording "consider". China asserted that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement required the investigating authority to

> consider whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree.[492]

The Appellate Body stated that although "consider" did not request investigating authority to make a definitive determination, such an obligation should "be based on positive evidence and involve an objective examination".[493] Thus, "consideration" must be reflected in relevant documentation, so that interested parties and WTO adjudicators can verify whether this obligation had been implemented.[494] The Appellate Body made a very important point in this case, documented evidence is essential for members and WTO adjudicators to verify the performance of obligations.

The debate over whether "consideration needs to be documented" was raised again in the US—Animals case. After interpreting "consider" in Anti-Dumping and the SCM Agreement, the question came back to the understanding of "consider" in Article 10.1 of the SPS Agreement. Argentina requested the Panel to adopt the interpretation adopted by the Appellate Body in China—GOES case, which required "consideration" be documented, and it claimed that if the Panel insisted on the approach in EC—Approval and Marketing of Biotech Products, the evidentiary basis could not be met by most members.[495] And it asked the Panel to conclude that the absence of documented evidence from the US meant that the US did not implement its obligation under Article 10.1. While the US argued that the approach in EC—Approval and Marketing of Biotech Products should be applied in this case, because it "was made in the specific context of Article 10.1 of the SPS Agreement" and constituted the directly relevant basis.[496] The panel rejected the request of Argentina and adopted the opinion of the US. It emphasized that provisions should be interpreted in the context of the whole agreement. And in this dispute, it found a significant difference between China—GOES case and EC—Approval and Marketing of Biotech Products case. The Anti-Dumping Agreement and SCM Agreement contained "very specific obligations regarding publication and documentation of decisions", while the SPS Agreement's provisions concerning transparency and communication obligations were not as

[492] Appellate Body report, China—GOES, WT/DS414/AB/R, adopted on 18 October 2012, para. 129.
[493] Appellate Body report, China—GOES, WT/DS414/AB/R, adopted on 18 October 2012, para. 130.
[494] Appellate Body report, China—GOES, WT/DS414/AB/R, adopted on 18 October 2012, para. 131.
[495] Panel report, US—Animals, WT/WT/DS447/R, adopted on 31 August 2015, para. 7.696.
[496] Panel report, US—Animals, WT/WT/DS447/R, adopted on 31 August 2015, para. 7.695.

detailed as those in Anti-Dumping Agreement and SCM Agreement. With regard to different requirements in transparency in different agreements, the word “consider” should be understood differently. Thus, it considered that the approach adopted in EC—Approval and Marketing of Biotech Products case was more relevant.[497]

However, the reasoning given by the Panel in this dispute is not convincing. If, as stated by the Panel in US—Animals case, different requirements for transparency in different agreements influenced the standard of proof, then the difficulties of collecting evidence should also be taken into consideration. The Panel explained in this case that Anti-Dumping and SCM Agreements placed a higher requirement concerning transparency, while obligations concerning transparency in SPS Agreement were not as detailed as those above, thus the requirements in SPS Agreement are lower. Therefore, it is possible that certain factors have been considered while the consideration has not been documented by the authority, or such documents were kept in an undisclosed manner. And the criteria for proving a violation are thus changed. Panel's analysis so far makes sense. However, the Panel did not analyze what exactly was the impact of lower transparency requirements on the burden of proof. Since the US in implementing its obligation under Article 10.1 does not have to disclosure or document its consideration, it is possible that its consideration has been recorded in an undisclosed manner, or it has not been recorded at all. This way of implementing consideration obligation also increases the difficulties for Argentina to find sufficient evidence. Because Argentina has no way to get access to undisclosed material of the US authority. And it is also hard to collect undocumented evidence. As Argentina argued, the Panel risked “‘setting an evidentiary basis that cannot be met by most complaining Members”.[498] However, the Panel placed a heavy and unreasonable burden of proof on the Argentine without responding to the difficulties Argentina face in collecting evidence, nor did it reallocate the burden of proof between two parties. This allocation of burden of proof is contrary to the transparency requirement in the SPS Agreement. One cannot allow consideration to be kept in an undisclosed manner on one hand, while assumes that such confidential materials can be found by complainant on the other. And such burden of proof would allow developed members to easily evade their obligation under Article 10.1 by stating that it has kept its consideration confidential.

Although the Appellate Body in EC—Sardines case confirmed that

> There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.[499]

The comparison of the degree of difficulty in EC—Sardines is made between finding a text that established an explicit violation and finding a violation that results from the administrative practice of the domestic authorities. There is a quantitative difference in the difficulties. Both evidence types of evidence are available, they are just different in the degree of difficulty to obtain. However, this conclusion cannot be transplanted into US—Animals case, because the

---

[497] Panel report, US—Animals, WT/WT/DS447/R, adopted on 31 August 2015, para. 7.697-7.698.
[498] Panel report, US—Animals, WT/WT/DS447/R, adopted on 31 August 2015, para. 6.45.
[499] Appellate Body Report, EC—Sardines, WT/DS231/AB/R, adopted on 26 September 2002, para. 281.

difficulties in finding disclosed evidence and finding confidential materials are qualitative. Confidential materials are not available. Although the difficulties in collecting information cannot decide the allocation of the burden of proof, the availability of evidence can. Panels in EC—Approval and Marketing of Biotech Products case and US—Animals case both made interpretation of SDT provisions that were unfavorable to developing members. The unreasonable interpretation and unreasonable burden of proof caused by such interpretation impaired the effectiveness of these provisions and discouraged developing members' enthusiasm to invoke SDT provisions in the DSM.

The interpretation of WTO adjudicators concerning best efforts clauses also led to developing members' reluctance to rely on these provisions in some cases. In EC—Poultry case, Brazil in its claim invoked rules that contain explicit wording and clear criteria for implementation, while ignored SDT contained in the same article. In this case, Brazil claimed that its export share of poultry products in the EC market had decreased because of the introduction of a new tariff rate quota (hereinafter TRQ) by the EC in 1994. Thus, Brazil asserted that the EC's TRQ caused distortion, and has violated Article 1.2 and 3.2 of the Agreement on Import Licensing Procedures (hereinafter LA).[500] Article 1.2 of the LA reads

> Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, *taking into account the economic development purposes and financial and trade needs of developing country Members*. (Emphasis added)[501]

And Article 3.2 of the LA provides

> Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.[502]

Although Article 1.2 also contains SDT that requests the special needs of developing members to be taken account, Brazil gave up its development claim on this point.

It is worth noting that Brazil also argued that frequent changes to the licensing rules and procedures caused difficulties for government and exporters to become familiar with these new rules, thus the TRQ also violated article 1.4, 3.3, 3.5 (b), 3.5 (c) and 3.5 (d) of the LA.[503] Brazil, again, did not invoke any SDT provision on the basis of its status as a developing country, although developing members do face more difficulties in adapting frequently changing rules. Articles invoked by Brazil in this case, whether in the panel or the appeal proceeding, are all clearly stipulated and are applicable to all members. Benefits that SDT provisions with ambiguous

---

500 Panel report, EC—Poultry, WT/DS69/R, adopted on 23 July 1998, para. 247-248.
501 LA, Article 1.2.
502 LA, Article 3.2.
503 Panel report, EC—Poultry, WT/DS69/R, adopted on 23 July 1998, para. 245-246.

wording can bring to developing members may be so limited that, as in this case, developing members choose not to invoke them, regarding the uncertain interpretive outcome as an inadequate basis for litigation strategy.

2.2. Difficulties Concerning Procedural SDT provisions

It is widely accepted that it is hard for developing members to have equal positions as their developed counterparts in the DSM due to their limited litigation ability.[504] Thus, WTO also established SDT provisions to address their needs in this area. Unlike substantive SDT provisions that focus on developing members' difficulties in international trade and in implementing treaty obligations, procedural SDT provisions recognized developing members' special situation in using the DSM as the main platform to defend their trade rights under covered agreements. As detailed in §1.1, the 11 SDT provisions in the DSU span consultation, panel, and implementation stages. However, developing members still face many obstacles in using these procedural SDT provisions, and whether the structure of these provisions themselves and their application in practice can effectively serve the role of providing developing members preferential treatments in their utilization of DSM is under debate. This part illustrates these difficulties developing members face by analyzing specific disputes.

2.2.1. The ambiguity and deficiency in some SDT provisions

The lack of effectiveness of some SDT provisions can be resulted from their general and ambiguous language. Article 4.10 of the DSU reads that "members should give special attention to the particular problems and interests of developing country Members" during consultations. Its use of 'should' rather than 'shall', analyzed in §1.1, raises immediate questions of legal enforceability. However, there are cases in which the WTO adjudicators considered that the term "should" sometimes imposed legal obligations. Thus, the legal effect of Article 4.10 is not clear. In addition, the language of this article is so general that it hardly provides any effective guidance to members. It is not clear how such attention should be paid, or what constitutes particular problems and interests of developing members. It is difficult for WTO adjudicators to determine the level of compliance based on the literal meaning of this provision alone. Even in the WTO Analytical Index, there is no relevant disputes or explanation. It is reasonable to assume that the lack of effectiveness constitutes the reason for the reluctance of developing members to invoke it in the DSM. This article has only been mentioned once by the representative of Chile during the Minutes of Meeting in 1995. Chile argued that its request for a consultation with the EC had been disregarded by the latter, thus the EC discriminated against and impaired "Chile's interests in deviation from the provisions of Article 4.10 of the DSU".[505] While this argument was not responded. After that, because this provision has never been invoked by any member in the DSM, WTO adjudicators have never got another chance to clarify it or made it more effective in any disputes. This provision seems to have been forgotten by members and WTO organs since 1995.

---

[504] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, p. 176 (2017).

[505] Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/7, 27 October 1995, p. 2.

A provision that is ignored by members also loses its value of existence, and the special consideration of developing members contained cannot play the role in helping developing members.

The lack of clear guidance in some SDT provisions not only affects the invocation of developing members, it also has an impact on the interpretation and application of these articles. Controversy in this regard can be found in disputes concerning Article 12.11, which is another example of ambiguity. This article requires that

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

This provision contains two obligations, the obligation to document panels' consideration of certain provisions, and the obligation to consider certain provisions. The wording of the accountability obligation is straightforward and clear, while the main obligation is implied in this provision, thus, is ambiguous and general. It constitutes a mandate for panels to consider certain SDT provisions even though they are not part of the terms of reference of the panel. However, it does not provide any detailed guidance for panels to implement this obligation. And it triggered different understandings of the expression "take into account" by WTO adjudicators. In India—Quantitative Restrictions case, the Panel stated it had fulfilled its obligation under Article 12.11 to consider relevant SDT provisions. Its consideration was documented in its analysis of Article XVIII:B of the GATT and its suggestions for implementation.[506] More specifically, the Panel examined whether the measures taken by India could be justified by Article XVIII:9, Note Ad Article XVIII:11 and the proviso to Article XVIII:11.[507] It also expressed its consideration of the special needs of developing members in the implementing stage. It combined the development objective in the Preamble of Marrakesh Agreement with the flexibility of timeframe in Article 21.3 (c) and decided to grant India a longer reasonable period in this case.[508] The Panel in the US—Offset Act (Byrd Amendment) case also confirmed its obligation to consider relevant SDT provision in Agreements which have been raised by developing members in disputes. Although Article 15 of the Anti-Dumping Agreement was not referred by complainants in their requests to establish the Panel, and thus did not fall within terms of reference of the panel proceeding. Since India and Indonesia both raised this provision during the panel proceeding, and the Panel had the obligation to consider SDT provisions in Anti-Dumping Agreements according to Article 12.11, developing members' special needs under Article 15 were seriously considered in this dispute.[509] While in Mexico—Telecoms case, the Panel's considerations took a different form. The Panel in its rulings stated that

> pursuant to Article 12.11 of the DSU, it has taken into account in its findings GATS provisions on differential and more-favourable treatment for developing country Members. In

[506] Panel report, India—Quantitative Restrictions, WT/DS90/R, adopted on 6 April 1999, para. 5.157.
[507] Panel report, India—Quantitative Restrictions, WT/DS90/R, adopted on 6 April 1999, para. 5.184, 5.215, 5.222.
[508] Panel report, India—Quantitative Restrictions, WT/DS90/R, adopted on 6 April 1999, para. 7.2-7.5.
[509] Panel report, US—Offset Act (Byrd Amendment), WT/DS217/R; WT/DS234/R, adopted on 16 September 2002, para. 7.88.

> particular, the Panel has examined Mexico's arguments that commitments of such Members have to be interpreted in the light of Article IV of the GATS, paragraph 5 of the preamble to the GATS, and paragraph 5(g) of the Annex on Telecommunications.[510]

The Panel in this paragraph just briefly mentioned that it has taken certain articles into consideration according to Article 12.11. However, it did not further elaborate its consideration in detail in the subsequent sections of its ruling. Whether and how these SDT provisions affected the proceedings and the outcome of this dispute were not indicated. Although it is hard to determine whether the approach of consideration adopted by the Panel in this case is consistent with the requirements of this article by applying literal interpretation. It should be noted that an article should also be interpreted in the light of its object and purpose.[511] The consideration and indication requirements in Article 12.11 are "meant to make transparent how effective these rules have been in a given case and to show how they have actually been applied".[512] Thus, the transparency itself is not the purpose of this article, transparency should be regarded as a tool to guarantee that the special needs of developing members in the dispute settlement system to be seriously considered. Thus, the effectiveness of these SDT provisions and how they have been applied by WTO adjudicators should be clearly presented in panels' reports. The consideration in Mexico—Telecoms case is not in conformity with such requirements. The direct cause of such inappropriate understanding of Article 12.11 is the interpretation adopted by the Panel in this dispute. However, the fundamental reason is the lack of specification of this article.

In comparison, the requirements stipulated in Article 21.7 and 21.8 concerning the implementation stage are more specific. Although they both request WTO adjudicators to give special attention to interests of developing members, Article 21.7 and 21.8 give detailed guidance as to the form of consideration and the way to protect developing members' interests. These two provisions read that

> 7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.
>
> 8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.[513]

More elaborated obligations can effectively reduce the possibility of misunderstanding and misuse of some provisions. According to Article 21.7, the DSB is required to explore further actions that are appropriate regarding the special needs of developing members. And Article 21.8 explains the scope of consideration as including "trade coverage of measures complained of" and "their impact on the economy of developing country Members concerned". Thus, in order to comply with these two provisions, WTO adjudicators cannot in their rulings or awards only briefly

---

[510] Panel report, Mexico—Telecoms, WT/DS204/R, adopted on 2 April 2004, para. 8.3.

[511] Vienna Convention, Article 31.

[512] Developing countries in WTO dispute settlement, World Trade Organization, available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm, last visited: 17 April 2022.

[513] DSU, Article 21.7 and 21.8.

mention that some SDT provisions have been considered without detailed reasoning or appropriate actions, as that in Mexico—Telecoms case. However, one must admit that the language of these two provisions is still not specific enough. For example, it is not clear what constitutes "further actions". This issue has been raised in one dispute. In US—Oil Country Tubular Goods Sunset Reviews case, Argentina as the complainant requested the panel to recall its obligations under Article 19.1 and 21.7 to take further actions, and in this dispute, Argentina argued that the recommendation that the United States terminate the anti-dumping duty order would be appropriate. This request was rejected by the Panel on the ground that there was no particular reason in the circumstances of the present dispute to make such suggestions.[514] And Panel's decision was upheld by the AB in its ruling. The AB further found that making a suggestion for implementation is not a form of "further actions", because deciding on the manner of implementation is within the discretion of the implementing member.[515] While it did not clarify the scope of "further actions" in its ruling. Thus, what action should DSB explore when considering the interests of developing members is still unclear.

Some procedural SDT provisions cause difficulties in their application because of the absence of some essential elements. Such deficit affects the effectiveness of these articles. Article 21.2 of the DSU requires that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement"[516] This provision have been criticized in many cases, the Arbitrator in Indonesia—Autos case stated that "the language of this provision is rather general and does not provide a great deal of guidance".[517] Besides that the word "should" impairs the effectiveness of this article as demonstrated in EC—Bed Linen case,[518] the barriers developing members face in using this provision are also caused by other defects of this provision. It is not clear which developing members' interests should be taken into account. And this issue has been discussed in several disputes. At first, it was assumed that the interests of developing members as respondents should be considered. In Chile—Alcoholic Beverages, Chile, as the respondent in this dispute, considered that its status as a developing member should be considered when deciding the reasonable period of time for implementation.[519] And Chile took the same approach when it was the respondent in Chile—Price Band System case.[520] The same approach can also be found in Indonesia—Autos case[521] and Argentina—Hides and Leather case.[522] The controversy over the

[514] Panel report, US—Oil Country Tubular Goods Sunset Reviews (Art. 21.5), WT/DS268/RW, adopted on 11 May 2007, para. 9.4.
[515] Appellate Body report, US—Oil Country Tubular Goods Sunset Reviews (Art. 21.5), WT/DS268/AB/RW, adopted on 11 May 2007, para. 184.
[516] DSU, Article 21.2.
[517] Arbitration award, Indonesia—Autos, WT/DS54/15; WT/DS55/14; WT/DS59/13; WT/DS64/12, adopted on 7 December 1998, para. 24.
[518] Panel Report, EC—Bed Linen, WT/DS141/R, adopted 12 March 2001, para. 6.267.
[519] Arbitration award, Chile—Alcoholic Beverages, WT/DS87/15; WT/DS110/14, adopted on 23 May 2000, para. 20-22, 44-45.
[520] Arbitration award, Chile—Price Band System, WT/DS207/13, adopted on 17 March 2003, para. 16.
[521] Arbitration award, Indonesia—Autos, WT/DS54/15; WT/DS55/14; WT/DS59/13; WT/DS64/12, adopted on 7 December 1998, para. 24.
[522] Arbitrator award, Argentina—Hides and Leather, WT/DS155/10, adopted on 31 August 2001, para. 51.

scope of "developing country Members" in Article 21.2 first emerged in the US—Offset Act (Byrd Amendment) case. Six of the nine complaining parties in this dispute were developing members. When deciding the reasonable period of time for implementation, they claimed that their interests as developing members would be severely impaired if the trade restrictive measures imposed by the US would continue for a long period of time. Thus, they requested that the reasonable period of time for the US to bring itself into compliance with the rulings should be shortened to six months.[523] The Arbitrator then recalled his obligation under Article 21.2 to consider matters affecting the interests of developing members in the implementation stage and stated that "Article 21.2 does not distinguish between situations where the developing country Member concerned is an implementing or a complaining party."[524] Thus, the Arbitrator in this dispute confirmed that developing members as complaining parties were also entitled to the right under Article 21.2. However, the controversy over the scope of developing members in this article did not end here. The parties of EC—Tariff Preferences case raised the question of whether the interests of developing members that were not parties to the dispute should be taken into account during implementation stage. India as the complaining party suggested that in order to comply with Article 21.2, the Arbitrator should take the interests of India into account and request the EC to take less time to implement recommendations and rulings. It argued that the "developing country Members" in Article 21.2 referred only to parties to disputes. While the EC suggested the opposite, it held the opinion that in order to comply with this article, it need more time for implementation, because the current beneficiaries of the Drug Arrangements are also developing members, and their interests should be considered in according to this article. It regarded the scope of developing members in Article 21.2 as not limiting to parties to any particular dispute.[525] The debate on this issue was inconclusive. The Arbitrator thought it is unnecessary to make a decision on this issue because both parties failed to provide sufficient evidence or satisfactory explanation about how the interests of these developing members were affected by the implementation of the EC.[526] The refusal to interpret this article left the scope of developing members unclear. Such ambiguous language in this provision makes its invocation and application difficult.

Besides the scope of developing members in Article 21.2, it also does not indicate the subject of consideration. Whether the developed members implementing the recommendations and rulings, or WTO adjudicators should pay attention to these matters is not clear. This deficiency is uncommon in WTO agreements. Although the obligation has always been imposed on arbitrators in arbitration under Article 21.3(c) of the DSU by default, the possibility that developed members implementing the rulings also undertake this obligation cannot be ruled out. Thus, it is uncertain whether developing members can invoke this provision to request the implementing party to consider their interests.

---

[523] Arbitration award, US—Offset Act (Byrd Amendment), WT/DS217/14, WT/DS234/22, adopted on 13 June 2003, para. 78.

[524] Arbitration award, US—Offset Act (Byrd Amendment), WT/DS217/14, WT/DS234/22, adopted on 13 June 2003, para. 81.

[525] Arbitration award, EC—Tariff Preferences, WT/DS246/14, adopted on 20 September 2004, para. 58.

[526] Arbitration award, EC—Tariff Preferences, WT/DS246/14, adopted on 20 September 2004, para. 59.

2.2.2. Lack of consideration of developing members' needs

The purpose of procedural SDT provisions is to address difficulties developing members face in dispute settlement proceedings and encourage them to actively participate in the DSM by offering them preferential treatments. Although some SDT provisions are specific and clear from a literal perspective, and leave little room for interpretation in practice, they fail to respond to the real needs of developing members, thus are limited in effectiveness.

The most typical example is Article 27.2 of the DSU concerning responsibilities of the Secretariat. This article provides that

> While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.[527]

The Secretariat recognizes the obstacles developing members face in the dispute settlement system by providing them additional legal advice and assistance. This arrangement helps developing members better participate in the DSM from two perspectives. Developing members lack sufficient legal experts who can represent their interests in the DSM. In the meantime, they also lack sufficient financial resources to hire private attorneys from law firms in developed countries. Thus, the assistance provided by the Secretariat can relieve both the scarce legal and financial resources of developing members in the DSM. However, the effectiveness of this SDT provision is impaired by the impartiality requirement for the Secretariat. The Secretariat is required to provide special and differential treatments to developing members. And this mandate is conflict with impartiality. According to the last sentence of this article, legal experts are not allowed "to act as counsel or assist in drafting submissions as this would be in violation of the neutrality obligation of the Secretariat".[528] The impartial requirement is also criticized by developing and least-developed members. Jamaica and the group of least-developed countries complained and reported that

> While in most instances the "expert" was sincere and sought to provide useful advice, he did not provide the wide-ranging, in-depth assistance that the countries felt they needed. In short, he was not "their lawyer." Rather, he merely provided technical assistance on a narrow range of issues, frequently doing no more than critiquing possible arguments or defenses and providing basic advice about the course of WTO dispute settlement proceedings.[529]

It can lead to the assumption that Secretariat's help to developing members is qualitative inadequate and less effective. And considering the increasing number of developing members, the quantity of experts the Secretariat can provide is difficult to meet the needs of developing members. Also, the number of qualified legal experts is very limited compared to the large

---

[527] DSU, Article 27.2.
[528] Van der Borght, 724.
[529] Hansel T. Pham, "Developing Countries and the WTO: The Need for More Mediation in the DSU," *Harvard Negotiation Law Review* 9 (2004): 356.

number of developing countries, which constitute the majority of all membership. The staffs in the Secretariat are assigned to different divisions, and they handle different jobs. Even in the legal affairs division, which is responsible for providing legal experts to developing countries, the staffs here also have other tasks to complete. There are only 37 staffs (including senior management and directors) in the Legal Affairs Division of the WTO Secretariat.[530] Besides providing assistance to developing members in the DSM, they are also responsible for assisting members in the composition of panels, providing support and legal advice to WTO adjudicators, providing legal advice to Director-General and Secretariat, providing trainings on WTO issues, and attending "meetings of other international organizations concerning international legal issues and attend international conferences on dispute settlement and other legal matters of relevance to the WTO."[531]

Another example is the content of Article 12.10 of the DSU. In this provision, only part of developing members' interests can be taken into consideration, while those of others are ignored. The first part of Article 12.10 reads

> In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. [532]

Special treatment is granted to developing members whose measure has been questioned in the consultation stage. It is understandable that developing members as respondents in disputes may need more time to prepare its arguments due to their limited legal and financial resources as that in the panel proceedings stipulated in the second part of Article 12.10. However, this provision does not realize the importance of sufficient time in consultation for developing members who request for a consultation.

Consultation as the pre-procedure of litigation offers members chances to solve their disputes before resorting to WTO adjudicators, thus can help members avoid legal and procedural complexity in panel and AB proceedings. And that is especially important for developing members. Because long and resource-consuming litigation stage put a heavy burden on developing members, whether they are complaining or responding parties.[533] Developing members can use their resources in more important areas if they can settle their disputes at an earlier stage. For developing members that request for a consultation with others, settling disputes in consultation stage has other benefits besides saving resources. Article 3.3 of the DSU

---

[530]"WTO | Secretariat and Budget Overview," accessed September 30, 2022, https://www.wto.org/english/thewto_e/secre_e/intro_e.htm.

[531] "WTO | Secretariat and Budget - Divisions," accessed September 30, 2022, https://www.wto.org/english/thewto_e/secre_e/div_e.htm.

[532] DSU, Article 12.10.

[533] Chad P. Bown & Bernard Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 Journal of International Economic Law 867–868 (2005) ; Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed*, 182-185 (2008), https://papers.ssrn.com/abstract=1320222 (last visited Nov 1, 2022).

recognized prompt settlement of disputes as "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[534] Ujal Singh Bhatia, a former AB member, emphasized the importance of prompt settlement by stating that "special emphasis on promptitude was based on the common understanding that, in the world of commerce, time really is money"[535]. And the prompt and early settlement is of particular importance for complaining developing members. Early settlement means that respondents will bring their measure into conformity with WTO agreements in a shorter time. Therefore, the economy of developing members will suffer less. Considering the fragile economy and special situation of developing members, such early settlement is of great importance to complaining developing members. It is also argued that consultation and negotiation are still the main approach to settle disputes in the WTO. This is reflected in the fact that most dispute settle early, and most of the fullest concessions are achieved in early settlement. However, from a statistical perspective, developing members are missing out on early settlement in the WTO, thus they are less likely to get benefits resulted from an early settlement.[536] This article fails to address the need for complaining developing members to increase their chances of getting early settlements.

2.2.3. The outdated content of some SDT provisions

Some SDT provisions might be precise and effective at the time they were created, however, their effectiveness gradually decayed due to external changes. The content of these provisions has not been improved, thus they cannot meet the current demands of developing members in the DSM. One example is SDT provisions in the 1966 Decision. It offers some SDT provisions that are different from those in the DSU, but some content is outdated. The 1966 Decision is regarded as the first step to provide special treatments to developing members in the dispute settlement proceedings in the multilateral trading system.[537] Before the establishment of WTO in 1995, its importance reflected in its recognition of the unequal positions of developing and developed members in the dispute settlement system and the resulting damages that could cause to the interests of developing members. The more flexible timeframe and alternative procedures were all significant developments in the field of SDT in the multilateral trading system. Although SDT provisions in 1966 Decision is still in effect, its effectiveness has declined because of the introduction of DSU as a comprehensive document governing dispute settlement in the WTO and some changes in disputes involving developing members.

The 1966 Decision provides more favorable treatments for developing members on some issues. Article 3.12 of the DSU reads that

---

[534] DSU, Article 3.3.

[535] Ujal Singh Bhatia, *The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System*, Release of the Appellate Body Annual Report 2016, available at: https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf, 2-3 (2017)

[536] Marc L. Busch and Eric Reinhardt, *Developing Countries and GATT/WTO Dispute Settlement*, 37 Journal of World Trade, p. 732-734 (2007).

[537] Robert E Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 (2) Cornell International Law Journal 145,173 (Summer 1980).

> if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

The 1966 Decision is provided now as *lex specialis* that takes precedence over some procedures in the DSU. It contains some differences with the DSU. Article 5 of the DSU requires that the start of good offices, conciliation and mediation is subject to the agreement of parties. [538] It means that when a dispute is between a developing and a developed member, the disagreement from a developed member can block the good office. Then the developing member loses a chance to settle the dispute before litigation. While the paragraph 1 of 1966 Decision provides that

> If consultations between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less-developed contracting party complaining of the measures may refer the matter which is the subject of consultations to the Director-General so that, acting in an ex officio capacity, he may use his good offices with a view to facilitating a solution.

It offers developing members the right to refer the matter directly to the Director-General, and the agreement of other parties is not required. Thus, the start of good office will not be influenced by opinions of others, and developing members are more likely to resolve disputes before the establishment of a panel. Considering the benefit of getting an early settlement, such an arrangement favors developing members. Furthermore, the 1966 Decision contains more elaborated rules concerning good office. It requests contracting parties concerned to furnish all relevant information, and the Director-General to consult with parties concerned and other members or organizations as he/she considers appropriate to promote a mutually acceptable solution.[539]

1966 Decision also differs from the DSU regarding the establishment of panels. According to Article 6 of the DSU,

> a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.

The 1966 Decision makes it possible to establish a panel earlier. If the dispute has not been settled after two months from the date of commencement of the consultation, the Director-General can bring the matter to CONTRACTING PARTIES or the Council at the request of members

[538] DSU, Article 5.

[539] 1966 Decision, para. 2 and 3.

concerned. And the CONTRACTING PARTIES or the Council shall forthwith appoint a panel of experts.[540] Thus, a DSB meeting is unnecessary for the establishment of a panel.

Concerning the panel proceeding, the timeframe of submitting findings and recommendations is shorter than that in the DSU. Paragraph 7 of the 1966 Decision request panels to "within a period of sixty days from the date the matter was referred to it, submit its findings and recommendations to the CONTRACTING PARTIES or to the Council".[541] While Article 12.8 of the DSU provides

> In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.[542]

Shortening the panel proceeding can reduce the damage resulted from the WTO in-consistent measures on the economy of developing members, thus relieve their economic burden during litigation stage, and encourage developing members to participate the DSM.

However, its content does not provide significant differences from those in the DSU, and sometimes the DSU offers more favorable treatments for developing members. Article 4 of the DSU governs consultation proceedings. If consultation failed to provide a mutually satisfactory solution to parties, Article 5 of the DSU also offers good office, conciliation and mediation as alternative mechanisms. Article 6 stipulates that if all approaches above failed to settle the dispute between members, they can request the establishment of a panel, and the panel stage is covered by Article 12 of the DSU. The "alternative proceedings" in the 1966 Decision provides that when a dispute cannot be settled in consultation stage, developing members can refer the matter to the Director-General for a good office. And a panel can be established to settle their dispute when no mutual satisfactory solution has been reached in the good office proceeding. From a process perspective, the 1966 Decision does not provide any unique mechanism for members to settle their dispute that is different from those in the DSU. Both the good office and the panel stage are contained by the DSU. Furthermore, the DSU also provides conciliation and mediation proceedings for members, and these are not mentioned in the 1966 Decision. The DSU contains even more approaches for dispute settlement than the 1966 Decision. Thus, it is not clear what constitutes the alternative to the DSU from this perspective.

In addition, the DSU contains more flexible rules regarding the composition of panels. Article 8 of the DSU provides that the composition of a panel shall be decided by parties concerned. If no agreement has been reached within 20 days after the establishment of a panel, the Director-General shall, at the request of either party, determine the panelists.[543] And if the dispute is

[540] 1966 Decision, para. 4 and 5.
[541] 1966 Decision, para. 7.
[542] DSU, Article 12.8.
[543] DSU, Article 8.7.

between developing and developed members, at least one panelist should be from developing countries when the developing party so requested.[544] While according to the 1966 Decision, members of the panel "shall be appointed in consultation with, and with the approval of, the Contracting Parties concerned"[545]. It does not state what to do when no agreement was reached between parties to the dispute, and it does not provide special treatment to developing members concerning the composition of a panel when the dispute is between developing and developed members. Therefore, the DSU contains more special treatments for developing members in this area.

Both the 1966 Decision and the DSU both require that special attention be paid to the particular situation of developing members. Although not referring directly to developing members, paragraph 6 of the 1966 Decision recognizes that "the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected Contracting Parties"[546] This provision only requests the panel to take due account, and the wording of this provision is ambiguous. There is no clear criterion concerning the extent of compliance. While requirements in Article 12.11 of the DSU are more detailed than those in paragraph 6 of the 1966 Decision. This article stipulates that the form of consideration is taking account of relevant SDT provisions that contained by covered agreements that have been raised by developing members, and such consideration should be explicitly indicated in the panel's report.[547] Thus, the DSU contains more detailed and effective requirements regarding considering the special needs of developing members than the 1966 Decision.

It cannot be denied that the introduction of this Decision in 1966 was a cornerstone in the development history of dispute settlement system and SDT provisions, however, its importance and attractiveness to developing members had reduced after the establishment of the WTO and the introduction of DSU. Although 1966 Decision have some differences with DSU provisions, it does not constitute a substantive alternative. On the one hand, many provisions in the 1966 Decision have been transformed to the content of the DSU. On the other hand, the DSU introduced some SDT provisions that are even more favorable to developing members than those in the 1966 Decision.

2.2.4. Judicial interpretation of some procedural SDT provisions

Whether substantive or procedural SDT provisions, both of their application is influenced by the interpretation of adjudicators of the multilateral trading system. The WTO adjudicators sometimes refrain from examining the development argument. In India—Import Restrictions on Almonds case, after six years of unsuccessful negotiation with India, the US as complainant

[544] DSU, Article 8.10.
[545] 1966 Decision, para. 5.
[546] 1966 Decision para. 6.
[547] DSU, Article 12.11.

requested the establishment of a panel under Article XXIII of the GATT on the ground that Indian import restrictions on Almonds from the US were inconsistent with Article XI of the GATT and they caused serious and substantial impact on US almonds exporters. The US stated it has satisfied all the prerequisites for invoking Article XXIII: 2 and the panel should be established to review the measures taken by India.[548] Article XXIII was the primary provision during the GATT period governing dispute settlement, it provides that when the relationship between the application of measures by one contracting party and nullified or impaired trade benefits of another contracting party is established, the Contracting Party should investigate matters concerned and make a recommendation or ruling as appropriate. When circumstances are serious enough, the Contracting Party can authorize retaliation.[549] However, India asserted that Article XVIII:B 12 (d) offered an alternative procedure concerning disputes between developed members and developing members. And this procedure should override the procedure under Article XXIII when available. Indian argument on this point also received supports from representatives of Yugoslavia and Egypt.[550] Thus, the applicable procedure for dispute settlement constituted one of their disagreements. The Council finally agreed to establish a panel, however, the dispute concerning applicable procedure was absent from the terms of reference of the Panel. The terms of reference read

> To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document L/6197 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.[551]

The argument of India concerning the application of Article XVIII was not even mentioned. As members paid more attention to development issues and the development of more SDT provisions, adjudicators of the multilateral trading system progressively changed their positions and procedural SDT provisions began to be considered in dispute settlement system. Although ignorance of development arguments concerning procedural issues gradually disappeared, the ineffectiveness of procedural SDT provisions has not been solved.

In some cases, WTO adjudicators choose to ignore their obligations to consider the special needs of developing members under certain provisions of the DSU. They, instead, shift the burden to developing members, and attribute its inaction to the failure of developing countries to invoke certain provisions. Such wrong understanding of SDT provisions can impair developing members' participation in the DSM. The different interpretation of Article 12.11, as mentioned above, can illustrate this point. And the panels' inappropriate interpretation in Mexico—Telecoms case also influenced the subsequent rulings. Thus, this inappropriate interpretation has been adopted to this day and that undermined developing members' interests.

After the Mexico—Telecoms case, the Panel in Turkey—Rice case again took into account developing members' special needs by citing its obligation under Article 12.11 in conjunction with

---

[548] Minutes of Meeting, C/M/215, 25 November 1987, p. 5.
[549] GATT, Article XXIII: 2.
[550] Minutes of Meeting, C/M/215, 25 November 1987, p. 5-7.
[551] Note by the Chairman, India—Import Restrictions on Almonds, c/154, adopted on 20 April 1988.

the requirement in Article 12.10.[552] It should be noted that the obligations of the Panel in these two articles are different. Article 12.10 of the DSU provides that "…in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation…"[553] It recognises the resource constraints that developing members face in dispute settlement proceedings and grants them additional time to ensure that their submissions are adequately prepared. While Article 12.11 requires panels to consider relevant SDT provisions in agreements which have been raised by the developing country. Such consideration is not limited to developing members' rights under the DSU, but includes preferential treatments in other agreements that have been invoked by developing members. Thus, in disputes where one or more of the parties is a developing member, obligations in these two articles should be both fulfilled by panels. However, by analyzing Article 12.11 and 12.10 together, the panel in Turkey—Rice case attempted to confuse these two obligations. The panel stated it has taken into account Turkey's status as a developing member when establishing the timetable for the process. However, the flexibility in timeframe could only be regarded as a fulfillment of obligation under Article 12.10. Panel's ruling of Turkey—Rice case seems to provide a template for how to consider this obligation in subsequent cases.

The panels in Philippines—Distilled Spirits case, Dominican Republic—Safeguard Measures case and Brazil—Taxation (Japan) case all took the same approach as the Panel in Turkey—Rice when considering their obligation in Article 12.11. They asserted they had taken into account the developing status of parties to disputes and their special needs when preparing the timetable for the process.[554] Reasonings in these cases did not even mention the relevance of SDT provisions to disputes. The obligation to grant developing members time flexibility is regulated in Article 12.10, and the obligation to make an objective assessment of the matter before the panel is provided in Article 11. They are different from the obligation under Article 12.11 of the DSU. Panels cannot fulfill its obligation under Article 12.11 by satisfying the requirements under other articles. And the current approach to interpret Article 12.11 makes this article null and void. The loss of special treatment provided in Article 12.11 of the DSU discourages developing members' participation in the DSM, and more importantly, the credibility of WTO adjudicators is impaired not only for developing members but also in the eyes of other WTO members.

The ambiguity of some SDT provisions gives WTO adjudicators great room for interpretation. It means that several different ways of understanding may all be consistent with the requirements under certain provisions. However, it does not mean that panels can freely interpret these provisions without limitation. In order to provide a reasonable expectation for members, the interpretation adopted by WTO adjudicators in different disputes should be coherent. And similar situations should be treated similarly. The lack of coherency of the interpretation also affects the effectiveness of some procedural SDT provisions in the DSU (e.g., 12.11 and 21.1). Besides article

---

[552] Panel report, Turkey—Rice, WT/DS334/R, adopted on 22 October 2007, para. 7.302-7.303.

[553] DSU, Article 12.10.

[554] Panel report, Philippines—Distilled Spirits, WT/DS396/R; WT/DS403/R, adopted on 20 January 2012, para. 7.189-7.195; Panel report, Dominican Republic—Safeguard Measures, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, adopted on 22 February 2012, para. 7.442-7.445; Panel report, Brazil—Taxation (Japan), WT/DS472/R, WT/DS497/R, adopted on 11 January 2019, para. 6.5.

12.11 of the DSU, WTO adjudicators' interpretation of Article 21.2 of the DSU can also illustrate this point. Article 21.1 provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."[555] The wording in this article is general, and that leaves WTO adjudicators great room for interpretation. That explains why the interpretation adopted by WTO adjudicators can affect the effectiveness of this provision. This article has been cited by developing members in arbitration awards pursuant to Article 21.3 (c). In Indonesia—Autos case, Indonesia emphasized its status as a developing member, and that its special economy and financial situation at that time should be taken into consideration when determining a reasonable period of time for implementation.[556] The Arbitrator in this case recognized the needs of developing members and thought Indonesia has successfully proved its special situation under Article 21.2 of the DSU. Thus, the Arbitrator decided that matters affecting the interest of Indonesia should be considered, and ultimately granted Indonesia an additional six months for implementation.[557] However, the application effects of this provision seem different in other cases. In Chile—Alcoholic Beverages case, Chile also invoked this provision. It argued that this provision required adjudicators to consider domestic realities in developing members as a factor in determining the reasonable period of time for implementation. It stressed its status as a developing member and the political sensitivity to the law change and the health effects during the implementation. And Chile considered that the reasonable period of time should be extended to 18 months.[558] However, its request was rejected by the Arbitrator in this dispute. The Arbitrator determined that "Chile has not been very specific or concrete about its particular interests as a developing country Member nor about how those interests would actually bear upon the length of "the reasonable period of time" to enact necessary amendatory legislation."[559] From the perspective of arbitrators' interpretation, it is not clear why the argument in Indonesia—Autos could be considered sufficient, while that in Chile—Alcoholic Beverages could not. The differences between these two cases were not explained, and they did not provide any criterion that would be used in future disputes.

This part takes the application of two articles as examples to demonstrate the impact of adjudicators' interpretation on developing members' participation in the DSM. Besides the lack of coherency of interpretation, there are many other similarities between difficulties resulted from the adjudicators' interpretation that developing members face in invoking the procedural SDT provisions and those when developing members using substantive SDT provisions. To avoid redundancy, the analysis of this part mainly focuses on the defects of procedural SDT provisions themselves.

---

[555] DSU, Article 21.2.

[556] Arbitration award, Indonesia—Autos, WT/DS54/15; WT/DS55/14; WT/DS59/13; WT/DS64/12, adopted on 7 December 1998, para. 8.

[557] Arbitration award, Indonesia—Autos, WT/DS54/15; WT/DS55/14; WT/DS59/13; WT/DS64/12, adopted on 7 December 1998, para. 24.

[558] Arbitration award, Chile—Alcoholic Beverages, WT/DS87/15; WT/DS110/14, adopted on 23 May 2000, para. 20-22.

[559] Arbitration award, Chile—Alcoholic Beverages, WT/DS87/15; WT/DS110/14, adopted on 23 May 2000, para. 44.

It should be noticed that the lack of effectiveness of invoked SDT provisions is not all caused by the interpretation adopted by WTO adjudicators or defects in these articles, it is sometimes attributable to mistakes made by developing members themselves. They sometimes invoked the wrong or inappropriate SDT provisions.[560] And that is mainly caused by their shortage of financial and legal resources, and these factors will be analyzed in other parts.

As the case analysis above demonstrates, the path to improvement differs by provision type: for substantive SDT provisions, the primary lever is judicial interpretation; for procedural ones, both content reform and interpretive improvement are available.

3. Promote the effectiveness of substantive SDT provisions in the DSM

The main difficulties developing members face in utilizing substantive SDT provisions in the DSM are caused by the inappropriate interpretation methods adopted by WTO adjudicators in some disputes. The reform of DSM cannot solve the deficiencies in their content. For procedural SDT provisions, their ineffectiveness is caused by the judicial interpretation in the DSM, as well as the deficiencies in the content of the provisions themselves. Thus, these can be addressed by reforming the DSM. The application of these two kinds of SDT provisions has many similarities concerning judicial interpretation, while given that procedural provisions regulate members' rights and obligations in the DSM, their content has a direct link with the participation of developing members. Compared to substantive provisions, procedural provisions have some unique characters. Thus, they will be analyzed in different parts, and this part focuses on the methods to improve the application of substantive SDT provisions in the DSM.

The content of substantive provisions impacts members' rights and obligations in specific trade agreements, and their behavior in international trade. It cannot be denied that the inappropriate interpretation by WTO adjudicators is mainly caused by ambiguous wording in substantive SDT provisions. Thus, the content also relates to the difficulties developing members face in invoking these provisions. However, its impact on developing members' participation is indirect. Thus, not the content of substantive SDT provisions, but their application in the dispute settlement proceedings affects members' participation in the DSM directly. Thus, whether and how to improve the content of these substantive provisions will not be analyzed in detail in this thesis. Instead, to address developing members' difficulties in utilizing substantive SDT provisions in the DSM, whether and how these provisions can be interpreted appropriately should be determined.

The main difficulties faced by developing members in invoking substantive SDT provisions are WTO adjudicators' ignorance of some development issues and their reluctance to give ambiguous provisions legal enforceability. It is worth noting that the first problem had only occurred in the early years of the multilateral trading system. And it is reasonable to assume that the disappearance of this issue in recent years is mainly caused by the following factors. The first one is the enhancement of the rule-oriented nature of WTO dispute settlement. WTO adjudicators are not likely to ignore the issues raised by parties to the dispute. Especially Article 7 of the DSU

[560] E.g. India in India—Quantitative Restrictions case, and Argentina in Argentina—Hides and Leather case.

requests panels "[t]o examine…the matter referred to the DSB…and to make such findings"[561], and Article 17 the AB stipulates that it "shall address each of the issues raised in accordance with paragraph 6…"[562]. The second one is that the increase in the number of developing members has improved the importance of development issues in the WTO. This can be illustrated by the fact that Doha Round is also known as "Doha Development Round", and the objective of improving the trade prospects of developing countries was put at the core of the agenda.[563] Such an attitude is reflected not only in negotiations but also in the dispute settlement proceedings. Thus, the ignorance of development issues will not be in conformity with the development trend of the entire system. Therefore, the ignorance of development issues will unlikely be the main difficulties developing members face in the future. And the second issue—WTO adjudicators' attitudes towards ambiguous SDT provisions should be addressed.

There is no shortage of research on the subject: how to interpret ambiguous SDT provisions in an enforceable and operational way. They explored whether SDT provisions could be used as a principle in the DSM and give developing members more flexibility even in the absence of a SDT provision. Some hold a positive attitude,[564] while some pointed out the difficulties in doing so from perspectives of textual restriction and coherence of SDT provisions.[565] They also analyzed the specific interpretation methods for each kind of SDT provisions. For example, to interpret Part 4 of GATT in a more operational fashion, and to adopt legal interpretation methods from other fields of international law, like human rights law and environment law, to some ambiguous provisions.[566] If the analysis focuses only on the methods of interpretation, some of these methods are technically not too difficult to implement in practice. However, these proposals have not translated into reality in the DSM. That is because the content of substantive SDT provisions reflects members' different understandings of the relationship between SDT and development, and the political balance reached in their negotiations. And the interpretation of these provisions is subject to the interaction between WTO, especially the DSM with its members. For the rulings to be convincing and acceptable to members, the interpretation of WTO adjudicators must not only be consistent with the general rule of interpretation in international law, but also correctly demonstrate the characters of WTO and the DSM. Adjusting interpretive approaches in isolation, without addressing the underlying political constraints, would generate systemic tension between judicial interpretation, the consensus reached by members in their negotiations, and the institutional function of the WTO as a whole. It is reasonable to conclude that such changes remain unfeasible in the short term. It is therefore unsurprising that the proposals identified in the academic literature for more development-friendly interpretation of substantive SDT provisions have not translated into practice in the DSM. As recognised by scholars of international law, treaty interpretation—particularly of ambiguous provisions—is a profoundly uncertain

561 DSU, Article 7.
562 DSU, Article 17.12.
563 "WTO | The Doha Round," accessed July 28, 2022, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.
564 Ezeani, "Can the WTO Judges Assist the Development Agenda?"
565 Mitchell, "A Legal Principle of Special and Differential Treatment for WTO Disputes." Joel Trachtman, *Ensuring a Development-friendly WTO*, 1 Bridges Monthly Review 12 (February 2008).
566 Sonia E. Rolland, *Special and Differential Treatment in the WTO Agreements: A Legal Analysis*, *in* DEVELOPMENT AT THE WORLD TRADE ORGANIZATION 0 (Sonia E. Rolland ed., 2012).

enterprise that cannot be divorced from its political context.[567] Thus, how to interpret substantive SDT provisions is not the most decisive factor in this issue. Instead, it should be put in a secondary position. To explore how to interpret substantive SDT provisions in a more effective way, the relationship between WTO, especially the DSM and its members, must be given first attention. The analysis will be proceeded in this order: first, analyzing whether the interpretation of WTO adjudicators can be fundamentally promoted to a more development-friendly way. In other words, if the nature of WTO and its DSM support the adjudicators to adopt significantly different interpretation methods concerning SDT provisions. If the answer is affirmative, then, discussing how to improve their methods of interpretation.

3.1. The function of judicial interpretation is limited

WTO has six functions, namely administering trade agreements, acting as a forum for trade negotiations, settling trade disputes, reviewing national trade policies, building the trade capacity of developing economies, and cooperating with other international organizations. Among these six functions, acting as a forum for trade negotiations, reviewing national trade policies, and settling disputes are the three principal ones. The first one is mainly about the formulation of trade rules, the latter two are about the implementation of these rules.[568] Without rule-making, implementation procedures lack a basis. Thus, members' negotiations on trade rules are in a crucial position within the whole WTO system. Trade policy review and the dispute settlement mechanism should respect what members have agreed in relevant agreements. So, the ambiguous wording in SDT provisions illustrates members' different opinions on SDT provisions. From the perspective of negotiations of these rules, the lack of effectiveness of these provisions shows the differences in perceptions among members of the function of SDT provisions. Developed members have emphasized on the importance of reciprocity and non-discrimination, while developing members have highlighted the enormous differences in the levels of economic development between developed and developing members, and their needs for SDT.[569] And from the perspective of the formulation of these rules, the ambiguity wording reflects, on the one hand, developing members' needs for special attention and assistance, on the other hand, developed members' reluctance to take binding obligations in this field. Developing members have always insisted on the operationalization of SDT provisions. African countries and a group of 12 Central American, Asia and African countries have proposed to strengthen SDT provisions. Besides African Group's proposal to convert non-binding provisions into binding ones, the group of developing members also argued before the Doha Round that "Special and Differential treatment shall be mandatory and legally binding through the dispute settlement system of the WTO"[570]. While developed members argued SDT should be "voluntary commitments assumed by

---

[567] Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT. LAW 47–97 (2012); Alexander Orakhelashvili, "Political Life of Treaties: Indeterminacy, Interpretation and Political Consequences," *Chinese Journal of International Law* 20, no. 3 (September 1, 2021): 545–60, https://doi.org/10.1093/chinesejil/jmab026.
[568] "WTO | The WTO in Brief," accessed September 6, 2022, https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm.
[569] Hegde and Wouters, "Special and Differential Treatment Under the World Trade Organization," 553–54.
[570] Preparations for the Fourth Session of the Ministerial Conference, WT/GC/W/442, adopted on 19 Sept 2001.

developed countries in favor of developing countries" and it "should be seen as an altruistic measure".[571] They also insisted that there should not be any textual changes to SDT provisions. The mandate of Doha Round is to assess and review these provisions, not to negotiate any changes to the original provisions.[572] Thus, the stagnation of SDT related negotiations and the failure to reformulate these provisions are not caused by any technical problem, but the unresolved contradictions between developed and developing members. As long as they both do not shift their views, a substantial change in the content of SDT provisions will not occur. That is also what is happening in the WTO negotiations. Therefore, the ambiguity of some SDT rules will remain. And WTO adjudicators still have to face the same difficulties in interpreting these provisions in the short term as they are now.

In the meantime, WTO adjudicators' interpretation activities are limited by rules in the DSU, especially Article 3.2 and Article 19.3. Article 3.2 reads

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[573]

Expressions like "providing predictability", "preserve the rights and obligations of members under the covered agreements", and "cannot add or diminish the rights and obligations provided in the covered agreements" all indicate that members object to WTO adjudicators' creative interpretation that is beyond what they have agreed, and WTO adjudicators can only apply the rules that is contained in the covered agreements. WTO adjudicators have, in many disputes, confirmed this point and emphasized the importance of this article. For example, in US—Wool Shirts and Blouses case, the AB clarified the meaning of Article 3.2 by stating that

> Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.[574]

And in EC—Computer Equipment case, the AB stated that

> the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994.[575]

They later also stated that the interpretation of WTO rules "would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views

---

[571] Edwini Kessie, The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements, in WTO Law and Developing Countries 12, 14–15 (George A. Bermann & Petros C. Mavroidis eds., 2007).
[572] Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, Revised edition (New York : New York: Zed Books, 2004), 264–65.
[573] DSU, Article 3.2.
[574] Appellate Body report, US — Wool Shirts and Blouses, WT/DS33/AB/R, adopted on 23 May 1997, p. 19.
[575] Appellate Body report, EC—Computer Equipment, WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R, adopted on 22 June 1998, para. 82.

of certain exporting Members alone".[576] However, sometimes provisions under which members file disputes cannot provide WTO adjudicators clear indications in dispute settlement proceedings. It is commonly accepted that not every detail is clearly regulated in international treaties. Moreover, both the will of states in explicit legal texts and the attitudes of states reflected in the absence of some rules and the vague stipulations in treaties are meaningful in legal interpretation. So the ambiguity of some provisions might be caused by the lack of consensus of members on some issues. However, in order to make rulings on members' disputes, adjudicators have to clarify these provisions in accordance with the customary rules of interpretation of public international law, and sometimes it is unavoidable to add something that is not written in the covered agreements to the original text, in these cases it is hard to draw a line between clarification and a violation of Article 3.2.

When there is no consensus among members, it is hard for WTO adjudicators to find a mutually satisfied way to interpret ambiguous SDT provisions. If WTO adjudicators adopt a way that is at odds with the understanding of developing members, developing members' high expectations for the effectiveness of these provisions will be disappointed, and they will criticize adjudicators for neglecting the real needs of developing members. And if the adjudicators adopt the opposite approach, they will be accused by developed members of exceeding their authorities and altering members' rights and obligations under covered agreements unreasonably. The dissatisfaction with WTO adjudicators is unavoidable. However, the former case occurred more often than the latter in practice. This can be attributed to the member-driven nature of WTO and the way members' political power affects the DSM.

3.2. Members' political impact on the interpretation of adjudicators

The WTO is essentially a member-driven organization. From the organizational structure point of view, the most important decisions within WTO are made by its members, and the entire system is run by its members. The top-level decision-making body of WTO is the Ministerial Conference, which is composed of all members of the WTO. So, "the WTO belongs to its members"[577]. In addition, the daily work of WTO is handled by the General Council, the Dispute Settlement Body and the Trade Policy Review Body, which are in fact composed of one set of people, all WTO members, with different names and mandates.[578] The basis of the WTO legal system is a set of rules that regulate international trade, and all trade rules in WTO are agreements resulting from members' negotiations. That means it's members' governments, not the WTO itself, that decide how international trade should be conducted. Furthermore, the dispute settlement in WTO is also a combination of political and legal nature. WTO dispute settlement system provides its members several ways to settle their trade disputes, these includes consultation, good office,

[576] Appellate Body report, EC—Computer Equipment, WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R, adopted on 22 June 1998, para. 82.

[577] "WTO | Understanding the WTO - Whose WTO Is It Anyway?," accessed September 7, 2022, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

[578] "WTO | Understanding the WTO - Whose WTO Is It Anyway?"

conciliation, mediation, arbitration and quasi-adjudicative proceedings.[579] Among these methods, consultation, good office, conciliation, and mediation are regarded as political approaches, while the latter two are regarded as legal approaches. According to Article 3.7 of the DSU

> [a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.[580]

That indicates arbitration and quasi-adjudicative proceedings as legal approaches are the last resort to settle disputes. The priority of political approaches, where the contrast of parties' political power can have a significant impact on the final results, can demonstrate the role of members' political power in dispute settlement in the WTO. Even the quasi-judicial proceedings, through which the WTO can have a direct impact on members' trade policies, also show the intertwining of political and legal approaches. First, the dispute settlement proceeding is quite flexible to some extent. Even when the panel stage has been started, political approaches can be requested at any time.[581] Second, the members of the AB are appointed by WTO members by consensus.[582] The selection process is not only about the assessment of professionalism, but also involves a political game among member states. Members have their own preferences when selecting candidates. They also screen the preferences and dispositions of candidates, which can be significant when dealing with disputes involving the multiple interests of different member states. This makes consensus even more difficult to achieve in this process.[583] The complexity involved in appointing members can be illustrated by the deadlock resulting from political differences among member states that could be seen in members' discussions concerning the choice of a successor to David Unterhalter in 2014,[584] and the currently paralyzed AB since the end of 2020 caused by the US obstructing the appointment of new AB members[585]. Thus, it can be seen that the appointment of an AB member also involves achieving a political balance within the DSB. This reflects that AB members are recognized for their legal expertise, and they simultaneously carry the political expectations of WTO members. Third, although rulings adopted by DSB are binding on parties to the dispute, there is no mechanism to guarantee their implementation. Even compensation and retaliation are provided as the alternatives when one party fails to implement the ruling, their role is also limited. Compensation has a voluntary nature

---

[579] DSU, Article 4 and 5.
[580] DSU, Article 3.7.
[581] DSU, Article 5.3.
[582] DSU, Article 17.2.
[583] Gregory Shaffer, et al. 'The Extensive (but Fragile) Authority of the WTO Appellate Body', 79(1) Law and Contemporary Problems 237-273, 271 (2016).
[584] Gregory Shaffer, et al. 'The Extensive (but Fragile) Authority of the WTO Appellate Body', 79(1) Law and Contemporary Problems 237-273, 270-272 (2016).
[585] The term of the last AB member expired on 30 November 2020, and now the AB is unable to review disputes due given its ongoing vacancies. Henry Gao, "Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement," *Journal of International Economic Law* 24, no. 3 (September 1, 2021): 534–35, https://doi.org/10.1093/jiel/jgab031. "Dispute Settlement - Appellate Body Members," accessed July 25, 2022, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

and depends on parties' agreement.[586] The effectiveness of retaliation is mainly decided by the contrast between members' trade and political power.[587] These two both contain a strong political nature.

Such political nature of WTO and its DSM determines the dominance of members with strong political and trade powers at these stages. From the textual perspective, under the principle of consensus, developed and developing members enjoy the same rights in decision-making. However, the consensus principle provides only equality in opportunities, not equality in results. The disparity of their level of economic development, influence on international trade, and leverage in negotiation determine that it is easier for developed members to change the negotiating positions of developing members and achieve their goals. Thus, like Lall pointed out in 1968, "a state's willingness to make concessions is in direct proportion to its power"[588]. This statement still applies today. For example, when a developed country and a developing country have different opinions in an international negotiation, it is possible that the developed country provides the developing country some resources it desperately needs or uses threats in exchange for the support from this country. While the developing country, on the other hand, lacks resources to do the same. And it is not uncommon in practice. The negotiation on intellectual property protection is a good illustration. The US initiated the TRIPS negotiation within the multilateral trading system and used its market power to pose credible threats to some developing members. These developing members enjoyed preferential treatments under the GSP provided by the US. The US threatened these developing members to suspend their privilege if they cannot implement some intellectual property protection standards.[589]

Besides, the dominance of developed members is also reflected in the DSM. Compared with developing members, developed members have more adequate resources to be invested in the dispute settlement proceedings. Thus, initiating a dispute in the DSM is easier for developed members. Their advantages in the DSM can play a role even before the initiation of a dispute. When the wording of some provisions is ambiguous, the vagueness benefits developed members. It can be used as a threat to developing members. Developed members can threat to bring a case before the DSM and claim that developing members violate the vague obligations in the agreement.[590] Because participating in costly dispute settlement procedures without a guarantee of success is highly detrimental to developing members. The lack of a mechanism to guarantee the implementation of DSB rulings also favors developed members. Even when the retaliation as the last resort is authorized, the complainant developing members may lack the

---

[586] DSU, Article 22.1.

[587] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 146-147.

[588] Arthur Lall, *Modern International Negotiation Principles and Practice* (Columbia Univ. Press, 1966), 857.

[589] Peter Drahos and John Braithwaite, Information feudalism who owns the knowledge economy? 146 (1. publ. ed. 2002).

[590] Robert Hunter Wade, "What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space,'" *Review of International Political Economy* 10, no. 4 (November 1, 2003): 630, https://doi.org/10.1080/09692290310001601902.

ability to substantially impact the economies of developed members. Like arbitrators stated in their decision in EC—Bananas III case,

> Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality.[591]

During the dispute settlement proceedings, the political character also impacts the interpretation of the AB. Given that the DSM contains simultaneously political and legal character, the interpretation of WTO rules cannot ignore the political context, and the delicate balance between political and legal elements must be reflected in the interpretation adopted in DSB rulings. Take the AB as an example, it has been accused by some developed members of "judicial activism" in its legal interpretation, which has "undermined the prospects for future negotiations."[592] And in order to prevent members from refusing to implement the ruling, or comply in only a symbolic way, the AB cannot adopt an interpretation that is quite at odds with members' expectations.[593] When developed members that have a significant political power are not satisfied with AB's interpretation of some WTO rules, they may show their dissatisfaction in the process of appointing the AB members, as noted above.

In sum, the DSM contains legal character as well as political character. As long as the political elements are retained in the system, it is inevitable that powerful developed members have a stronger impact on this mechanism than developing members. Then, it is not surprising that developed members would influence the legal interpretation of WTO rules. That can, to some extent, explain why WTO adjudicators in many cases adopt legal interpretations that favors developed members when the wording of SDT rules is ambiguous. The imbalance in interpretation actually mirrors the disparity in power between developed and developing members, and the limited role that quasi-judicial proceedings can play in settling trade disputes among WTO members. From this perspective, the change of interpretation methods is not easy to be achieved unless a major power shift in international trade takes place.

It is argued that even the disparity in power exists, developing members have achieved great successes in the multilateral trading negotiations. For example, the great effort of Group of 77 in the UNCTAD conference held in the spring of 1964 caused the multilateral trading system to rethink its relationship with development, and to recognize the special situation of developing

[591] Article 22.6 Arbitration Decision, EC—Bananas III, WT/DS27/ARB/ECU, authorization to retaliate granted on 18 May 2000, para. 177.

[592] Terence P. Stewart and Sandra K. Jorgensen, "The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?," *Global Trade and Customs Journal* 8, no. 11/12 (November 1, 2013): 989–91, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/8.11/GTCJ2013052.

[593] Gregory Shaffer, Manfred Elsig, and Sergio Puig, "The Extensive (but Fragile) Authority of the WTO Appellate Body The Variable Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (2016): 267–68.

members, especially least-developed members in the WTO.[594] Developing members also formed coalitions in the negotiation of TRIPS and they successfully introduced the Article 1.1 of TRIPS,[595] which reads "[m]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."[596] After that, the coalitions like Like-Minded Group, Friends of the Development Box, the Friends of Fish, and the Friends of Geographical Indications all played important roles in trade negotiations. It is worth noting that the incorporation of the proposal from Cotton-4 in the final declaration was regarded as "the most positive achievements of the Hong Kong Ministerial Meeting in 2005".[597] Thus, developing members can enhance their leverage in trade negotiations by forming coalitions to prevent developed members from using their market powers and taking advantages of developing members.

However, the reality shows that although the pan-developing members coalition has played a crucial role in the history of multilateral trading system, such alliance is "illogical and archaic in the present setting".[598] And "[t]he sense of solidarity that the developing countries had in the 1970s and early 1980s is no longer extant."[599] The type of WTO members' coalitions has become diversified. The influence of some old coalitions has gradually declined, while new alliances have emerged. It is hard to identify the common characters and common interests of developing members' group that can reunite them in the trade negotiations nowadays. For instance, the major interests and trade needs of members of the Association of Southeast Asian Nations (hereinafter ASEAN) have gradually diverged, although they cooperated effectively on some issues. Thailand still adopts a defensive approach to protect its domestic industries, while Singapore has an export-oriented economy. And compared with Malaysia, Indonesia and the Philippines, Thailand and Singapore are more open to trade-off with developed members.[600] New coalitions like Cairns Group of agriculture exporting countries have brought the interests of developed and developing countries together. This group includes both developed and developing countries. It contributed to the huge reduction of agricultural goods' tariff.[601] The formation of Africa Group is inspiring. It is a large developing countries group contains countries with similar characters and common interests, and it is active in WTO negotiations. However, the

---

[594] Robert E. Hudec, Developing countries in the GATT Legal System, Cambridge University Press, p.64 (2011).
[595] Milana Karayanidi, "Bargaining Power in Multilateral Negotiations on Intellectual Property Rules: Paradox of Weakness," *The Journal of World Intellectual Property* 14, no. 3–4 (2011): 268–69, https://doi.org/10.1111/j.1747-1796.2011.00418.x.
[596] TRIPS, Article 1.1.
[597] Sonia E. Rolland, "Developing Country Coalitions at the WTO: In Search of Legal Support," *Harvard International Law Journal* 48, no. 2 (2007): 493–94.
[598] Peter Draper and Razeen Sally, "Developing Country Coalitions in Multilateral Trade Negotiations: Aligning the Majors?," Africa Portal (South African Institute of International Affairs (SAIIA), January 1, 2005), 30, https://www.africaportal.org/publications/developing-country-coalitions-in-multilateral-trade-negotiations-aligning-the-majors/.
[599] Surya P. Subedi, "The Road From Doha: The Issues for the Development Round of the Wto and the Future of International Trade," *International & Comparative Law Quarterly* 52, no. 2 (April 2003): 444, https://doi.org/10.1093/iclq/52.2.425.
[600] Rolland, "Developing Country Coalitions at the WTO," 498.
[601] Subedi, "The Road From Doha," 430.

function of this group is restricted by their strong defensive position in international trade, their limited resources in negotiations, and domestic weak-to-terrible institutions. Thus, they may express their attitudes through blocking, but they lack the capacity to provide constructive solutions.[602] Therefore, developing members can hardly form coalitions large enough to negotiate effectively with developed members in the WTO. From the perspective of developed members, they can mirror this practice and act as a group. Then developing members' leverage in negotiations will further decline.

Considering developed members' strong influence on WTO and DSM, and combining the slim possibility that developing members can form a strong coalition, at least in the short term, the way in which political powers impact the interpretation of WTO adjudicators will not be fundamentally changed. That means when the wording of substantive SDT provisions is ambiguous, and developed members hold different understanding with developing members, the bias towards developed members in interpretation adopted by WTO adjudicators is not likely to be completely redressed under this background. Recalling the order of analysis mentioned above, it is only meaningful to explore the appropriate methods of legal interpretation of substantive SDT provisions when such change is consistent with the nature and main characters of WTO and DSM. The proposals to adopt an interpretation that favors developing members, whether to use SDT as a principle when interpreting all WTO rules, or to grant legal enforceability to some best efforts clauses by adopting the interpretation methods in other fields of international law, go contrary to the interaction between law and politics in the DSM, thus, are not likely to be achieved in the short term. Therefore, the second issue will not be further discussed in this thesis.

However, the failure in the field of substantive SDT provisions does not mean the incapability to promote the effectiveness of procedural SDT rules. The differences between substantive and procedural provisions also cause differences in their reformation.

4. Promote the effectiveness of procedural SDT provisions in the DSM

This part explains why the promotion of effectiveness of substantial and procedural SDT provisions is different, and explores ways to enhance procedural SDT provisions.

4.1. Differences in reform of substantive and procedural SDT provisions

The promotion of effectiveness of substantive and procedural SDT provisions differs in terms of both the difficulty and scope. The differences in difficulty of reform stems from the differences in objectives and contents of substantive and procedural SDT provisions. Also, members' diverse

[602] Draper and Sally, "Developing Country Coalitions in Multilateral Trade Negotiations," 30.

level of concerns in these two fields constitute another reason. And the differences in the scope of reform are caused by the nature of substantive and procedural rules.

4.1.1. Differences in difficulty of reform

Article 1.1 of the DSU reads

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements").[603]

Besides trade agreements, both multilateral and plurilateral, covered agreements also include the DSU. Except for plurilateral agreements, which are negotiated by and apply to part of WTO members, multilateral trade agreements and the DSU are both negotiated by all members and are adopted by members as a "single undertaking". However, these two kinds of rules influence the dispute settlement in different ways.

The preamble of the GATT shows members' intention to enter "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[604] The preamble of the GATS demonstrates members will

> to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.[605]

Members wrote in the preamble of TRIPS that they desire

> to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.[606]

Thus, one of the objectives of trade agreements is to reduce trade restrictions, achieve trade liberalization in certain areas, and stipulate members' rights and obligations in international trade. The content of trade agreements is about how international trade in these areas should be conducted. It is for the regular management of international trade. The corresponding international trade is conducted in accordance with these legal bases. Whether these provisions can be implemented determines members' interests in international trade and development of certain domestic industries. While the DSU is designed to provide security and predictability to WTO members, and to "preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[607] It means that DSU rules have

[603] DSU, Article 1.1.
[604] GATT, Preamble.
[605] GATS, Preamble.
[606] TRIPS, Preamble.
[607] DSU, Article 3.2.

the task of guaranteeing the effectiveness of other trade rules. It is about the conduction of dispute settlement proceedings, and members' rights and obligation in these procedures. The DSU regulates how members should solve trade disputes between them. Therefore, it does not apply as frequently as trade rules, it applies only when a trade measure or the adoption of a measure is in question. Besides, DSU rules as procedural rules only influence the procedural justice. From this perspective, although DSU rules and the DSM play important roles in the WTO, they are still accessory to trade rules.

Considering the function of SDT provisions in these two kinds of rules, SDT provisions in trade agreements are to address developing members' difficulties in international trade, it recognizes the special needs of developing members in economic development. While the main objective of SDT provisions in the DSU is to respond to developing members' lack of resources in using the DSM to protect their rights and obligations in covered agreements. Thus, as with other provisions in the DSU, the function of SDT provisions in the DSU is also accessory. It is reasonable to assume that the reform of rules which do not directly link to the economy interests of WTO members, and which are accessory to other rules would be much easier to achieve.

Besides the differences in objectives and contents of substantive and procedural SDT provisions, members' different opinions upon these two areas also demonstrate that promoting the effectiveness of procedural SDT provisions might be more feasible in the short term. First, developed members' response to SDT reform issues showed their different levels of concern about substantive and procedural SDT provisions. The major controversy between developed and developing members over the SDT provisions focuses on substantive SDT provisions. Their conflict of views on procedural provisions is relatively less. Although developing members have submitted proposals concerning the enhance of both substantive and procedural SDT provisions at many conferences of Committee on Trade and Development Special Session (hereinafter CTDSS), WTO members have failed to reach consensus on the way to enhance these provisions,[608] and the opposition from developed members mainly focuses on the reform in the field of substantive rules. As analyzed in §3, the fundamental disagreement between developed and developing members on the function of SDT provisions—whether they should recognize development needs or merely facilitate integration—is concentrated in the field of substantive SDT provisions.[609] From this perspective, their different understandings concerning the function of SDT provisions mainly fall into the field of substantive SDT provisions. Because only substantive SDT provisions regulate members' behavior in international trade, procedural SDT provisions in the DSU are merely about members' rights and obligations in dispute settlement proceedings.

During the Cancún Ministerial Conference, members' debate on SDT provisions mainly focused on 88 proposals from developing members. Their discussions were provoked to be a difficult task and have only limited success up to date. In 2003, the General Council Chairperson proposed a procedural to deal with these issues and divided these proposals into three categories. The first category contains 38 proposals that are the most likely to be accepted with minor changes, 12 of

[608] Chang, "WTO for Trade and Development Post-Doha," 555.
[609] Chang, 556–57.

which had already been agreed by members in February 2003; the second category includes 38 proposals that would be discussed in relevant WTO bodies; the residual set of 12 proposals was classified as the third category, the consensus on these proposals was regarded as the most difficult to reach. It is worth noting that the 12 proposals that were firstly be accepted by WTO members are mostly technical assistance and information/transparence related, which means that the proposals concerning provisions that do not directly touch members' trade interests are the easiest to be accepted.[610] By the same token, the difficulty in enhancing procedural SDT provisions that only regulate members' rights and obligation in the DSM should be lower than that in substantive rules.

Developed members are also proponents of differentiation between developing members. They refuse to grant the same preferential treatments to all developing members. They asserted that one size SDT cannot fit all developing members with diverse development and economic situations. Developed members emphasized that SDT provisions were designed to help developing members to implement trade policies that they considered as appropriate for development. While applying the same rules to all developing members cannot respond to their real development needs. Thus, the differentiation between developing members has been proposed. Both the US Trade Representative and the EU Commissioner for External Trade have expressed their claims on this issue.[611] It is not hard to see that their proposal centered on the content of substantive SDT provisions. Therefore, members' conflict of views is mainly about the way to enhance rules regulating members' rights and obligations in international trade, namely substantive SDT provisions. That means in the field of procedural SDT provisions, members' consensus on the enhancement might be easier to be reached.

Second, differences in views of developing members indicate that their level of interest divergence on substantive and procedural issues differs. The conception that developing members are diverse in interests has been enhanced. Some developing members have become strong competitors in international markets, while others are left behind, they have not achieved economic diversification. This triggered developed members' initiation of differentiation, and it also caused conflicts of views between developing members. However, diversity of developing members is mainly reflected in their economic development level and export interests. It can be seen from the coalitions of developing members in recent negotiations. Those fragmented coalitions are organized based on their different interests in global trade. For example, the emergence of G20, which brought together some major developing members like China and India,

---

[610] Bernard Hoekman, Constantine Michalopoulos, and L. Alan Winter, "Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún," *The World Economy* 27, no. 4 (2004): 498–99, https://doi.org/10.1111/j.0378-5920.2004.00610.x."WTO | Ministerial Conferences - Cancún 5th Ministerial - Briefing Notes - Special and Differential Treatment," accessed September 14, 2022, https://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief21_e.htm.

[611] Anne-Sophie Novel and Jean-Marie Paugam, "Why and How Differentiate Developing Countries in the WTO? Theoretical Options and Negotiating Solutions," in *REVIVING THE SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES IN INTERNATIONAL TRADE* (Travaux&Recheches, n.d.), 151–52.Aniekan Ukpe and Sangeeta Khorana, "Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development," *Journal of International Trade Law and Policy* 20, no. 2 (January 1, 2021): 84, https://doi.org/10.1108/JITLP-08-2020-0052.

targeted on developed members' agricultural protectionism.[612] And as mentioned above, the gradual decline of ASEAN is also caused by members' adoption of different economic models in international trade. As noted in §3, ASEAN members have adopted increasingly divergent economic models. At the same time, developing members' diverse opinions on DSM are rarely heard. That means they are more likely to have different views concerning the rules that relate to their interests in international trade. Thus, it can be inferred that the reform of procedural SDT rules, which do not directly relate to their trade interests, can bring them together more easily.

Therefore, the enhancement of procedural SDT provisions could be easier to be accepted by all members because it does not directly link to the very sensitive area of members, namely interests in international trade and economic development. And the classification proposed by the General Council Chairperson in 2003 can be used as guidelines for members' future negotiations. When the negotiations stall because of members' different views on some key topics, it is worthwhile to adopt a fragmental approach, which means to classify issues in accordance with their difficulty of reaching agreement and discuss issues that are easier to be accepted first and shelve those where consensus of members are difficult to achieve.

4.1.2. Differences in scope of reform

The content of substantive SDT provisions is about developing members' special rights and obligations in international trade, thus, it does not directly influence developing members' participation in the DSM. Only the application of these rules can impact developing members' participation. And their difficulties in using these provisions refer to the inappropriate interpretation adopted by WTO adjudicators. That is why the previous discussion about the reform of substantive SDT provisions excludes the reform of its content. While the content of procedural SDT provisions aims at providing a more level playing field for developing members and addressing their difficulties in utilizing the DSM. That means, the special treatments in these provisions can directly influence developing members' participation in the DSM. Thus, the enhancement of procedural SDT provisions also includes the reform of their content.

According to the analysis above, developing members' difficulties in utilizing procedural SDT provisions include the ambiguous wording of some SDT provisions, some provisions' lack of consideration of developing members real needs, the outdated content of some rules, and the inappropriate interpretation by WTO adjudicators. These can be categorized into two major groups: the difficulties caused by the content of SDT provisions themselves, and the difficulties caused by their application in the DSM. The following part will discuss the way to enhance procedural SDT provisions from the above two perspectives. Since it was confirmed that the enhancement of procedural SDT provisions is easier for all members to accept, the following part will not analyze whether the reform in this field is workable as the premise for the analysis of specific approaches.

[612] Draper and Sally, "Developing Country Coalitions in Multilateral Trade Negotiations," 8–9.

4.2. Reforming the content of procedural SDT provisions

Although developing members face difficulties caused by both the content and the application of procedural SDT provisions, the inappropriate interpretation in the DSM can be fundamentally attributed to the flaws in the content of these provisions. For example, taking best efforts clauses as examples, the wording of these provisions is not precise enough, and the implementation of such provisions lacks clear criteria. In order for them to be applied in specific disputes, the WTO adjudicators have to clarify them by adopting judicial interpretation, and this is the process where the bias against developing members can easily arise. If the content of these provisions is precise enough, it can then provide clear instructions to both parties to the dispute and WTO adjudicators, and the scope of interpretation will be limited, thus, WTO adjudicators' understanding of these provisions will be more predictable. The improvement of the content can also, to some extent, relieve developing members' difficulties caused by the inappropriate interpretation. Thus, the lack of effectiveness of some provision caused by combined reasons, both the flaw in the content of provisions and the inappropriate interpretation of WTO adjudicators. The reform in either aspect can effectively enhance them, and these two approaches will be analyzed separately. Considering the sequence of problem solving, the reform of content should be analyzed first.

According to the typology introduced above, procedural SDT provisions are mainly escape clauses, best efforts provisions, accountability provisions and provisions using the term "should". The content of accountability provisions is usually precise and enforceable. So, it is not likely to trigger disputes between members. Therefore, the flaw of content is mainly concentrated in escape clauses, best efforts provisions and provisions using "should".

4.2.1. The reform of "should" provisions

There are two SDT provisions in the DSU contain the term "should", namely Article 4.10 and 21.2. From the perspective of reform, the main problem of provisions with "should" is that the term "should" may deprive them of any binding effect. The problems caused by this term are not limited to the field of SDT provisions or DSU. Article 3.1 of the GATT, which establishes one of the most important pillars of WTO, Article 7.2 of the GATS, and Article 7 of the TRIPS, also use the term "should" instead of "shall". Therefore, considering the coherence of WTO legal system, the reform in the wording of SDT provisions in the DSU will also influence provisions in other agreements.

Sometimes, the adoption of "should" is reasonable. For example, Article 7 of the TRIPS reads

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a

> manner conducive to social and economic welfare, and to a balance of rights and obligations.[613]

This article sets out the objective of TRIPS. It contains no specific obligations for members, thus, cannot be implemented or reviewed in practice. The use of "should" and the content of this article are in harmony.

However, the use of "should" can cause some problem in legal effect. Article 11 of the DSU reads

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

And Article 13.1 provides that "…A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate…" These two articles both contain the term "should" with specific obligations. As mentioned above, the AB in Canada—Aircraft case confirmed that the term "should" in Article 11 and 13.1 of the DSU impose legal obligations. Article 11 and 13.1 of the DSU and Article 7 of the TRIPS all contain the term "should". However, what differentiates them is the fact that Article 11 and 13.1 of the DSU combine this term with specific obligations. It could be argued that the legal effect of "should" depends on whether it is followed by a specific obligation or a vague principle. However, when it is followed by an ambiguous obligation, the legal effect of "should" can again raise doubt.

As to Article 4.10 of the DSU, which reads "[d]uring consultations Members should give special attention to the particular problems and interests of developing country Members"[614], it is hard to distinguish what constitutes "special attention" given to developing members. Article 21.2 uses similar wording as Article 4.10, which reads "particular attention should be paid". So, they both contain the term "should" and ambiguous obligations. It is not clear whether the term "should" has the same legal effect as those in Article 11 and 13.1 of the DSU.

In accordance with the use of "should" or "shall" (including terms with similar legal effect) and whether the obligations are specific enough to be implemented, relevant provisions in the DSU can be divided into four groups. The first group is "shall" with specific obligations, like Article 1.1, which establishes the coverage of DSU. The second group of rules are "shall" with ambiguous obligations, they are classified above as best effort clauses. The third group is "should" with specific obligations. Examples given by the AB are Article 11 and 13.1, the "should" was interpreted to create legal obligation to panels and members. And the fourth group is "should" with ambiguous obligations, for example, Article 4.10 and 21.2. The first and the fourth group both keep the wording and content in harmony, while the second and the third group are questionable. The reform of best effort clauses will be analyzed in the next part. This part focuses on the reform of the last two groups.

[613] TRIPS, Article 7.

[614] DSU, Article 4.10.

In order to avoid the unnecessary ambiguity and uniform the wording in the DSU, when the obligations contained are specific enough to be implemented and reviewed, the wording that clearly creates legal obligations and that is legally mandatory, instead of “should”, should be used, for instance, “shall” and “cannot”. The reform in this perspective will not lead to fundamental change in the meaning and legal effect of these provisions. While for SDT provisions combining “should” with ambiguous obligations, they also guarantee the harmony of wording and content. If treating them as soft law, no promotion is needed. However, exhortatory and recommendatory provisions cannot guarantee that the special situation and problems developing members face can be taken into account by panels and developed members, and they cannot be relied upon by developing members in the DSM. Thus, they cannot play a role in promoting developing members’ participation in the DSM. Also, from the point of view of reforming the WTO, the maintenance of the hortatory nature of these articles does not meet the objective of Doha Development Round, which is to strengthen these SDT provisions and make them more precise, effective, and operational.[615] Thus, the soft law nature of these articles should be changed.

Take the Article 4.10 of the DSU as an example. Some developing members have submitted proposals to make it mandatory, their proposals are mainly composed of two parts: The first is to replace the word “should” with “shall”.[616] The distinction between “should” and “shall” is about whether there is a mandatory obligation. The replacement is an essential step for the enhancement of this provision. It changes the hortatory nature of this article, and it clearly creates a legal obligation for developed members. However, such change in wording is not enough. If the content remains the same, the combination of “shall” with ambiguous obligations will change these provisions into best effort provisions. And best efforts provisions still lack the effectiveness in practice because it is hard to determine whether members’ conducts satisfied the requirements. Therefore, these developing members sought changes in substance as well, proposing to articulate precise and measurable implementing obligations. The combination of “shall” with specific obligations can grant strong legal effects to this provision. Thus, for a provision to be precise, effective and operational, the wording should reflect its binding nature, and simultaneously, the content of obligation should be specific enough.

After replacing “should” with “shall”, these provisions become provisions containing the term “shall” and ambiguous obligations, and they can be classified as best efforts clauses. Then the way to enhance them is to directly promote the effectiveness of these vague implementation content. And further analysis will be conducted in the next part together with other best efforts provisions.

4.2.2. The reform of best efforts provisions

The lack of effectiveness of best efforts clauses is caused by the combination of ambiguity of implementation content in these provisions and the inappropriate interpretation adopted by the WTO adjudicators in the dispute settlement proceedings. While the ambiguity constitutes the

[615] Doha WTO Ministerial Declaration of 22 December 2005, WT/MIN(05)/DEC, para. 35.
[616] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/19, Dispute Settlement Body Special Session, 9 October 2002, p. 2-3.

fundamental reason. Thus, there are also two approaches to enhance best effort clauses. The first is to improve the implementation content and make them more precise in practice. This approach can address the problem at its root cause. The second approach is to improve the judicial interpretation adopted in the DSM. However, since the reports of panels or the AB are not binding precedents for subsequent disputes, panels or the AB have no obligations to follow the previous rulings,[617] the change of content has a stronger legal effect. Thus, the reform of their content should be analyzed first in this part, and the improvement of interpretation methods of WTO adjudicators will be discussed later. And the objective of reform is to clarify the ambiguous wording of best efforts clauses, and change them into escape clauses, which are easier to be implemented and reviewed in practice.

In the DSU, Article 12.11, 21.7, 21.8 and 24.1 can be considered as best efforts clauses. After replacing "should" with "shall", Article 4.10 and 21.2 can also be classified as this group. Considering their content, they all contain phrases like "give special attention", "take account" or "exercise due restraint", which leave it to implementers to determine the way of implementation and the extent of the obligations. Historically, the use of such words was understood as indicating contracting parties' intention not to establish legal relations.[618] However, take rulings in EC—Bed Linen and EC—Asbestos case mentioned above as examples, WTO adjudicators have confirmed in several disputes that these best efforts provisions do impose legal obligations on developed members, notwithstanding their imprecise drafting. Thus, these provisions should be regarded as hard law, instead of soft law. Although the use of "shall" determines the binding nature of these obligations, the vague and general implementation content makes it hard for members and WTO adjudicators to distinguish the extent of compliance. As stated by Fawcett in his article, these best efforts clauses "in one way or another leave it to the parties themselves to determine the extent of the obligations they have assumed and the mode of performance".[619] It grants members or WTO organs who are bound by these articles flexibility in their implementation process. However, such flexibility should not be unlimited. With no limitation on the extent of compliance or the mode of implement, one can easily argue that a superficial implementation can satisfy the requirements of these articles, just like the panel did in Mexico—Telecoms case.[620] Thus, the reform of the content of best efforts clauses should focus on the expressions that grant too much discretion to implementers.

Article XXXVII.1 of GATT gives an example of how to limit the discretion authorized by best efforts clauses. It reads, "The developed contracting parties shall to the fullest extent possible — that is, except when compelling reasons, which may include legal reasons, make it impossible — give effect to the following provisions…".[621] This article also contains a vague expression, which is "to the fullest extent possible… give effect to the following provisions". It is hard to determine

[617] "WTO | Disputes - Dispute Settlement CBT - Participation in Dispute Settlement Proceedings - Amicus Curiae Submissions - Page 1," accessed July 3, 2022, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm.
[618] J. E. S. Fawcett, The Legal Character of International Agreements, 30 Br. Year b. Int. Law 381, 390–391 (1953).
[619] Fawcett, 390.
[620] Panel report, Mexico—Telecoms, WT/DS204/R, adopted on 2 April 2004, para. 8.3.
[621] GATT, Article 37.1.

whether developed members have satisfied the requirement of "fullest extent possible". Such wording is ambiguous concerning the extent to comply. However, this provision should not be treated as a best efforts provision, because the subsequent discerption to a large extent clarified these requirements. It stipulates that "to the fullest extent possible" means "except when compelling reasons, which may include legal reasons, make it impossible". Although it does not exhaust all circumstances that may constitute compelling reasons, the example of "legal reasons" can also illustrate their nature. So, the additional description effectively limits the compelling reasons to a relatively small range, only those at the same level as legal reasons could be regarded as compelling reasons. Thus, what can be learned from the drafting pattern of Article XXXVII.1 of the GATT is that imposing restrictions on the ambiguous wording can achieve the effect of making best efforts provisions more precise and operational.

Nevertheless, the exception of legal reasons or other reasons at the same level in Article XXXVII.1 cannot be directly applied in other best efforts clauses. The content of the introduced restrictions should be consistent with the wording of specific provisions, satisfy the need to clarify the content and should not deviate too much from members' expectations on the flexibility. Even if they are categorized as the same group, the wording of these best efforts provisions is different in coverage and level. However, the wording mentioned above in the DSU best efforts SDT provisions, such as "give special attention", "take account" or "exercise due restraint" does not provide adequate examples to illustrate these differences. Putting them in a larger context can reveal their differences more clearly. By comparing with other best efforts clauses, the level of flexibility in best efforts clauses in the DSU SDT provisions can be illustrated. The most commonly used wording to grant such flexibility in best efforts clauses are "to the fullest extent"[622], "make every effort"[623], "to the greatest extent possible"[624], "to the extent possible"[625], "if possible"[626], "exercise due restraint"[627], "accord full and sympathetic consideration"[628], "give active consideration"[629], "have special regard"[630], "pay due regard"[631] and "take account of"[632]. Among them, "to the fullest extent", "make every effort", "to the greatest extent possible", "to the extent possible", "if possible" and "exercise due restraint" are only about the extent to which implementers' conductions could be regarded as satisfying the requirements in these articles. They do not regulate the content of obligations or methods of implementation. Thus, they merely introduce ambiguity in the extent of compliance. While the rest, such as "accord full and sympathetic consideration" and "give active consideration" contain both the vagueness in the extent of compliance and content of implementation. Taking the expression "give active consideration" as an example, "give consideration" is the specific act of fulfilling this obligation,

[622] E.g. GATT, Article 29.1.
[623] E.g. GATT, Article 37.3 (a).
[624] E.g. DSU, Article 4.9.
[625] E.g. GATS, Article 4.2.
[626] E.g. GATT, Article 18.12(f).
[627] E.g. DSU, Article 24.1.
[628] E.g. TRIPS, Article 40.3.
[629] E.g. GATT, Article 37.3(b).
[630] E.g. GATT, Article 37.3(c).
[631] E.g. GATT, Article 18.9.
[632] E.g. DSU, Article 12.11.

and “active” refers to the extent of compliance. When talking about the reform of best efforts provisions, this difference should be taken into consideration.

Within the first group, some provisions use superlative or equivalent expressions—such as “fullest”, “greatest”, and “every”—to set the highest expectations for compliance. From a linguistic point of view, although flexibility is still granted by these provisions, these articles have higher expectations for members to fulfill their obligations, compared with provisions containing “to the extent possible” and “if possible”. It could be clearly illustrated by the comparison between “to the fullest extent possible” and “to the extent possible”. As established in §4.2.2, the legal effect of the phrase “to the fullest extent possible” can be found in Article XXXVII.1 of GATT. It refers to “except when compelling reasons, which may include legal reasons, make it impossible”. Therefore, to clarify the extent to which requirements in these provisions could be regarded as fulfilled, such an explanation could be introduced. Since such an understanding was provided by members in their negotiations, the introduction will not far exceed their reasonable expectation. While there is no clarification for “to the extent possible” and “if possible” in neither the legal text of WTO agreements nor the DSB rulings, the reform of such provisions faces more difficulties. However, given that “to the extent possible” and “if possible” show lower expectations for members to comply, the compelling reasons that can exclude the application of these provisions should have a broader range than those of the previous provisions. For example, “if possible” could be replaced with “if do not cause unreasonable burden for the implementers”. Article 4.2 of the GATS reads

> Developed country Members, and *to the extent possible* other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members’ service suppliers to information, related to their respective markets…[emphasis added][633]

After replacing “if possible”, those developing and least-developed members that have been suffering from a severe staffing shortage in trade administration can assert that the obligation stipulated in Article 4.2 causes unreasonable burden for their weak administration system, and they should be granted a longer period of time for implementation. As to the phrase “exercise due restraint”, what makes it different from others is that it imposes a duty to refrain from action. However, the “due” does not express a strong tone. Thus, it can be understood in a similar way as “if possible”. For example, Article 24.1 of the DSU requires members to “exercise due restraint in raising matters under these procedures involving a least-developed country Member.” It can be modified as “Members shall not raise matter under these procedures involving a least-developed country Member when such action can cause unreasonable burden for the least-developed Member”.

The second group of provisions contains ambiguity in both the extent of compliance and the method of implementation. Differing from the first group, they regulate behaviors, instead of outcomes. Thus, their reform requires not only the clarification of the extent but also more specific descriptions of the act. The texts of WTO agreements and the rulings of DSB also do not provide any guidance as to the legal effect of these provisions. But as the first group of provisions,

[633] E.g. GATS, Article 4.2.

the different wording also show the different levels of compliance in this group. Expressions commonly used in these provisions are "accord full and sympathetic consideration", "give active consideration", "have special regard", "pay due regard", "take account of". These provisions contain the same acts of performance, which is to consider certain situation. However, as the AB stated in China—GOES[634], "consider" is an activity of thought, its implementation should be proved by some documents or records. Thus, the act of "consideration" should be made tangible in order to prove the existence of implementation and to be reviewed by the WTO adjudicators. In addition, consideration is not specific enough to provide clear guidance for implementers. And different degrees of fulfilment demonstrate different requirements for consideration. If distinguishing them according to the wording used in these provisions, then "accord full and sympathetic consideration" should be regarded as placing the highest requirements on implementers, "give active consideration" and "have special regard" are the next most demanding, while "pay due regard" and "take account of" are less demanding. The clarification of obligations under these provisions should be calibrated in accordance with this hierarchy of compliance expectations. And according to different levels of consideration, this obligation could be understood in several ways. For example, as India proposed on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia in 2003, concerning the general and ambiguous content of Article 21.2 of the DSU. They suggested to rewrite this article in the following manner

> Article 21.2
>
> Notwithstanding anything contained in this Article, particular attention shall be paid to matters affecting the interests of developing-country Members with respect to measures which have been subject to dispute settlement in the following manner:
>
> (a) if the party complained against is a developing country Member and the complaining party, a developed country Member,
>
> (i) the reasonable period of time under paragraph 3 this Article below should normally not be less than 15 months. If the measure at issue requires change of statutory provisions or change of long held practice/policy, the reasonable period of time should be at least two years. The arbitrator under paragraph 3 (c) of this Article may indicate, where the situation warrants, the requirement of a reasonable period of time beyond two years;
>
> (ii) the complaining party should request consultations with the party concerned prior to seeking recourse to the proceedings under the terms of paragraph 5 of this Article. The time for completion of such proceedings should be increased from 90 days to 120 days. The panel should give consideration as may normally be given to the particular situation of developing country Members.
>
> (iii) Filing of status report under the terms of paragraph 6 of this Article should be in alternative meetings rather than in every regular meeting of the DSB.
>
> (c) if the complaint is by a developing country Member against a developed country Member:
>
> reasonable period of time under the terms of paragraph 3 below should not exceed 15 months. Existing 90 days time limit for proceedings in accordance with paragraph 5 of this Article should be observed strictly. In case of delay the developed country Member

[634] Appellate Body report, China—GOES, WT/DS414/AB/R, adopted on 18 October 2012, para. 130.

concerned should offer mutually acceptable compensation for continuing trade loss to the developing country complainant.[635]

The phrase "pay particular attention" in the original article requires members to take certain actions, but it cannot lead to any concrete results, and the suggestions from these developing members followed this pattern. Although specific results were illustrated, they used "should" and "may" to meet this characteristic and indicated that these results were not legally binding. Such improvement is different from that of the first group, because it also relates to the content of obligation. That means, different level of compliance can be reflected from different content of obligations. However, such improvement cannot help members and WTO adjudicators determine whether these obligations have been implemented, because the use of "should" and "may" does not indicate any specific result in practice. And such proposals can be further improved by clarifying the circumstances under which these obligations should be mandatory, as Article XXXVII.1 of the GATT and other escape clauses. Besides that, different levels of consideration can also be understood as proactively proposing possible implementation plans or solutions, establishing dedicated working groups with other members or scheduling a special discussion on relevant issues, analyzing the feasibility of proposals from other members, combining with some mandatory accountability obligations, and so on. For example, India and other developing members in the same proposal combined vague content of Article 4.10 with accountability obligations. This article reads "[d]uring consultations Members should give special attention to the particular problems and interests of developing country Members.". India and other developing members suggested that such obligation should be improved, and the revised version reads

Article 4.10

During consultations Members shall give special attention to developing-country Members' particular problems and interests in the following manner:

(a) if the complaining party is a developed country Member and if it decides to seek establishment of a panel, it shall explain in the request for establishment of panel as well as in its submissions to panel and the Appellate Body as to how it had taken into account or paid special attention to the particular problems and interests of the developing country Member concerned;

(b) if the developed country Member is a defending party, it shall explain in its submissions to the panel as to how it had taken into account or paid special attention to the particular problems and interests of the developing country Member concerned;

(c) the Panel, while adjudicating the matter referred to it, shall make a ruling on this issue.

Therefore, they introduced an accountability obligation. However, as mentioned in previous parts, the existence of reporting obligation can to some extent monitor the implementation of the main obligation, in this case, considering the special situation of developing members, but the fulfilment of a reporting obligation does not imply that the main obligation has also been fully implemented. For example, Article 12.11 of the DSU also contains both accountability obligation and the main obligation. The accountability obligation is that panels should indicate the form of their consideration, and the main obligation is that panels should take account of relevant provisions. Mexico—Taxes on Soft Drinks, Turkey—Rice and other disputes arising from this

[635] DISPUTE SETTLEMENT UNDERSTANDING PROPOSALS: LEGAL TEXT, TN/DS/W/47, 11 February 2003.

article indicate that the main controversy focuses on the implementation of the main obligation, instead of the accountability obligation. Thus, introducing reporting obligation can only, to some extent, enhance the enforceability of the main obligation. That means the obligation to give consideration to developing members' special situation is still ambiguous, and such ambiguity still affects the effectiveness of this article. Thus, the approach of merely introducing accountability obligations can only play a limited role.

However, the content of submissions or reports is about the implementation of main obligations, thus, the requirements in accountability obligations can also impact main obligations. When the content of accountability obligations is general, and the content of the main obligations is ambiguous as well, the monitoring function of accountability obligation is limited. The main obligations can be implemented in a superficial manner, and the report or submission can just briefly mention that "they have considered". However, when the content of accountability is detailed and specified, it places higher demand for the implementation of the main obligations. For accountability obligations to be more effective in monitoring the implementation of main obligations, the content of accountability obligations can be further refined. For example, the main obligation of Article 4.10 is for developed members to "give special attention to the particular problems and interests of developing country Members". The accountability obligation introduced can require developed members to indicate what particular problems or interests of developing members have been considered, how these issues have been considered, opinions from both parties, and the impact of such considerations on the result of consultations.

It should be noticed that the introduction of accountability obligations is not essential to guarantee the implementation of main obligations. Many rules in WTO agreements are effective and operational even without accountability obligations. Thus, this proposal can be more specific and detailed concerning the main obligation. The proposal in the "Chairman's text" provides an approach to clarify the "special attention". Besides replacing "should" with "shall", it also suggests that "[w]hen the party complained against is a least-developed country Member, the possibility of holding consultations in the capital of that Member shall always be considered."[636] Although the expression "consideration of possibility" is still vague in the extent of compliance, it should be admitted that "holding the consultation in the capital of the least-developed Member" is a more specific obligation.

After reviewing best efforts SDT provisions in the DSU with best efforts clauses in other WTO agreements, it is clear that even if the wording can be clarified in the above-mentioned ways, the wording in the DSU itself, namely "give special attention", "take into account", "pay particular attention" and "exercise due restraint", does not impose high requirements on implementers compared with the wording found in best efforts clauses elsewhere in the WTO covered agreements. Because the reform of provisions with "should" and best effort clauses just makes the content of these provisions more precise and operational in practice, it does not make any modification that is beyond the expectation of members. And changing them into escape clauses

[636] SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY, TN/DS/9, 6 June 2003.

does not mean that what developing members can get from invoking these provisions is enough. There is still room to further enhance these provisions.

4.2.3. The reform of escape clauses

For difficulties developing members face in the DSM that are caused by the incomplete article content, lack of consideration of developing members' special needs and the outdated content of some escape provisions, the solution will inevitably make substantial changes to the content. Therefore, compared with the other two kinds of rules, improvement in this aspect is harder to be accepted by members. Besides that, when the content of SDT provisions is more precise and operational, it is time to review whether their content is effective in providing developing members a level playing field. It can also illustrate why the improvement of escape clauses should be discussed last.

The objective of procedural SDT provisions is to address developing members' difficulties in the dispute settlement proceedings. And the mandate of members in the Doha Round to make these provisions more effective should not only be understood as merely making them more effective in implementation but also making them more effective in providing a more level playing field for developing members. Thus, besides enhancing the legal enforceability and making the obligations more precise, content deficiencies of some provisions should also be improved in the Doha Round. After replacing ambiguous wording with more specific content, provisions using "should" and best efforts clauses tend more towards escape clauses, thus, the reform of escape clauses actually covers the content of all procedural SDT provisions.

Article 21.2 of the DSU is an example of lacking essential elements. It reads, "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement". It does not provide which developing member's interests should be taken into account. Developing members could be complainants, respondents, or third parties in disputes. And this defect can be demonstrated in many disputes. In Indonesia—Autos (Article 21.3 (c))[637], Chile—Alcoholic Beverages (Article 21.3 (c))[638], and Chile—Price Band System (Article 21.3 (c))[639], implementing developing members invoked this article, and arbitrators analyzed how their interests should be taken into account. Thus, the issue who can rely on this article had not triggered much controversy at that time. While in US—Offset Act (Byrd Amendment) (Article 21.3 (c)) case, complaining developing members for the first time asserted their rights under this article. And the arbitrator confirmed that "Article 21.2 does not distinguish between situations where the developing country Member concerned is an implementing or a complaining party" [640]. Thus, complaining developing

[637] Arbitration Award, Indonesia—Autos (Article 21.3(c)), WT/DS54/15 ; WT/DS55/14 ; WT/DS59/13 ; WT/DS64/12, 7 December 1998, para. 24. See also Arbitration Award, Argentina—Hides and Leather (Article 21.3(c)), WT/DS155/10, 31 August 2001, para. 51.
[638] Arbitration Award, Chile—Alcoholic Beverages (Article 21.3(c)), WT/DS87/15 ; WT/DS110/14, 23 May 2000, para. 45.
[639] Arbitration Award, Chile—Price Band System (Article 21.3(c)), WT/DS207/13, 17 March 2003, paras. 55-56.
[640] Arbitration Award, US—Offset Act (Byrd Amendment) (Article 21.3(c)), para. 81.

members can also invoke this article. Then, EC—Tariff Preferences (Article 21.3 (c)) case made the interpretation of "developing country Members" more complicated. The EC requested the arbitrator to consider the interests of developing members, which were beneficiaries of its WTO-inconsistent measure. The arbitrator of this dispute decided that it is unnecessary to make a decision on this issue on the ground that neither India as the complaining party nor the EC as implementing party had provided convincing explanation or evidence that could prove that the interests of these developing members were affected in this dispute.[641] Therefore, the coverage of developing country Members in this article has not been clarified, and it may again cause controversy in a future dispute. Besides the developing members that can benefit from invoking this article, Article 21.2 also fails to specify who should consider the interests of developing members. And this controversy might be raised in the future. This lack of essential elements might bring difficulties for members and WTO adjudicators in future disputes. And it can be avoided by making up these deficiencies. Specifically, this requires clarifying: first, whether developed members who are parties to a dispute bear an obligation to consider the interests of developing members; and second, whether non-party developing members can invoke this article. From another perspective, making incomplete article more precise can reduce unnecessary waste of litigation resources, and that is especially important for developing members who suffer from shortage of resources. India and other developing members in their proposals also pointed out this problem, and suggested that, although in different manners, arbitrators, panels and developed members all have obligation to consider the interests of developing members. They also limited the coverage of developing members to complaining and implementing parties. Thus, the interests of non-party developing members are excluded.[642]

Besides the incomplete content of some SDT provisions, developing members also face difficulties in using some rules that cannot meet their real needs in the DSM. Assistance provided by the WTO Secretariat, as mentioned above, can illustrate this point. Article 27.2 of the DSU requests the WTO Secretariat to "make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests".[643] The objective of this article is to relieve developing members' shortage in litigation resources. Considering the increasing number of developing members and the heavy workload of legal affairs division, the assistance this division can offer to developing members is limited in quantity. Developing members that cannot obtain assistance from the Secretariat must still procure outside legal services at their own expense. So, it cannot effectively solve the legal and financial restraints in developing countries. In addition to the inadequate help in quantity, the quality of such assistance cannot meet needs of developing members. Because, according to Article 27.2, the legal expert must provide assistance in a manner that ensures the impartiality of the Secretariat. The latitude of legal experts to help developing members in the DSM is limited by such a requirement.[644] Thus, the reform of this article is needed.

---

[641] Arbitration Award, EC—Tariff Preferences (Article 21.3(c)), para. 59.
[642] TN/DS/W/47, 11 February 2003.
[643] DSU, Article 27.2.
[644] Valentina Delich, *Developing Countries and the WTO Dispute Settlement System, in DEVELOPMENT,* TRADE, AND THE WTO 71, 74-75 (Bernard Hoekman et al. eds., 2002).

First, the inadequacy in quantity should be addressed. As Part 3 §1.1 establishes, the ACWL acts as a supplement to Article 27.2, though its narrower membership coverage means it cannot replace reform of the Article itself. However, the role of ACWL in addressing this issue is also limited. Because legal support provided by ACWL is only available to a limited number of developing members.[645] It should also be noted that "developing countries that have become ACWL Members to date include approximately two-thirds of the developing countries that have been a complainant or respondent in WTO dispute settlement proceedings."[646] This means that the needs of developing members who have already been parties to WTO disputes are, to a significant extent, met. However, developing members that lack the financial resources to participate in the DSM and have not contributed to the ACWL Endowment Fund fall outside the scope of ACWL services—yet these are precisely the members most in need of assistance. Thus, the lack of litigation resources still constitutes obstacles for developing members to participate in the DSM. Considering the narrow scope of services of the ACWL, the reform of Article 27.2 can directly and effectively resolve this problem and encourage more developing members to solve their disputes through the DSM. Article 27.2 can stipulate the waiting period for developing members to get legal assistance from the Secretariat, and the Secretariat can appropriately adapt the number of legal experts according to the real needs of developing members so as to guarantee the minimum availability of legal assistance. The Chairman's text also recognizes the shortage of legal experts, and proposes that "the Secretariat shall maintain a roster of qualified legal experts, from which an expert shall be made available to any developing country Member which so requests".[647] Concerning the inadequacy in quantity, it could also be argued that the limited number of legal experts can help prevent the misuse of legal assistance provided by the WTO and can leave chances to developing members in real need of help. Thus, some extent of inadequacy in quantity of legal experts should be reserved in this article and the ACWL. Furthermore, the establishment of the ACWL has considerably addressed this issue. Thus, the increase in the number of legal experts is unnecessary. However, it must be admitted that inadequacies still exist. The establishment of the ACWL in 2001 indicates the limited effectiveness of Article 27.2 in meeting the minimum needs of developing members. The limited number of developing members that can benefit from the ACWL also suggests that developing members' shortage in legal and financial resources has not been fully addressed. Thus, the reform of Article 27.2 is still meaningful for developing members. Also, as the supplement of Article 27.2, the ACWL can also mitigate the difficulties by expanding its scope of service to all developing members.

Second, developing members' needs of lawyers who can provide wide-ranging and in-depth assistance in the DSM cannot be addressed by Article 27.2. Thus, the way legal experts provide legal assistance should be improved. And the quality of assistance could be improved by removing the requirement of "impartiality", which limits the assistance provided by these legal experts. Without such a requirement, legal experts can act as lawyers of developing members, and can effectively fill positions of legal representatives of these countries in the DSM. The

[645] ACWL, at: https://www.acwl.ch/, last visited: Sept. 30, 2022.
[646] "The Services of the ACWL," 5.
[647] "TN/DS/9."

support of these legal experts can be drawn from corresponding rules in the ACWL, which includes

> initial assessment and preparation of the case; drafting consultation requests; drafting questions or answers to questions in preparation for consultations; drafting requests for the establishment of a panel and statements for meetings of the Dispute Settlement Body (DSB); advising on the composition of the panel and the submission of a request to the Director-General to compose the panel; drafting panel submissions and responses to written questions from panels and other parties to the proceedings; advocacy at panel meetings, including answering questions from panels and parties at the meetings; and drafting notices of appeal and notices of other appeal, Appellate Body submissions and advocacy during Appellate Body hearings, including responding to questions.[648]

Besides the inadequacy in the quality and quantity of legal assistance, the WTO Secretariat and the ACWL are also criticized for their failure to provide non-legal technical help in the DSM. It should be noted that these two arrangements were designed to provide developing members with assistance solely in addressing their shortage of financial and legal resources. However, WTO disputes also cover other areas of expertise, and WTO Secretariat and the ACWL could not provide any help to developing members in these areas. The ACWL has responded effectively by establishing a Technical Expertise Trust Fund to finance part of cost in some non-legal technical issues that developing members increasingly required in the DSM.[649] This gap, however, has not been addressed in the DSU itself. Therefore, developing members that are not members of the ACWL cannot obtain assistance on these non-legal issues. Thus, Article 27.2 should also take into account developing members' lack of expertise in other areas.

Even if some SDT provisions were precise and considered meaningful for developing members at the time of their creation, their effectiveness in providing special and differential treatment has diminished over time. Corresponding provisions in the 1966 Decision are good illustrations. Although this Decision is the first document in the multilateral trading system addressing developing members' special situations and needs, and its status as the milestone in the history of SDT provisions in dispute settlement proceedings cannot be denied, the effectiveness of this decision has been diminished. Article 3.2 of the DSU offers developing members with provisions in the 1966 Decision as alternatives to procedures in the DSU. Article 3.12 as a SDT provision in the DSU should have introduced better treatments for developing members, however, as *lex specialis* that takes precedence over some procedures in the DSU, the 1966 Decision's role in this sense is questionable. Generally, special treatments in the 1966 Decision have no significant difference with rules in the DSU. After this decision entered into force, the subsequent 1979 Understanding, 1982 Declaration, 1984 Decision and the 1989 Improvements all followed the lead of 1966 Decision, and they failed to introduce any meaningful change on SDT issues. Even the establishment of WTO and the introduction of the DSU added some SDT rules on the basis of previous documents, procedural SDT provisions are still modeled on 1966 Decision. The SDT provisions in 1966 Decision that differ significantly from those in the DSU are limited in number, some rules even cannot be considered as special treatments, they are just more elaborate and

[648] "The Services of the ACWL," 13.
[649] Nottage, "Developing Countries in the WTO Dispute Settlement System," 7.

contain more detailed steps than the DSU, such as alternatives to Article 4 and 5 of the DSU. Some provisions are more favorable than those in the DSU, but some provisions in the DSU offer developing members more flexibilities than the 1966 Decision. Thus, whether provisions in the 1966 Decision can be considered as better choices for developing members is questionable. From a historical point of view, the DSU incorporates many rules in the 1966 Decision. For the 1966 Decision to serve as a more favourable alternative for developing members, it must offer them more preferential treatment than the DSU already provides, and its content should be improved. When some rules in the 1966 Decision cannot offer developing members better treatments or they contain similar rules as the DSU, there is little reason for developing members to invoke the 1966 Decision. Thus, these rules fail to act as SDT provisions for developing members, and they should be deleted from this document. Content that is not substantively different from existing DSU provisions—but merely more detailed in expression—can hardly be considered preferential treatment and should be incorporated directly into the corresponding DSU provisions. Considering that the 1966 Decision has been rarely used by developing members in the DSM, the effectiveness of provisions that should have offered more favourable treatment for developing members, such as the right of developing members to refer the matter unilaterally to the Director-General to use his/her good office and a shorter panel procedure, should be reassessed. Take the shorter panel procedure as example, although it can benefit complaining members, especially complaining developing members whose fragile economy could be severely damaged due to the perspective remedies in the WTO and the long litigation proceedings. However, the legal complexity of litigation and the lack of litigation resources force developing members to choose a longer preparation time. The practical effectiveness of this special procedure has been diminished. In addition, this special procedure also fails to provide developing members more favorable treatments they can enjoy in the DSU. And that further explains the reluctance of developing members to use 1966 Decision.

It is argued that this decision "has not lived up to its expectations".[650] It has been also discussed whether this decision should be terminated, and the feasibility of incorporate some of its provisions into the DSU.[651] Given how rarely these provisions have been invoked, their termination would likely have little practical impact on developing members' use of SDT provisions in the DSM. While the incorporation cannot solve the ineffectiveness of these rules and there are still chances to improve the special procedure contained in the 1966 Decision. And if the decision is to be preserved, members should explore how the *lex specialis* status can be used more effectively to address developing members' difficulties in the DSM. And new SDT provisions that can better meet contemporary developing members' needs should be formulated to breathe new life into the old document. For example, the shorter panel procedure has not worked to its value, some reform is required to restore the practical effectiveness of this decision. When shortening the panel procedures, drafters should simultaneously consider reducing the

[650] Saleh Al Shraideh, The Participation of Developing Countries in the Dispute settlement System of the WTO, Wolf Legal Publisher, p.159 (2013).

[651] Qureshi Asif H., "Participation of Developing Countries in the WTO Dispute Settlement System," *Journal of African Law* 47, no. 2 (October 2003): 196, https://doi.org/10.1017/S0021855303002080.

legal complexity of litigation and other burdens of developing members, and introducing the arrangements stipulated in the DSU that are more favorable to developing members.

4.3. Reforming the interpretation methods of procedural SDT provisions

Whether the replacement of “should” with “shall”, or the clarification of obligations, or substantive improvement of content, any change of the SDT provisions themselves cannot be achieved without members’ consensus. Thus, any opposition from members can block the negotiations on these issues. Achieving consensus on changes to SDT provisions has proved extremely difficult, as demonstrated by the prolonged stagnation of the Doha Round negotiations. Beyond the legislative approach, the interpretation of these provisions without amending their content offers an alternative avenue for addressing these problems. According to the Marrakesh Agreement, “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”[652] Such authoritative interpretation is “binding on the parties and any organs which decides on their rights and duties on a basis of delegated authority.”[653] However, considering the composition of these two organs (the Ministerial Conference and the General Council are both composed of representatives of all members) and the consensus principle in decision-making process, their interpretation on WTO agreements will not be easier to be achieved than the conclusion of members’ negotiations.[654] Although members have requested for authoritative interpretation from these two organs, such an authoritative interpretation has, as of yet, never been adopted in the WTO.[655] Besides the Ministerial Conference and the General Council, the WTO also grants adjudicators some discretion to explain the covered agreements in the DSM through making judicial interpretation. Although such interpretation in principle only binds the parties to specific dispute, and cannot constitute binding precedent for subsequent cases,[656] it still profoundly impacts the understanding of members and adjudicators in other cases. Thus, the change in the methods of legal interpretation can influence developing members’ use of SDT provisions. Furthermore, judicial interpretation needs no consensus from members. Therefore, it is easier to change interpretation methods in the DSM. When the change of the content of SDT provisions faces obstacles, developing members might therefore seek to advance their interests through the avenue of judicial interpretation, encouraging WTO adjudicators to adopt more development-friendly readings of SDT provisions. In addition, from the perspective of difficulties developing members face in the DSM, some difficulties are caused by inappropriate judicial interpretation. This further supports the case for reforming the interpretive approaches adopted in the DSM.

---

[652] Marrakesh Agreement, Article IX.2.

[653] Georg Schwarzenberger, “Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties,” *Virginia Journal of International Law* 9, no. 1 (1969 1968): 11.

[654] Marrakesh Agreement, Article IV.

[655] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford ; New York: Oxford University Press, 2009), 26.

[656] “WTO | Disputes - Dispute Settlement CBT - Participation in Dispute Settlement Proceedings - Amicus Curiae Submissions - Page 1.”

However, it must be noted that the function of judicial interpretation is limited. Besides the general rule of interpreting international treaties, considering the member-driven nature of the whole multilateral trading system, the WTO adjudicators' interpretation should not deviate from the will of members. Otherwise, opposition from the members who established the system and who sustain its functioning risks precipitating a recurrence of the institutional crisis that the DSB is currently facing—most notably, the paralysis of the Appellate Body. It is important to examine the scope of discretion that WTO adjudicators possess in applying procedural SDT provisions.

4.3.1. The principle of interpreting procedural SDT provisions

The first issue that needs to be addressed before discussing specific interpretation methods is the boundary of applying these procedural SDT provisions in the DSM. More specifically, the potential of these rules in dispute settlement. It has been recognized that one size cannot fit all. Given these differences in development levels and litigation capacity, different rules should apply and more preferential treatments should be afforded to developing members. And that is the original purpose of the SDT provisions. Developing members' needs for more flexibility has been considered as one of the principles of the WTO.[657] However, such an arrangement is contrary to another principle, namely the non-discrimination principle of the multilateral trading system. This principle requires members to treat all other trading partners equally and without discrimination. Thus, WTO adjudicators must figure out the relationship between these two principles and balance them in their interpretation.

As Qureshi pointed out in his article, developing members have in many cases invoked development as factual consideration of disputes when there was no applicable SDT provision.[658] For example, India in India—Quantitative Restrictions case has not invoked SDT provisions to explain its adoption of measures but asserted that

> It did not announce quotas as required under Article XIII:2(a) because quotas were not practicable in the case of a relatively closed economy like India that was in the process of liberalizing its economy. As a developing country with a low standard of living, India simply did not have the financial and administrative resources to identify and administer the quotas for nearly 2,300 tariff lines.[659]

However, this argument was not adopted by the Panel. Such practice of developing members reflects their intent to treat SDT as a principle in interpreting all WTO rules. Some members also proposed that SDT should be treated "more importantly as an integral and inherent objective of the multilateral trading system". These members regarded SDT as "a fundamental building bloc

[657] "WTO | Understanding the WTO - Principles of the Trading System," accessed September 20, 2022, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.
[658] Asif H. Qureshi, "Interpreting World Trade Organization Agreements for the Development Objective," *J. World Trade* 37 (2003): 855–56.
[659] Panel report, India — Quantitative Restrictions, WT/DS90/R, adopted on 22 September 1999, para. 3.54.

of the multilateral trading system".[660] In their opinion, the SDT principle should have the same status as non-discrimination. However, their intention is hard to achieve for several reasons. It has been argued that the difficulty in differentiating developing members and "in advancing their interests as an amorphous group"[661] is one of the main reasons. While, as mentioned in the previous part, although diverse interests of developing members cause difficulties in the interpretation of substantive SDT rules, their different levels of development and different needs within the DSM do not manifest themselves as clearly in procedural matters as they do in the field of substantive trade rules. So, it does not constitute a major obstacle to treat SDT as a principle in the DSM. But such understanding is still infeasible due to other reasons.

Treating the principle of SDT as having the same status as non-discrimination will also raise doubt about the relationship between these two principles. It is conceivable that the application of the non-discrimination principle might trigger oppositions from developing members asserting their development objectives. And the unlimited SDT provisions will also hollow out the non-discrimination principle and turn the WTO from a trading system to a mere development system. And the objective of WTO to facilitate international trade would be diminished. It is not easy to draw the line and members making this claim did not propose a corresponding solution. The difficulties in balancing these two principles are particularly evident in non-violation complaints. Because there is no provision violated, when regarding the SDT principle as having the same status as non-discrimination principle, it will be harder to determine which principle should prevail.[662] So, it faces great obstacles in applying this principle in interpreting WTO rules in a general sense. Besides, although current SDT principle in procedural SDT provisions aiming at reducing the burden of developing members in the DSM can to some extent provide a more level playing field for all members, the introduction of SDT provisions in the DSU is premised on the recognition that developing members lack adequate resources to participate effectively in the DSM, therefore the role of SDT provisions in this sense will gradually diminish as developing members' litigation capacity increases. The importance of these rules for developing members will decline. Thus, unlike the non-discrimination principle that can serve as a long-term and stable objective of WTO system, the importance of SDT principle in the DSM, along with members' understanding of it will change over time. It is reasonable that these rules will not always be interpreted in the same manner by WTO adjudicators. Therefore, the temporary nature of SDT provisions also limits their function in the DSM. It cannot be regarded as having the same status as the non-discrimination principle in the WTO.

The AB in the EC-tariff preference case stated that members have recognized that the non-discrimination principle "failed to secure adequate market access for developing countries so as to stimulate their economic development"[663]. Concerning the SDT provision in the DSU, it could also be inferred that the application of the same rules to all members without differentiating

---

[660] WT/GC/W/442, 19 September 2001, para. 1, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/CTD/35.pdf&Open=True (last visited Sep 14, 2022).
[661] Mitchell, "A Legal Principle of Special and Differential Treatment for WTO Disputes," 445.
[662] Ezeani, "Can the WTO Judges Assist the Development Agenda?," 134–38.
[663] Appellate Body report, EC-tariff preference, WT/DS246/R, adopted on 1 December 2003, para. 109.

members discrepancy in litigation resources will in fact put developing members in a disadvantageous position in the DSM. Therefore, the principle of non-discrimination alone cannot achieve the objective of the WTO, it must be combined with other principles, for example, the principle of SDT. So, the principle of SDT plays a role when the non-discrimination principle cannot serve the interests of all members. The SDT principle could be considered as complementary to the non-discrimination principle. Although it also constitutes one of the principles of the WTO, it does not have the same status as non-discrimination. This also applies in the field of treaty interpretation. It can be concluded that the role of SDT as a principle of legal interpretation is limited.

Besides that, the inappropriate interpretation taken by the WTO adjudicators mentioned above also triggers members' questions about the status of SDT provisions. Restrictions on the effect of the SDT provisions in the judicial interpretation adopted by WTO adjudicators have raised doubt about whether SDT provisions should be regarded as exceptions. Generally, when an exception is found, the principle of *exceptio est strictissimae applicationis* should apply. It means exceptions should be interpreted restrictively, and when ambiguity exists, decisions should be made in favor of general provisions and against exceptions. It is not written in the Vienna Convention as a general rule of treaty interpretation, and it is not clear whether this principle is mandatory or discretionary in different international organizations. However, the principle of strict interpretation has been adopted by different international tribunals in many disputes. For example, the NAFTA arbitration panel in one case referred to this principle and stated that "reservations to treaty obligations are to be construed restrictively".[664] The ECJ also treats the principle of strict interpretation of exceptions as mandatory. It has in one case observed that "as it is an exception to the primary rule, the provision must be interpreted strictly"[665]. The ICJ has in Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) case stated that

> The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively.[666]

The judicial practice in the old GATT system and in the WTO has also recognized the importance of this principle in interpreting exceptions. However, the WTO adjudicators appear to have deviated from above international practice in several disputes. The AB in EC—Hormones (US) case stated that

> In much the same way, merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meanings of the actual treaty words, viewed in

[664] J. Martin Hunter et al., In the Matter of Cross-Border Trucking Services (Secretariat File No. USA-MEX-98-2008-01), 2 Asper Rev. Int. Bus. Trade Law 361, para. 237 (2002).

[665] Judgment of the Court (Fifth Chamber) of 7 March 2002. Commission of the European Communities v Republic of Finland. C-169/00, para. 18.

[666] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001, para. 212.

> context and in the light of the treaty's objective and purpose, or, in other words, by applying the normal rules of the treaty interpretation.[667]

And such understanding has been referred in other disputes, for example, the Panel in US—Steel Safeguards case also considered that

> Moreover, the Panel, when interpreting Article XIX of GATT 1994 and the Agreement on Safeguards, must bear in mind that exceptions under WTO law are not to be interpreted narrowly but rather in light of the ordinary meaning of the terms of such exception provisions taking into account the object and purpose of the Agreement on Safeguards, including the need to maintain a balance between market access and safeguards rights and obligations. Since the Agreement on Safeguards itself would have been drafted so as to recognize its exceptional nature and the emergency character of safeguard measures, the Agreement on Safeguards does not call for any especially restrictive interpretation.[668]

WTO adjudicators have repeatedly emphasized the foundational status of general rules of interpretation, and that there is no direct link between exceptions and narrow interpretation. However, they have not overruled the international practice on the interpretation of exceptions. Because none of their reasonings has denied the application of strict interpretation, they just exclude the characterization as the mere reason of invoking the principle of strict interpretation. Besides, the use of general rules of interpretation set forth in Article 31-32 of the Vienna Convention itself does not exclude the use of strict interpretation, and general rules of interpretation could eventually lead to the adoption of strict interpretation. The analysis of ordinary meanings, context, the purpose and objectives of the treaty will only reinforce the application of strict interpretation. Because liberal interpretation of exceptions will undermine members' original intent in establishing the treaty, and exceptions should also serve the purpose of the whole treaty. It could be understood that the principle of *exceptio est strictissimae applicationis* is originated in the general rule of treaty interpretation. The adoption of Article 31-32 of the Vienna Convention will also lead to the same conclusion.[669] Thus, the principle of interpreting exceptions restrictively is also applicable in the DSM. Concerning the status of procedural SDT provisions, if these provisions are considered as exceptions to other rules, they should also be narrowly interpreted. That means, the existence of ambiguity in SDT provisions will lead to interpretation that is favorable to general rules, and against SDT provisions.

The WTO adjudicators have in US—Wool Shirts and Blouses case established two criteria to determine whether a provision constitutes exceptions to general rules: "first, it must not be a rule establishing legal obligations in itself; and second, it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations."[670] And in EC—tariff preference case, the Panel by applying such criteria, recognized that the function of Enabling Clause was to authorize derogation from Article I.1 of the GATT, it met the two criteria.[671] Thus,

---

[667] Appellate Body report, EC—Hormones (US), WT/DS26/AB/R; WT/DS48/AB/R, adopted on Jan. 16.1998. para. 104.

[668] Panel report, US—Steel Safeguards, WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R, adopted on Jul. 11.2003. para. 10.13.

[669] ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES 109–110 (2006).

[670] Panel report, EC-tariff preference, WT/DS246/R, adopted on 1 December 2003, para. 7.35.

[671] Panel report, EC-tariff preference, WT/DS246/R, adopted on 1 December 2003, para. 7.38-7.39.

when it comes to the interpretation of the Enabling Clause, the principle of strict interpretation should apply. While characterizing Enabling Clause as an exception does not itself mean that all SDT provisions are exceptions. Whether procedural SDT provisions should be regarded as exceptions depends on whether they meet the two criteria. Concerning the first criterion, which is "must not be a rule establishing legal obligation itself", it means exceptions should not contain mandatory legal obligations. Take Article XX and XXI of the GATT as examples, they provide that "nothing in this Agreement shall be construed to prevent…"[672] They stipulate when members can act against other GATT provisions. However, they do not request members to do so. Members do not have mandatory legal obligations under Article XX and XXI to take any trade restrictive measures. They are only permitted to do so when certain requirements are met. According to this understanding, members can also decide not to invoke these two provisions. And the Enabling Clause has the similar characteristic. It provides "notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries…"[673] There is no mandatory legal obligation for developed members to grant more favorable treatments to developing members, instead, they may choose to. So, provisions that set forth mandatory legal obligations cannot be regarded as exceptions. It should be noted that, even when members elect to invoke a derogation, they must still satisfy certain procedural requirements. For example, when a member decides to implement trade restrictive measures under Article XX, these measures cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".[674] And Enabling Clause requests members applying GSP to developing members to "notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action".[675] Such requirements cannot change the non-obligation nature of this provision. Because whether they shall meet these requirements depends on their decision whether to invoke the derogations. The second requirement for determining whether a provision is an exception is that "it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations". The wording used in Article XX, XXI of GATT, and the Enabling Clause is similar from this perspective. They all authorize derogations from other provisions, Article XX and XXI stipulate when to exclude the application of other provisions of GATT, and the Enabling Clause is about the derogations from Article I of the GATT. That means the understanding and application of exceptions must be combined with rules establishing obligations.

According to these two criteria, whether procedural SDT provisions should be treated as exceptions, and whether they should be interpreted restrictively, can be determined. Take Article 3.12 of the DSU as example. It reads

[672] GATT, Article XX, XXI.
[673] Paragraph 1, Differential and more favourable treatment reciprocity and fuller participation of developing countries
[674] GATT, Article XX.
[675] Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, 28th November 1979 (L/4903, BISD 26S/203), para. 4(a).

> Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding…[676]

It is a derogation from Article 3.11, 4, 5, 6 and 12 which establish legal obligations. In addition, it does not create legal obligations itself. Some provisions in the 1966 Decision to which this provision refers requests parties to the dispute and some organ in the WTO to satisfy some requirements. For instance, paragraph 2 of the 1966 Decision requires that "Contracting Parties concerned shall, at the request of the Director-General, promptly furnish all relevant information."[677] However, as noted above, whether they should satisfy these requirements depends on whether developing members invoke this provision. Thus, the requirements in the1966 Decision will not change the non-obligation nature of Article 3.12, and this provision should be considered as an exception to other rules in the DSU. While some provisions do not meet the two criteria. Article 12.11 provides

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.[678]

It contains a legal obligation for the panel in case where one or more of the parties is a developing member. And the implementation of this obligation is not affected by the decision of any party, thus it establishes mandatory legal obligations for the panel. It does not meet the first criterion as an exception. Furthermore, it does not authorize developing members any derogation from mandatory legal obligations in other provisions. The implementation of this article does not affect the obligations in other procedural provisions. Thus, Article 12.11 does not constitute an exception to other rules.

From the panel's report in EC—tariff preference and the analysis of SDT provisions in the DSU, it could be concluded that not all SDT provisions are exceptions, even for SDT provisions in the same agreement, such as the DSU, their nature could be different. The consistent application of the principle of strict interpretation to all procedural SDT provisions—regardless of whether they constitute exceptions—is legally unsound. However, the judicial practice in the WTO suggests that WTO adjudicators are generally biased towards a strict interpretation of procedural SDT provisions, whether they are exceptions or not. And such interpretation method does not comply with the general rule of treaty interpretation set forth in the Vienna Convention. At least, it is not reasonable to interpret SDT provisions that do not constitute exceptions in a restrictive manner. They should be interpreted in accordance with the general rules stipulated in the Vienna Convention.

---

[676] DSU, Article 3.12.

[677] Decision of 5 April 1966 on procedures under Article XXIII, para. 2.

[678] DSU, Article 12.11.

Even for SDT provisions that are regarded as exceptions to other rules, concerning the manners of interpretation, the adoption of strict interpretation should also comply with the principle of effective interpretation. It means, although the non-discrimination prevails over the SDT principle in a general sense in the WTO, once the exception explicitly provides that the general rule does not apply in certain circumstances, these two norms have a different scope of application, and the general rule "must simply be carved out to the extent required to give effect to the exception (the exception can then even be considered as a conditional right, delinked from the general rule)."[679] Thus, in accordance with the principle of effective interpretation, the effectiveness of procedural SDT provision that constitutes exceptions to the general rules should not be diminished by the adoption of strict interpretation. Besides, it has been confirmed in the WTO that the interpretation method of these rules should be different from other exceptions. The AB in the EC-tariff preference confirmed that although Enabling Clause is an exception to Article I.1 of the GATT, the principle of SDT reflects members' consensus to encourage members to provide preferential treatments to developing members.[680] Instead of being interpreted restrictively, this kind of exception should be encouraged. The Enabling Clause as SDT provisions should enjoy "special status". Thus, the judicial practice of WTO adjudicators also contradicts their determination of the status of SDT provisions. When WTO adjudicators adopt a restrictive manner in interpreting SDT provisions, a lower threshold than members' consensus in their negotiations will actually achieve the effect of encouraging members not to grant better treatments to developing members. The adoption of such understanding goes against the principle of SDT and will diminish the interests of developing members under these rules. Thus, for procedural SDT provisions that constitute exceptions to other rules, the interpretation by WTO adjudicators should serve the purpose of encouraging members to grant developing members more favorable treatments. the SDT provisions that are regarded as exceptions need to be interpreted in such a way as to ensure that their effectiveness is not diminished, in the meantime, the goal of encouraging members to grant such SDT to developing members should be taken into account.

4.3.2. Interpretation methods of procedural SDT provisions

Principles above can chart a course for interpreting procedural SDT provisions. However, these principles alone cannot address problems in understanding specific provisions and improve their effectiveness. Solutions should be found in accordance with the characteristic of different types of SDT provisions. In addition, it should be noted that the inappropriate interpretation methods adopted by WTO adjudicators are mainly caused by the ambiguity in some provisions. Discretion of adjudicators will be to a large extent be limited when SDT provisions are precise, effective, and operational, and in this case, the analysis of how to improve the legal interpretation will then make little sense. Besides, improving the content of SDT provisions requires members' consensus, which is hard to be reached, but it is easier to improve the effectiveness of SDT provisions through legal interpretation. Thus, the discussion of this part takes place in the context of the inability of

[679] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), 163.
[680] Appellate Body report, EC—tariff preference, WT/DS246/R, adopted on 1 December 2003, para. 107, 111, 114.

members to make consensus on the improvement of these procedural SDT provisions. And it focuses on how to make these ambiguous provisions more effective through legal interpretation.

It should be admitted that there is relatively little room for improvement in legal interpretation compared with modification of procedural SDT provisions. According to Article 3.2 of the DSU, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." In other words, judicial interpretation cannot break the balance reached by members in their negotiations. Thus, WTO adjudicators in interpreting WTO rules face the pressure of possible criticism from members. And that should be taken into consideration in the process of exploring possible ways to improve the legal effectiveness of SDT provisions. For example, in order to give legal effectiveness to SDT provisions that contain "should", this term can be replaced with "shall" if members so agreed in their negotiations. However, interpreting the term "should" as imposing legal obligation in some cases will trigger members' oppositions. Because WTO adjudicators cannot add to the obligations provided in this article. And the interpretation of provisions containing outdated content cannot deviate from what has been determined by members in these provisions, which means WTO adjudicators' interpretation cannot substantively change rights and obligations in these outdated obligations. Making these provisions more responsive to the needs of developing members can only be achieved by modifying their content, and that is beyond the capacity of WTO adjudicators. The area where legal interpretation can play a major role is in interpreting ambiguous rules. Because the implementation of ambiguous provisions requires WTO adjudicators to clarify the content, and WTO adjudicators can exercise their discretions in this process. Therefore, the change of content can fundamentally address the ineffectiveness of these provisions, while the WTO adjudicators should mainly focus on the interpretation of ambiguous best efforts provisions without adding to or diminishing the rights and obligations provided in these rules.

Before exploring the specific interpretation methods, there are some general rules in interpreting best efforts provisions WTO adjudicators should bear in mind. First, best efforts clauses impose legal obligations. Best effort clauses contain ambiguous obligations that provide members and WTO adjudicators limited guidance for implementation, and similar expression is also common in other international treaties, such as Article 4 and 5 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, which provide

> Article 4
>
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> Article 5
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country…

and Article 2.1 of the Covenant on Economic, Social and Cultural Rights, which reads

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The ambiguous obligations contained have led to debates on the legal effect of these provisions. However, corresponding institutions have made it clear that such "best efforts" expression should not be regarded as eviscerating the obligations or merely stating the intention of contracting parties. They are legal obligations. Although WTO agreements and the above treaties cover different fields of international law, rules contained all have to be interpreted in accordance with Vienna Convention. Thus, it is reasonable that WTO adjudicators borrow the interpretation methods from other fields. And in light of the increasing interaction between different international organizations, inevitably, the interpretation of WTO adjudicators would be affected by institutions in other organizations.[681] WTO adjudicators have in many disputes followed the international practice and confirmed that best efforts imposed legal obligations.[682] Such understanding is in line with current international judicial practice in international law.

Second, such legal obligations should not be regarded as the mere good faith requirement. Farnsworth has distinguished these two terms by stating that

> Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting.[683]

Also, good faith is implicated in every agreement. Members can expect others to act in good faith even in the absence of any explicated good faith clauses. Given that members bargained hard to reach these best effort clauses, they should be regarded as requiring additional performance.[684] It also required considerable effort on the part of members to negotiate provisions using terms such as "if possible". Thus, such best efforts clauses should be interpreted as imposing a higher requirement of compliance than good faith. While regarding the different levels of compliance in best efforts clauses, the exact extent should be determined by WTO adjudicators.

As mentioned in the previous part, different wording in best efforts clauses demonstrates different requirements for the implementation of these obligations. As established in §4.2.2, best efforts clauses fall into two groups by their linguistic structure: those ambiguous only in the degree of compliance ('to the fullest extent possible', 'to the extent possible', 'if possible'), and those ambiguous in both degree and content ('give active consideration', 'take account of', etc.).

---

[681] Sonia E. Rolland, Development at the World Trade Organization, Oxford University Press, p. 119-124 (2012).

[682] For instance, Panel Report, EC-Bed Linen, WT/DS141/R, adopted 12 March 2001. para. 6.233; Panel report, EC - Asbestos, WT/DS135/R, adopted on 5 April 2001, para. 4.23.

[683] E. Allan Farnsworth, "On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law," *University of Pittsburgh Law Review* 46, no. 1 (1985 1984): 8.

[684] Zachary Miller, "Best Efforts: Differing Judicial Interpretations of a Familiar Term Notes," *Arizona Law Review* 48, no. 3 (2006): 617–18.

The same gradation that informs content reform equally guides the interpretive approach. WTO adjudicators have in some disputes clarified the meaning of ambiguous terms and filled gaps in agreements, and such understanding has been referred in subsequent cases. For example, the establishment of burden of proof in US—Wool Shirts and Blouses case[685], and the clarification of "exhaustible natural resources" in the US—Shrimp case[686] both confirmed the extent of WTO adjudicators' discretion in interpreting covered agreements. Thus, it is possible for WTO adjudicators to determine the legal effect of terms like "to the extent possible" and rephrase them in a clearer way. And compared with making decisions on a case-by-case basis, establishing a clear standard is preferable for both WTO adjudicators and members. For WTO adjudicators, a clear standard can conserve judicial resources and improve judicial efficiency. For members, a clear standard can provide them with prediction in future disputes and reduce litigation cost, and that is especially important for developing members that lack such resources.

It should also be noted that, when the specific legal effects of terms like "to the extent possible" have not been determined by members or WTO adjudicators, some interpretation methods from other fields can play a role. However, they can only be applied on a case-by-case basis. For example, the combination of subjective and objective factors should be adopted by WTO adjudicators. This method is established in the field of contract law in the US. In Bloor v. Falstaff Brewing Corp, the plaintiff James Bloor as the producer of beer, and the defendant Falstaff Brewing Corporation who acquired the plaintiff's assets reached a contract that requested the defendant to "use its best efforts to promote and maintain a high volume of sales" of the plaintiff's products. These two parties disagreed on the meaning of "best efforts" in the trial, and they requested the court to determine whether the decline of the sale of plaintiff's beer could demonstrate that the defendant had violated the contract. The court defined the "best efforts" as implementing the obligation to the "extent of its own total capabilities", and in order to determine whether this requirement had been satisfied, not only subjective factors, such as the total capabilities of the bound party, but also objective factors, for instance, "the marketing expertise and experience attributable to the 'average, prudent, comparable' brewer"[687], or in other words, "the circumstances surrounding the agreement"[688], should be considered. Although this judgement did not provide a unified standard that also apply in other cases, and judges have to make decisions on a case-by-case basis, the interpretive method of combining subjective and objective factors provides WTO adjudicators an approach to interpret best efforts clauses that are less exacting than provisions containing highest adjective and similar expressions.

There is no unified standard to interpret best efforts clauses. Besides the Bloor approach, there are also other methods of interpretation. Judge Posner, in Olympia Hotels Corp. v. Johnson Wax Development Corp., adopted a purely subjective approach that focused on the prior, similar activities of the implementors. If their activities had never been questioned before, it should not be regarded as a violation.[689] However, it is not clear what constitutes "being questioned", and

[685] Appellate Body report, US—Wool Shirts and Blouses, WT/DS33/AB/R, adopted on 25 April 1997, p. 14.
[686] Appellate Body report, US—Shrimp, WT/DS58/AB/R, adopted on 6 November 1998, para. 128-130.
[687] Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258 (S.D.N.Y. 1978).
[688] Miller, "Best Efforts," 623.
[689] Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, August 21, 1990.

this standard is meaningless in cases where there is no prior activity. Thus, the Bloor approach is more operable in practice.[690] Rob Park also proposed to attach an agency obligation to best efforts clauses to provide clearer criteria for judgement, but the agency obligation mode does not fit the relationship in the WTO agreements, thus it can hardly help solve the issue in DSM.[691] Having excluded the approach that treats best efforts clauses as equivalent to a mere good faith requirement, and the approach that denies their legal effect altogether, the most appropriate method for interpreting best efforts clauses in the WTO is the Bloor approach. Although the Bloor case is not in the field of international trading agreements, the best effort clause in this case has a similarity with best efforts clauses in the WTO, which is the ambiguity in the extent of compliance. Thus, WTO adjudicators in interpreting best efforts clauses can also apply the Bloor approach to analyze from both subjective and objective aspects.

For the second group—those ambiguous in both degree and content—WTO adjudicators face the additional difficulty of determining what 'consideration' consists of, beyond merely how much of it is required. In this case, the WTO adjudicators can make a non-exhaustive list of behaviors in accordance with different levels of compliance in these provisions. Regarding the judicial practice in the WTO, WTO adjudicators enjoy such discretion. The Panel in Russia - Measures concerning traffic in the Transit case clarified the term “other emergency in international relations” contained in Article XXI(b)(iii) of the GATT. This term is ambiguous and must be further clarified before applying. The panel stated that

> An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.[692]

It replaced the vague expression with three more specific terms. Thus, it is also possible for WTO adjudicators to clarify what constitutes “full and sympathetic consideration”, “special regard” and “due regard” in the same way in future cases. In addition, when the different terms in these best efforts clauses cannot be clarified in the short term, the method of combining subjective and objective factors and determining the extent of compliance on a case-by-case basis can be applied here.

As noted in §4.2.2, DSU best efforts SDT provisions sit at the lower end of this linguistic spectrum, making their interpretation correspondingly more demanding. In the absence of clear guidance on the content of these provisions, only certain interpretive approaches can assist WTO adjudicators in clarifying their scope. WTO adjudicators can replace ambiguous terms with more specific examples. If that is still too hard to be achieved, they can use the analysis approach that combines subjective and objective factors and make decisions on a case-by-case basis. However, the last approach can only provide developing members with limited help regarding their participation in the DSM. Because it is only about the perspectives of interpretation, the ambiguity of these provisions and the uncertainties in future disputes cannot be resolved,

[690] Miller, “Best Efforts,” 630–31.

[691] *See* Rob Park, “Putting the Best in Best Efforts Comment,” *University of Chicago Law Review* 73, no. 2 (2006): 705–30.

[692] Panel report, Russia—Measures concerning traffic in Transit, WT/DS512/R, adopted on 7 June 2017, para. 7.76.

developing members still have to invest a great deal of financial and legal resources in each dispute settlement proceeding to get a ruling in their favor. Therefore, from the perspective of encouraging the participation of developing members in the DSM, major efforts should be put in modifying the content of these ambiguous SDT provisions and encouraging WTO adjudicators to establish clear standards that can be used in different disputes.

It can be inferred from the above analysis that when members have not put enough efforts to make these rules precise and operational in their negotiations, they have to face more uncertainties in future disputes and invest more resources in litigation process to get an interpretation in their favor. And that is especially unfavorable to developing members who lack financial and legal resources. Thus, making the provisions precise enough to be implemented is especially meaningful for developing members in their future negotiations. And concerning the modes of improving the effectiveness of these rules, modifying the current provisions by negotiations is also the best way to address this issue, considering that rulings of WTO adjudicators apply only to parties to specific dispute, and that the member-driven nature of the whole system. When the modification cannot receive consensus from all members, the burden of clarifying ambiguous SDT provisions is left to WTO adjudicators. In this case, providing a clear standard that can be used in future disputes is better than deciding on a case-by-case basis, given that clear criteria can provide members with more prediction in the future disputes, and resources used to analyze the capabilities of implementors and facts in different disputes can be saved.

Part 4 Remedies in the WTO and their reform

After the resources- and time-consuming litigation process, whether measures that are recognized as WTO-inconsistent can eventually be brought into conformity with covered agreements is an important criterion for evaluating the effectiveness of the DSM. When immediately implementing recommendations and rulings is not practical, members should be given a reasonable period of time to do so.[693] In case that members fail to implement these recommendations and rulings within this period, the DSU provides complainants some temporary remedies for the violation of trade rules. Article 22 provides that

> If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.[694]

However, developing members have claimed that their experience in the DSM showed that the ineffectiveness of these remedies in the DSU constitutes another obstacle for them to utilize the DSM to protect their rights and interests under covered agreements. And they demanded a reform of WTO remedies to take into account their special needs in the implementation stage. They showed great enthusiasm in participating in the Special Sessions of the DSB for reviewing the DSU and the Special Sessions of the Committee on Trade and Development. And their efforts in prompting the reform in WTO remedies continued through the Doha Round negotiations, but little outcome in this regard has been achieved.[695] Members and experts in this field have proposed to enhance the effectiveness of WTO remedies in several different ways, these proposals include retroactive remedies, financial compensation, collective retaliation, tradable retaliation, carousel retaliation, *etc*.[696] Whether these proposals are practical in the WTO legal system is not an easy question to answer, it involves, but is not limited to, an understanding of WTO agreements and the major purpose of WTO remedies. Thus, before discussing the feasibility of specific proposals, some essential preparations need to be completed.

---

[693] DSU, Article 21.3

[694] DSU, Article 22.2

[695] Babu, "Remedies for Violations of WTO Law," 492.

[696] Shraideh, *The Participation of Developing Countries in the Dispute Settlement System of the WTO*, 206–28. William J. Davey, Sanctions in the WTO: Problems and Solutions, in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, (ed. Bown and Pauwelyn) 360, 360-372. *etc.*

This chapter will be structured in the following way: The first part introduces the development of remedies in the multilateral trading system and the impact of such changes on developing members. Then the second part illustrates difficulties developing members face in using these remedies, and why these remedies should be reformed to provide members with a more level playing field. Members as well as scholars in WTO law proposed several options for improvements. The following parts of this chapter analyze whether these proposals are feasible, and whether they can improve the effectiveness of WTO remedies for developing members. Conflicts among these proposals reveal different understandings of WTO rules. These include issues on the relationship between general public international law and the WTO law, the nature of WTO treaties, and the purpose of WTO dispute settlement. This chapter aims to address these questions and offer proposals for the reform of WTO remedies.

1. The development of remedies in the GATT and WTO legal system

1.1. Remedies in the GATT legal system

Given that the GATT system evolved from a temporary solution for the unestablished ITO to an organization with a more complete operational mechanism, the remedies in the GATT period had also undergone a gradual development. Such development is bounded by the Tokyo Round. The characteristics of these remedies are also reflected in both the relevant provisions and the practice of the period.

1.1.1. Remedies in the GATT legal system before the Tokyo Round

In the GATT period, when contracting parties considered that their trade interests were being nullified or impaired, or that the attainment of any objective of the Agreement was being impeded due to the trade measures adopted by other contracting parties, they should try to make a mutually satisfactory solution.[697] If that is not possible, the GATT legal system also provides some remedies. Remedies in the GATT period are mainly regulated in the GATT Article XXIII:2, which provides

> If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting

[697] GATT 1947, Article XXIII:1.

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…[698]

This article provided three kinds of outcomes of dispute settlement procedure, namely appropriate recommendations, rulings, and suspension of concessions or other obligations. Among these outcomes, giving appropriate recommendations or rulings was obligatory in every dispute, while the authorization of suspension was at the discretion of CONTRACTING PARTIES when they considered the circumstances as serious enough. If members failed to implement recommendations or rulings, the suspension of concessions or other obligations was the last resort in the GATT legal system, and it was the sole remedy for complainants when respondents failed to implement the recommendations or rulings.[699] Retaliation had only been authorized in one case in the GATT period. In a dispute brought by the Netherlands against the US, the import restrictive measures adopted by the US against the dairy products from the Netherlands were found to be in violation of GATT rules. After the failure of the US to implement the ruling, the Netherlands was authorised by the CONTRACTING PARTIES to impose trade barriers on imports of wheat flour from the US. However, the Netherlands never implemented this suspension.[700] Due to the lack of use, practice in the early GATT period cannot provide much help in analyzing the retaliation mechanism. However, the drafting history and the academic literature on the subject can provide some guidance.

The purpose of remedies for violation at that time was determined by the pattern of GATT rules. From a historical perspective, retaliation as a countermeasure was derived from bilateral commercial arbitration.[701] Given that remedies in the GATT period were patterned after the US bilateral trade agreements, their purpose could be inferred from the same source. These bilateral trade agreements aimed to preserve the balance of reciprocal tariff concessions among parties. Thus, remedies should be provided when such a balance was breached. And such a reciprocal nature strongly impacted the formulation of the GATT legal system. Dam, in his research, explained that GATT "is a system of reciprocal rights and obligations to be maintained in balance."[702] The purpose of GATT remedies was to rebalance the trade interests that had been nullified or impaired as a result of measures adopted by other contracting parties.[703] In explaining the function of retaliation, one of the drafters of the GATT also described the purpose of remedies in GATT dispute settlement system by stating that "[w]hat we have really provided, in the last analysis, is not that retaliation shall be invited or sanctions invoked, but that a balance of interests once established, shall be maintained."[704] Thus, whether the cessation of the violation

698 GATT 1947, Article XXIII:2.
699 Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System*, Studies in Transnational Economic Law, v. 11 (London ; Boston: Kluwer Law International, 1997), 38–39.
700 Robert E. Hudec, "GATT or GABB? – The Future Design of the General Agreement on Tariffs and Trade," *Faculty Scholarship Series*, January 1, 1971, 1322, https://openyls.law.yale.edu/handle/20.500.13051/3441.
701 Grané, "Remedies Under WTO Law," 759.
702 Dam, "The GATT," January 1, 1977, 352.
703 Sungjoon Cho, "The Nature of Remedies in International Trade Law," *University of Pittsburgh Law Review* 65, no. 4 (2004 2003): 766–67.
704 John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill Company, 1969), 170–71.

and the performance of treaty obligations, or the suspension of concessions or other obligations, they both served the purpose of rebalancing the interests of disputing parties. This purpose can also be demonstrated in some disputes in the early years of the GATT period. For instance, the UK claimed in 1958 that trade statute adopted by Italy constituted a violation of GATT rules, and it also impaired the benefit of UK under the Agreement. In this dispute, the violation of GATT rules and the "nullification or impairment" were treated as two separate issues, and the panel examined both issues in detail.[705]

1.1.2. Remedies in the GATT legal system after the Tokyo Round

The GATT system in the following years experienced a transformation from mere contracts among members to a more sophisticated system. The nature of GATT as a bundle of tariff reduction concessions was changed because of the reduction of tariffs and the increase in non-tariff barriers. And the change of the system also affected the development of dispute settlement procedure and its remedies. An increasingly sophisticated system required the strengthening of the legal element. The relationship between the violation of GATT rules and the "nullification or impairment" changed. The violation of GATT rules was considered *prima facie* constituting "nullification or impairment", and in case of violation, whether measures concerned breach the balance of interests between disputing parties would not be analyzed as a separate issue. More disputes were settled with the involvement of a neutral third party, the panel. And the function of remedies for violation to maintain the delicate balance of tariff concessions was reduced. Instead, the importance of complying with trade rules was increasingly emphasized by members.[706] Debra Steger, the former Director of the WTO Appellate Body Secretariat, described this change by saying that the GATT system had gradually become "something greater than a contract that could be withdrawn from by any contracting party whenever it found the obligations too onerous."[707]

This significant development in remedies was formalised in the 1979 Understanding. Paragraph 4 and 5 of the Annex in the 1979 Understanding reads

> 4. Before bringing a case, contracting parties have exercised their judgement as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement.

[705] ITALIAN DISCRIMINATION AGAINST IMPORTED AGRICULTURAL MACHINERY, Report adopted on 23 October 1958 (L/833 - 7S/60)
[706] Cho, "The Nature of Remedies in International Trade Law," 770.
[707] Debra P. Steger, "Afterword: The 'Trade and … ' Conundrum—A Commentary," *American Journal of International Law* 96, no. 1 (January 2002): 137, https://doi.org/10.2307/2686130.

> The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case.
>
> 5. In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.[708]

It recognized that a breach of GATT rules itself was assumed to have an adverse impact on other contracting parties. In addition, it provided that when a mutually agreed solution cannot be achieved by disputing parties, "the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement". It emphasized the importance of compliance with GATT rules and recognized it as the first objective of dispute settlement. And another highlight in the 1979 Understanding is that it introduced another remedy, which is compensation, for complainants when respondents failed to implement recommendations or rulings. After the 1979 Understanding, remedies for violation in GATT legal system included cessation of violation, compensation, and retaliation. Since then, including the subsequent WTO period, forms of remedies for violation have largely taken shape.

1.1.3. Characteristics of remedies in the GATT legal system

The remedies concerning recommendations and rulings were prospective. Both the cessation of violation and the implementation of treaty obligations were forward-looking. This point was confirmed by the panel in the *Norway–Procurement of Toll Collection Equipment for the City of Trondheim* (the Trondheim case). In this dispute, the US claimed that Norway violated the Government Procurement Agreement (GPA) by illegally awarding to a Norwegian company the construction of a toll ring system in Trondheim. The panel accepted the position of the US and found this action to be a breach of GPA rules. In its report,

> the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel's proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation. Recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendations be within the

[708] 1979 Understanding, Annex, para. 4-5.

> task assigned to panels under standard terms of reference. Moreover, the Panel considered that in the case under examination such a recommendation might be disproportionate, involving waste of resources and possible damage to the interests of third parties.[709]

Compensation and retaliation were also prospective. This forward-looking nature was developed in the GATT in the 1950s and 1960s. In the GATT ninth session report, the WORKING PARTY considered the possibility of providing temporary compensation for damage suffered by complainants.[710] The panel of the *Uruguayan Recourse to Article XXIII* case in 1962 also confirmed the prospective nature of retaliation. It stated that

> The contracting parties concerned be asked to report on their action taken to comply with the CONTRACTING PARTIES' Recommendations or any other satisfactory adjustment (such as the provision of suitable concessions acceptable to Uruguay) by 1 March 1963. If by that date the Recommendations are not carried out and no satisfactory adjustment is made, the circumstances shall be deemed to be "serious enough" to justify action under the penultimate sentence of Article XXIII:2 and Uruguay shall be entitled immediately to ask for the authorization of suspension of concessions or obligations. The CONTRACTING PARTIES should make arrangements for prompt determination as to what concessions or obligations the suspension of which should be authorized.[711]

Thus, if respondents failed to bring their measures into conformity with corresponding provisions within a certain period of time, complainants could ask for the authorization of retaliation. The prospective nature of compensation and retaliation were then accepted by all contracting parties and were codified in the 1979 Understanding. The Annex of this Understanding confirmed that

> The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures.[712]

---

[709] NORWAY - PROCUREMENT OF TOLL COLLECTION EQUIPMENT FOR THE CITY OF TRONDHEIM, Report of the Panel adopted by the Committee on Governement Procurement on 13 May 1992 (GPR.DS2/R). para. 4.17

[710] REPORT OF REVIEW WORKING PARTY IV ON ORGANIZATIONAL AND FUNCTIONAL QUESTIONS, L/327, 22 February 1955. para. 64.

[711] REPORT OF THE PANEL ON URUGUAYAN RECOURSE TO ARTICLE XXIII, Report adopted on 16 November 1962, (L/1923 - 11S/95). para. 20

[712] UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE, Adopted on 28 November 1979 (L/4907). Annex, para. 4.

If there is no mutually agreed solution, the aim of dispute settlement is to secure the removal of the violation. It showed a prospective nature. The function of remedies in the multilateral trading system seemed to be preserving future trade opportunities, rather than redress the past losses.[713]

However, nothing in GATT rules or practice ruled out the possibility of retroactive remedies. Practice that deviated from this principle could be found in six disputes. Panels in these six disputes all provide complainants with retroactive remedies.[714] Panels in these disputes also explained the reasons to adopt retroactive remedies by showing the specificity of such cases. In the *US–Softwood Lumber II* case, the panel cited two dispute settlement decisions adopted by the CONTRACTING PARTIES,[715] and noted that

> [P]anels, having found a measure to be inconsistent with a signatory's obligation, generally recommended that the signatory be requested to bring its measure into conformity with the Agreement. The Panel considered that such a recommendation was especially appropriate in those cases where there were several options available to a signatory to bring itself into conformity with the Agreement. The Panel considered however that such multiple options were not available to the United States in the present case and that the only option open to the United States was, with respect to imports of softwood lumber from Canada, to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent interim measures imposed in October 1991 under the authority of Section 304 of the Trade Act of 1974.[716]

Thus, according to panel's opinion, the absence of options in such cases constitute basis for the adoption of retroactive remedies. However, these disputes were unique in the multilateral trading system, because they were all anti-dumping or countervailing duties disputes, and no such remedies have been recommended in other areas.

Besides the forward-looking nature of remedies, the political nature of the entire GATT system also impacted the remedies for violation. The adoption of recommendations and rulings and the authorization of suspension all required contracting parties' consensus. And in accordance with a Secretariat note in 1965, two points must be noted concerning the compensation,

> Firstly, any such recommendation under the provisions of the present Article XXIII can be implemented only to the extent that it proves acceptable to the contracting party to

---

[713] Frederick M. Abbott, "Cross-Retaliation in TRIPS: Options for Developing Countries," SSRN Scholarly Paper (Rochester, NY, April 1, 2009), 517, https://doi.org/10.2139/ssrn.1415802.

[714] These six disputes are: Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC, United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, United States – Measures Affecting Imports of Softwood Lumber from Canada, New Zealand – Imports of Electrical Transformers from Finland, United States – Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico, and United States – Imposition of Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden. Grané, "Remedies Under WTO Law," 763–64.

[715] UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA, Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 27 October 1993 (SCM/162), para. 414.

[716] UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 27 October 1993 (SCM/162), para. 413

whom it is addressed. If such contracting party is not in a position to accept the recommendation, the final sanction must remain the authority for withdrawing equivalent obligations as provided in paragraph 2 of Article XXIII. Secondly, the nature of the compensatory concessions and the items on which these are offered would have to be determined by the contracting party to whom the recommendation is directed and would have to be a matter of agreement between the parties concerned. It would not be possible for a panel or other body set up by the Contracting Parties to adjudicate on the specific compensations that should be offered.[717]

Thus, the compensation could only be provided on a mutually acceptable basis. And the content of compensation was to be determined by the respondents. That means reaching a compensation agreement was a political process. It was confirmed by the panel in the *EEC–Dessert Apples* case. In this dispute, Chile argued that the measures taken by the EEC during the period from 1 April to 31 July were inconsistent with EEC's obligation under corresponding obligations under GATT rules. And it was entitled to compensation, since such measures distorted the competitive relationship. Chile considered that retroactive compensation was appropriate because other remedies in the dispute settlement system were meaningless for measures that have been lapsed.[718] While the EEC considered that providing mandatory compensation would make the panel "go beyond the framework of the General Agreement"[719] and create new obligations for contracting parties. The panel rejected the request of Chile and adopted EEC's view by stating that "there was no provision in the General Agreement obliging contracting parties to provide compensation"[720], and it cited the 1979 Understanding and 1965 Secretariat Note. It concluded that "it would be possible for the EEC and Chile to negotiate compensation consistent with the provisions of the General Agreement; however, the Panel did not consider that it would be appropriate for it to make a recommendation on this matter."[721] Therefore, whether complainants could get remedies was to a large extent impacted by political elements. So, the remedies in the GATT legal system also revealed a strong political nature.

1.2. Remedies in the WTO legal system

The remedies for violation in the GATT period were renovated and written in the DSU after the Uruguay Round. But the remedies in the WTO have some differences with those in the GATT period. Besides cessation of violation and perform the obligation under covered agreements, the DSU contains a specific provision dealing with compensation and retaliation. Article 22.1 provides that

[717] COMPENSATION IN THE CONTEXT OF GATT DISPUTE SETTLEMENT RULES AND PROCEDURES, Note by the Secretariat, MTN.GNG/NG13/W/32, 14 July 1989, p. 6.

[718] EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF DESSERT APPLES - COMPLAINT BY CHILE, Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93). para. 10.1-10.3.

[719] EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF DESSERT APPLES - COMPLAINT BY CHILE, Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93). para. 10.4.

[720] EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF DESSERT APPLES - COMPLAINT BY CHILE, Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93). para. 12.35.

[721] EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF DESSERT APPLES - COMPLAINT BY CHILE, Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93). para. 12.36.

> Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.[722]

The rest part of this article refines the rules on compensation and retaliation. Although debates on prospective and retroactive remedies arose in several disputes, such as *Brazil–Aircraft*[723] case, *Guatemala–Cement I*[724] case and *Australia–Automotive Leather*[725] case, WTO adjudicators still insist on the prospective nature of remedies. The panel in *US—Certain EC Products* case reemphasized this point, it stated that "retroactive remedies are alien to the long established GATT/ WTO practice where remedies have traditionally been prospective."[726]

However, since the multilateral trading system has changed from a more power-oriented system to a more rule-oriented system, as mentioned in previous parts, the political elements of remedies have reduced. Although reaching compensation agreements is still a political process, the adoption of negative consensus principle makes authorization of retaliation almost automatic. Thus, the DSU detailed and elaborated the rules governing retaliation. Generally, the retaliation shall be adopted in the same sector as that in which the nullification or impairment has been found. If not practical or effective, they can seek the suspension in other sector(s) under the same agreement. And when the party still considers the above methods as not practical or effective, it may seek retaliation under other agreements.[727] If parties to the dispute disagree on the level or one party considers the principle and procedure in suspension has not been followed, they can refer such dispute to arbitration. All these detailed arrangements enhanced the judicial character of the system and reduced the interference of political power.

The WTO practice also affects the form of compensation. As noted in §2.3.2, WTO compensation typically takes the form of trade benefits rather than monetary payment. In practice, however, parties to a limited number of disputes have also treated monetary arrangements as compensation. Although the compensation provided in the DSU refers only to certain trade benefit, in practices parties to a limited number of disputes also in their mutually accepted resolutions regarded the monetary arrangements as compensation.[728] In the *US-Copyrights* case,

[722] DSU, Article 22.1.
[723] Panel Report, Brazil – Export Financing Program for Aircraft, WT/DS46/R, adopted 20 August 1999.
[724] Panel Report, Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico, WT/DS60/R, adopted 25 November 1998.
[725] Panel Report, Australia – Subsidies to Producers and Exporters of Automotive Leather, WT/DS126/ RW, adopted 11 February 2000.
[726] Panel Report, United States – Import Measures on Certain Products from the European Communities, WT/DS165/R, circulated 17 July 2000, para. 6.106.
[727] DSU, Article 22.3.
[728] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 140.

the monetary compensation was for the first time granted under the Article 22 of the DSU.[729] It was then further developed in the *US-Upland Cotton* cases.[730] And it should be noted that nothing in the DSU excludes the possibility of monetary compensation.

The question of whether WTO remedies are designed to induce compliance or rebalance trade interests is examined in §3 as the basis for evaluating reform proposals.

2. Constraints of WTO remedies and their impact on developing members

2.1. The prospective nature of WTO remedies for violation

When a WTO rule is found to be violated by a member, WTO cannot provide remedies for all the damages suffered by the injured party. That is because of the prospective nature of WTO remedies. First, cessation of violation and bringing the measure back into conformity with WTO rules are by themselves forward-looking in both general public international law and WTO law. In public international law, responsibility for states' wrongful acts is stipulated by the International Law Commission (ILC) in the Responsibility of States for Internationally Wrongful Acts (Act of States' Responsibility), and "cessation and non-repetition" is recognized as the foremost remedy for states' wrongful acts. It also exists in the WTO legal system when WTO adjudicators found a violation of WTO rules. In the *U.S.–Section 301* case, the panel also emphasized the status of this remedy. It stated that "[t]he obligation on Members to bring their laws into conformity with WTO obligations is a fundamental feature of the system."[731] The past violation itself cannot be reversed, what can be changed is future action.[732] However, the ILC and WTO prescribed different reparation rules. Article 31 of the Act of States' Responsibility provides that

> 1. The responsible State is under an obligation to make *full reparation* for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State. [emphasis added]

The Permanent Court of International Justice explained the meaning of "full reparation" in the Factory at Chorzów case by saying that

> The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the

[729] Bernard O'Connor & Margareta Djordjevic, Practical Aspects of Monetary Compensation: The US – Copyright Case, Journal of International Economic Law, vol. 8, iss. 1, March 2005, p. 127–142, 127.

[730] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 140.

[731] Panel report, U.S. - Section 301, WT/DS152/R, adopted on 22 December 1999, para. 7.102.

[732] Park Nohyoung and Shadikhodjaev Sherzod, "Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility" 41, no. 6 (2007): 1241–42.

> consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[733]

Thus, the reparation in the general public international law is retrospective. It also covers the past damage suffered by the complainant. While in the WTO legal system, the calculation of level of compensation and retaliation, as mentioned above, is prospective. The starting point of calculating the damage is the expiry of the reasonable period of time for implementation. Thus, the complainant cannot receive any remedy for their losses during the entire dispute settlement procedure and the reasonable period of time.

Such conflict between general public international law and the WTO law can be explained by Article 35 of the Act of States' Responsibility, which reads

> 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.

It is accepted that the WTO rules constitute *lex specialis* to general international law, therefore WTO remedies prevail over those in the Act of States' Responsibility.[734] And WTO adjudicators have, in the *US—Shrimp* case, clarified the relationship between general public international law and WTO law. The AB stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith", which is a principle in international law. Thus, in interpreting this principle, the AB can seek additional interpretation guidance from the general principle of international law.[735] While, the WTO law, as the *lex specialis* to general international law, fails to put developing members in a more advantageous position, on the contrary, prospective compensation and retaliation have a significant negative impact on their trade interests. Under the general public international law, developing members affected by international wrongful acts of others can get full reparation. In the WTO system, they can only receive partial reparation. From an economic perspective, this character provides the non-complying party a strong incentive to delay implementation.[736] Bronckers and van den Broek also argued in their research that "[p]rospective remedies effectively give a premium to non-complying countries that drag their feet in implementing a WTO ruling, as they do not have to worry about the past."[737] And members' practice in some disputes shows that it has become habitual for the non-complying parties to do so. In the *EC—Bananas III*[738] and the *EC—Hormones (US)*[739] case, the EC showed a

---

[733] "The Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928, Permanent Court of International Justice (PCIJ)," para. 125, accessed December 9, 2022, http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm.

[734] Joachim Åhman, "Exploring Border Areas Between the Law of State Responsibility and WTO Law," *Journal of World Trade* 54, no. 2 (April 1, 2020): 219–20, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2020010.pdf. Kyle Bagwell, "Remedies in the WTO: An Economic Perspective," 2007, 765, https://doi.org/10.7916/D8GF15QQ. Nohyoung and Sherzod, "Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility," 1237–38.

[735] Appellate Body report, US — Shrimp, WT/DS58/AB/R, adopted on 6 November 1998, para. 158.

[736] Diego-Fernandez and Herran, "The Reform of the WTO Dispute Settlement Understanding," 8.

[737] Bronckers and van den Broek, "Financial Compensation in the WTO," 103.

[738] Arbitration Award, EC — Bananas III, WT/DS27/15, 7 Jan. 1998.

[739] Arbitration Award, EC — Hormones (US), WT/DS26/15; WT/DS48/13, 29 May 1998.

clear reluctance to cease the violation even in the reasonable period of time for implementation. Considering the fragile economies of many developing members, time-consuming dispute settlement and long reasonable period of time mean their losses keeping mounting, and that can cause fatal blows to their domestic industries. Antigua and Barbuda's experience in the *US — Gambling* case can also demonstrate the damage caused by delayed implementation. From the initial consultations on March 2003 to the authorization from the DSB to retaliate against the US on March 2007, Antigua had been rejected to get access to the US gambling market due to the trade restrictive measures adopted by the latter. Even if Antigua was eventually entitled to retaliate, the vital losses it suffered during this period cannot get any remedy, and that caused a significant impact on its economy.[740]

2.2. Impact on injured industry and innocent industries

Both compensation and retaliation operate in such a way that the injured industries cannot get direct remedies, and some innocent bystanders will be injured instead. Although not provided clearly in the DSU, compensation for non-implementation means extra trade concessions, such as tariff reduction, for products different from those directly affected by the WTO-inconsistent measures. For example, the textile industry in country A is affected by the trade restrictive measures adopted by country B, and these measures were considered by WTO adjudicators as a breach of relevant GATT rules. The compensation agreement reached by country A and B should concern other products, for instance, dairy products. That means the tariff reduction offered by country B to the dairy products imported from country A constitutes a compensation for country A's losses in textile industry. Thus, the injured textile industry in country A cannot get any benefit from the compensation. In the meantime, the dairy industry in country B, which is not involved in the trade dispute between country A and B, might suffer some losses, because the extra concessions offered by country B grant better market access to dairy products from country A, and that enhances the market competitiveness of country A's dairy products in the country B. Although such an arrangement can make the dairy industry put political pressure on the government of country B and lobby the government to bring their measures back into conformity with covered agreements. It is a disproportionate burden on the innocent bystanders.[741]

The operation of retaliation has the same defects. Usually, the retaliation is conducted in the same sectors as that in which the violation is found, while such retaliation does not benefit exporters who were affected by the violation, rather it operates by punishing the same sectors or industries in the responding member country. Besides, in accordance with Article 22.3 of the DSU, when some requirements are satisfied, retaliation in other sectors under the same agreement, or under another covered agreement, is possible.[742] For instance, in the *EC–Bananas III* case, EC's banana trade regime was found to be WTO-inconsistent, and Ecuador requested the authorization of retaliation under the TRIPS agreement from the DSB.[743] If the retaliation was

[740] Cai, "Making WTO Remedies Work for Developing Nations," 168–69.
[741] Bronckers and van den Broek, "Financial Compensation in the WTO," 103–4.
[742] DSU, Article 22.3.
[743] Arbitration Decision, EC — Bananas III, WT/DS27/ARB/ECU, 24 March 2000.

conducted by Ecuador (which in fact did not happen) , the injured industry, which is banana export, would not get any benefit from the retaliation. Instead, the innocent corresponding intellectual property rights holders in the EC, who did not engage in the banana trade regime adopted by the EC, would bear some losses. Such impact on the injured industry and innocent bystanders is described as a wrong allocation of benefits and burden.[744]

Although these defects affect developed and developing members in the same way, the fragile economy and special situation in developing members determine that developing members will be impacted more significantly. However, from a political perspective, such decoupled remedy in the WTO, which means the injured industry cannot get benefit, while innocent bystanders will be affected, can benefit developing members. According to Sykes, decoupled remedy is of great political value. Because domestic pressure can force the government to change their position in two ways.

> One option is to target the sanctions at foreign exporters who seem likely to lobby their own governments to cure the violation in order to end the sanctions… A second option is to employ trade sanctions to protect import-competing firms that value such protection, and that will directly reward their officials for providing it.[745]

When negotiating a compensation agreement, developing members can choose the products that are of particular importance to their economy, or products of which the producers in responding member can effectively exert political pressure on their government to implement the adopted report as soon as possible. And when requiring the authorization of retaliation, the DSU provides developing members more options. The rules of cross-retaliation aim at enhancing the practicability and effectiveness of this remedy. Thus, developing members have even more options to put political pressures on the governments of responding members. To sum up, it is not easy to evaluate whether such a decoupled remedy brings more benefits or disadvantages to developing members.

In addition to the common shortcomings, compensation and retaliation also each have some unique defects.

2.3. Flaws of retaliation

Although compensation is preferred over retaliation, and retaliation is the last resort remedy in the DSU. Due to the voluntary nature of compensation, whether such a compensation agreement can be reached by members is, to a large extent, determined by whether the threat of retaliation would be effective. Thus, some characters of retaliation also affect the application of compensation. If the reasonable period of time was expired, and the retaliation is not ideal for respondents, they might choose to negotiate a compensation with complainants to avoid the possible retaliation. If the threat of retaliation is ineffective, and retaliation can have little influence on respondents, they will be unwilling to compensate complainants. Therefore, the flaws of retaliation should be analyzed first.

[744] Eleso, "WTO Dispute Settlement Remedies," 40.
[745] Sykes, "Optimal Sanctions in the WTO," 11.

Trade restrictive nature
First, retaliation is taken in the form of rising trade barriers. This trade restrictive nature runs counter to one of the main objectives that WTO attempt to achieve, which is to reduce trade barriers and enhance the international trade. It is intended to destroy another sector or industry, rather than to compensate for the losses.[746] Charnovitz argued that, generally speaking, "international agencies do not generally plan to take actions that contradict the agency's purpose." He also took the World Health Organization and World Intellectual Property Organization as examples. The World Health Organization does not authorize its members to take measures that harm the health of nationals of another country. And the World Intellectual Property Organization does not protect intellectual property rights by piracy.[747] From a political perspective, industries that affected by retaliation in the responding country will lobby the government to bring measures back into conformity with covered agreements, and that aims at achieving another objective of the WTO, which is to protect the expectation of governments' behavior in international trade. Thus, it is understandable in the WTO legal system. However, whether it is effective in inducing compliance is questionable in some circumstances, while its damage to free trade is inevitable, and it is undeniable that "this welfare-reducing outcome of sanctions and an embedded protectionism fly directly in the face of free trade which the WTO pursues".[748] And the destruction of free trade is not the only negative effect of retaliation.

Self-damaging effect
Second, and the biggest disadvantage of retaliation is that, in addition to the damage to the respondents, retaliation is also self-damaging for members who implement it. By imposing retaliation, the injured member cannot get a comparable benefit. Because along with some profits caused by extra industry protection comes the extra costs in implementing member. Domestic consumers, importers and other related industries can no longer get the same products on which the retaliation occurs at the same low price as before the retaliation started. They have to pay more.[749] This can be illustrated by the retaliation in the *EC—Bananas III* and the *EC—Hormones (US)* cases. After withdrawing some trade concessions, the US frustrated domestic users by narrowing their choices and increasing their purchase costs.[750] Adam Smith recognized this disadvantage in The Wealth of Nations, identifying two possible outcomes of retaliation, the first one is that retaliation finally leads to the remove of trade barriers imposed by another member, the second one is that retaliation is not effective enough to result in such an outcome. In the first case, retaliation is a good policy from the perspective of inducing compliance, while in the second, "it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other

---

746 Babu, "Remedies for Violations of WTO Law," 480.
747 Steve Charnovitz, "Should the Teeth Be Pulled? An Analysis of WTO Sanctions," in *The Political Economy of International Trade Law*, ed. Daniel L. M. Kennedy and James D. Southwick, 1st ed. (Cambridge University Press, 2002), 622, https://doi.org/10.1017/CBO9780511494512.033.
748 Cho, "The Nature of Remedies in International Trade Law," 787.
749 Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), 357.
750 Steve, "Rethinking WTO Trade Sanctions," 814–15.

classes of them."[751] So, retaliation also has requirements for the capacity of the implementing member to bear the loss.

And it is especially harmful for developing members. Considering that the forward-looking nature provides developing members only partial remedies, and that retaliation also has a detrimental effect on the economy of implementing members, in addition to not receiving full remedy, developing members also have to bear some losses. Although developing complainants and their developed respondents both have to bear economic losses caused by the adoption of retaliation, the smaller market scale and fragile, less diversified economies of developing members make the costs of implementing retaliation disproportionately higher for them than for their developed counterparts.[752] As mentioned, the DSU provides possibilities for developing members to retaliate in different sectors under the same agreement, or under another covered agreement. Thus, theoretically, when seeking retaliation authorization from the DSB, developing members can target industries that can put the strongest political pressures on governments of responding members, simultaneously not of a vital interest to their economy, to avoid harm to themselves.[753] However, if the market scale of developing members is not big enough to put political pressure on developed respondents, or the less diversified economy of developing members cannot provide them with such flexibility when planning their retaliation strategy, which in practice is likely to happen, the losses of developing members caused by implementing retaliation might out weighted the harm suffered by their developed respondents. That constitutes a disincentive for developing members to utilize retaliation.

The dispute between US and Antigua and Barbuda can illustrate this point. Antigua and Barbuda is a small developing country with limited nature resources. Thus, it is heavily reliant on import, especially imports from the US (approximately 48.9% of those imports are from the US). When Antigua and Barbuda planned its retaliation strategy against the US in the *US—Gambling* case, it expressed its concerns about the self-harming effect of retaliation. It argued that the adoption of trade restrictive countermeasures would cause a "disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country", and that retaliation under GATT and GATS would have "a much greater negative impact on Antigua and Barbuda than it would on the United States".[754] Although Antigua and Barbuda was authorized by the DSB to retaliate under the TRIPS agreement, it is still argued that due to the "tremendous asymmetry between the economic situation of the two countries", the threat of suspension of TRIPS concessions is, in fact, ineffective.[755]

Disadvantageous position of developing members

The above two defects of retaliation contribute to the third, which is developing members' disadvantage in using retaliation. Due to the way it is carried out, whether retaliation can be

---

[751] Adam Smith, "The Wealth of Nations (1776)," n.d., 296.

[752] Kym Anderson, "Peculiarities of Retaliation in WTO Dispute Settlement," *World Trade Review* 1, no. 2 (July 2002): 129, https://doi.org/10.1017/S1474745602001118.

[753] Abbott, "Cross-Retaliation in TRIPS," 10.

[754] Arbitration Award, US — Gambling, WT/DS285/ARB, 21 December 2007, para. 4.2-4.3.

[755] Abbott, "Cross-Retaliation in TRIPS," 8.

effective depends on the comparative economic power of disputants.[756] Charnovitz pointed out that retaliation favors larger economies, because "small countries are more trade-dependent than large countries".[757] Therefore, retaliation will be more effective when it is used by developed members against developing members, while it is hard for developing members to inflict much harm upon developed members. This view is also supported by Renouf[758] and Mavroidis[759]. Besides the academic research, developing members' experience in the multilateral trading system can also show this defect. The LDC group, in the Negotiations on the Dispute Settlement Understanding, recognized that "[t]he lack of an effective enforcement mechanism and the potential negative impact of retaliatory measures for poor economies is well documented."[760] The African Groups also observed that "[t]he means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members"[761] in their proposal. They also stated that

> realities are such that developing-country Members cannot practically utilise this ultimate sanction, as individual countries, against developed country Members. They would probably suffer further injury if they adopted retaliatory measures. As the DS is the linchpin of the multilateral trading system, this handicap of developing-country Members means that the system is skewed against them.[762]

Therefore, small developing members can hardly use retaliation as a real threat to induce compliance. And back to the question of the relationship between retaliation and compensation. When retaliation is effective enough, the non-implementing member in a dispute will resort to a more favorable and less harmful means to settle the dispute, for example, to bring the WTO-inconsistent measures back into conformity with covered agreements or negotiate a compensation agreement with the complainant. If the retaliation as the last resort remedy in the DSM cannot be effective for some developing member complainants, and it can hardly cause any significant impact to their developed respondents, the possibility to retaliate cannot facilitate compensation agreements between disputants. The defects mentioned above can explain developing members' lack of use of retaliation. In the meantime, it can partially show the difficulties for them to reach compensation agreements. Of course, some defects in compensation itself also contribute to its limited use.

---

[756] Arwel Davies, "Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?," *World Trade Review* 5, no. 1 (March 2006): 34, https://doi.org/10.1017/S1474745605002636.
[757] Charnovitz, "Should the Teeth Be Pulled?," 625–26.
[758] Yves Renouf, "A Brief Introduction to Countermeasures in the WTO Dispute Settlement System," in *Key Issues in WTO Dispute Settlement: The First Ten Years*, ed. Bruce Wilson and Rufus Yerxa, WTO Internal Only (Cambridge: Cambridge University Press, 2005), 110–22, https://doi.org/10.1017/CBO9780511754340.012.
[759] PC Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place," *European Journal of International Law* 11, no. 4 (January 1, 2000): 763–813, https://doi.org/10.1093/ejil/11.4.763.
[760] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002, para. 15.
[761] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, Proposal by the African Group, TN/DS/W/15 , 25 September 2002, para. 2.
[762] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, Proposal by the African Group, TN/DS/W/15 , 25 September 2002, para. 5.

2.4. Flaws of compensation

According to Article 22.2 of the DSU,

> If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.[763]

compensation is preferred over retaliation. And given that compensation is taken in the form of reducing trade barriers, while retaliation is taken in the form of trade restrictive measures, compensation does not run counter to the free trade objective of the WTO. But it was less used by members in practice due to some restraints. Only a limited number of disputes reported mutually agreed compensation. In two early cases, the *Japan-Alcoholic Beverages II*[764] and the *Turkey-Textiles*[765], compensation reached by disputing parties strictly abided by the DSU rules on compensation. They both revealed the restraints of compensation.

Voluntary nature

First, compensation is voluntary—its conclusion depends on the willingness of the responding party. If the respondent refuses to offer any compensation to the complainant, the latter can only resort to retaliation. The WTO compensation retained the political nature of that in the GATT period. Whether the complainant can get compensation depends on the attitude of the respondent. Thus, the respondent can easily avoid providing compensation without giving concrete reasons. For the respondent, the tariff reductions may trigger some political difficulties at respondent's domestic level, because the innocent domestic competing producers will receive a shock from products with lower tariff.[766] Furthermore, when the compensation agreement cannot be reached by disputants, the complainants might seek the authorization of retaliation as the last resort of remedy in the DSU. If the small market scale, the heavy reliance on imports, and the less diversified economy of developing members make the retaliation unlikely to have a significant impact on the economy of respondents, the retaliation cannot constitute an incentive for the latter to negotiate a compensation agreement with developing complainants. In this case, the developed respondents are also likely to reject the request for consultation on a compensation agreement. Besides, the respondent can end it once the violation has been removed, unless the compliance panel, upon request of the complainant, confirms that the

763 DSU, Article 22.2.

764 Mutually Acceptable Solution on Modalities for Implementation, Japan-Alcoholic Beverages II, WT/DS10/20, 12 Jan. 1998.

765 Notification of Mutually Acceptable Solution, Turkey-Textiles, WT/DS34/14, 19 Jul. 2001.

766 Davies, "Reviewing Dispute Settlement at the World Trade Organization," 44.

inconsistence still exists according to Article 21.5 of the DSU. In this process, the complainant is in a relatively passive position.[767] While the retaliation is adopted by complainants themselves. Thus, it is not for respondents to determine when retaliation should be stopped. It is more favorable for complainants. The passive position in compensation can cause more harm to developing members. Because of their scarce legal and financial resources, it is hard for developing complainants to tell whether the inconsistent was removed by their respondents. Simultaneously, the procedure to determine the status of implementation requires further investment of corresponding resources from disputants, that is burdensome for developing members.

Reasons above illustrate the reason that compensation agreement is hard to be reached by disputing parties. The strong political nature of compensation discourages developing members' use of compensation in the WTO. Without strong market and political impact, they can hardly put pressure on their developed trading partners to accept the compensation agreement. The lack of legal and financial resources also constitutes a disincentive for them to use compensation.

MFN principle
Second, the requirement of being consistent with the covered agreements makes the compensation less attractive for members. Article 22.1 requests that compensation "shall be consistent with covered agreements". That should be understood as including the MFN principle in a number of WTO agreements, such as Article 1 of the GATT, Article XVII of the GATS, and Article 4 of the TRIPS. Take the MFN principle in the GATT as an example, it requires that

> any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[768]

Given that the general form of compensation in the WTO is trade compensation, which means extra trade concessions, for instance, tariff reduction, such an "advantage, favour, privilege or immunity" should be accorded to products from all other contracting parties as well. That means all members, instead of the complainant only, can benefit from such extra trade concessions. For example, in the *Turkey-Textiles* case, the tariff reductions agreed by India and Turkey were for specific products, such as Iodides and Iodide oxides, Dithionites and sulphoxylates of sodium, *etc*, not only products from India.[769] So, the compensation also benefited exporters from other members. The application of the MFN obligation discourages the conclusion of the compensation agreement for both the complainant and the respondent. For the complainant, the compensation is not exclusive. And for the respondent, it raises the price of compensation, it has to offer such benefit equally to all WTO members.[770] While for retaliation as another kind of temporary remedy, the countermeasures contained cannot be regarded as "any advantage,

[767] Anderson, "Peculiarities of Retaliation in WTO Dispute Settlement," 126.
[768] GATT, Article 1.1.
[769] Notification of Mutually Acceptable Solution, Turkey-Textiles, WT/DS34/14, 19 Jul. 2001.
[770] World Trade Organization, A Handbook on the WTO Dispute Settlement System (2nd edition), Cambridge University Press, 2017, p. 140.

favour, privilege or immunity" in Article 1.1 of the GATT, thus it does not have to be implemented on the MFN basis. And the complainant can get the full "benefit" in case of retaliation. That explains why compensation is not preferred over retaliation. The prospective nature of remedy already leaves the complainant without getting any compensation for the past damage, if the compensation has to be adopted in accordance with the MFN principle, the remedy complainants can get will be further reduced. That means complainants have to bear more losses under this principle. For developing complainants whose domestic industries have been significantly affected by the WTO-inconsistent measures, and whose economy is fragile, a higher level of compensation might be vital to them, while the MFN principle reduces the level of compensation they can get. In this case, they will be less willing to request for a compensation.

Procedural deficiencies

Third, there lacks a procedure to determine the level of compensation. Besides the voluntary nature of compensation, and the obligation to be inconsistent with other covered agreements, the DSU keeps silent on other issues concerning compensation, one of which is how to determine the level of compensation. Without general agreement on the level of compensation, it is hard for both parties to the negotiation to reach an agreement.[771] While the DSU provides retaliation more effective procedural guarantee. Unlike compensation, the retaliation regime is clearly governed by the DSU: Article 22.4 sets the equivalence requirement by providing that "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment", and any disagreement on the level of retaliation can be resolved through the arbitration procedure under Articles 22.6 and 22. Therefore, the adoption of retaliation is clearly guided by the DSU. the disagreement of parties on the level of retaliation can be resolved through certain procedures. However, the *US—Section 110(5) Copyright Act* has made some development on this issue. Although this dispute was resolved by financial compensation, parties to this dispute made full use of the arbitration process in the DSU to provide guidance for their compensation negotiation. Article 25 of the DSU provides members an alternative means to settle their disputes, which is arbitration, in case that concerned issues have been clearly defined by both parties.[772] In this case, the EU agreed to give the US an extra implementation period until December 31, 2001, to make the required changes in exchange for an arbitration to determine the level of nullification and impairment. After the failure of the US to remove its WTO-inconsistent measures within this period, the arbitration started. Due to different methods of calculation, the EU and the US have a huge discrepancy concerning the specific level. The US stated that the annual losses should be around US$446,000-$733,000, while the EU asserted that it should be approximately US$25 million.[773] The arbitration award eventually confirmed that the level of nullification or impairment should be US$1.1 million per

---

[771] Xiaoling Li and Yusong Chen, "Constraints of the WTO Compensation Mechanism and Implications from Recent Practice," *Journal of World Trade* 49, no. 4 (August 1, 2015): 647, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2015025.pdf.

[772] DSU, Article 25.1.

[773] Arbitration Award, US — Section 110(5) Copyright Act, RECOURSE TO ARBITRATION UNDER ARTICLE 25 OF THE DSU, WT/DS160/ARB25/1, 9 November 2001, para. 4.2-4.3.

year.[774] This amount was not adopted in retaliation, instead, it became the basis of their negotiation on financial compensation. The arbitration on the level of nullification or impairment bridged the difference between the EU and the US, and it played an important role in facilitating the conclusion of their financial compensation agreement. Although financial compensation has not been recognized as one of the remedies provided by the DSU, members can also resort to Article 25 to determine the level of trade compensation. For developing complainants who have discrepancy with their developed respondent on the level of compensation, the involvement of a neutral third party can add legal element to the process and reduce the political impact from stronger members. Thus, a procedure to determine the level of compensation is favorable to developing members.

Impact on developing members

The issue of whether compensation can benefit or harm developing members is still under debate. For example, Davey argued that when the timely implementation is not possible, developing members can choose between compensation and retaliation. And considering that the economy of developing members might hardly bear the self-damaging impact caused by retaliation, or the retaliation might be impractical for other reasons, the compensation can be more favorable to developing members. From this perspective, compensation is particularly desirable for developing members. While there are also concerns that the compensation could be used by developed members as a way to "buy-out" their WTO obligations, because when small and poor developing members violate WTO rules, their weak market and economy make it almost impossible for them to provide enough trade concessions to their developed trading partners. Thus, the compensation is not a practical option for these responding developing members to provide remedies, and it becomes a privilege for rich members. From this perspective, compensation puts developing members, especially those poor members, in a disadvantage position.[775] Except for flaws mentioned, compensation is also considered favorable to developing members regarding its trade-liberalization nature and its function in limiting the cost-benefit issues.[776] As to the latter, poor developing members have to analyze the cost to initiate a dispute and the possible benefits they can get from the dispute settlement outcome. When they cannot determine the benefit they can get, they might be hesitant to participate in the DSM to avoid high cost. Thus, their desirable outcome will be fully considered in the negotiation of compensation agreements, and they can, to some extent, control the dispute settlement results. That means it is of paramount importance to developing members to get compensation, and it can further encourage developing members to actively participate in the DSM.[777]

3. Possible reforms of compensation and retaliation

---

[774] Rebecca Ullman, "Enhancing the WTO Tool Kit: The Case for Financial Compensation Annual Survey on the Law of the WTO," *Richmond Journal of Global Law and Business* 9, no. 2 (2010): 177.

[775] William J. Davey, "Compliance Problems in WTO Dispute Settlement Symposium - Process and Procedure in WTO Dispute Settlement: Comment," *Cornell International Law Journal* 42, no. 1 (2009): 122–23.

[776] Shraideh, *The Participation of Developing Countries in the Dispute Settlement System of the WTO*, 139–40.

[777] Shraideh, 139–40.

3.1. The criteria to evaluate the effectiveness of reforms

There are debates on the major objective of dispute settlement in the multilateral trading system. Whether the remedies provided by this system are effective should be measured by the role they can play to achieve this major objective. As stated by Jackson, the objective of dispute settlement mechanism in multilateral trading system is multifaceted. It serves the purpose of providing predictability and security, keeping the peace, addressing the asymmetry of power in a system, and many others simultaneously. However, these goals are not always compatible, and when they are not compatible, it is not easy to identify the major objective among them.[778] The most famous of these debates is whether the primary purpose of dispute settlement in this system is to induce compliance or guarantee efficient breach. Sykes argues that efficient breach theory should apply here, because WTO rules are contracts among members, and it is impossible for drafters to anticipate every possible contingency in the future and write down every solution at the time of negotiations. Thus, some flexibility is needed to provide members with some possibilities to deviate from WTO rules and benefit from such deviation.[779]

This thesis considers that as the multilateral trading system has changed from a more power-oriented one to a more rule-oriented system, the major goal of the multilateral trading system has also evolved.[780] As §1.1 establishes, the GATT system was designed to rebalance trade interests, with dispute settlement focused on 'nullification or impairment' rather than violation as such. While gradually, the legal nature of dispute settlement system in the multilateral trading system has been enhanced. The WTO becomes more than a mere contract between members.[781] The main beneficiaries of the WTO, economic actors, rely on members' concessions, and they need predictability provided by the dispute settlement system. Thus, the importance of compliance increases, and it becomes the main objective of the WTO dispute settlement system. As shown in §1.1, the shift to treating violation as *prima facie* 'nullification or impairment' illustrates this evolution. The success of the reform of these remedies should be measured by whether they can contribute to the achievement of this main objective. That means, the reform should strengthen their capacity to induce compliance, and from the perspective of developing members, the reform should also consider developing members' special needs in using them, and enhance their capacity to protect their trade rights.

Given that remedies for violation provided in the DSU failed to address satisfactorily the concerns of the majority of WTO members, especially developing members due to the above-mentioned reasons, WTO members and experts have proposed several possible reforms, including retroactive remedies, financial compensation, mandatory compensation, collective retaliation,

---

[778] John H. Jackson, Comment on Chapter 2, in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement,* Chad P. Bown and Joost Pauwelyn ed., (Cambridge University Press, 2010), 66–67.
[779] Sykes, "Optimal Sanctions in the WTO," 7–8.
[780] John H. Jackson, Comment on Chapter 2, in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement,* Chad P. Bown and Joost Pauwelyn ed., (Cambridge University Press, 2010), 66–67.
[781] Cho, "The Nature of Remedies in International Trade Law," 766–70.

tradable retaliation,[782] and the use of carousel provisions in retaliation[783]. This part introduces these proposals, the flaws they focus, and discusses their feasibility.

3.2. Retroactive remedies

In accordance with the DSU, the starting point of calculating the level of remedies in the DSM is the expiry of reasonable period of time for implementing relevant rulings of the panels or the AB. No relief will be provided to the damage before this point. And that can cause more negative impact on the economy of developing members due to their special situation. The prospective nature of WTO remedies has been criticized for a long time. For example, Hudec has in his research described WTO remedies as "fall a good bit short of what might ask of an effective legal system"[784] due to this nature.

3.2.1. Proposals to introduce retroactivity

Proposals concerning this issue have been brought by WTO members. They advocated an earlier point to evaluate the level of nullification or impairment, in other words, make the remedies retroactive. The LDC Group in 1966 proposed to calculate the level of financial compensation from the date of the adoption of the WTO-inconsistent measures.[785] Later, in the negotiation to reform the DSU, Mexico put forward recommendations concerning some important issues, including the prospective nature of WTO remedies.[786] It proposed that

> Retroactive determination would require that nullification or impairment be calculated for a period which could start at any of the following moments:
> (a) The date of imposition of the measure;
> (b) the date of the request for consultations; or
> (c) the date of establishment of the Panel.[787]

Its suggestions have sparked a heated discussion within the WTO, and they are supported by some WTO members and scholars.[788] Bronckers and Baetens recommended that the calculation of financial liability should commence once a request for consultation or for the establishment of a panel had been made.[789] Davey suggested that any remedy should be calculated from "the date of adoption of the relevant report or date of panel establishment or even earlier"[790].

---

782 Babu, "Remedies for Violations of WTO Law," 499–500.
783 Bown and Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, 368–69.
784 Robert E. Hudec, "Broadening the Scope of Remedies in WTO Dispute Settlement," 34, accessed February 21, 2023, https://www.worldtradelaw.net/document.php?id=articles/hudecremedies.pdf.
785 Report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM.TD/F/4, 4 March 1966, para. 7.
786 Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/23, 4 November 2002.
787 Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/23, 4 November 2002, Part II (b).
788 Diego-Fernandez and Herran, "The Reform of the WTO Dispute Settlement Understanding," Manchester Journal of International Economic Law 1, no. 1 (2004): 4-23, 4.
789 Bronckers and Baetens, "Reconsidering Financial Remedies in WTO Dispute Settlement," 310.
790 Davey, "Compliance Problems in WTO Dispute Settlement Symposium - Process and Procedure in WTO Dispute Settlement," 126.

As established in §2.3 and §2.4, the prospective nature of WTO remedies constitutes one of their most significant structural flaws, disproportionately harming developing complainants whose fragile economies cannot absorb the losses accumulated during lengthy proceedings. From this perspective, retroactivity can increase the cost of violation and has the effect of inducing compliance. Bronckers and Baetens consider that a lump sum for the past damages could be added to the financial payment for the continuation of violation in the future. And such payment can send the message that members have to pay for their past violation, and past damage suffered by the complaining members should be redressed.[791] Also, after removing the incentive to delay litigation proceedings, members can save time in dispute settlement mechanism, because the extra time gained by non-complying members will also be calculated for the level of compensation.[792] The introduction of retroactive remedies can rebuild the confidence of WTO members that the WTO remedies can provide a fairer settlement of trade disputes.[793] Thus, the introduction of retroactivity is significant for the reform of the WTO dispute settlement system.

3.2.2. Debates on introducing retroactivity and responses

The first issue that needs to be addressed is whether to introduce retroactivity into WTO remedies. Academics have raised some objections to this issue, whether these criticisms are reasonable is subject to analysis.

Prospective remedies as lex specialis to general public international law

The general public international law provides both prospective and retroactive remedies in international dispute settlement. Article 30 of the Act of States' Responsibility contains the obligation to cease the wrongful acts and promise non-repetition in the future, which is prospective. And Article 31 provides "an obligation to make full reparation for the injury caused by the internationally wrongful act"[794], which is retroactive. And the Permanent Court of International Justice in Chorzów Factory case confirmed again the retroactive nature of compensation.[795]

However, there is no provision for retroactive remedies in the multilateral trading system. The prospective nature of remedies was developed during the early years within the GATT system. The withdrawal of inconsistent measures is prospective in nature. Although the Tokyo Round enhanced the legal nature of dispute settlement in the GATT system by consolidating the role of panels in this proceeding, and retroactivity has been ambitiously applied by panels in some disputes after this round, the subsequent mixed reaction of members to these reports impeded the introduction of retroactive remedies. Some members regarded retroactivity as an essential

[791] Bronckers and Baetens, "Reconsidering Financial Remedies in WTO Dispute Settlement," 308.
[792] Diego-Fernandez and Herran, "The Reform of the WTO Dispute Settlement Understanding," 20–21.
[793] Adekola, "US–China Trade War and the WTO Dispute Settlement Mechanism," 131.
[794] The Responsibility of States for Internationally Wrongful Acts, 2001, Article 31.
[795] The Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928, Permanent Court of International Justice (PCIJ).

part of effective remedies, while some saw it as an infringement of state sovereignty.[796] The underlying reason for the adoption of prospective remedies in the GATT system could be contributed to the major objective of GATT dispute settlement system. As mentioned, the GATT system is more power-oriented, the major objective of dispute settlement was to rebalance the trade interests between signatories in the future. Thus, the forward-looking remedies were compatible with the rebalancing objective. During the late GATT, the enhancement of the legal nature of dispute settlement system reflected the gradual evolution of the major objective. That means, the main goal of dispute settlement was undergoing a change from "rebalancing trade interests" to "inducing compliance". The ambitious attempts by the panels were the embodiment of this change.

When it came to the WTO period, the formulation of the DSU further consolidates the legal nature of the dispute settlement system, and the objective of inducing compliance prevails in the dispute settlement mechanism. However, the prospective remedies for violation were consolidated in the DSU. Article 19 of the DSU provides that when a violation is found, a panel and the AB "shall recommend that the Member concerned bring the measure into conformity with that agreement"[797]. Such recommendation constitutes a legal obligation for members. Therefore, members are obliged to a prospective remedy. Besides, a panel or the AB can also suggest the way to implement this recommendation. Suggestions are not essential, and such suggestions are not binding. Article XXIII offers members the possibility to get compensation and conduct retaliation. However, nothing in this article mentions retroactive remedies. Article 19.2 further limits the form of remedy that WTO adjudicators can offer by providing that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements"[798]. The wording of this article increases the difficulty of introducing any retroactive remedy. Although the WTO dispute settlement mechanism has become a quasi-judicial system, the remedies for violation have not evolved with this trend. The prospective remedies in the WTO still reflect a strong "rebalancing" idea, thus, are incompatible with the "inducing compliance" objective of the WTO legal system.

The argument against the retroactive remedies in the WTO is that although general international law provides both prospective and retroactive remedies, the WTO legal system has a special character and, as *lex specialis*, may in certain respects depart from the rules of general public international law. Such particularity argument would be more convincing when the two sides of the comparison are public international law and the GATT rules, because both the contractual nature of GATT rules and the strong political nature of the GATT dispute settlement system can clearly distinguish the GATT system from general public international law. The dispute settlement in the GATT system was more of a political process than a legal one, while the general public international law formulated the responsibility of states on a legal basis. Thus, the adoption of prospective remedies in the GATT system that deviated from general practice was reasonable. However, the transformation of GATT to the WTO system and the consolidation of the legal

[796] Geraldo Vidigal, "Re-Assessing WTO Remedies: The Prospective and the Retrospective," *Journal of International Economic Law* 16, no. 3 (September 1, 2013): 513.
[797] DSU, Article 19.1.
[798] DSU, Article 19.2.

nature in the dispute settlement system have diminished such differences. Mere prospective remedies in the WTO are not compatible with the public law nature of this system, and they can no longer serve the main objective of the WTO dispute settlement mechanism, which is to induce compliance. In accordance with Article 55 of the Act of States' Responsibility, the formulation of special rules can preclude the adoption of general rules of the Acts. Thus, the special rules concerning prospective remedies in the WTO are not against the general rules of public international law. However, in addition to consistency with international law, any deviation should be compatible with the nature of this system and should serve the major objective of it. It can be illustrated by the special rules in the European Convention on Human Rights concerning compensation. In the *Neumeister* case, the Court held that special rules for compensation did not prevail over the more general provision in this case on the grounds that the application of special rules would cause "consequences incompatible with the aim and object of the Convention"[799]. The mere prospective remedies in the WTO are incompatible with the goal of this system, thus, retroactivity should be introduced into the WTO remedies.

Good faith breach

Another strong argument in favor of prospective remedies is the good faith breach theory. First, Schwartz and Sykes pointed out the inevitable ambiguity of WTO rules and its impact on members' behavior in the DSM. Due to the legal vague in WTO rules, the possibility of good faith breach by members is high. That means members sometimes cannot determine whether their measures are in compliance with corresponding rules when obligations are ambiguous. And these members should not be punished by retroactive remedies because of the deficiencies in the WTO rules. And when prospective remedies apply, members whose measures were questioned do not have to worry about the increasing compensation during the litigation. So, they are more likely to litigate through all stages to conclusion. That can clarify vague provisions, which can benefit all WTO members. Thus, prospective remedies prevail.[800] However, their argument is one-sided. They do not consider the impact of prospective remedies on members suffering damage caused by such good faith breaches. If members violating WTO rules in good faith should not be "punished" by retroactive remedies, why innocent complaining members should bear all damage? In addition, it is inappropriate to describe retroactive remedies as a punishment or sanction, because in accordance with members' suggestions concerning the retroactivity, retroactivity is simply the return to the injured party of all or part of the benefit obtained as a result of the violation of the rule, the scope of the remedy does not exceed the damage caused. Therefore, retroactivity will not introduce any punishment for good faith breaches. Besides, as already indicated, compared to prospective remedies that always benefit members violating the law and cause foot-dragging problems in the DSM, retroactive remedies can better encourage members to initiate disputes in the DSM. Because retroactive remedies can guarantee that they will be compensated for their losses caused by the violation at least during the time-consuming litigation. Even prospective nature of WTO remedies can encourage members to litigate all litigating stages, when considering its disincentive effect on members'

[799] Neumeister v. Austria, Eur. Court H.R., Series A, No. 17 (1974), para. 30.
[800] Schwartz and Sykes, "The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization," 201.

motivation to initiate disputes, the claimed benefits prospective remedies can bring are questionable. Therefore, conclusion reached when considering only the party in good faith breach and not the member suffering losses is untenable.

Prospective remedies benefit developing members

The theory of good faith breach also mentions the function of prospective remedies in leveling the playing field for developed and developing members. According to Zimmermann, the WTO legal system is sophisticated and complex, and developing members that lack legal resources are more likely to commit good faith breaches than their developed trading partners. In addition, due to the lack of economic power, developing members' economies are more vulnerable. On this occasion, retroactive remedies can place a heavier burden on the economies of developing members. So, the adoption of prospective remedies favors developing members, because they take account of the higher possibility of developing members to breach the rules in good faith, and can avoid the negative impact of retroactive remedies on the economies of developing members.[801] This argument is again unconvincing, and it is also one-sided. It considers only the trade interests of responding members, and neglects the impact of prospective remedies on complaining members. As stated above, from the perspective of complainants, developing members are also the main victims of prospective remedies. Whether prospective or retroactive remedies are more beneficial to developing members can be easily determined when reviewing the debate on this issue within the WTO. If the assumption of Zimmermann is correct, that the forward-looking nature of WTO remedies favors developing members, then, in the current debate, developing members should be strong supporters for forward-looking remedies, and developed members should insist on retroactive remedies. However, the reality is exactly the opposite. The fact that developing members proposed and support to introduce retroactivity into WTO remedies demonstrates that retroactive remedies can better protect trade interests of developing members, and can better encourage their participation in the DSM. Besides, retroactive remedies can be introduced as SDT for developing members. Therefore, only poor developing members can get retroactive remedies, while when they are respondents, the prospective remedies still apply.

Prospective remedies' contribution to future negotiation

Furthermore, Pauwelyn and Zimmermann pointed out that the prospective remedies, by lowering the cost of violation, can effectively encourage members to participate in future negotiations. They hold the view that members, when negotiating further trade liberalization, may not foresee all circumstances. Thus, they tend to leave some wiggle room once they decide to violate some rules due to domestic political or economic reasons in the future. Prospective remedies in the WTO are the embodiment of such wiggle room. If retroactive remedies are introduced, the cost of violation would increase, and members may be hesitant to make further commitments.[802] It cannot be denied that the cost of violation can influence members' decision

[801] Zimmermann, "The Neglected Link between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies Special Issue," 255.

[802] Pauwelyn, *Optimal Protection of International Law Navigating between European Absolutism and American Voluntarism*, 157–63. Zimmermann, "The Neglected Link between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies Special Issue," 255–56.

in future negotiations. Davey responded to this view that we do not have to worry about making the violation too costly. In a rule-based system, we have to make sure "that breaches are not too cheap"[803]. In addition, what members can get from violation should be analyzed along with the benefit of compliance, because there is a trade-off between cost and benefit when members make decisions. The mere consideration of lowering the cost of violation cannot help members make an optimal choice. From a historical point of view, the development of GATT system into WTO system can well illustrate this point. Compared with its predecessor, the GATT system, the WTO is more sophisticated and complex concerning both rules and dispute settlement mechanism. And due to the consolidation of legal nature and the weakening of political interference in the DSM, the cost of violation has increased. For example, in the GATT period, members whose measures were questioned in the dispute settlement system can block the establishment of the panel, the adoption of a panel report, or the authorization of retaliation. That means there were many ways they can avoid adverse legal consequences. While in the WTO system, the establishment of a panel, the adoption of a panel or AB report, and the authorization of retaliation are almost automatic, and the wiggle room for violation has narrowed. The cost of violation has increased, while the number of WTO members has increased rather than decreased. Pauwelyn, citing Palmeter, characterised the WTO remedy regime as a reflection of members' unwillingness "to commit themselves to providing more as unsuccessful defendants". [804] However, the development history of the multilateral trading system tells a different story, it shows the willingness of WTO members to bear more cost of violation. That can be explained by the relationship between benefit of violation and compliance, and the evolving role of the multilateral trading system. The increasing cost of violation reduces the benefit brought by violation, and it can lead to more compliance. And the compliance is also beneficial, as it provides more security and predictability. When the multilateral trading system is more of private law, the effective breach theory in domestic contract law should prevail, and the cost of violations should not be too high. If the system evolved into one of a more public law nature, then the main objective of dispute settlement should be to induce more compliance, and higher cost of violation would be reasonable. Members' acceptance of a higher cost of violation suggests that they regard compliance as increasingly valuable. It is also compatible with the evolvement of the role of multilateral trading system and the changes in the main objective of the DSM. Whether to introduce retroactive remedies is another trade-off for members. Since the major goal of DSM is to induce compliance, compared with prospective remedies, retroactive remedies can better serve this goal. However, the public law nature of the WTO has not been universally accepted, and the concerns of some members about the unpredictability of retroactive remedies are valid. In order not to deter them from using DSM or making new commitments in the future negotiations, the scope of retroactivity could be limited. One way is to limit the starting point of calculating the level of remedy, such as suggestions in some proposals (from the date of the request for a consultation, the date of the request for the establishment of the Panel…); the

[803] William J. Davey, Sanctions in the WTO: Problems and Solutions, in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, (ed. Bown and Pauwelyn) 360, 363.
[804] Pauwelyn, *Optimal Protection of International Law Navigating between European Absolutism and American Voluntarism*, 159.

limitation on the overall level of remedy to a certain amount is also workable.[805] Another way to limit the cost of violation is to narrow the beneficiaries of retroactive remedies, for example, only developing members, or part of developing members can get retroactive remedies.

Political filter function of governments

It is argued that views supporting retroactive remedies also neglected the function of governments as political filters *ex ante* in the DSM. This argument pointed out the intergovernmental nature of dispute settlement system, which means only governments of members can access to the dispute settlement proceedings. And governments, for some political or economic reasons, might decide not to bring a measure to the DSM or initiate a dispute concerning a measure after several years of its adoption. In the latter case, if the measure was taken by a developing member who lacks expertise in WTO law, and violated WTO rules in good faith, under prospective remedies, this developing member do not have to worry about the injury caused by its measure before the expiry of the reasonable period of time to implement the report. While the retroactive remedies can impose a heavy burden on it.[806] However, of all proposals regarding retroactive remedies to date, only the one that proposed to start calculating the level of remedies from the date of the adoption of the measure neglects the political filter function of members' governments. And it constitutes good reason to exclude this proposal. For the rest, whether the starting point is the date of the request for a consultation, the date of the request to establish the Panel, the date of the establishment of the Panel, or the date of adoption of relevant report, takes into account the political filter function of governments. Thus, it will not pose an obstacle to introduce retroactive remedies.

3.2.3. The starting point of calculation

After confirming that retroactive remedies are more compatible with the current system, and should be introduced, the second issue to be addressed is the starting point to calculate the level of remedy needs to be determined. This issue has been partly solved. Just as indicated, the date of the adoption of a measure should be ruled out first. And all the rest options can satisfy the requirement of retroactive remedies, because the starting points of calculation are all earlier than the date of expiration of a reasonable period for implementation. Among these proposals, the date of the request for a consultation is the beginning of the formal dispute settlement process in the WTO, and it also means that the requested member is aware of the possibility that the measure it took constitutes a violation. It is more ambitious than others, and is harder to get a consensus from members; the date of the request for the establishment of the Panel is the beginning of the litigation process; the measure is recognized as WTO-inconsistent on the date of the adoption of relevant report. Thus, calculating the level of remedy from the date of the adoption of relevant report is a conservative choice for members, and it is more likely to get support from all members. They are all representative steps in the DSM from some perspectives, and which one would be accepted is determined by how big a step members would like to take.

---

805 Yang, "Some Thoughts on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in the WTO Dispute Settlement," 447.

806 Zimmermann, "The Neglected Link between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies Special Issue," 261–66.

3.3. Financial compensation

3.3.1. Proposals and practice of financial compensation

Financial compensation means that the responding members give financial benefit to the complaining governments or to certain sectors or industries. This concept was not first initiated by WTO members. Actually, financial compensation has always been one of remedies in public international law. Article 36 of the Act of States' Responsibility provides that

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

In the classic Chorzów Factory case, the compensation was also paid in the financial form.[807] While, the WTO, as the *lex specialis* to general international law, deviates from this practice. The compensation provided by the WTO legal regime is in the form of trade compensation, for example, tariff reduction. While members have on many occasions proposed to introduce this international practice, the financial compensation, into the WTO remedies as an alternative to trade compensation and retaliation. It was first proposed in the 1966 Report of the Ad Hoc Group on Legal Amendments to the General Agreement as a special arrangement for less developed members, but some members of the group indicated their opposition.[808] Pakistan in 1999 also suggested that

> Panels should be authorised to recommend payment of such financial compensation in disputes between developed and developing countries where they find that as a result of WTO inconsistent measures taken by developed countries, the developing country has lost its trade in the affected product.[809]

LDC group, in the Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, asserted that monetary compensation can benefit developing and least developed members.[810] And Ecuador also expressed its support for such arrangements.[811] Besides developing and least developed members in the WTO, many academics in this field also support the introduction of financial compensations, such as Charnovitz[812], Diego-Fernandez and Herran[813], Bronckers and van den Broek[814], *etc*.

---

[807] The Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928, Permanent Court of International Justice (PCIJ).
[808] Report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM.TD/F/4, 4 March 1966, para. 7.
[809] Preparations for the 1999 Ministerial Conference, WT/GC/W/162, 1 April 1999, para. 15.
[810] Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/17, 9 October 2002, para. 13.
[811] Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/33, 23 January 2003, p. 4.
[812] Steve, "Rethinking WTO Trade Sanctions."
[813] Diego-Fernandez and Herran, "The Reform of the WTO Dispute Settlement Understanding."
[814] Bronckers and van den Broek, "Financial Compensation in the WTO."

The introduction of financial compensation does not only exist at the theoretical level. From a practical perspective, WTO members have already applied this remedy in some disputes. In the *US–Copyright* dispute, financial compensation was first granted under Article 22 of the DSU. According to the mutually agreed temporary arrangement between the US and the EC, the US agreed to make a lump-sum payment to a fund to be set up by the EC performing rights societies, who had been negatively affected by the WTO-inconsistent measures adopted by the US.[815] In the *US–Upland Cotton* dispute, the US and Brazil agreed on the constitution of the Fund for Technical Assistance and Capacity Building for the injured cotton industry, and the Memorandum required the US to transfer the amount of US$300 million to this Fund.[816] Thus, the experience of the US confirmed the feasibility of this remedy, and it also provides members with confidence to make such a proposal.

3.3.2. Debates on introducing financial compensation and responses

The financial/monetary compensation they mentioned in their proposals and research has some advantages. First, there is no substantial obstacle to introduce financial compensation. Because, on the one hand, financial compensation is in line with the general practice of public international law. Financial compensation provisions in some free trade agreements (FTA) can also demonstrate its effectiveness in the field of international trade law.[817] Therefore, introducing this into the WTO rules will not cause difficulties in public international law. And the WTO law does not preclude the possibility of financial compensation. Members have also in some dispute resort to this remedy. Thus, it does not violate WTO law. Financial compensation can be adopted even if there is no modification of WTO rules.

Second, just like trade compensation, financial compensation is not trade restrictive. Thus, it does not run counter to the free trade objective of the WTO, as retaliation does.

Third, financial compensation helps redress the injury suffered by affected industries or sectors in the complaining members. And it does not hurt the innocent bystanders in the complaining members. As mentioned above, both trade compensation and retaliation have inevitable flaws, which is lack of remedies for the affected industries or sectors, and negative impact on some bystanders. In addition, trade compensation must be in conformity with the MFN principle. The complainants are not the only beneficiaries of this remedy. The benefit they can get from trade compensation reduces and the cost of offering this remedy rises. However, financial compensation is a good way to mitigate them. The use of financial compensation is decided by the parties. Therefore, the complaining members can decide to compensate the injured industries or sectors, or to use it for other purpose. Unlike the trade compensation that reduce trade barriers in other areas, there is a possibility for financial compensation to redress the

[815] Notification of a Mutually Satisfactory Temporary Arrangement, *US – Copyright*, WT/DS160/23, 26 June 2003.
[816] Notification of a Mutually Agreed Solution, *US – Upland Cotton*, WT/DS267/46, 23 October 2014.
[817] e.g. Article 22.13 of the US–South Korea FTA, Article 21.16 of the US–Peru Trade Promotion Agreement.

injured industries or sectors. The US, in both the *US–Copyright* and the *US–Upland Cotton* dispute, paid compensation to the Fund of affected sectors or industries. Such compensation did help the development of these sectors or industries, and such payment did not affect innocent bystanders in whether the complaining or responding member. Concerning the MFN principle, the payment of financial compensation does not constitute "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country" that has to be accorded under MFN principle in Article 1 of the GATT. Thus, non-complying members do not have to grant financial compensation to members other than the complainants. That could be an incentive for members to choose this remedy.

Fourth, financial compensation can, in appropriate circumstances, provide a more effective means of inducing compliance. Financial compensation can continue until the violation is removed, and the respondent members' government might be forced to implement the rulings due to political reasons caused by financial compensation.[818] Because the payment "may be felt more keenly than adjustments to tariff levels".[819] And the proposals concerning financial compensation are usually combined with retroactivity.[820] The increasing cost of violation can also increase the possibility of financial compensation to induce compliance.

However, even financial compensation is preferred to trade compensation due to the above advantages, such advantage might be smaller than is presumed by some. The payment of an amount of money can also trigger some problems in practice, and that causes criticisms. First, as Sykes stated, the difficulties in the tax system can raise the cost of financial compensation. Because although the financial compensation can release the market distortion caused by changes of trading conditions, from the economic perspective, the use of taxes can also have the effect of distorting market.[821] And the budget constraints can discourage non-complying members to reach an agreement with complaining members on financial compensation agreements. Sykes also questioned the effectiveness of financial compensation from other aspects, and argued that the cost of violation should not be too high to prevent the possibility of violation.[822] However, the major basis of these arguments is that the efficient breach theory in contract law should apply to the dispute settlement system. Given that this thesis argues that the main goal of dispute settlement in the WTO is to induce compliance, this part will not further respond to those issues.

Second, it is argued that financial compensation cannot redress the inequality between developing and developed members. Because the financial compensation put financial pressure on non-complying members, and the different situations between responding developed and

---

[818] Eleso, "WTO Dispute Settlement Remedies," 40.

[819] Davies, "Reviewing Dispute Settlement at the World Trade Organization," 40.

[820] e.g. Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/17, 9 October 2002, para. 13; Hudec, R. (2002). The adequacy of WTO dispute settlement remedies: a developing country perspective. Development, Trade, and the WTO, ed. Bernard Hoekman, Aaditya Mattoo and Philip English. Washington, DC: The World Bank, 81-91, 84.

[821] Sykes, "Optimal Sanctions in the WTO," 14–15.

[822] Sykes, 13–15.

developing members make a difference in their capacity to provide such financial compensation. It gives rich members chances to buy out of violation, thus, financial compensation constitutes an alternative for developed members. However, poor developing members who lack financial resources might be incapable of providing such a remedy. Thus, providing financial compensation is not an effective alternative for these non-complying members, and they can hardly enjoy the advantages of this mechanism.[823] It is true that different situations in developed and developing responding members constitute an obstacle for poor members to choose this remedy. But this issue can be addressed by granting only developing complainants the right to resort to financial compensation. Whether financial compensation is more favorable for developing complainants should be decided by themselves. Even developed respondents buy themselves out of violation by paying an amount of money, whenever developing complainants consider it as the optimal option for dispute settlement, their choices should be supported. It can guarantee that financial compensation always benefits developing members. Besides, the adoption of financial compensation does not prevail over the full implementation of recommendations and rulings. Financial compensation, just as trade compensation and retaliation, is temporary. It can continue until the removal of WTO-inconsistent measures. From another point of view, although financial compensation put more pressure on developing respondents, it does not impair the original rights and interests of these countries in the DSM, they can still choose to remove their measures, accept trade compensation agreement or to be retaliated against. Simultaneously, when developing members are complainants, they need financial compensation more than developed complainants to compensate for the injured sectors and industries. Financial compensation is not a remedy that can benefit developing members from all aspects, but generally speaking, advantages of this remedy for developing members outweigh the disadvantages. In addition, it is undeniable that different levels of development between developing members can also cause some political problems. Thus, as a compromise, financial compensation can be granted to part of small and poor developing members.

Third, it is argued that the adoption of financial compensation will increase the difficulty in calculating the level of damages suffered by members.[824] However, it is a technical issue, not a substantive obstacle. It could be overcome in some ways in practice, for example, by developing expertise.[825] Thus, it is not convincing enough to reject the introduction of financial compensation. Besides, not only financial compensation, but also the adoption of existing remedies, trade compensation and retaliation, require such evaluation. The difficulty in calculating the level of losses has always been a reason for members and scholars to criticize remedies in the DSM. Although in the retaliation proceeding, the level of retaliation could be decided by arbitration, arbitrators still find the calculation difficult. The arbitrators in the *US — Gambling* dispute stated that

> we feel we are on shaky grounds solidly laid by the parties. The data is surrounded by a degree of uncertainty. For most variables, the data consists of proxies for what needs to be measured, and observations are too few to allow for a proper econometric analysis.

[823] Bronckers and van den Broek, "Financial Compensation in the WTO," 118–19.
[824] Sykes, "Optimal Sanctions in the WTO," 14.
[825] Bronckers and Baetens, "Reconsidering Financial Remedies in WTO Dispute Settlement," 305–6.

> Certain data that we have requested and that, to some extent, could have remedied this situation has not been provided. On methodological questions, parties, in a number of respects, have retained their extreme positions and have failed to propose alternative solutions that would have taken into account the exchange of arguments.[826]

There is no dedicated proceeding that can determine the level of compensation in the DSU. Thus, the calculation of the level of compensation could be harder. Even if members can solve this problem through other arrangements provided by the DSU or by establishing a dedicated mechanism, the determination will not be easier. Furthermore, the calculation of the level of nullification or impairment is an econometric issue, it is outside the scope of our analysis. Thus, this thesis will not discuss it in detail.

Therefore, from both the perspectives of inducing compliance and benefiting developing members, financial compensation is an effective alternative to the current remedies. And given that the introduction of this remedy does not need any modification of WTO rules, and members' practice has already proved its feasibility, thus, the formal negotiation and the consensus of all members are not necessary. The DSU can be interpreted as including financial compensation. It is not hard for financial compensation to be used to encourage developing members' participation in the DSM.

3.4. Mandatory compensation

3.4.1. Proposals to make compensation mandatory

In considering the advantages of compensation over retaliation, and the voluntary nature of compensation in the current WTO regime, some developing and LDCs proposed to make compensation mandatory. For instance, the African Group suggested in 2002 that mandatory financial compensation should be introduced as an alternative to the current remedies.[827] LDCs in the same year proposed that compensation under Article 22.2 of the DSU should be mandatory by eliminating the "if so requested" requirement.[828] The brief content in their proposals raises the issue of how to design such a regime to make the current trade compensation or the possible financial compensation mandatory. Given the differences between these two forms of compensation, the feasibility issue should be discussed separately.

3.4.2. Mandatory trade compensation

Concerning the trade compensation, Pauwelyn suggested making it mandatory in a way that is slightly different from that of the LDCs. He proposed that the approval of a request for trade compensation by the DSB should not be contingent on the mutual agreement of disputing parties. Instead, it should be automatic if so requested by the complaining member. It is also

---

[826] Arbitration Award, US — Gambling, WT/DS285/ARB, 21 December 2007, para. 3.173.

[827] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, Proposal by the African Group, TN/DS/W/15 , 25 September 2002, para. 5.

[828] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002, para. 13.

suggested that the member that prevailed in a dispute and is facing with non-compliance, or the DSB, can nominate a specific sector or industry in which the trade compensation should be offered. An alternative option is that members can nominate the sector or industry and the form of compensation before or when it fails to implement the ruling.[829] However, the enforceability of trade compensation constitutes a hurdle to introduce such compulsory.

It is argued that WTO rules are the outcome of a careful balance among different interests within a state. In the negotiation concerning trade compensation, the responding member should consider which innocent sector to expose to more foreign competitors. When making such decisions, members have to take into account not only the possible negative impact on that sector but also the possible impact on other sectors and the entire economy, even the ripple effect on other fields of society. So, it is unreasonable for other members or the DSB, that have bare knowledge of the situation of one state, to make such important decisions.[830] However, leaving the decision to the member targeted by WTO remedies is not always necessary for remedy implementation. The way retaliation works can well illustrate this point. Retaliation is requested by the complaining party and implemented with the authorization of the DSB. When it is not practical or effective to retaliate in the same sector in which a violation was found, complaining members may seek to suspend concessions or obligations in other sectors.[831] Although in this process, the complaining member has to take into account the importance of such trade to the targeted member and the broader economic consequences, consent from the responding member is not needed. In this case, the decision is also in the hand of others. Thus, the fact that members cannot participate in the decision-making of the content of remedies does not constitute an obstacle to introduce mandatory compensation. In addition, the proposal that suggests pre-establishing the content of trade compensation can solve this problem, and prevent infringement of state sovereignty. Therefore, it is not the most important reason to reject the introduction of compulsory.

The most fundamental difficulty is the nature of trade compensation. Trade compensation is extra trade concessions offered by the lawbreaker. For example, the government of the responding member can agree to provide the complaining member trade compensation in the form of lowering the tariff on imported products of a certain sector. It must be conducted by the responding member. Thus, no matter how trade compensation can be triggered in a dispute, and regardless of who is entitled to determine the sector and the form of trade compensation, whether and how to offer trade compensation depend on the will of the lawbreaker. Trade compensation is, by its nature, voluntary.[832] While retaliation, which is the suspension of concessions or other obligations under the covered agreements, is the act of the complaining member. And the responding members are bearers of this act. The implementation of retaliation

[829] Robert Z. Lawrence, *Crimes and Punishments? Retaliation under the WTO* (Institute for International Economics, 2003), chapter 5.
[830] Mercurio, "Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding," 326.
[831] DSU, Article 22.3.
[832] Mercurio, "Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding," 326.

does not need the cooperation of the latter. That means there is no mechanism in the WTO to force or guarantee the implementation of trade compensation. Even the sector and the form to be triggered can be pre-established before a member fails to implement the ruling, neither the complaining member nor the DSB can circumvent the decision-making process of the government of responding member to directly implement such compensation when non-compliance occurs, otherwise, there will be a suspicion of infringement of national sovereignty. The introduction of compulsory into trade compensation goes against the nature of this remedy, therefore, cannot be achieved.

3.4.3. Mandatory financial compensation

Making financial compensation mandatory is not easy either, due to the voluntary nature of both trade and financial compensation. It also faces the possibility that the responding member refuses to implement. Thus, as with trade compensation, merely announcing that financial compensation is mandatory without any systematic safeguards cannot achieve the desired results. A proposal from Yang suggested establishing a procedural mechanism to guarantee the enforcement of mandatory financial compensation. More specifically, a member has to pay a certain amount of compensation before resorting the Article 22.6 to question the level of compensation requested by the complaining member. And when the responding member refuses to pay financial compensation, and decides not to resort to arbitration, some rights of the responding member within the DSM will be suspended.[833] It might be a real threat to small and poor members, because the WTO dispute settlement system provides them with a more equal position with their strong and powerful trade partners. If their rights in this system are suspended, they will be at a greater disadvantage in the political settlement process. Therefore, developing members will choose to implement the ruling, or pay the compensation. However, the effectiveness of this mechanism for strong members is questionable, because they have more leverage to put themselves in a good position when settling disputes through other approaches outside the WTO system. Therefore, its effectiveness might be diminished due to the different bargaining power of WTO members.

However, compared with trade compensation, financial compensation has some peculiarities in terms of introducing compulsory, and they can be used in designing enforcement mechanism. One of the proposals concerning mandatory trade compensation mentioned above suggests that a member can pre-establish the content of compensation before it refuses to comply with the ruling. But, even if the content of compensation is pre-determined, it does not imply that it is pre-executed. Due to the voluntary nature of trade compensation, its implementation still depends on the will of the responding member after its refusal to implement the ruling. While as to financial compensation, Eleso suggested establishing a system whereby each member "posts a bond of a given amount, as part of its Membership commitments", which is used to pay the financial compensation if the member fails to implement relevant rulings in the future.[834] Although it has some similarities with the former, the most significant difference is that, under

[833] Yang, "Some Thoughts on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in the WTO Dispute Settlement," 455–56.
[834] Eleso, "WTO Dispute Settlement Remedies," 35–36.

such a system, generally, the pre-posted bond replaces the financial compensation afterwards, and no action is required from the responding members when the non-compliance occurs. Therefore, such a difference makes the mandatory financial compensation possible. Besides, Eleso also considered the special situation of developing members, and proposed that mandatory financial compensation is mainly designed to solve the difficulties some developing members face in the DSM, thus, these members should be beneficiaries of this mechanism, and they do not have to post any bond.[835] Therefore, it is feasible to make financial compensation mandatory to encourage the participation of developing members into the DSM.

3.5. Collective retaliation

3.5.1. Proposals to introduce collective retaliation

As §2.3 establishes, current retaliation is structurally ineffective for small developing members and self-damaging for those who implement it. Thus, current retaliation should be reformed. Some developing members proposed to introduce collective retaliation to enhance the compliance-inducing effect of retaliation, including a 1965 proposal concerning amendments to the remedies provisions[836], the LDC Group's 2002 proposal[837], and the African Group's proposal in the same year[838]. Collective retaliation is a mechanism whereby a group of developing members would be authorized to retaliate against the non-complying developed member. It has some advantage in inducing compliance and release the burden of retaliating developing member. Under current retaliation, developing members may lack economic power to put any significant pressure on developed member, even the cross-retaliation is authorized. The collective retaliation can pool the economic power of developing members, and increase the pressure they can impose on non-complying members, therefore can lead to more and quicker compliance from their developed respondents.[839] For developing members, when the level of retaliation is allocated within the retaliating group, the negative impact on the complainant cause by implementing retaliation could also be diffused. Thus, the price to be paid to get the respondent to implement the ruling would be less.

3.5.2. Debates on introducing collective retaliation and responses

The proposal to make the current bilateral retaliation multilateral considers WTO obligations as collective, which means any WTO member can bring suspicious measure before WTO adjudicators whether it was negatively affected by this measure or not, and all WTO members have the right to retaliation against non-complying members. This idea has been questioned, and it triggered debates on the nature of WTO obligations. Pauwelyn argued that both the negotiation and the dispute settlement reflect a strong bilateral nature of WTO obligations. From

[835] Eleso, 36.
[836] PROPOSALS FOR AMENDMENTS TO THE GENERAL AGREEMENT, COM.TD/F/W.l, 27 April 1965.
[837] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/17, 9 October 2002.
[838] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/15 , 25 September 2002.
[839] Qasim, "Collective Action in the WTO," 176–77.

the perspective of negotiation, the main object of WTO is trade, which occurs on a bilateral basis. WTO members negotiate trade-related rules on a bilateral level, so these WTO agreements are a bundle of bilateral commitments. From a dispute settlement point of view, the breach of law affects only a limited number of members, and the claim is made by one member to another one, which is also bilateral, not multilateral. Thus, the bilateral nature of WTO obligations prevents the possibility of making retaliation multilateral.[840] However, Carmody raised an objection to this view. Carmody argued that WTO obligations concern not merely trade as such but also "expectations concerning the trade-related behaviour of governments"—expectations that cannot be regarded as purely bilateral in character. Although the negotiation is conducted on a bilateral basis, the adoption of the MFN principle makes such obligation apply on a multilateral basis. As to the dispute settlement system, the DSU confirms the unassailable position of the full implementation of relevant ruling among WTO remedies, which also emphasizes the importance of protecting expectation. Even WTO shows some bilateral characters, considering the dual nature of the WTO system, those are necessary to adapt to certain realities and maintain the well function of the entire system.[841] Combined with the evolvement of the multilateral trading system, and the change of its function in international trade, it is not easy to consider WTO obligation as pure biliteral or multilateral, but it is more convincing to believe that with enhancement of WTO's influence at the domestic level and the legal nature of its DSM, WTO obligations have acquired an increasingly multilateral character. Thus, the second view should prevail.

However, even the nature of WTO obligations can be determined, the introduction of collective retaliation still faces some obstacles. The current bilateral retaliation has been criticized as contrary to the free trade objective of WTO, the introduction of collective retaliation would expand the scope of retaliation, and would increase the number of members deviating from WTO obligations, therefore, it would aggravate the trade-restrictive effect of this remedy. It would be questionable to induce compliance by taking a trade-restrictive measure in a significantly large scope. Thus, the proposals to authorize all WTO members with the right to suspend their commitments is not feasible. Also, the implementation of retaliation should be kept to a smaller extent.[842] A limited scope of retaliation is more workable. For example, narrowing the retaliating member to members affected by the same WTO-inconsistent measure, or grouping members in accordance with their same goods or services/same sector/same agreement. As to the latter choice, it also has the problem of expanding retaliation scope, and might cause political difficulties, because big developing members like China and India could fall within too many trade units, and the implementation of collective retaliation could undermine their trade relations with too many developed members. And such overlapping would also diminish the purpose of grouping developing members into small retaliation units.[843] On the other hand, for members that were not affected by the WTO-inconsistent measures, they have good reasons not to implement retaliation of their parts. Cai's findings on the impact of collective action on

[840] Pauwelyn, "A Typology of Multilateral Treaty Obligations," 930–36.
[841] Carmody, "WTO Obligations as Collective," 420–34.
[842] Shraideh, *The Participation of Developing Countries in the Dispute Settlement System of the WTO*, 214.
[843] Qasim, "Collective Action in the WTO," 170–78.

negotiations also apply here. Because of the self-damage effect of retaliation, even the complainant of a dispute is hesitant to adopt this remedy. Therefore, members that were not affected by the same measure, especially those who have strong political or economic ties with the respondent, might show more reluctance to retaliate. In addition, smaller members are more likely to betray the retaliation units to maintain preferential treatments offered by the non-complying member. In these circumstances, retaliation units are easily disintegrated.[844]

However, narrowing the scope of retaliation units to members affected by the same measure and are not complainants in a dispute can also raise legitimacy issue in the WTO. Although narrowing the scope of retaliating member can release the negative impact on the achievement of free trade goal of the WTO, the implementation of retaliation should be based on relevant rulings by the Panel or the AB. Without the evaluation of the nullification or impairment caused to each affected member, the level of retaliation authorized to each member can hardly be determined. And such evaluation should be based on cautious reasoning by panels or the AB.[845] Therefore, it is necessary for all affected members to bring their claims to the DSM. In order to maintain the free trade goal of the WTO and its legitimacy, the collective retaliation should be based on the collective action in litigation proceedings. Collective action of all affected members can achieve of goal of inducing compliance by pooling the market power of all complainants and increasing the reputational cost of non-compliance.[846] The introduction of such collective action does not need a significant amendment of the current rules, it can be implemented by applying Article 9 of the DSU concerning multiple complainants and expanding the rights of third parties provided in Article 10. Concerning the allocation of retaliation shares, it could be determined by those members in advance. It can help members balance between the achievement of individual interests and maximizing the effect of inducing compliance.[847] Thus, the introduction of collective retaliation is possible, but should be approached with caution.

3.6. Tradable retaliation

Similar to introducing collective retaliation, the proposals concerning tradable retaliation also aims at addressing the lack of retaliatory capacity in some small developing members. It was first proposed by Mexico in 2002. The idea is that when a member cannot find a specific sector or agreement in respect of which the retaliation can constitute a real threat to the non-complying developed member, and there is a third member that can effectively implement such retaliation, the complainant can negotiate with this third party to transfer its right to retaliate in exchange for other negotiated benefits.[848] Mexico in its proposal mentioned two potential benefits this mechanism can bring. The first one is increasing the incentive for compliance, because members are more likely to implement relevant rulings when facing with more effective retaliation. The second one is to better readjustment of concessions, since complainant can get tangible benefit

[844] Cai, "Making WTO Remedies Work for Developing Nations," 190–91.
[845] Shraideh, *The Participation of Developing Countries in the Dispute Settlement System of the WTO*, 214–15.
[846] Cai, "Making WTO Remedies Work for Developing Nations," 181–82.
[847] Cai, 186–87.
[848] NEGOTIATION ON THE IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/23, 4 November 2002.

after the negative impact caused to their economy.[849] Bagwell, Mavroidis and Staiger suggested the third benefit, which is a more effective allocation of the right to retaliate when the right is transferred to a member that value this right most highly.[850] The fourth benefit of tradable retaliation is that under the current rules, retaliating member should be the one that authorized by the DSB, while there might be another member that under domestic pressure choose to violate WTO rules, and two breaches happen. While the introduction of tradable retaliation might have the effect of combining two breaches, and only one violation will be imposed.[851] Thus, compared with collective retaliation, which would expand the impact of retaliation to more members, tradable retaliation would not expand the scope of retaliation, but rather reduce it.

Bagwell, Mavroidis and Staiger created two models of first-price sealed-bid auction. The first one has two foreign members bid for the right of retaliation, the second one also includes the member to be retaliated against as the third bidder. Even the auction fails, the original right to retaliate would not be affected. And when a foreign member wins the auction, the retaliation could be implemented in a more effective way. If in the second mode of auction, the member to be retaliated against wins the auction, the retaliation can be avoided, and the complainant can get compensation at the same time. It actually facilitates the compensation agreements between parties to the dispute.[852]

Bronckers and van dan Broek questioned the feasibility of this proposal by stating that such suggestion "continue[s] to require the retaliating country to shoot itself in the foot, and to create costs for innocent bystanders. In the case of tradeable retaliation rights, one can also seriously wonder why one country would buy another country's problems, only to then shoot itself in the foot on someone else's behalf."[853] However, whether transferring the right to retaliate can bring benefit to sellers and bidders should be decided by the members themselves. If they regard such a deal as uneconomical, they can choose to retaliate by themselves or to opt out of the bidding. Besides, the possibility cannot be ruled out that a bidder is forced to act in violation of WTO rules due to domestic political or economic pressure, thus, winning the auction can be a win-win situation for both the seller and the buyer, and it can also mitigate the negative impact of two possible violations on the respondent. So, the proposal of tradable retaliation provides just one possibility, whether to use it depends on the cost and benefit analysis by members.

Potipiti came to a different conclusion concerning the auction from the economic perspective. It was observed through economic analysis that

> i) The buyer with the lowest valuation for the good may get the good and the allocation is inefficient. ii) Numerical results suggest that the optimal mechanisms cannot be

849 NEGOTIATION ON THE IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/23, 4 November 2002.
850 Bagwell, Mavroidis, and Staiger, "The Case for Auctioning Countermeasures in the WTO," 2.
851 Diego-Fernandez and Herran, "The Reform of the WTO Dispute Settlement Understanding," 22–23.
852 Bagwell, Mavroidis, and Staiger, "The Case for Auctioning Countermeasures in the WTO," 37.
853 Bronckers and van den Broek, "Financial Compensation in the WTO," 107.

> implemented by an ordinary auction. Moreover, we show that allowing retaliation to be tradable might weaken rather than strengthen the WTO enforcement system.[854]

The impact of tradable retaliation on the WTO as a whole and its dispute settlement system still needs more economic analysis, which is beyond the scope of this thesis. Thus, no conclusion can be drawn concerning the introduction of tradable retaliation without sufficient information at hand.

3.7. Carousel retaliation

Introducing the carousel method is another way to enhance the effectiveness of retaliation. This concept was first initiated by the US in 2000. The US was authorized to adopt countermeasures against the EC in the *EC—Hormones (US)*[855]. However, the US considered the retaliation authorized in the WTO as ineffective. It came up with a new method, carousel retaliation, to impose more pressure on the EC to bring it into compliance with the ruling.[856] Although the US did not apply the carousel method in this case, this method was signed into law in the Trade and Development Act of 2000.[857] Basically, the carousel method of retaliation means rotating the products affected by retaliation periodically. The rationale behind this mechanism is that, by changing the targeted sectors or industries, the reach of retaliation would be expanded. Under the traditional retaliation method, the domestic political pressure to bring the non-compliance government into conformity with relevant ruling comes mainly from the lobby group in the affected sectors or industries. The adoption of carousel retaliation, by increasing the number of victims of retaliation, would increase the impact of multiple lobby groups on their government. Thus, under greater pressure, the non-compliance member is more likely to bring its measure into compliance with covered agreements.[858]

The advantage of carousel retaliation among other proposals is that its adoption does not require any amendment to the current DSU, because it would not extend retaliation to other members, thereby preserving the current bilateral character of the remedy. Besides, it does not challenge the prospective nature of WTO remedies.[859] Furthermore, there is no need to violate the equivalence requirement in the WTO remedies to implement the carousel method. And for developing members, who cannot effectively use retaliation even in case of cross-retaliation, the carousel method offers them an alternative within the existing retaliation framework to enhance their leverage.[860] The arbitrator in the *EC—Hormones (US)* did not reject the US argument that the carousel method did not violate the DSU, and referred to the carousel method by stating that

> We thus assume that the US -- in good faith and based upon this unilateral promise -- will not implement the suspension of concessions in a "carousel" manner. We therefore do

[854] Potipiti, "How to Sell Retaliation in the WTO," 17.
[855] Arbitration Decision, EC — Hormones (US), WT/DS26/ARB, 12, July 1999.
[856] Rosemary A. Ford, "The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions Andrew P. Vance Memorial Writing Competition Winners," *Brooklyn Journal of International Law* 27, no. 2 (2002 2001): 547.
[857] Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251.
[858] Mercurio, "Chapter 16 Retaliatory Trade Measures in the WTO Dispute Settlement Understanding," 439.
[859] Ford, "The Beef Hormone Dispute and Carousel Sanctions," 565.
[860] Abbott, "Cross-Retaliation in TRIPS," 61.

> not need to consider whether such an approach would require an adjustment in the way in which the effect of an authorized suspension is calculated.[861]

Therefore, from the arbitrator's point of view, adopting carousel retaliation would only affect the way of calculating the level of nullification or impairment. The WTO Secretariat also recognized the legitimacy of this model. It considered that

> Among the procedures and disciplines for retaliation, the Dispute Settlement Understanding does not contain any obligation on the retaliating country to submit a list of products targeted for sanctions. Nor does the agreement contain any mention of whether or not the retaliating country can change its selection of targeted products. The word "carousel" refers to the possibility of changing the targeted products as and when the country wants, so long as it stays within the authorized level of retaliation.[862]

However, carousel retaliation is still controversial within the WTO. The opinions from WTO mentioned above cannot form the basis for proving the legality of this method. The precedent effect does not exist in the WTO. Arbitrator's opinion concerning carousel retaliation in the *EC—Hormones (US)* can be overruled in other disputes. And documents published by the WTO Secretariat do not have legal effect. Besides, some members have expressed their opposing views. The EC considered that by using carousel retaliation, the US would create a structural imbalance between the level of suspension and the level of nullification or impairment, thus would violate the equivalence requirement provided in the DSU.[863] But the EC did not argue this conclusion in detail. In addition, Thailand and Philippine expressed their concern that the carousel method could be used unilaterally by the retaliating member to modify the list of targeted products without authorization from the DSB, thus cause uncertainty.[864] But it can be solved by determining the list of targeted products and the plan of implementation when setting the level of retaliation.[865] There are also opinions considering that the introduction of carousel method could raise the pain over the retaliated member, while causing more harm to the retaliating member at the same time.[866] It must be admitted that the carousel method is a double-edged sword. And due to the nature of retaliation, its self-damage nature is inevitable. Therefore, the carousel method is not perfect. But when implementation of the relevant ruling is of great value to the retaliating member, the carousel method is more effective to achieve this goal, and could be an effective alternative for these members.

---

[861] Arbitration Decision, EC — Hormones (US), WT/DS26/ARB 12, July 1999, para. 22.

[862] "WTO | Ministerial Conferences - Hong Kong 6th Ministerial - Briefing Notes - Dispute Settlement."

[863] Request for Consultations by the European Communities, UNITED STATES – SECTION 306 OF THE TRADE ACT OF 1974 AND AMENDMENTS THERETO, WT/DS200/1 , G/L/386 , 13 June 2000.

[864] CONTRIBUTION OF THE EUROPEAN COMMUNITIES AND ITS MEMBER STATES TO THE IMPROVEMENT OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/1, 13 March 2002, p. 6; PROPOSAL TO REVIEW ARTICLE 22.7 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, TN/DS/W/3, 21 March 2002, p. 2.

[865] William J. Davey, Sanctions in the WTO: Problems and Solutions, in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, (ed. Bown and Pauwelyn) 360, 368-69.

[866] Steve, "Rethinking WTO Trade Sanctions," 823.

Thus, compared with other proposals concerning the reform of WTO remedies, the carousel method requires no amendment to the current rules, and is easier to implement under the existing framework. Developing members can use it to increase their leverage when they are authorized the right to cross-retaliate against the non-compliance members.

As the foregoing analysis demonstrates, each of the reform proposals addresses only some of the structural flaws identified in §2.3 and §2.4, and no single proposal resolves all of them simultaneously. Although these proposals all have some benefits, it should be noted that the introduction of them can also bring some unpredictable cost, which should be analyzed in detail before adoption. And the political element in the WTO should also be taken into account considering the consensus principle in the WTO decision-making process. When proposals cannot be introduced to apply to all members, introducing them as SDT provisions for those developing members whose situation requires special attention could be a compromise option, and a more acceptable way. It can also serve the purpose of this thesis, which is to encourage developing members to actively participate in the DSM.

Part 5 Capacity Building for Developing Members

We have stated in earlier sections that a two-pronged strategy should be used to increase the engagement of developing members. That means, on the one hand, the dispute settlement proceedings should be modified to adapt to the special situations of developing members. On the other hand, developing members' capacity to participate in the DSM should be improved. Section 3 and 4 concerning the reform of SDT provisions and WTO remedies focus on the first issue, and this section will discuss the latter one, the capacity building issue for developing members in the DSM. The second issue, capacity building, is just as important as the first since efforts made domestically can make up for issues that the procedural reform cannot address, but it cannot address all issues that developing members encounter in the DSM.

As many academics pointed out, the insufficient capacity to participate is another main obstacle that hinders developing members' active use of the DSM.[867] Bohanes and Garza even argued that "the greatest constraints today on developing country participation in WTO dispute settlement are situated at the domestic, rather than at the multilateral level."[868] This section will not discuss whether procedural deficiencies at the multilateral level or insufficient domestic capacity are the major obstacles for developing members to utilize the DSM, because the reforms in both aspects are not exclusive, but are two levels of the same problem. Reforms of the WTO dispute settlement proceedings and the capacity building work can both contribute to developing members' active participation in the DSM, and they should be carried out simultaneously. This section consists of two parts. The first part introduces problems faced by developing members in using the DSM that cannot be solved by merely reforming the procedural rules by giving specific examples. This part also summarizes these problems as issues of legal capacity and financial capacity. And the second part discusses the possible solutions of these legal and financial constraints. Specifically, the effectiveness of existing arrangements, the proposals from members and academics, and experience from some members will be analyzed.

1. Domestic constraints faced by developing members in the DSM

The dispute settlement procedure in the multilateral trading system has undergone a significant change. It has introduced more legal elements into the dispute settlement procedures, and reduced the possibility of political interference. From this perspective, this system should be more favorable to developing members than that in the GATT period. However, the rule-oriented system also creates challenges for developing members, because the more sophisticated and complicated procedure also requires more resources from developing members.[869] The lack of resources and corresponding capacity undermines developing members' opportunities to

---

867 Bohanes and Garza, "Going beyond Stereotypes."Bohl, "Problems of Developing Country Access to WTO Dispute Settlement."Bown and Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases." *etc.*

868 Bohanes and Garza, "Going beyond Stereotypes," 45.

869 Shaffer and Meléndez-Ortiz, *Dispute Settlement at the WTO*, 342.

protect their trade rights and interests via the DSM. And their experience in the DSM has confirmed this view.

1.1. The difficulties in noticing the existence of non-conformity measures

To bring a claim to the DSM, developing members have to identify the actionable measures that caused injuries to its exporters in the first place. And it is argued that the lack of such capacity of developing members has resulted in some WTO-inconsistent measures not being questioned. Thus, developing members have not fully utilized the tool provided by the WTO to protect their trade interests.[870] The statistics presented in Part 2 are consistent with this observation. The number of complaints that developing countries have initiated has been seriously influenced by the observability of the non-conformity measures taken by their trading partners. From the perspective of an exporting firm, the most obvious non-conformity measures are anti-dumping measures, countervailing duties and safeguards. Anti-dumping and countervailing duties require the foreign governments to "inform affected exporting firms directly of its actions" [871]. Although the safeguards do not require such notice, the foreign governments have the obligation to alert the affected members' governments. Most complaints that initiated by developing countries fall into these categories. The observability of these measures requires little ability to gather information. So, for developing countries that lack the ability to collect related information, and lack the legal and economic experts to assess such information, initiating complaints that fall into these categories is the most economical option. The reason behind it could be multifaceted.

One possible reason is that developing members' governments do not have enough staffs to work on WTO related issues and collective information concerning trade restrictive measures. Some developing members have only limited staffs in embassies and consulates, and some even lack dedicated international trade law unit to deal with WTO lawsuits.[872] Without sufficient legal and economic experts, it is hard for developing countries to analyze the existence of a non-conformity measure, and hard to assess the effect of a non-conformity measure on its economy. When deciding whether to initiate a dispute, the diplomatic consideration is also essential, because developing members have to take into account the possible political consequences. Therefore, the insufficient diplomatic staffs also contribute to developing members' inadequate utilization of the DSM.[873] Besides, it could also show the absence of an effective mechanism in developing members, through which governments can obtain trade-related information from private enterprises. Such inadequate communication between private and public sectors exists in many developing members, private sectors either do not trust their governments, or believe that WTO dispute settlement is the task of members' governments, and they have little room to play in this process.[874]

---

[870] Shaffer, "The challenges of WTO law," 179.
[871] Bown and McCulloch, "Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law," 33, 45.
[872] Taslim, "How the DSU Worked for Bangladesh," 230–46.
[873] Busch, Reinhardt, and Shaffer, "Does Legal Capacity Matter?," 8.
[874] Bohanes and Garza, "Going beyond Stereotypes," 80–81.

1.2. The issue of fact-finding at pre-litigation stage

Developing members lack the ability to collect relevant information in the pre-litigation stage. The WTO agreements govern international trade in different fields, and some of them are more specialized. Settling disputes in these areas needs expertise in fields other than international law. For example, in Japan—Alcoholic Beverages II, Korea—Alcoholic Beverages, and Chile—Alcoholic Beverages cases, economic analysis was required to enhance members' arguments concerning the direct competitiveness and substitutability of products.[875] Therefore, economic expertise is needed in some circumstances. WTO is the organization that governs international trade. Both the negotiation and the implementation of WTO rules require economic consideration. Economic analysis also plays an important role before and during the litigation. After members noticed the suspicious measures, they have to make a cost-benefit analysis to determine whether to initiate a dispute in the DSM. During the litigation, economic information also constitutes important evidence. Thus, economic experts are essential for participating in the DSM.[876] Another example is the recent Korea—Radionuclides (Japan) case, in which the information in the field of health and radioactive materials is essential for the Panel's decision.[877] Thus, members in the DSM have to invest more resources to support their claims. These two examples concern information needed during the litigation proceeding, and the WTO has, to some extent, alleviated this constraint by authorizing adjudicators to seek information from any relevant individual or organisation.[878] However, such information is also important for developing members before they bring these disputes to the DSM. The comprehensive understanding of the suspicious measure is helpful for developing members to decide whether to file a case, and what their chances are of winning the case.[879]

This inability to conduct adequate pre-litigation fact-finding can be attributed to the lack of relevant professional expertise and financial resources. When the talent pool does not meet the member's information gathering needs at the pre-litigation stage, which usually occurs in developing countries, members have to seek help from external bodies or individuals. However, some poor developing members cannot afford the high cost of hiring external experts. Bohl has interviewed an attorney in Washington D.C., this attorney noted that the price for hiring an economic expert in an agriculture subsidies case was USD$250,000. This price might not be a big barrier for developed members to initiate a case, but can constitute a deterrent to many developing countries,[880] when considering that some developing members do not have adequate

---

[875] "Quantitative Economics in WTO Dispute Settlement," 191.
[876] Chad P. Bown, Comment on Niall Meagher's "Representing Developing Countries in WTO Dispute Settlement Proceedings", in *George A. Bermann and Petros C. Mavroidis ed., WTO Law and Developing Countries*, Cambridge University Press, 2007, 227-232.
[877] Panel report, Korea — Radionuclides (Japan), WT/DS495/R, adopted on 22 February 2018.
[878] DSU, Article 13.1.
[879] Bohl, "Problems of Developing Country Access to WTO Dispute Settlement," 15.
[880] Bohl, 17.

resources at hand, or they are reluctant to invest in WTO litigation when they have other social needs.[881]

1.3. Shortage of competent staff

Conti mentioned the importance of expertise derived from direct experience in the DSM to developing members. In his interview with several attorneys, these attorneys all emphasized that members' representatives should know how the DSM works, and how to ask questions. They should also master the way to deal with the delegates, and should learn by seeing negotiations.[882] Such knowledge can only be obtained by working in the WTO and frequently using the DSM. Thus, it is not enough to have a relevant unit and adequate staff. Staff dealing with WTO issues should have extensive experience. Shaffer also regarded the lack of expertise derived from direct participation as an importance reason for the disadvantageous position of developing members in the DSM.[883]

South Africa's loss of competent staff has caused a serious inability to deal with WTO disputes. In order to enhance the legal capacity to effectively pursue a case in the DSM, South Africa has sent both the Director of Trade Remedies Policy and the Director of Trade Remedies Investigation II to training courses in Geneva in 2003. However, only one year after the training courses, both directors and some other most competent staff in the field of WTO issues have left public sectors. After such a heavy blow, most staff left are investigating or support staff, or in units that were unlikely to engage in any dispute settlement. Considering that few of these skills have been institutionalized in South Africa, its loss in experienced staff could not be easily made up in short terms. Thus, staff with rich experience derived from participating in the WTO are an important guarantee for members to use this mechanism effectively.[884] The loss of experienced and knowledgeable staff is particularly pronounced in developing members' public sectors. Bohanes and Garza pointed out that "smaller staff levels and low public sector salaries, especially in comparison to salaries in the private sector, mean that a critical number of knowledgeable officials may be lost on a more frequent basis."[885] They lack incentives to work in public sectors. Also, there is an overall lack of experienced professionals at the domestic level, that makes the talent shortage problem difficult to remedy once it occurs. For example, the practical WTO training in law education in China is insufficient, as both professors and law students in China hardly possess working experience in this field. And even some professionals could be regarded as knowledgeable, the limited remuneration that the Chinese government offered to them when seeking advice also constitutes a disincentive for them to actively engage in cooperation with public sectors.[886] And developing members' private sectors, like law firms and institutions, also face the same problem. When Bangladesh faced the anti-dumping investigation conducted by

[881] Shaffer, "The challenges of WTO law," 185–86.
[882] Conti, "Producing Legitimacy at the World Trade Organization," 137–38.
[883] Shaffer, Mosoti, and Qureshi, "Towards a Development-Supportive Dispute Settlement System in the WTO," 15.
[884] Brink, "South Africa's Experience with International Trade Dispute Settlement," 267–68.
[885] Bohanes and Garza, "Going beyond Stereotypes," 88–89.
[886] Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1012–13.

India, the affected domestic exporters could not find competent people or institutions to be consulted on such matter.[887]

Language skill is another essential requirement for competent staff. Developing members also face language obstacle in participating in the DSM. Delegations from many developing members have to work in a foreign language. Shaffer pointed out that although official languages of WTO are English, French, and Spanish. English is absolutely dominant in the organization. Even delegations whose speak French and Spanish face some difficulties in the litigation hearing process,[888] not to mention those developing members' delegations whose languages are so different from any of the above languages. Relying on translation can also put them in a disadvantageous position. It takes time to wait for the translation in the panel proceeding, and the translation of documents is also time-consuming. Even though those few experts are capable of drafting submissions in English, they still face considerable difficulties when presenting arguments in an oral hearing.[889]

1.4. Issue of public sectors setting

Given that DSM is a state-to-state mechanism, only members' governments can bring a lawsuit and pursue a case in the WTO. Members' governments are the main actors in this process. The ability of developing members' governments can have a significant impact on their behavior in the dispute settlement proceedings. If developing members have not established a proper structure within their governments, or the cooperation among different public sectors is not effective, their efforts in dealing with WTO disputes would be diminished. And that further affects their participation in the DSM.

Some developing members lack a dedicated public unit working in WTO affairs. As of 2007, only three quarters of WTO members have their Mission in Geneva. Developing members that have no Mission in Geneva lack a point person to establish a long-term relationship with the organization, thus the expertise derived from working in Geneva would not be established. And more importantly, they cannot facilitate the filing of a WTO dispute, and cannot make effective use of the resources provided by the WTO Secretariat, the ACWL or other international organizations located in Geneva.[890] It is also not uncommon that the developing members' Missions in Geneva cannot work effectively due to the lack of support from their home capitals. Because developing members' governments has only a limited number of staff handling all WTO matters, and sometimes they are also in charge of other trade-related issues, thus are overstretched. A representative from the Caribbean stated that they need "better instructions, quicker instructions, more detailed instructions" from home capitals. Some delegations from developing members have to make decisions on an *ad hoc* basis, because there is no institutional

---

[887] Taslim, "How the DSU Worked for Bangladesh," 237–38.
[888] Shaffer, "The challenges of WTO law," 182–83.
[889] Liyu HAN and Henry S. GAO, "China's Experience and Challenges in Utilising the WTO Dispute Settlement Mechanism," in *Dispute Settlement at the WTO: The Developing Country Experience*, ed. Gregory C. Shaffer and Ricardo Meléndez-Ortiz (Cambridge: Cambridge University Press, 2010), 148–49, https://doi.org/10.1017/CBO9780511663192.005.
[890] Bohl, "Problems of Developing Country Access to WTO Dispute Settlement," 34–35.

decision-making process in their country. When the ability of developing members' governments to obtain information and assistance is also insufficient, Missions in Geneva can only play a limited role.[891]

Experience in Kenya can illustrate the importance of coordination between public sectors. Kenya adopted a trade restrictive measure against pork products from South Africa in 2005. However, different public sectors have different understandings of such measure. The Minister of Livestock and Fisheries insisted that Kenya had adopted a ban on these products, but the Minister of Trade and Industry disagreed and insisted that there was no ban. Such contradiction indicates a lack of effective cooperation between public sectors.[892] The failure of interdepartmental cooperation in the South Africa is another example. In six formal and informal WTO disputes against the South Africa, the division that should be responsible for dealing with WTO disputes was never involved. Instead, another department which should be in charge of domestic trade remedies handled all these issues.[893] All these obstacles could be attributed to the lack of financial resources to invest in WTO related affairs, the lack of understanding of WTO dispute settlement issues, and the insufficient emphasis placed by the government on WTO matters.

1.5. High cost of WTO litigation

The WTO litigation proceedings are resource-consuming for both developing and developed members. It has been mentioned by African Group. It noted that one of the major obstacles Africa members face in seeking the DSM is the overly expensive procedure.[894] Financial constraint handicaps developing members and impairs their ability to make use of the DSM. In accordance with the complexity of the dispute, the cost varies from several hundred thousand dollars to several million.[895] Furthermore, the cost of pursuing a case in the DSM for a developing member is relatively higher than that for a developed member. Even if they invest the same amount of resources in the WTO litigation process, the relatively smaller size of developing members' economy and limited government budgets add to their burden to participate in this system. Bangladesh, as one of the LDCs, lacks sufficient financial resources to fight a case in the WTO. And the lack of financial resources had forced it to drop the dispute against the US concerning the anti-dumping duty on its towel exporters adopted in 1992.[896] Another example is Kenya. In the *EC–Suger* case, Kenya participated as a third party. Although government staff developed a legal opinion, the lack of financial support prevented the staff who drafted the opinion to participate directly in the panel hearing. They missed the opportunity to learn about how DSM worked, and that also affected the capacity building concerning WTO dispute settlement.[897]

---

[891] Busch, Reinhardt, and Shaffer, "Does Legal Capacity Matter?," 13–14.
[892] Ochieng and Majanja, "Sub-Saharan Africa and WTO Dispute Settlement," 327.
[893] Brink, "South Africa's Experience with International Trade Dispute Settlement," 271–72.
[894] NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, "TN/DS/W/15," 25 September 2002.
[895] Niall Meagher, "Representing Developing Countries in WTO Dispute Settlement Proceedings," *in George A. Bermann and Petros C. Mavroidis ed., WTO Law and Developing Countries*, Cambridge University Press, 2007, 218.
[896] Taslim, "How the DSU Worked for Bangladesh," 240.
[897] Ochieng and Majanja, "Sub-Saharan Africa and WTO Dispute Settlement," 326.

And in practice, developing members' absolute cost in litigation is higher. For example, the US and the EU, as frequent users of the DSM, can spread the cost they have invested in domestic capacity building activities. They have sufficient WTO lawyers as well as expertise in other fields in their public sectors, and they do not have to pay much for legal assistance and information gathering. However, developing members' absence in the DSM makes them less likely to benefit from economies of scale. When they determine to initiate a dispute, their start-up cost for each case might be higher. The lack of expertise in public sectors force them to pay a high price to hire lawyers and experts from private sectors. And that constitute challenge to their financial resources. In addition, compared with developing members, developed members can manage the litigation cost more readily. Although the DSM provides only state-to-state interaction, trade restrictive measures affect directly the enterprises, instead of members' governments. Thus, members' governments are involved in DSM to protect the interests of domestic enterprises. And those private sectors can be governments' right hand in WTO litigation. Due to the effective communication between public and private sectors in developed members, private sectors can provide not only information, but also financial support to their governments. Thus, the public-private cooperation can reduce the burden of their governments. Bown and Hoekman have analyzed the important role that private sectors can play in WTO litigation. In the US, section 301 provides domestic industries a petition mechanism to voice their concerns to competent government authorities, and for government to pursue the case in the WTO, those industries can provide help to prepare the legal briefs and relevant evidence.[898] While private sectors in developing members might not be well-funded, well-organized, or well-informed to share the legal and financial burden for their governments.[899] Or there lacks a channel for private and public sectors to cooperate on WTO affairs.

Therefore, the resource-consuming WTO litigation process constitutes an obstacle for developing members to participate in the DSM. Also, unlike the litigation mode in developed members, the absence of the role of private sectors, especially domestic industries who have a stake in the WTO litigation process, leads to an excessive burden on developing member governments to seek assistance from other sources. Thus, improving the public-private partnership could be an effective approach to release the cost of WTO litigation for developing members' governments.

It should be noted that the WTO has recognized the difficulty concerning high litigation cost for developing members. Article 27.2 of the DSU provides that

> While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.[900]

[898] Bown and Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases," 869–70.
[899] Niall Meagher, "Representing Developing Countries in WTO Dispute Settlement Proceedings," *in George A. Bermann and Petros C. Mavroidis ed., WTO Law and Developing Countries*, Cambridge University Press, 2007, 218.
[900] DSU, Article 27.2.

Thus, members who lack enough financial support to hire lawyers from developed countries can ask for help from the WTO Secretariat when necessary. Besides, as introduced in Part 1 §2.3 and Part 3 §1.1, the ACWL supplements Article 27.2 by providing free or subsidized legal assistance—including in non-legal technical areas through its Technical Expertise Trust Fund—outside the WTO institutional framework.

Although the contribution made by the WTO Secretariat and ACWL cannot be denied, evidence shows that they cannot solve all obstacles faced by developing members, such as difficulties in noticing the WTO-inconsistent measures before litigation stage, because it only provides help concerning certain disputes.[901] It is also suggested that even with help from private lawyers, the WTO Secretariat or the ACWL, the disputing member still need legal capacity to make effective use of these resources. Because it is hard for members without adequate legal capacity to express their litigating strategy and their objectives, and they are unlikely to provide useful domestic information to experts who might lack understanding of the special situation of this member.[902] Therefore, even the financial constraint can be mitigated to some extent, the legal capacity is still an obstacle for developing members to utilize the DSM.

1.6. Other constraints

In addition to the above-mentioned factors, other elements, such as relatively smaller trade volume, political considerations, culture background, could also hinder developing members' participation in the DSM.

A research by Horn, Mavroidis, and Nordström shows that the participation in DSM is significantly affected by members' share of global trade and their development situation. Members with greater economic size and diversified industries are more likely to utilize DSM to protect their trade interests, and are more likely to be targeted in WTO disputes. Therefore, developing members' inadequate participation is partly caused by their underdeveloped international trade.[903] Bohanes and Garza further argued that a greater trade volume at stake in any given dispute provides a stronger incentive for members to bring their disputes to the DSM, because they regard it as more worthwhile to initiate a dispute, and the affected industries would be more likely to voice their concerns to their governments and provide necessary assistance to governments. Besides, the higher possibility of being targeted in WTO dispute settlement proceedings also forces these members to develop their litigation capacity and invest more resources into WTO matters. It in return enhances their ability to participate in the DSM more actively.[904] The significant impact of an economic factor on developing members' participation in the DSM cannot be denied. And it is argued that the income level and trade stakes, instead of legal capacity or financial resources, are the most important factors that caused the inadequate participation of developing members.

[901] Bown and McCulloch, "Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law," 59.
[902] Busch, Reinhardt, and Shaffer, "Does Legal Capacity Matter?," 16.
[903] Horn, Mavroidis, and Nordström, "IS THE USE OF THE WTO DISPUTE SETTLEMENT SYSTEM BIASED?," 2.
[904] Bohanes and Garza, "Going beyond Stereotypes," 63–66.

However, the absolute economic statistics do not take into consideration the importance of such trade to the development of developing members. Although the trade volume concerning one suspicious measure against developing members might be relatively smaller, when considering their smaller economic size, the WTO-inconsistent measure can cause even more harm to their economy. Thus, they have a relatively higher stake in such dispute. And there is a greater incentive for them to make better use of the DSM.[905] Besides, when the affected exporting products focus only on a limited number of markets, the loss of any of these markets can cause significant harm to the whole industry. Under this circumstance, developing members would also have greater incentives to litigate in the WTO.[906] And many scholars have shifted their attention to the legal capacity and other factors, and they recognized that these factors might matter more than market power.[907]

As mentioned, WTO dispute settlement has a dual nature, it has both political and legal element, involves not only legal issues, but also economic, trade, and political issues. Thus, participating in the DSM requires expertise in these fields. The dual nature of the DSM also shows the inevitable interference of political element. Therefore, the decision on whether to initiate a dispute or not can also be affected by some political considerations. Ochieng and Majanja argue that "some of these considerations could include historical alliances, and future trade and national security"[908]. When the EU adopted a trade restrictive measure against fresh fish products from Kenya, even though this measure lacked scientific support, Kenya still decided to comply with the EU directives without bringing its claims to the WTO due to political reasons.[909] Shahin also noted that developing members might face political pressure from developed members whose allegedly WTO-inconsistent measures had been identified. Before or during the litigation process, developed members would make a threat to withdraw some preferential treatments or political aid to these developing members. In order not to lose market access to these large markets, to maintain export opportunities, and to guarantee the continuation of the aid from developed members, after a careful cost-benefit analysis, developing members sometimes determine not to bring such WTO-inconsistent measures into the DSM.[910] It is also the case for larger developing members like South Africa. Brink states that even South Africa possess sufficient litigation resources, it would "first determine whether any such dispute might be detrimental to its political agenda, e.g., the negotiation of an FTA, regardless of the effect on the industry."[911] The political cost can happen within the WTO regime as well. For example, the respondent of a dispute can file another case against the complainant in the DSM, and leave the complainant with limited resources at hand overwhelmed.[912]

[905] Shaffer, "The challenges of WTO law," 178–79.
[906] Bohanes and Garza, "Going beyond Stereotypes," 68.
[907] Busch, Reinhardt, and Shaffer, "Does Legal Capacity Matter?," 5–6.
[908] Ochieng and Majanja, "Sub-Saharan Africa and WTO Dispute Settlement," 329–30.
[909] Ochieng and Majanja, 329–30.
[910] Shahin, "WTO Dispute Settlement for a Middle-Income Developing Country," 283–84.
[911] Brink, "South Africa's Experience with International Trade Dispute Settlement," 272.
[912] Bohanes and Garza, "Going beyond Stereotypes," 111–12.

Different cultural backgrounds constitute another obstacle for developing members to utilize the DSM. Cultural differences contain different legal traditions, and different understanding of litigation. Although China now is one of the most active participants in the DSM, its early experience in this mechanism can illustrate the impact of all these factors on its participation in the DSM. Influenced by the dominating powers in the GATT and early WTO periods, the WTO jurisprudence is conducted mainly in a mixed approach, including characteristics of both common law and civil law. And for China, whose legal system is developed on a civil law basis, participating in a system with different legal culture is not easy. That means government officials and professionals who can effectively use the DSM must have mastered knowledge of both civil law and common law during the stage of legal education. That is also a challenge for the development of domestic legal education. In the early years of China's accession to the WTO, legal experts have difficulty in understanding the operation of WTO litigation, and that constituted an obstacle for them.[913]

The unique tradition and experience with international law in the modern era made China's government reluctant to settle international disputes through litigation in the early years of its accession. Although China's history of international trade dates back to Han Dynasty (approximately 2 thousand years from now), its exposure to international trade law is relatively recent. The 1842 unequal Nanjing Treaty between China and the Britain marked the beginning of China's engagement with international trade law. And such a beginning is frustrating. This treaty and subsequent series of unequal treaties between China and western powers led to a cautious approach to international trade law in China. So, for a long time, China cherished its hard-won sovereignty so much that it was reluctant to accept the jurisdiction of the international tribunals.[914] Besides that, the non-litigation tradition also affects China's approach to settle disputes with others. Gao accurately describes the traditional Chinese cultural understanding of litigation by stating that "according to Confucianism philosophy which is deeply rooted in the Chinese society, litigation causes irreparable harm to relationships and should be pursued only as a last resort, or, better still, as the great philosopher himself would have preferred, avoided."[915] These two reasons can explain why settling disputes through the non-litigation approach, like consultation and negotiation, was preferred by the China's government in the early years.

Although these obstacles, namely impact of trade volume, political pressures, and different cultural background, also impact developing members' participation in the DSM, they are beyond the scope of international trade law. They should be addressed in fields of economy, trade, politics, and education. Thus, their possible solutions would not be analyzed in detail in the following parts.

[913] Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1011–12.
[914] Gao, "China's Participation in the WTO," 71. Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1000–1001.
[915] Gao, "China's Participation in the WTO," 72.

These interconnected barriers—rooted in the lack of legal capacity and financial resources—cannot be fully addressed through multilateral reform alone. The following section examines available solutions at both the international and domestic levels.

2. Enhance the participation capacity of developing members

Some of the difficulties mentioned above can be addressed by currently existing arrangements and resources available that need to be actively sought by members. These can benefit developing members in a short term. While some have to be mitigated by long-term investment in domestic capacity building. It might not be able to provide developing members with immediate and urgent resources, but it is the best way to solve the fundamental problems.

2.1. Making full use of current arrangements

As introduced in Part 1 §2.3 and analyzed in Part 3 §1.1, the WTO Secretariat and the ACWL are the two primary multilateral arrangements available to developing members facing financial and legal constraints in litigation. This section examines how effectively developing members have used these resources in practice. As indicated, the issue of developing members' lack of financial support to hire legal experts and experts in other fields has been noticed by the WTO and its members. Thus, seeking free legal help from the WTO Secretariat is possible. Making full use of the resources in these two bodies—especially the ACWL—can therefore, to some extent, alleviate developing members' resource constraints.

Members' experience in participating in the DSM with the help of ACWL can also demonstrate its effectiveness in practice. Since its establishment in July 2001, the ACWL has provided help to developing members in 71 WTO disputes (splitting a dispute with multiple complainants into several disputes brought individually by each complainant), whether as complainants, respondents, third parties, or interested parties. That is a remarkable record. As analyzed in the second section, statistics on members initiating a dispute in the DSM can best reflect their capacity for participation, because acting as complainants is much more resource-consuming than only participating as respondents or third parties. The ACWL has help 46 developing members act in the DSM as complainants. Only one of these disputes was brought jointly by multiple developing countries. That means, in other cases, developing members all acted as sole complainants in the DSM.[916] That is also an impressive achievement.

This mechanism is praised by developing members with different levels of development, that includes large developing members like India, and LDCs like Bangladesh. Although India established dedicated institutions to handle WTO disputes, it still faces constraints in sufficient competent lawyers who can represent India in front of the WTO adjudicators. Its active use of ACWL alleviate this constraint. India established its relationship with the ACWL by cooperating with Frieder Roessler, who provided India with legal assistance initially in his own capacity, then as the Executive Director of ACWL. And India now becomes one of the most active users of this

[916] "WTO Disputes," ACWL, accessed March 24, 2023, https://www.acwl.ch/wto-disputes/.

mechanism.[917] The attorney for the Indian delegation noted the effectiveness of ACWL by saying that

> it's been the default law firm for us. It's available. It's in town. It's much cheaper—much cheaper than a U.S. law firm, and it has good lawyers, possibly [some] of the best in the world.[918]

The service provided by the ACWL is of particular importance for LDCs like Bangladesh, who might drop the case in the WTO if without assistance at a much lower price. Bangladesh, as the only LDC that has initiated a dispute in the DSM, exemplifies how LDCs can litigate in the WTO with the help of ACWL. Before the initiation of Anti-Dumping Measure on Batteries from Bangladesh case, Bangladesh was informed that the legal fee would be about 150 thousand dollars if the case goes through all processes of the DSM. But it only had to pay 15 thousand dollars under the help of the ACWL, because the ACWL provide service to LDCs at 10% of the full cost, which is much lower than that for other developing members. It is affordable for Bangladesh. Due to the severe lack of competent staff in Bangladesh, the ACWL provided it with assistance concerning the preparation of the request for a consultation and also two lawyers during the consultation proceeding. The example of Bangladesh is very informative. Because Bangladesh, as one of the LDCs, represents those members most lacking in litigation resources. If members like Bangladesh can initiate a dispute in the WTO with the help of the ACWL, other developing members that possess relatively more legal and financial resources are more likely to benefit from this organization.

It is thus reasonable to assume that such data and success stories will encourage more developing members to bring their trade concerns into the WTO, and the ACWL can provide more effective help for developing countries to participate in the DSM in the future. If developing members face similar obstacles like India and Bangladesh, seeking help in the ACWL could effectively improve their capacity for participating in the DSM. As to deficiencies of the WTO Secretariat and the ACWL, some reforms of the WTO Secretariat and the ACWL could enable them to better assist developing countries. For example, provisioning sufficient experts in the WTO Secretariat that are capable of providing help to developing members in the DSM, and hiring some economic professionals in the ACWL to analyze the cost and benefit of initiating a dispute in the WTO for developing members.

But as mentioned in the previous part, help provided by the ACWL is still insufficient, from some perspectives. China's limited engagement with the ACWL illustrates this point. China is not a member of the ACWL, because it thinks the ACWL cannot provide adequate help it needs. As stated by Hsieh, the ACWL cannot help in noticing the existence of suspicious measures. It does not have expertise in Chinese law and economy, and it lacks economic professionals to analyze the cost and benefit of litigation.[919] Besides, in accordance with the GDP per capita and share of world trade, developing members are divided into four groups in the ACWL. Members in different

[917] Shaffer, Nedumpara, and Sinha, "Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity," 17.
[918] Conti, "Producing Legitimacy at the World Trade Organization," 145.
[919] Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1020–21.

groups enjoy different discounted rates in fee. That can guarantee that the most resource-poor countries have access to the most favorable price. And China's huge economic size makes the preferential rate less attractive to it.[920] Therefore, the ACWL cannot solve all problems faced by developing members, some obstacles have to be addressed at the domestic level.

2.2. Seeking assistance from abroad

Besides the ACWL, developing members can also get assistance from development organizations, non-governmental organizations (NGOs), and even customer unions in some developed members. Development organizations like UNCTAD, UNDP and the World Bank have professionals in trade and development. Thus, they have the ability to provide developing members with information and expertise in certain fields. However, due to the intergovernmental character of these organizations, their roles in the DSM could be limited by some political factors.[921] If some formal arrangements can be established within these organizations concerning the cooperation between them and developing members, such assistance could be more effective.

NGOs are also potential collaborators for developing members. Some NGOs have gained international influence on certain trade issues. For example, the Swiss NGO, Ideas, has helped four West African countries in negotiating the cotton subsidy related issues with developed members. Another successful example in dispute settlement proceeding is the cooperation between developing members and Doctors Without Borders, a northern-based NGO, in disputes under TRIPS agreement and relevant negotiations. They challenged the strict interpretation method adopted by the US concerning the enforcement of US pharmaceutical company patents under TRIPS in developing members. Due to successful collaborations between these developing members and the Doctors Without Borders, the US has, on many occasions, given up its claims about the pharmaceutical patents, and also backed down before Cancun and Hong Kong ministerial meetings on issues concerning compulsory licenses for the importation of generic drugs in developing members.[922] Thus, their ability to assist developing members is well illustrated. Some NGOs have branches in more than one country, and that can help the host countries' governments collect information. And for those NGOs that have their own legal teams, they can also provide legal service to the government of the host countries. Thus, developing members' governments should establish long-term collaboration with NGOs that have branches within their territories. However, working with NGOs also faces some constraints. NGOs tend to have a narrow focus, and most NGOs are not interested in trade-related issues, they are more likely to engage in disputes that fall within their areas of expertise and that are likely to attract broad public attention. In addition, the source of funding and their location also affects their activities and choice of disputes. Thus, it is not easy for developing members to find an NGO that is capable and willing to provide assistance.[923]

[920] Orozco, "The Wto Solution," 247.
[921] Bown and Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases," 886.
[922] Shaffer, "The challenges of WTO law," 194–95.
[923] Bown and Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases," 884–85.

Trade restrictive measures not only affected the interests of enterprises engaged in international trade, but also the interests of customers in importing countries. Thus, customer unions in importing members also have an incentive to provide help to developing members' governments when their interests are also impeded by the trade restrictive measures. Such cooperation also benefits customers in importing country, because when they lack the legal standing and ability to influence the policy-making and policy-implementation at the domestic level, working with foreign governments could be an alternative to protect their interests. For example, the US safeguard and anti-dumping statutes did not take into account the interests of customers in the determination of injury, thus customer unions chose to cooperate with foreign governments and challenged the trade measures adopted by the US.[924] And in EC — Sardines dispute, the customer group in the UK cooperated with Peruvian sardine exporters and wrote an *amicus curiae* brief.[925] However, the success of the cooperation also depends on the existence of consumer organizations in certain fields and the well-organized nature of these unions. Thus, customer unions might only have limited roles to play in providing assistance to developing members.

Relying on outside assistance has significant limitations. Whether the ACWL, NGOs, or other groups, to some extent, cannot provide comprehensive help to developing members, and the effectiveness of such help depends on many conditions that are beyond the control of developing members themselves. Thus, developing and nurturing domestic resources should also be emphasized.

2.3. Enhancing the public-private cooperation

Private sectors include not only domestic industries, but also private law firms, academic institutions, *etc*. Among them, the cooperation between public sectors and domestic industries is of significant importance, because domestic industries are directly affected by foreign trade measures, and thus have an interest in the dispute settlement proceedings. The special role of these private sectors in the DSM should be analyzed separately from others. The help from domestic industries can effectively enhance the ability of members' government to litigate in the WTO. Their role in this process is multifaceted, including information providing, legal capacity and financial supporting.

The first situation in which domestic industries can play a role is bringing their suspicions about a measure adopted by another member to their governments. This mechanism has a long history in the US and the EU, whose industries have developed considerable expertise in invoking it. The petition mechanism in the US is regulated by Section 301. Regardless of the controversies of legality of this approach in international law, it grants the United States Trade Representative (USTR) the responsibility and authority to act against foreign trade measures. Any interested person, like a company, certain industry, or trade association, can file a petition with the USTR. After receiving the petition, the USTR has the responsibility to determine whether to conduct an investigation. The USTR can also self-initiate an investigation. But such investigation must be

[924] Bown and Hoekman, 886.
[925] Shaffer, Mosoti, and Qureshi, "Towards a Development-Supportive Dispute Settlement System in the WTO," 35.

conducted after consulting with appropriate stakeholders, including domestic industries.[926] In both cases, the opinions from domestic industries are important. The investigation cannot be initiated without the participation of these private sectors. As described by Shaffer, the petition mode of Section 301 institutionally fosters the cooperation between public and private sectors, and advances the national and commercial interests in the US.[927] A similar mechanism also exists within the EU. In a similar role to section 301 is Trade Barrier Regulation (TBR), which aims at helping EU industries overcome trade barriers adopted by other countries. It also provides EU industries with the petition right. Under this mechanism, EU companies, commercial associations, and EU members can complain about trade obstacles in third countries to start the investigation.[928] The coordinated efforts governed by the TBR enhance the communication between European Commission and EU businesses, and that is also proven to be a successful example of public and private cooperation.[929]

Besides institutional cooperation between public and private sectors in the US and the EU. The informal public-private partnership in these two members is also developed. The US has a more "bottom-up" approach. For example, in the US, industries can lobby the government to take actions by using congressional pressure. While the EU has a more "top-down" mode. The Commission plays a more active role. It sometimes has to proactively establish contact with private sectors, and lobby companies to lobby it.[930]

While many developing members lack such arrangements, as indicated above, or their arrangement is not as effective as it should be. They also face difficulties in cooperating with domestic industries through informal approach. China has learned from the successful experience of the US and the EU, and established its own communication channel between government and enterprises in 2002. This mechanism is regulated in the Provisional Rules on Foreign Trade Barrier Investigation (TBI). Under these rules, Chinese companies and industries can file a petition with the Ministry of Commerce (MOFCOM) concerning the foreign trade barriers that negatively affected their exporting. The MOFCOM must decide whether to initiate an investigation, and may also do so on its own initiative. The applicants will be notified of both the decision to initiate an investigation and the decision not to initiate an investigation.[931] However, this petition mechanism has only been invoked once. The Jiangsu Laver Association regarded the Japan's quota regime on laver from China as violating WTO rules, and filed a petition with the MOFCOM. The trade dispute was finally resolved through consultation.[932]

---

[926] Andres B Schwarzenberg, "Section 301 of the Trade Act of 1974," 1974.
[927] Shaffer, *Defending Interests*, 20.
[928] "Trade Barriers Regulation (TBR)" Text, European Commission - European Commission, accessed March 24, 2023, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_434.
[929] Bohl, "Problems of Developing Country Access to WTO Dispute Settlement," 28–29.
[930] Bohl, 30–32.
[931] Provisional Rules on Foreign Trade Barrier Investigation, No. 31, 2002. "中华人民共和国对外贸易经济合作部令（二oo二年第 31 号）对外贸易壁垒调查暂行规则_2003 年第 9 号国务院公报_中国政府网," accessed March 24, 2023, http://www.gov.cn/gongbao/content/2003/content_62654.htm.
[932] Ministry of Commerce Announcement No. 10 of 2005 - Announcement on the termination of the Japanese laver import management measures trade barriers investigation, "商务部公告 2005 年第 10 号 关于终止日本紫菜进

Such a poor record could be attributed to many domestic factors. Han and Gao summarize these factors as the lack of daily direct communication between government and firms, even with the TBI, the underdeveloped industry associations, *etc*.[933] Therefore, merely establishing the petition mechanism cannot solve the public-private cooperation issue. For instance, industry associations in China are underdeveloped. Such associations should serve as a bridge between the government and the private sector. However, there is no specific legislating regulating the activities of these groups, and their roles, responsibilities and operations are unclear under China's legal regime. So, they can hardly play any effective role in protecting the interests of domestic industries. And that constitutes a significant reason for the rare use of the petition mechanism in China.[934] The impact of insufficient communication between public sectors and domestic industries can be demonstrated in the *EC—Tariff Preferences* case. The association of the textile industry in India lobbied the government to take actions against trade restrictive measures adopted by EU four months after the consultation between India and the EC. Thus, the Indian government suffered from a lack of transparency, and domestic industries had no idea what their government was doing. That would cause a waste of resources, because the Indian government could have used the information provided by companies instead of collecting it itself.[935] For this mechanism to be effective in practice, a well-developed capacity of industries to report their concerns, and the multiple approaches for communication, are both necessary.

The lack of cooperation between public and private sectors after the initiation of a dispute in developing members should also be addressed. In China, the cost of litigation, including the high cost of hiring foreign lawyers, is fully covered by the government budget.[936] That might be feasible for big developing members whose government budget is sufficient to support the litigation in WTO, even if the case goes through all processes of the DSM. However, most developing members lack the economic power like China. Thus, it is very burdensome to have their government cover the entire cost of WTO litigation. Thus, this approach is of little relevance to most developing members. In order to release the burden on developing members' governments, China, India, and Brazil take different approaches. China invests in long-term legal talent development, which will be discussed later; India makes effective use of the resources of the ACWL, which has been introduced in previous part; and the public-private cooperation in Brazil helps its government solve this problem. The legal and financial support from domestic industries who were directly affected by the measure, and who have a stake in litigation, makes a big difference in this case. Thus, enhancing the cooperation between public and private sectors can also help to address the lack of legal and financial resources during the litigation process.

口管理措施贸易壁垒调查的公告," accessed March 24, 2023, http://www.mofcom.gov.cn/aarticle/b/c/200502/20050200019196.html.

[933] HAN and GAO, "China's Experience and Challenges in Utilising the WTO Dispute Settlement Mechanism," 162–63.

[934] HAN and GAO, 146–47.

[935] Dhar and Majumdar, "Learning from the India–EC GSP Dispute," 184.

[936] Papa, "Emerging Powers in International Dispute Settlement," 98.

In order to enhance the public-private cooperation, both industries and officials should have a basic understanding of WTO rules, and the effective information flow is also important. Governments of developing members should take active steps to disseminate WTO-related knowledge among domestic enterprises and local officials, enhance their capacity on WTO related matters, and establish a contact point that is easier for domestic industries to get access to. For example, governments of developing members can establish think tanks. These think tanks can be established in different cities. They can hold programs and conferences to build the capacity of both companies and officials to notice trade barriers adopted by other members. They can also provide help to local companies by providing trade related information, identifying whether certain measures are suspected of violating WTO rules, and collecting their concerns and reporting them to public sectors. They can also take the responsibility for communication between government and domestic industries through formal and informal channels. That is the mode currently adopted by China.[937]

As introduced in §2.1, Brazil has developed both a media-based knowledge diffusion strategy and the Dispute Settlement Unit as a central public-private contact point. These institutional arrangements derive much of their effectiveness from a third foundation: the development of well-funded and legally sophisticated domestic industry associations.[938]

Brazil's successful public-private partnership in WTO litigation has also benefited from well-developed and well-funded domestic industries. Therefore, it is also very important to encourage the development of industry associations. The changes in Brazilian trade policy in the 1990s encouraged the development of industry associations. These groups enhanced their ability to provide input and coordinate with their government on trade matters. They recognized the importance of having knowledge on WTO related issues. And some of them hire top trade specialists, including former governmental officials, to get better access to governmental information and enhance their ability to handle foreign trade measures. Thus, both their financial support and legal expertise can help their government in the WTO litigation process. Brazil's successful public and private cooperation can be illustrated by the *EC—Sugar* case, *EC—Bananas* arbitration, and *EC—Tyres* case.[939] Brazil is regarded as one of the most frequent users of the DSM, and its successful experience can motivate other developing members. The above approaches adopted by China and Brazil can improve the capacity of domestic industries to identify potential disputes, and increase information flows between public and private sectors. With these arrangements, the petition mechanism can work better in developing members, and the lack of legal and financial resources can be partly mitigated. However, even if the cost of hiring foreign lawyers could be paid by domestic industries or trade associations, foreign law firms may lack a deep understanding of policy-making and policy-implementation in developing countries. And for small and poor developing members that lack resources in public sectors, while

[937] Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1013–15.
[938] Rosenberg, Shaffer, and Sanchez, 46–47.
[939] Shaffer, Sanchez, and Rosenberg, "The Trials of Winning at the WTO," 446–51.Papa, "Emerging Powers in International Dispute Settlement," 94.

domestic industries are also underdeveloped, the cost of hiring foreign lawyers is still burdensome, and cannot be effectively diffused at the domestic level.

Other private sectors also possess resources that can be utilized in the DSM. They can provide professional information and advice in legal and other fields. Thus, public sectors can benefit from establishing long-term cooperation with them. In order to make full use of the resources in these private sectors and enhance information exchange between public and private sectors, think tanks can be established to serve as a forum for cooperation. And other possible approaches should be explored. For example, Brazilian government, by providing internship opportunity to domestic lawyer in its permanent Geneva Mission, successfully establishes its communication with private lawyers, and diffuses WTO related knowledge to private sectors. After the end of internship program, those lawyers can better help public sectors, as well as domestic industries concerning WTO disputes.[940] The “revolving door” culture in the US plays a similar role. By encouraging career movement between public and private sectors, former officials working in the private law firms, and former lawyers working in public sectors can both enhance the communicate between the government and private sectors.[941] The establishment of Economic and Trade Policy Advisory Committee in China is another example of public and private partnership. This committee was established in 2011 to research the trends in international and domestic business development, the expansion of a country's opening-up policy, and major global, strategic, and forward-looking issues in business operations, in order to provide consultancy services for the development strategy and planning of China's commerce work. The members of this committee include experts in international trade, economic development, and WTO affairs from several top academic and institutions.[942]

Cooperation among private sectors is also important. Domestic industries should rely more on the assistance from private law firms or their internal legal personal. Although they have the first-hand information about trade restrictive measures adopted by foreign governments, they might lack the ability to figure out whether they are WTO-inconsistent, thus the internal or external legal personal with expertise in WTO law can effectively protect their trade interests, and can communicate on behalf of domestic industries and public sectors. Successful examples in this regard include developed members such as the US and the EU, as well as Brazil.[943] Academic institutions can also provide platforms for communication between public and private sectors. For example, Beijing Academy of International Economy and Trade regularly invites experts, scholars, and government officials to give lectures to international trade practitioners and related legal professionals to popularize the latest developments in international trade and spread WTO related information.[944]

[940] Bohanes and Garza, “Going beyond Stereotypes,” 85.
[941] Bohanes and Garza, 88–89.
[942] “ Policy Advisory Committee of the Ministry of Commerce(商务部政策咨询委员会),” accessed April 5, 2023, http://zys.mofcom.gov.cn/article/zxw/202004/20200402953374.shtml.
[943] Bohl, “Problems of Developing Country Access to WTO Dispute Settlement,” 49–51.
[944] “Beijing Academy of International Economy and Trade(北京国际经济贸易学会)”, accessed April 5, 2023, http://www.gjjmxh.com/gjjmxh/index.html.

Besides efforts at the domestic level, those small and poor developing members can also pool their resources at the regional level. This approach is similar to the EU's participation model in the WTO. European Commission's Legal Services pools the legal and financial resources of EU countries, and helps EU member states, including those with smaller economic scales, to act effectively in the DSM. When small and poor developing members within a region have similar trade interests and similar cultural and legal background, the establishment of such a center at the regional level can enhance their ability to participate in the DSM. It can also make up for some of the deficiencies of the ACWL, such as lack of financial expertise and lack of understanding of domestic policies.

2.4. Developing domestic legal talents

Due to the limitations mentioned in seeking assistance from international organizations, foreign law firms, and other groups, China, India, and Brazil, all recognize the importance to have domestic expertise, especially expertise in WTO law, that can help their governments handle WTO matters. Because sufficient domestic legal talents in WTO litigation can overcome all constraints indicated above, they have a deep understanding of both international trade law and domestic affairs, they also charge lower fees, and there are no cultural or language obstacles in their cooperation with governments. From a short-term perspective, investing in legal education and legal talent development may incur high costs. However, it can lead to cost saving in future litigation. Developing members can diffuse this cost across multiple disputes, and benefit from economies of scale. Furthermore, the efforts of developing countries in this regard not only benefit them in WTO dispute settlement, but also have significant advantages for their participation in other aspects of international trade.

2.4.1. Enhancing domestic WTO law education

All these three emerging powers have invested in WTO law education in domestic law schools. Brazil's frequent participation in trade dispute settlement has spawned the emergence of Brazilian epistemic trade law community since 2000. The University of São Paulo, which is Brazil's flagship institution, began to offer trade-related law courses in 2000, and gradually established long-term study group coordinated with government officials and other private sectors. Other law schools also integrated trade-related courses into their teaching plans. They are also active in holding conferences and public seminars. These law schools fostered a back-up for Brazil's litigation in the WTO. With the rise of the spreading of WTO law in education institutions, there is also an expertise competition within Brazil. Professors and experts in the field of international trade began to create research institutions and groups to analyze WTO issues, and to act as a contact point between public and private sectors. The enhancement of Brazil's negotiation and litigation capacity benefits from the cultivation of legal talents.[945]

Indian government funded a WTO Chair in the National Law School of India University in Bangalore just after the establishment of the WTO in 1996. It shows the importance that the

[945] Shaffer, Sanchez, and Rosenberg, "The Trials of Winning at the WTO," 56–63.

Indian government attaches to matters related to international trade. The importance of introducing trade-related courses into universities is emphasized by K.M. Chandresekhar, the former Joint Secretary in the Trade Policy Division, by saying that "the idea was to get young lawyers who can follow and provide expertise on WTO matters. The idea was to create new structures within the Indian context."[946] In addition, the creation of WTO-related journals has enhanced academic exchanges in the WTO field. The study and internship opportunities offered by newly established academic institutions also help to develop legal talents in India.[947]

The rise of Chinese WTO legal education coincided with its accession to the WTO. The translation of books from experts in developed countries helps domestic scholars gain a better understanding of the operation of WTO and rationale behind the DSM. The need to participate in WTO affairs, and especially the DSM, triggered the demand for experts in relevant fields, and as a result, WTO law education has emerged in many law schools. Universities in many cities, like Beijing (China University of Political Science and Law, University of International Business and Economics), Shanghai (Fudan University, Shanghai Institute of Foreign Trade) Wuhan (Wuhan University), Xiamen (Xiamen University), *etc.*, all play a significant role in the development of domestic expertise.[948]

The cultivation of expertise in WTO dispute settlement is the task of not only WTO members, but also the WTO itself. At the multilateral level, the WTO also has a Chairs Programme aiming to "support and promote trade-related academic activities by universities and research institutions in developing and least-developed countries".[949] Recently, 17 institutions were selected as WTO Chairs in the Phase 3 of the Program in 2020. The network of the program now is composed of 36 universities from developing countries around the world. Both scholars and students in these institutions can benefit from the supports provided by the WTO. Thus, domestic institutions in developing members can also develop their expertise in international trade through applying for attending this Program.

2.4.2. Working in the WTO and ACWL

Besides cooperation with academic institutions, the WTO also provide opportunities to developing members' officials and other nationals to obtain legal capacity. To develop domestic legal expertise derived from direct participation in the WTO, especially the DSM, one of the most effective ways is to make use of the resources in the WTO and the ACWL. Governments of developing members could enhance the ability of their governmental officials by expanding their Missions in Geneva and increasing the number of rule-makers of their nationality within the WTO. More staff working in WTO and ACWL, more first-hand experience can then be brought back to their home countries. For instance, before the *US—Cotton Yarn* dispute, Pakistan had no dedicated institution to handle WTO disputes, let alone a permanent Mission in Geneva. In the

[946] Shaffer, Nedumpara, and Sinha, "Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity," 11.
[947] Shaffer, Nedumpara, and Sinha, 11–12.
[948] Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1009–10.
[949] "WTO | WTO Chair Programme."

course of this dispute, Pakistan recognized the importance of having experienced staff in WTO issues and established WTO sections in its Geneva Mission.[950] Brazil took a more flexible approach. It not only expanded its permanent Mission in Geneva, but also combined the work in Geneva with domestic expertise development by providing internships program to private lawyers in its Mission.[951]

Besides increasing the number of government officials based in Geneva to deal with WTO related issues, working at the WTO Secretariat is another ideal way for developing members to enhance their understanding of the WTO. Because Secretariat staff are responsible for the day-to-day operations of the WTO and have access to internal information of the organization, which sets them apart from part-time panelists and AB members. For example, only 5 Chinese nationals worked in the WTO Secretariat in 2010, and this number rose to 14 by the end of 2021. Although there has been a significant increase in the number of members, however, considering China's total trade volume and its economic power, and especially in comparison with the number of staff from countries such as the UK (46), France (165), and Italy (25), this figure is still far from sufficient. When considering other developing members, the situation is even worse. No African country currently has more than five nationals working at the WTO Secretariat.[952] That means their expertise derived from direct participation is also limited. Thus, developing members should make more efforts to encourage their officials and other nationals working in Geneva. It should be noted that the WTO Secretariat also offers short-term internship opportunities to nationals from developing members, including the WTO Internship Programme, China's LDCs and Accessions Programme, and WTO Support Programme for Doctoral Studies.[953] Nationals' active participation of these programs could also effectively enhance the domestic legal capacity in developing members.

In addition to the day-to-day work of the WTO, developing members should also enhance their ability in interpreting and implementing WTO rules, making the role of WTO adjudicators significant. China has nominated WTO experts to be panelists in many disputes, and two government officials have been appointed as judges in the AB.[954] When they return to China after their tenure at the AB, they pass on their WTO dispute settlement experience to domestic law students, legal scholars and government officials by teaching at law schools, attending academic conferences and providing suggestions to their government. Thus, both academic institutions and government sectors benefit from their experience in the DSM. The participation in WTO legal interpretation process is particularly important for developing members from another perspective. Although panelists and AB members are required to serve in their individual

[950] Turab Hussain, "Victory in Principle: Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States," in *Managing the Challenges of WTO Participation: 45 Case Studies*, ed. Andrew L. Stoler, Patrick Low, and Peter Gallagher, WTO Internal Only (Cambridge: Cambridge University Press, 2005), 462, https://doi.org/10.1017/CBO9781139030526.035.
[951] Bohanes and Garza, "Going beyond Stereotypes," 85.
[952] "WTO | Secretariat and Budget Overview."
[953] "WTO | Working at the WTO," accessed March 31, 2023, https://www.wto.org/english/thewto_e/vacan_e/iypp_e.htm#WTO_Support.
[954] Zhang Yuejiao, 2008-2016; Zhao Hong, 2016-2020.

capacities, and be unaffiliated with any government,[955] panelists and AB members from developing members can diversify the membership of WTO adjudicators, and can better understand the special situations in developing countries.

ACWL, as an organization aiming to provide developing members with legal services in the WTO litigation, could also serve as a platform for developing members to enhance their legal capacity. The Secondment Program for lawyers from developing members held by the ACWL can develop their expertise in WTO law by working with and learning from experts who directly engage in WTO dispute settlement activities.[956] A former participant from Samoa regards this program as a considerable success by saying that "it was even more rewarding to be able to work alongside and be taught by experts in WTO law. I was also exposed to a higher level of working environment."[957] And Liang-rong Lin, a lawyer from Chinese Taipei, who has participated in this program, also recognized ACWL's active role in building capacity in developing members. Just one month after completing her secondment, the programme's value was demonstrated in her contribution to the *EC—IT Products* dispute. In this case, she participated in the draft of submissions, and also served as a representative of Chinese Taipei in the second panel hearing.[958]

Thus, both the WTO and ACWL provide officials and nationals from developing members with direct or indirect opportunities to participate in the operation and dispute settlement of the organization. Making full use of these opportunities can significantly enhance the domestic legal capacity of developing countries.

2.4.3. Cooperation between foreign and domestic law firms

A special arrangement adopted by the Chinese government in enhancing the legal ability of domestic lawyers should be highlighted. None of the emerging powers, namely China, India, and Brazil, can rely solely on their domestic legal expertise. They all require assistance from foreign law firms or other organizations. India's frequent use of ACWL can partly solve this problem, while China and Brazil choose to hire elite private law firms.[959] Certain law firms located in some developed members monopoly the WTO cases.[960] The fees charged by these lawyers are very high, and foreign lawyers usually lack a deep understanding of domestic affairs in developing members. China tries to break this monopoly by insisting on the engagement of domestic law firms. Specifically, when China participated dispute settlement proceedings as a complainant or respondent, it would hire foreign law firms to take the main responsibility in representing it, while the Chinese government required them to cooperate with local law firms. Thus, it is common to see that foreign and local law firms represented China simultaneously in one dispute. Local law

[955] DSU, Article 8.9, 17.3.
[956] Meagher, "Representing Developing Countries in WTO Dispute Settlement Proceedings," 9.
[957] Meagher, 9.
[958] Qaraman Mohammed Hasan, "The Role of Advisory Centre on World Trade Organization Law (ACWL) in Supporting Developing Countries Regarding the Dispute Settlement Mechanism," *International Journal of Social Sciences & Educational Studies* 3, no. 2 (2016): 123.
[959] Papa, "Emerging Powers in International Dispute Settlement," 98.
[960] Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," 1023.

firms can directly learn from these experienced foreign lawyers, and enhance their own legal capacity. In disputes where China was involved as third party, trade interests of domestic industries were not at significant risk. In these cases, local law firms tended to play a much bigger role. These cases provide domestic law firms with an opportunity to practice their skills, and as they become proficient in WTO practice, they are expected to play a greater role in cases involving China as a complainant or respondent, and even replace foreign law firms in their position in WTO dispute settlement.[961] Such strategic arrangement adopted by China can serve as a model for other developing members to emulate.

2.4.4. Frequently participating in DSM as third parties

China is also famous for actively participating in the dispute settlement proceedings as a third party. Since two years after its accession to the WTO, China has participated in 192 disputes as a third party,[962] this number exceeds the corresponding figure for most developing members, including Brazil (166)[963] and India (178)[964]. If taking into account China's relatively late accession to the WTO compared to these two members, this data further illustrates China's proactive participation in dispute settlement as a third party.

China's frequent participation as a third party should be analyzed from the capacity-building point of view. Participating as a third party has multiple benefits. First, the most direct way to get experience in the DSM is to participate in this process more frequently. However, acting as a complainant or respondent is too costly for both developing and developed members. In order to enhance its litigation capacity by increasing the frequency of participation while controlling costs, participating as a third party is the optimal choice for China. Second, Chinese government officials can gain a better understanding of the operation of DSM, the legal interpretation method adopted by the WTO adjudicators, and the implementation of foreign policies. These experiences will greatly benefit China's future participation in dispute settlement as a complainant or respondent. Third, as indicated above, domestic law firms play a bigger role in these cases. Thus, frequent participation as a third party can provide local lawyers with more opportunities to enhance their legal capacity. Last but not least, as a third party, China could express its opinions on topics of interest. Thus, its participation can also help other members to have a better understanding of China's attitude towards related issues. And China can present its view on the interpretation of WTO rules, and that can facilitate its engagement in the rule-making process in the DSM.[965]

---

[961] HAN and GAO, "China's Experience and Challenges in Utilising the WTO Dispute Settlement Mechanism," 148.
[962] "WTO | China - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/china_e.htm.
[963] "WTO | Brazil - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/brazil_e.htm.
[964] "WTO | India - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/india_e.htm.
[965] Bohanes and Garza, "Going beyond Stereotypes," 117–18.

Many developing members have not been active third parties in the DSM. Even Nigeria, the largest economy in Africa, has only participated in the DSM as a third party in six disputes.[966] For members with sufficient resources to support their participation in the DSM, at least as third parties, active engagement as third parties is a valuable means of enhancing their litigation capacity.

2.5. Optimizing the government structural setting at the domestic level

Besides the above factors, the proper government structural setting is also crucial to increase the litigation capacity in developing members. Because the DSM has an intergovernmental nature, and only members' governments can have sittings in the dispute settlement proceedings. Optimizing the internal organization of the government can also enable them to better integrate and utilize domestic and international litigation resources. The optimization includes establishing institutions to deal with WTO matters, and improving coordination between different public sectors. As mentioned above, all three emerging powers, as well as the most frequent users of the DSM, have established dedicated government institutions to handle WTO disputes at their domestic level, and public sectors have a clear division of labor and cooperation mechanism among them.

The establishment of the WTO and the rule-oriented DSM compelled its members to take measures to adapt to this new trend. After the *Argentina—Textiles and Apparel* case in 1997, Argentina realized that the traditional GATT approach to settle trade disputes has changed, and has been exchanged by the new WTO approach. It is necessary to develop its ability to integrate economic analysis and public international law to better participate in the DSM. Thus, it has established a dedicated unit within its Ministry of Foreign Affairs and International Trade to handle WTO dispute settlement-related issues, which is separate from units that handle general WTO affairs.[967] China, although accessed to the WTO later than the former, also took some measures to change its governmental structure after its accession. It took the same approach as Argentina. Specifically, the MOFCOM was established to govern both domestic and foreign trade. Within the MOFCOM, the Department of WTO Affairs is responsible for WTO negotiations and trade policy reviews, while the Department of Treaty and Law handles DSU negotiations and dispute settlement under WTO agreements.[968]

Besides dedicated institutions for WTO dispute settlement, the effective participation in the DSM also requires coordination between public sectors. Because due to the wide scope of trade issues, the involvement and support of not only trade-related departments, but also agricultural and

[966] "WTO | Nigeria - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/nigeria_e.htm#disputeCases.

[967] José Gabilondo, "Argentina's Experience with WTO Dispute Settlement: Development of National Capacity and the Use of in-House Lawyers," *Dispute Settlement at the WTO: The Developing Country Experience*, November 1, 2010, 148, 2010, 118–20, https://doi.org/10.1017/CBO9780511663192.004.

[968] "Ministry of Commerce of the People's Republic of China (中华人民共和国商务部)", accessed April 2, 2023, http://www.mofcom.gov.cn/mofcom/shezhi.shtml.

intellectual property-related departments, might be crucial. When they belong to different Ministries, a platform for them to collaborate or a formal procedure for them to negotiate is needed. Kenya's failure in 2005 and South Africa's experience can demonstrate the importance of coordination between different public sectors. In order to address this issue, Brazil has institutionalized this coordination. The Chamber of Foreign Trade (CAMEX) was established to serve as a forum within the Brazilian government where different Ministries can reach consensus. A Brazilian official highly praised the role of CAMEX in a telephone interview with Shaffer. He recognized the crucial role that CAMEX played in bringing trade issues to the attention of different Ministries, and clarifying issues for these public sectors. Effective coordination also exists within the governments of some most frequent users of the DSM, such as the US, EU, and Canada. [969] The experience of these members derived from frequent participation in the DSM is valuable for the enhancement of developing members' litigation capacity.

The structural setting issue within public sectors in developing members also includes the lack of sufficient competent staff. After the establishment of dedicated institutions and the coordination mechanism between these sectors, adequate staffing with capable personnel is necessary for effective functioning of the relevant mechanisms. However, it depends on the advanced legal education, and sufficient expertise derived from first-hand experience in the WTO. When sufficient domestic expertise in WTO-related fields has been cultivated, the shortage of qualified public sector personnel can be substantially reduced.

In summary, the lack of participation of developing members in the DSM can be attributed to the increasingly sophisticated and complicated dispute settlement proceedings, and insufficient capacity of developing members to settle trade disputes. The reform of SDT provisions and the remedy mechanism can lower the threshold for developing members' participation, while developing members should also make efforts to build domestic capacity. This section focuses on the latter issue. The analysis above demonstrates that no single solution suffices: a combination of multilateral support, domestic institutional reform, and sustained investment in legal education is required.

It should be noted that the lack of litigation capacity of developing members might be caused by one of the above reasons, or it may be the result of a combination of various factors. Hence, not all members may find the aforementioned suggestions to be sufficient. For example, for poor developing members, including the least-developed members like Bangladesh, who cannot afford the cost of hiring foreign lawyers in each dispute, developing domestic legal talents through repeated coordination between local and foreign law firms can hardly be realized. Instead, seeking assistance from the ACWL may be a better option for them. However, for large developing members that suffer less from the financial constraint, for instance, China, the services provided by the ACWL might not satisfy all its demands in the DSM. Also, it has other superior choices for improving its litigation capability, such as consistent collaboration between

[969] Sanchez Badin, Rosenberg, and Shaffer, "Winning at the WTO," 42–43.

local and foreign law firms, or through effective public-private cooperation. Therefore, members should selectively adopt the above recommendations in the context of their specific situations.

Conclusion

This study has examined the reasons behind the underparticipation of developing members in the WTO Dispute Settlement Mechanism (DSM) and has proposed reforms to promote their more effective engagement. The starting point of this thesis is that the WTO contains both developed and developing members, yet the participation of the latter in the DSM remains insufficient and deeply unbalanced compared to that of developed members. This disparity is not merely a procedural concern: the DSM serves as the primary mechanism through which WTO members enforce their trade rights and clarify the meaning of covered agreements. Developing members' limited engagement in this system therefore undermines both their ability to protect their trade interests and their capacity to influence the evolution of WTO law. Although the ongoing Doha Development Agenda was designed to focus on development issues and the special needs of developing members in the multilateral trading system, and developing members have submitted proposals to reform the DSM and improve their participation, the impasse of the Doha Round has left these issues largely unresolved. As the former Director-General of the WTO, Pascal Lamy, observed in invoking the bicycle theory of trade negotiations, the stall of multilateral negotiations will lead to a less effective and less stable trading system.[970] Thus, efforts must be made to actively explore ways to increase the participation of developing members in the DSM and push forward the corresponding reform negotiations.

1. Answers to the Research Questions

This thesis addressed two central research questions: what are the reasons behind the underparticipation of developing members in the WTO DSM, and how can their participation be more effectively promoted? The analysis across the five chapters of this thesis yields the following answers.

The underparticipation of developing members in the DSM can be attributed to three interconnected sets of problems. The first is the inadequacy of Special and Differential Treatment (SDT) provisions, both in terms of their substantive content and the interpretive approaches adopted by WTO adjudicators. Although the WTO covered agreements contain approximately 155 SDT provisions designed to address developing members' special needs, most of these provisions are formulated in general and non-binding language, offering political expectations rather than enforceable legal guarantees. Where the content of provisions is sufficiently clear, WTO adjudicators have in several cases adopted interpretation methods that circumvent or diminish the effectiveness of these rules, increasing the burden of proof for developing members and deterring their invocation of SDT rights. The inadequacy of SDT provisions reduces the incentives for developing members to engage in the DSM, since they cannot rely on these provisions to secure meaningful advantages during dispute settlement proceedings.

[970] Pascal Lamy, The Place of the WTO in the International Legal Order, World Trade Organization, Jun. 15, 2008, at: https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm.

The second set of problems concerns the remedy regime under the DSU. Compensation and retaliation—the two temporary remedies available when a respondent fails to implement a DSB ruling within the reasonable period of time[971]—are both structurally disadvantageous for developing members. The prospective nature of these remedies means that developing member complainants cannot recover losses suffered during the often lengthy dispute settlement proceedings. The voluntary nature of compensation makes its conclusion dependent on the political and economic leverage of the parties, while the self-damaging effect of retaliation is disproportionately burdensome for small and poor economies. These features of the remedy regime reduce the practical benefits that developing members can obtain from successful litigation, thereby weakening their incentive to bring and pursue disputes.

The third set of problems is the lack of legal capacity and financial resources at the domestic level. WTO dispute settlement has evolved into a highly technical and resource-intensive process requiring expertise not only in WTO law but also in economics, health, environmental science, and other specialized fields. Many developing members face interconnected capacity deficits: they lack the ability to identify WTO-inconsistent measures in the pre-litigation stage; they lack competent staff with direct experience of WTO proceedings; they face inadequate institutional settings within their public sectors; they cannot afford the high cost of WTO litigation; and they are affected by political considerations and cultural factors that reduce their willingness to engage the DSM. These capacity deficits prevent developing members from making effective use of even those formal rights that the DSM provides.

In response to these three sets of problems, this thesis has proposed reforms across all three dimensions. With respect to SDT provisions, the thesis proposes modifications to the content of procedural SDT provisions—replacing exhortative "should" language with legally binding "shall," clarifying best-efforts clauses by distinguishing levels of obligation and providing specific implementation criteria, and updating or removing outdated provisions such as parts of the 1966 Decision that no longer offer developing members more favourable treatment than the DSU itself. It also proposes improvements to the interpretive approaches of WTO adjudicators, including recognition that not all SDT provisions constitute exceptions to other rules and therefore should not be subject to the principle of *exceptio est strictissimae applicationis* without adequate justification. With respect to remedies, the thesis argues for the introduction of retroactivity to the remedy regime, the recognition of financial compensation as a viable alternative, the feasibility of mandatory financial compensation through pre-posted bonds, the conditional introduction of collective retaliation limited to members affected by the same measure, and the selective adoption of the carousel method where it enhances compliance-inducing pressure. With respect to capacity, the thesis proposes improvements to the ACWL and WTO Secretariat assistance, enhanced public-private cooperation at the domestic level, investment in domestic legal education, and expanded use of third-party participation as a lower-cost pathway to institutional learning.

2. Summary of Main Findings

[971] DSU, Article 22.

The analysis in this thesis has demonstrated that developing members' underparticipation in the DSM is not a consequence of any single factor but the result of mutually reinforcing structural conditions. The inadequacy of SDT provisions reduces the returns from participation; the deficiencies of the remedy regime reduce the practical value of successful litigation; and the lack of capacity prevents developing members from accessing even those benefits that formally exist. These three problems must therefore be addressed together. Reforms that target only one dimension—for example, improving SDT provisions without addressing capacity—will leave developing members unable to invoke the improved rules in practice. A comprehensive and integrated approach is essential.

The analysis has also demonstrated the importance of understanding the development trajectory of the multilateral trading system. The shift from the power-oriented GATT system to the more rule-oriented WTO system has been beneficial for developing members in several important respects: the adoption of negative consensus in key procedural stages, the establishment of a unified dispute settlement mechanism, and the creation of the Appellate Body have all reduced the scope for political obstruction and placed weaker members on a more equal procedural footing with powerful ones. However, the WTO remains a member-driven organization in which political dynamics continue to shape outcomes. The recent crisis surrounding the Appellate Body, caused by the blocking of new appointments since 2017,[972] illustrates that the political character of the WTO has not been overcome, and that reform proposals must be designed to function within this institutional reality.

The development of SDT provisions reflects the same dynamic. Despite more than seven decades of negotiation from the ITO Charter through the Doha Development Agenda, the tension between developed members' emphasis on reciprocity and non-discrimination and developing members' insistence on the need for asymmetric obligations and preferential treatment has consistently produced SDT provisions that are weaker and less enforceable than developing members sought. Reforming these provisions requires both content-level changes—which require the consensus of members and are therefore politically difficult—and interpretation-level changes, which can be achieved through WTO adjudicators without the need for member consensus and are therefore more feasible in the short term.

With respect to remedies, this thesis has argued that the major objective of the DSM has evolved from rebalancing trade interests between members towards inducing compliance with WTO obligations, consistent with the broader shift from a power-oriented to a rule-oriented system. The prospective nature of current remedies is in tension with this objective, since it provides non-implementing respondents with an incentive to delay implementation. Reforms that introduce retroactivity and financial compensation would bring the remedy regime into closer alignment

[972] Henry Gao, "Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement," *Journal of International Economic Law* 24, no. 3 (September 1, 2021): 534–35; Ujal Singh Bhatia, "The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System," Release of the Appellate Body Annual Report 2016, available at: https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf (2017).

with the DSM's objective of inducing compliance and with the broader framework of general public international law, which ordinarily requires full reparation for internationally wrongful acts.

3. Contributions to the Existing Literature

Before setting out this thesis's original contributions, it is necessary to identify two critical shortcomings in the existing academic research on this subject. First, key issues regarding the WTO and the DSM are frequently studied in isolation, failing to account for their systemic interdependence. The literature on SDT provisions, on WTO remedies, and on capacity building for developing members has largely developed in separate scholarly communities, with limited cross-fertilization. As a result, reform proposals advanced in one field tend to assume away the problems identified in another, and the cumulative effect of addressing all three sets of barriers simultaneously has not been adequately theorized. Second, existing discussions of DSM reform are frequently characterized by proposals that lack practical feasibility within the political and institutional context of the WTO. Proposals that presuppose a depoliticized adjudicatory system, require the transformation of the WTO from a trade organization into a development organization, or depend on the comprehensive reform of the WTO's negotiating structures cannot be implemented under current conditions and therefore provide limited guidance to developing members seeking actionable reform strategies.

Against this background, this thesis makes three main contributions to the existing literature. First, it demonstrates that improving developing members' participation in the DSM requires a broader perspective beyond simple rule optimization. The three sets of barriers—SDT provisions, remedies, and capacity—are interconnected and mutually reinforcing, and must be addressed through a comprehensive and integrated reform framework. Strengthening SDT provisions without improving capacity leaves developing members unable to invoke the improved rules; improving remedies without addressing SDT deficiencies may increase the theoretical returns from successful litigation while leaving the underlying barriers to access unaddressed. This thesis provides a systematic analysis of the relationships among these three dimensions—an integrative approach that has been largely absent from the existing literature—and proposes a reform agenda that treats them as a connected whole.

Second, the reform proposals advanced in this thesis acknowledge the inevitable political nature of the WTO and aim to reduce political intervention rather than unrealistically attempting to eliminate it. Each reform proposal in this thesis is evaluated not only in terms of its desirability from the perspective of developing members but also in terms of its feasibility within the existing institutional framework. This requires distinguishing between reforms that can be achieved through changes in the interpretive practice of WTO adjudicators without requiring member consensus, reforms that require modification of existing DSU provisions and therefore depend on negotiated agreement, and reforms that would require broader institutional changes that are not feasible in the short term. By systematically applying this feasibility filter to the full range of reform proposals in the literature, this thesis identifies a set of reforms that are both meaningful for developing members and realistically achievable within the current WTO system.

Third, this thesis treats WTO law as part of general international law rather than as a self-contained legal order, and applies broader legal principles from public international law to specific problems of WTO dispute settlement. As recognized by Article 3.2 of the DSU, the dispute settlement system serves to clarify WTO agreements in accordance with customary rules of interpretation of public international law. This thesis invokes principles of treaty interpretation, including the principle of consistent interpretation[973] and the principle of *exceptio est strictissimae applicationis*, to inform its analysis of how WTO adjudicators should approach ambiguous SDT provisions. It also draws on the law of state responsibility's framework of full reparation to evaluate the adequacy of current WTO remedies and justify the introduction of retroactivity and financial compensation. By treating WTO law as part of a broader international legal order rather than as an autonomous regime, this thesis opens up a wider range of reform options than would be available within a purely WTO-internal analytical perspective.

4. Limitations of This Research

This thesis recognizes several limitations that constrain its analysis and conclusions. First, the thesis assumes throughout that the fundamental political and institutional character of the WTO—its member-driven nature, the consensus principle in negotiations, and the coexistence of legal and political dispute settlement methods—will remain substantially unchanged in the short to medium term. This assumption is necessary to ensure that the reform proposals advanced are operationally feasible, but it necessarily excludes more radical reform proposals that would require a fundamental transformation of the WTO's institutional structure. The possibility that such ambitious reforms could ultimately produce better outcomes for developing members cannot be ruled out, and the analysis in this thesis does not foreclose that possibility.

Second, due to insufficient information and the absence of adequate economic analysis, certain issues could not be resolved conclusively. The discussion of tradable retaliation illustrates this limitation most clearly: it is not currently possible to determine with confidence how different auction designs would affect members' strategic choices, and without a more complete economic analysis, a definitive assessment of the welfare implications of tradable retaliation for developing members cannot be provided. Similar limitations apply to several other reform proposals where empirical evidence on implementation effects is unavailable.

Third, the analysis of developing members is necessarily conducted at a level of generality that does not fully capture the significant diversity within this category. Developing members range from major emerging economies such as China, India, and Brazil to small island states and least developed countries with minimal trade capacity. The barriers to participation and the most appropriate reform responses differ significantly across these groups, and a reform agenda that is appropriate for one subset of developing members may be poorly suited to another. This limitation is acknowledged in the analysis but not fully addressed within the scope of this thesis.

---

[973] Davíd T. Björgvinsson, "Principle of Consistent Interpretation," in *The Intersection of International Law and Domestic Law* (Edward Elgar Publishing, 2015), 104–20.

5. Directions for Future Research

This research provides a stepping stone for future inquiry in several important directions.

First, there is a pressing need to refine the differentiation among developing members for the purposes of WTO reform proposals. The category of "developing members" encompasses an enormous range of economic circumstances, institutional capacities, and trade profiles, yet most reform proposals—including those in this thesis—are necessarily formulated at a level of generality that applies to the category as a whole. Future research should develop more granular analytical frameworks that distinguish between the specific needs and circumstances of least developed countries, small and vulnerable economies, and middle-income developing members with significant trade capacity. Such differentiation would enable reform proposals to be more precisely targeted, ensuring that changes to SDT provisions, the remedy regime, and capacity-building programmes more effectively address the diverse economic realities within the WTO membership.

Second, the impact of regional trade agreements (RTAs) on the DSM and on developing members' participation in it deserves substantially more attention than this thesis has been able to provide. The proliferation of RTAs—including major "mega-regional" arrangements such as the Regional Comprehensive Economic Partnership (RCEP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)—has increasingly supplemented, and in some respects displaced, the multilateral system as the primary forum for trade rule-making and dispute resolution. Bown has identified the development of these RTAs as a potential threat to the multilateral system,[974] while Crawford and Laird have pointed out that their development risks excluding least developed countries from key issues of international trade.[975] At the same time, there is a historical precedent for other developments pressuring the WTO to address the concerns of developing members, as illustrated by the role of UNCTAD in pushing the GATT to introduce Part IV. Whether the expansion of RTAs will similarly accelerate or impede DSM reform at the multilateral level, and how increasing developing member participation in RTAs with their own dispute settlement mechanisms will affect their engagement with the WTO DSM, remain important open questions for future research.

Third, technological shifts—most notably the rapid growth of digital trade and the transformative potential of artificial intelligence—are fundamentally reshaping the global economic landscape in ways that have significant implications for developing members and for the DSM. The existing WTO framework was designed for an era of primarily goods-based trade, and the DSU's procedures and remedies have not been updated to address the challenges posed by digital trade disputes, which may involve highly technical evidence, jurisdictional complexity, and fast-moving commercial circumstances that are poorly suited to proceedings that currently take several years

---

[974] Chad P. Bown, "Mega-Regional Trade Agreements and the Future of the WTO," *Global Policy* 8, no. 1 (2017): 107, https://doi.org/10.1111/1758-5899.12391.

[975] Jo-Ann Crawford and Sam Laird, "Regional Trade Agreements and the WTO," *The North American Journal of Economics and Finance* 12, no. 2 (July 1, 2001): 207–8, https://doi.org/10.1016/S1062-9408(01)00047-X.

to conclude. At the same time, AI-driven changes to global production and comparative advantage may alter the trade profiles and litigation interests of developing members in ways that are difficult to predict. Future research should investigate how the DSM and its remedy framework would need to adapt to serve developing members effectively in an increasingly digital and AI-shaped trade environment, and whether new forms of SDT provisions are needed to address the specific vulnerabilities of developing members in digital trade.

Finally, the ongoing Appellate Body crisis has created a period of significant institutional uncertainty for the WTO dispute settlement system. The reform of the Appellate Body and the broader question of how to restore a functioning two-tier dispute settlement system are matters of central importance that have been noted but not fully addressed in this thesis. Future research should examine how the outcomes of Appellate Body reform discussions will affect the three dimensions of developing members' participation analyzed in this thesis, and whether the reform process creates opportunities to introduce more development-friendly approaches to SDT interpretation and remedy design.

6. Concluding Remarks

Improving the participation of developing members in the DSM is a critical and ongoing challenge for the WTO and all its members. The multilateral trading system is currently at a crossroads. If it continues to allow the underparticipation of the majority of its members in its primary enforcement mechanism, it risks becoming a system that formally enshrines equality while functionally entrenching the advantages of those members with the greatest political and economic resources. This outcome would undermine the WTO's founding objectives of providing a fair and equitable framework for international trade and promoting the economic development of all members.

This thesis has argued that meaningful progress is achievable, but only through a strategy that is simultaneously ambitious in its goals and realistic in its design. The reform proposals advanced here are deliberately calibrated to the institutional and political constraints of the current WTO system. They aim to reduce, rather than eliminate, political intervention in the DSM; to work within, rather than against, the member-driven character of the organization; and to build on, rather than replace, the existing framework of WTO law and general international law. In this sense, the thesis reflects a commitment to change that is both principled—grounded in the equal right of all WTO members to benefit from a functioning dispute settlement system—and practical—designed to be implementable in a world where far-reaching reform requires the consensus of a politically diverse membership. The time for action is now, and it is the collective responsibility of all WTO members, policymakers, academics, and civil society organizations to work together to ensure that the WTO's dispute settlement system works for the benefit of all its members—especially those who have historically been most marginalized in the global trading system.

References

Books and Journal Articles:

Abbott, Frederick M. "Cross-Retaliation in TRIPS: Options for Developing Countries." SSRN Scholarly Paper. Rochester, NY, April 1, 2009. https://doi.org/10.2139/ssrn.1415802.

Abbott, Roderick. "Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the Years 1995–2005." ECIPE Working Paper No. 01/2007, 2007.

Adekola, Tolulope Anthony. "US–China Trade War and the WTO Dispute Settlement Mechanism." *Journal of International Trade Law & Policy* 18, no. 3 (2019): 125–135.

Åhman, Joachim. "Exploring Border Areas between the Law of State Responsibility and WTO Law." *Journal of World Trade* 54, no. 2 (2020): 219-238 . https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2020010.pdf.

Akamatsu, Kaname. "A Theory of Unbalanced Growth in the World Economy." *Weltwirtschaftliches Archiv* 86, no. 2 (1961): 196–217.

Akpan, George. "Developing Countries and the Reform of the WTO Dispute Settlement System: Expectations and Realities." In *Developing Countries and the WTO: Policy Approaches*, edited by Gary P. Sampson and W. Bradnee Chambers, 255–279: United Nations University Press, 2008.

Alavi, Amin. *Legalization of Development in the WTO: Between Law and Politics*. Kluwer Law International, 2009.

Alesina, Alberto, Sule Özler, Nouriel Roubini, and Phillip Swagel. "Political Instability and Economic Growth." *Journal of Economic Growth* 1, no. 2 (1996): 189-211. https://doi.org/10.1007/BF00138862.

Alessandrini, Donatella. *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*. Hart Publishing, 2010.

Al Shraideh, Saleh. *The Participation of Developing Countries in the Dispute Settlement System of the WTO*. Oisterwijk: Wolf Legal Publishers, 2013.

Amorim, Celso L. N. "The WTO from the Perspective of a Developing Country." *Fordham International Law Journal* 24, no. 1–2 (2000): 95–106.

Anderson, Kym. "Peculiarities of Retaliation in WTO Dispute Settlement." *World Trade Review* 1, no. 2 (2002): 123–134.

Babu, R. Rajesh. "Remedies for Violations of WTO Law: The Misplaced Notion of Effectiveness." *Asian Journal of WTO and International Health Law and Policy* 7, no. 2 (2012): 457-515.

Bagwell, Kyle. "Remedies in the WTO: An Economic Perspective." Working paper, Department of Economics, Columbia University, 2007. https://doi.org/10.7916/D8GF15QQ.

Bagwell, Kyle, Chad P. Bown, and Robert W. Staiger. "Is the WTO Passé?" *Journal of Economic Literature* 54, no. 4 (2016): 1125–1231.

Bagwell, Kyle, Petros C. Mavroidis, and Robert W. Staiger. "The Case for Auctioning Countermeasures in the WTO." NBER Working Paper No. w9920. National Bureau of Economic Research, August 2003. https://doi.org/10.3386/w9920.

Balas, Peter. “Chairing the DSU Negotiations: An Overview.” In *Reform and Development of the WTO Dispute Settlement System*, edited by Dencho Georgiev and Kim van der Borght: 15-36. Cameron May, 2006.

Bamba, Aminata M. “The Developing Countries in the WTO.” *World Economy*, 1999, 117–143. https://www.academia.edu/2356119/The_Developing_Countries_in_the_WTO.

Bartels, Lorand. “The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program.” *Journal of International Economic Law* 6, no. 2 (2003): 507–532.

Barton, John H. *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*. Princeton University Press, 2006.

Bello, Judith Hippler. “The WTO Dispute Settlement Understanding: Less Is More.” *American Journal of International Law* 90, no. 3 (1996): 416-418. https://doi.org/10.2307/2204065.

Benoit, Philippe, and Kevin Tu. “Is China Still a Developing Country? And Why It Matters for Energy and Climate.” Center on Global Energy Policy, Columbia SIPA, July 23, 2020. https://www.energypolicy.columbia.edu/research/report/china-still-developing-country-and-why-it-matters-energy-and-climate.

Bhatia, Ujal Singh. “The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System.” Release of the Appellate Body Annual Report 2016. World Trade Organization, 2017. https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf.

Bohanes, Jan, and Fernanda Garza. “Going beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement.” *Trade, Law and Development* 4, no. 1 (2012): ix–124.

Boisson de Chazournes, Laurence, Kohen, Marcelo G.; and Viñuales, Jorge. *Diplomatic and Judicial Means of Dispute Settlement*.Martinus Nijhoff, 2013.

Bohl, Kristin. “Problems of Developing Country Access to WTO Dispute Settlement.” *Chicago-Kent Journal of International and Comparative Law* 9 (2009): 1–71.

Van der Borght, Kim. “The Advisory Center on WTO Law: Advancing Fairness and Equality.” *Journal of International Economic Law* 2, no. 4 (1999): 723-728.

Bown, Chad P. “Comment on Niall Meagher's ‘Representing Developing Countries in WTO Dispute Settlement Proceedings.'” In *WTO Law and Developing Countries*, edited by George A. Bermann and Petros C. Mavroidis, 213-226. Cambridge University Press, 2007.

Bown, Chad P., and Bernard Hoekman. “WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector.” SSRN Scholarly Paper. Rochester, NY, May 1, 2005. https://doi.org/10.2139/ssrn.746384.

Bown, Chad P., and Rachel McCulloch. “Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law.” *The Journal of International Trade & Economic Development* 19, no. 1 (2010): 33-63. https://doi.org/10.1080/09638190903327468.

Brewster, Rachel. “Rule-Based Dispute Resolution in International Trade Law.” *Virginia Law Review* 92, no. 2 (2006): 251–288.

Brink, Gustav. "South Africa's Experience with International Trade Dispute Settlement." In Dispute Settlement at the WTO: The Developing Country Experience, edited by Gregory

C. Shaffer and Ricardo Meléndez-Ortiz, 251–274. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511663192.009.

Bronckers, Marco, and Freya Baetens. "Reconsidering Financial Remedies in WTO Dispute Settlement." *Journal of International Economic Law* 16, no. 2 (2013): 281-311. https://doi.org/10.1093/jiel/jgt014.

Chimni, Bhupinder Singh. "Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations." In *Developing Countries in the WTO Legal System*, edited by Chantal Thomas and Joel P. Trachtman, 21-45. Oxford University Press, 2009.

Busch, Marc L. "Democracy, Consultation and the Paneling of Disputes under GATT." *Journal of Conflict Resolution* 44, no. 4 (2000): 425–446.

Busch, Marc L., and Eric Reinhardt. "Developing Countries and GATT/WTO Dispute Settlement." *Journal of World Trade* 37 (2003): 719-735.

Cai, Phoenix X. F. "Making WTO Remedies Work for Developing Nations: The Need for Class Actions." *Emory International Law Review* 25, no. 1 (2011): 151.

Carmody, Chios. "WTO Obligations as Collective." *European Journal of International Law* 17, no. 2 (2006): 419–443. https://doi.org/10.1093/ejil/chl007.

Chaisse, Julien, and Debashis Chakraborty. "Implementing WTO Rules through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System." *University of Pennsylvania Journal of International Economic Law* 28, no. 1 (2007): 153–186.

Chang, Ha-Joon. *Why Developing Countries Need Tariffs: How WTO NAMA Negotiations Could Deny Developing Countries' Right to a Future*. South Centre, 2005.

Chang, Seung Wha. "WTO for Trade and Development Post-Doha." Journal of International Economic Law 10, no. 3 (2007): 553–570.

Charnovitz, Steve. "Rethinking WTO Trade Sanctions." *American Journal of International Law* 95, no. 4 (2001): 792–832.

Charnovitz, Steve. "Should the Teeth Be Pulled? An Analysis of WTO Sanctions." In *The Political Economy of International Trade Law*, edited by Daniel L. M. Kennedy and James D. Southwick, 602-635. Cambridge University Press, 2002. https://doi.org/10.1017/CBO9780511494512.033.

Cho, Sungjoon. "The Nature of Remedies in International Trade Law." *University of Pittsburgh Law Review* 65, no. 4 (2004): 763–810.

Chuang, Yih-Chyi, and Pi-Fum Hsu. "FDI, Trade, and Spillover Efficiency: Evidence from China's Manufacturing Sector." *Applied Economics* 36, no. 10 (2004): 1103–1115.

Conconi, Paola, and Carlo Perroni. "Special and Differential Treatment of Developing Countries in the WTO." *World Trade Review* 14, no. 1 (2015): 67-86. https://doi.org/10.1017/S147474561400041X.

Conti, Joseph A. "Producing Legitimacy at the World Trade Organization: The Role of Expertise and Legal Capacity." *Socio-Economic Review* 8, no. 1 (2010):131-155. https://doi.org/10.1093/ser/mwp023.

Cot, Jean-Pierre. "Conciliation." Oxford Public International Law, last updated April 2006. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e20.

Croome, John. *Reshaping the World Trading System: A History of the Uruguay Round*. World Trade Organization, 1995.
Crozier, Andrew J. *The Causes of the Second World War*. History of the Contemporary World. Blackwell, 1997.
Dam, Kenneth W. *The GATT: Law and International Economic Organization*. Midway Reprint, 1977. https://chicagounbound.uchicago.edu/books/244.
Davies, Arwel. “Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?” *World Trade Review* 5, no. 1 (2006): 31-67. https://doi.org/10.1017/S1474745605002636.
Davey, William J. “Compliance Problems in WTO Dispute Settlement.” *Cornell International Law Journal* 42, no. 1 (2009): 119–128.
Davey, William J. “Dispute Settlement in GATT.” *Fordham International Law Journal* 11, no. 1 (1987): 51–109.
Davey, William J. “Sanctions in the WTO: Problems and Solutions.” In *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, edited by Chad P. Bown and Joost Pauwelyn, 360-372. Cambridge University Press, 2010.
Delich, Valentina. “Developing Countries and the WTO Dispute Settlement System.” In *Development, Trade, and the WTO: A Handbook*, edited by Bernard Hoekman, Aaditya Mattoo, and Philip English, 71–80. Washington, DC: World Bank, 2002.
Desjardins, Jeff. “These Are the World's Biggest Exporters.” World Economic Forum, June 25, 2018. https://www.weforum.org/agenda/2018/06/these-are-the-worlds-biggest-exporters.
Dhar, Biswajit, and Abhik Majumdar. “Learning from the India–EC GSP Dispute: The Issues and the Process.” In *Dispute Settlement at the WTO: The Developing Country Experience*, edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz,174-209. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511663192.006.
Diego-Fernandez, Mateo, and Roberto Rios Herran. “The Reform of the WTO Dispute Settlement Understanding: A Closer Look at the Mexican Proposal.” *Manchester Journal of International Economic Law* 1, no. 1 (2004): 4-23.
Drahos, Peter, and John Braithwaite. *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan, 2002.
Draper, Peter, and Razeen Sally. “Developing Country Coalitions in Multilateral Trade Negotiations: Aligning the Majors?” South African Institute of International Affairs, January 1, 2005. https://www.africaportal.org/publications/developing-country-coalitions-in-multilateral-trade-negotiations-aligning-the-majors/.
Ehlermann, Claus-Dieter. “Experiences from the WTO Appellate Body.” *Texas International Law Journal* 38, no. 3 (2003): 469–488.
Eleso, Adebukola. “WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries.” Bepress Legal Series Working Paper No. 1378, May 18, 2006. https://law.bepress.com/expresso/eps/1378.
Escobar, Arturo. *Encountering Development: The Making and Unmaking of the Third World*. Princeton University Press, 1995.
Ezeani, Elimma C. “Can the WTO Judges Assist the Development Agenda?” *Journal of International Trade Law and Policy* 10, no. 2 (2011): 124–150.

Farnsworth, E. Allan. “On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law.” *University of Pittsburgh Law Review* 46, no. 1 (1984): 7-13.

Fawcett, J. E. S. “The Legal Character of International Agreements.” *British Year Book of International Law* 30 (1953): 381–400.

Ford, Rosemary A. “The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions.” *Brooklyn Journal of International Law* 27, no. 2 (2002): 543-573.

Gabilondo, José. “Argentina's Experience with WTO Dispute Settlement: Development of National Capacity and the Use of In-House Lawyers.” In *Dispute Settlement at the WTO: The Developing Country Experience*, edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz, 105-134. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511663192.004.

Gao, Henry. “China's Participation in the WTO: A Lawyer's Perspective.” *Singapore Year Book of International Law* 11 (2007):41-74.

Gao, Henry. “Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement.” *Journal of International Economic Law* 24, no. 3 (2021):534-550. https://doi.org/10.1093/jiel/jgab031.

Garcia, Frank J. “Beyond Special and Differential Treatment.” *Boston College International and Comparative Law Review* 27, n0. 86 (2005): 291-317.

Ghosh, Arunabha. “Developing Countries in the WTO Trade Policy Review Mechanism.” *World Trade Review* 9, no. 3 (2010): 419–455.

Goh, Gavin, and Andreas R. Ziegler. “Retrospective Remedies in the WTO after Automotive Leather.” *Journal of International Economic Law* 6, no. 3 (2003): 545–564. https://doi.org/10.1093/jiel/6.3.545.

Grané, Patricio. “Remedies under WTO Law.” *Journal of International Economic Law* 4, no. 4 (2001): 755–772. https://doi.org/10.1093/jiel/4.4.755.

Guzman, Andrew T. “How International Law Works: Introduction.” *International Theory* 1, no. 2 (2009): 285–293.

Guzman, Andrew T., and Beth A. Simmons. “Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes.” *Journal of Legal Studies* 34, no. 2 (2005): 557–598.

Guzman, Andrew T., and Timothy L. Meyer. “International Soft Law.” *Journal of Legal Analysis* 2, no. 1 (2010): 171–225.

Hafner-Burton, Emilie M., David G. Victor, and Yonatan Lupu. “Political Science Research on International Law: The State of the Field.” *American Journal of International Law* 106, no. 1 (2012): 47–97.

Hamadeh, Nada, Catherine Van Rompaey, and Eric Metreau. “New World Bank Country Classifications by Income Level: 2021–2022.” World Bank Blogs, July 1, 2021. https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2021-2022.

Han, Liyu, and Henry S. Gao. “China's Experience and Challenges in Utilising the WTO Dispute Settlement Mechanism.” In *Dispute Settlement at the WTO: The Developing Country Experience*, edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz, 137-173.

Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511663192.005.

Hart, Jeffrey A., and Joan Edelman Spero. *The Politics of International Economic Relations*. 5th ed. Routledge, 1997.

Hegde, Vineet, and Jan Wouters. "Special and Differential Treatment under the World Trade Organization: A Legal Typology." *Journal of International Economic Law* 24, no. 3 (2021): 551-571. https://doi.org/10.1093/jiel/jgab033.

Henig, David, and Anna Guildea. "No, China Does Not Make Everything!" European Centre for International Political Economy, March 2021. https://ecipe.org/publications/no-china-does-not-make-everything/.

Hoekman, Bernard M. "The WTO: Functions and Basic Principles." In *Development, Trade, and the WTO: A Handbook*, edited by Bernard Hoekman, Aaditya Mattoo, and Philip English, 41–49. Washington, DC: World Bank, 2002.

Hoekman, Bernard, Constantine Michalopoulos, and L. Alan Winter. "Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancún." *The World Economy* 27, no. 4 (2004): 481-506. https://doi.org/10.1111/j.0378-5920.2004.00610.x.

Hoekman, Bernard M., and Petros C. Mavroidis. "To AB or Not to AB? Dispute Settlement in WTO Reform." *Journal of International Economic Law* 23, no. 3 (2020): 703–722.

Hoekman, Bernard M., and Petros C. Mavroidis. "WTO 'à la Carte' or 'Menu du Jour'? Assessing the Case for More Plurilateral Agreements." *European Journal of International Law* 26, no. 2 (2015): 319–343.

Hoda, Anwarul. *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices*. Cambridge University Press, 2018.

Horn, Henrik, Petros C. Mavroidis, and Håkan Nordström. "Is the Use of the WTO Dispute Settlement System Biased?" CEPR Discussion Paper No. 2340. Centre for Economic Policy Research, December 1999.

Hsieh, Pasha L. "China's Development of International Economic Law and WTO Legal Capacity Building." *Journal of International Economic Law* 13, no. 4 (2010): 997-1036. https://doi.org/10.1093/jiel/jgq047.

Huang Zhixiong 黄志雄. "Fazhanzhong guojia canyu GATT/WTO zhengduan jiejue huodong de falü fenxi 发展中国家参与 GATT/WTO 争端解决活动的法律分析 [The Analysis of the Participation of Developing Countries in the Dispute Settlement Process of the GATT/WTO]." *Faxue Pinglun* 法学评论 [Law Review], no. 6 (2001): 87–95.

Hudec, Robert E. "Broadening the Scope of Remedies in WTO Dispute Settlement." In Improving WTO Dispute Settlement Procedures, edited by Friedl Weiss and Jochen Wiers, 345–376. Cameron May Publishers, 2000. https://www.worldtradelaw.net/document.php?id=articles/hudecremedies.pdf.

Hudec, Robert E. *Developing Countries in the GATT Legal System*. Cambridge University Press, 2011.

Hudec, Robert E. *Enforcing International Trade Law*. Salem, NH: Butterworth Legal Publishers, 1993.

Hudec, Robert E. "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business." *Cornell International Law Journal* 13, no. 2 (1980): 145–204.

Hudec, Robert E. "GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade." Yale Law Journal 80 (1971): 1299–1386. https://openyls.law.yale.edu/handle/20.500.13051/3441.

Hudec, Robert E. "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective." In *Development, Trade, and the WTO: A Handbook*, edited by Bernard Hoekman, Aaditya Mattoo, and Philip English, 81–91. Washington, DC: World Bank, 2002.

Hudec, Robert E. *The GATT Legal System and World Trade Diplomacy*. Praeger, 1975.

Hunter, J. Martin, Luis Miguel Diaz, David A Gantz and Alejandro Ogarrio. "In the Matter of Cross-Border Trucking Services (Secretariat File No. USA-MEX-98-2008-01)." *Asper Review of International Business and Trade Law* 2 (2002): 361–450.

Hussain, Turab. "Victory in Principle: Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States." In *Managing the Challenges of WTO Participation: 45 Case Studies*, edited by Andrew L. Stoler, Patrick Low, and Peter Gallagher, 459-472. Cambridge: Cambridge University Press, 2005. https://doi.org/10.1017/CBO9781139030526.035.

International Monetary Fund. *The Rise in Protectionism*. Pamphlet Series No. 24. International Monetary Fund, 1978.

Iqbal Qasim, Sayera J. "Collective Action in the WTO: A Developing Movement toward Free Trade." *University of Memphis Law Review* 39, no. 1 (2008): 159-167.

Jachec-Neale, Agnieszka. "Fact-Finding." Oxford Public International Law, last updated March 2011. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e27.

Jackson, John H. "Comment on Chapter 2." In *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, edited by Chad P. Bown and Joost Pauwelyn, 66–70. Cambridge University Press, 2010.

Jackson, John H. "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospect." In *The WTO as an International Organization*, edited by Anne Krueger, 161–180. University of Chicago Press, 1998.

Jackson, John H. "Dispute Settlement and the WTO: Emerging Problems." *Journal of International Economic Law* 1, no. 3 (1998): 329–351.

Jackson, John H., William J. Davey and Alan O. Sykes. *International Economic Relations*. 4th ed. Thomson West Group, 2002.

Jackson, John H. "International Economic Law: Reflections on the Boilerroom of International Relations." *American University Journal of International Law and Policy* 10, no. 2 (1995): 595–606.

Jackson, John H. *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*. Cambridge University Press, 2000.

Jackson, John H. *Sovereignty, the WTO, and Changing Fundamentals of International Law*. Cambridge University Press, 2006.

Jackson, John H. *The World Trade Organization: Constitution and Jurisprudence*. Royal Institute of International Affairs, 1998.

Jackson, John H. *World Trade and the Law of GATT*. Bobbs-Merrill, 1969.

Jawara, Fatoumata, and Aileen Kwa. *Behind the Scenes at the WTO: The Real World of International Trade Negotiations; Lessons of Cancun*. Zed Books, 2004.

Jiang Zuoli 姜作利. "Shixi WTO teshu chabie daiyu guize 'yinghua' de helixing 试析 WTO 特殊差别待遇规则"硬化"的合理性 [An Analysis of the Justification of 'Hardening' of the WTO Special and Differential Treatment Rules]." *Shandong Shifan Daxue Xuebao* 山东师范大学学报 [Journal of Shandong Normal University] 60, no. 4 (2015): 68–89.

Johns, Leslie, and Krzysztof J. Pelc. "Free Riding on Enforcement in the World Trade Organization." CTEI Working Paper No. CTEI-2017-04. Centre for Trade and Economic Integration, Graduate Institute of International and Development Studies, 2017.

Jones, Kent. *The Doha Blues: Institutional Crisis and Reform in the WTO*. Oxford University Press, 2010.

Karayanidi, Milana. "Bargaining Power in Multilateral Negotiations on Intellectual Property Rules: Paradox of Weakness." *The Journal of World Intellectual Property* 14, no. 3–4 (2011): 265-275. https://doi.org/10.1111/j.1747-1796.2011.00418.x.

Kelly, Claire R. "Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes." *Berkeley Journal of International Law* 24, no. 1 (2006): 79–128.

Kelsen, Hans. "Compulsory Adjudication of International Disputes." *American Journal of International Law* 37, no. 3 (1943): 397–406.

Kessie, Edwini Kwame. "Developing Countries and the World Trade Organization—What Has Changed?" *World Competition: Law and Economics Review* 22, no. 2 (1999): 83–110.

Kessie, Edwini. "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements." In *WTO Law and Developing Countries*, edited by George A. Bermann and Petros C. Mavroidis, 12–35Cambridge University Press, 2007.

Khor, Martin. *WTO's Doha Negotiations and Impasses: A Development Perspective*. Third World Network, 2007.

Kufuor, Kofi Oteng. "From the GATT to the WTO—The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes." *Journal of World Trade* 31, no. 5 (1997): 117–145.

Lall, Arthur. *Modern International Negotiation: Principles and Practice*. Columbia University Press, 1966.

Lamy, Pascal. "The Place of the WTO in the International Legal Order." World Trade Organization, June 15, 2008. https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm.

Lawrence, Robert Z. *Crimes and Punishments? Retaliation under the WTO*. Institute for International Economics, 2003.

Lawrence, Robert Z. "Rule-Making amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection." *Journal of International Economic Law* 9, no. 4 (2006): 823–835.

Lee, Yong-Shik. *Reclaiming Development in the World Trading System*. Cambridge University Press, 2016.

Li, Xiaoling, and Yusong Chen. "Constraints of the WTO Compensation Mechanism and Implications from Recent Practice." *Journal of World Trade* 49, no. 4 (2015): 643-663.

Maneschi, Andrea. *Comparative Advantage in International Trade: A Historical Perspective*. Edward Elgar, 1998.

Martin, Mervyn. *WTO Dispute Settlement Understanding and Development*. Martinus Nijhoff, 2013.

Mavroidis, Petros C. "Remedies in the WTO Legal System: Between a Rock and a Hard Place." *European Journal of International Law* 11, no. 4 (2000): 763–813. https://doi.org/10.1093/ejil/11.4.763.

McCall Smith, James. "WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings." *World Trade Review* 2, no. 1 (2003): 65–100.

McRae, Donald. "What Is the Future of WTO Dispute Settlement?" *Journal of International Economic Law* 7, no. 1 (2004): 3–21.

Meagher, Niall. "Representing Developing Countries in WTO Dispute Settlement Proceedings." In *WTO Law and Developing Countries*, edited by George A. Bermann and Petros C. Mavroidis, 213-232. Cambridge University Press, 2007.

Meier, Gerald M. "The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries." *Cornell International Law Journal* 13, no. 2 (1980): 239–256.

Melitz, Marc J. "When and How Should Infant Industries Be Protected?" *Journal of International Economics* 66, iss. 1 (2005): 177–196.

Mercurio, Bryan. "Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are There Really Alternatives?" In *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment*, edited by James C. Hartigan, 397-442. Frontiers of Economics and Globalization 6. Emerald Group Publishing, 2009. https://doi.org/10.1108/S1574-8715(2009)0000006019.

Mercurio, Bryan. "Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding." *World Trade Review* 8, no. 2 (2009): 315-338. https://doi.org/10.1017/S1474745609004273.

Merrills, J. G. *International Dispute Settlement*. 6th ed. Cambridge University Press, 2017.

Michalopoulos, Constantine. "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization." Policy Research Working Paper No. 2388. World Bank, 2000.

Miller, Zachary. "Best Efforts: Differing Judicial Interpretations of a Familiar Term." *Arizona Law Review* 48, no. 3 (2006): 615-638.

Mitrany, David. "A Working Peace System: An Argument for the Functionalist Development of International Organization." *International Affairs* 20, no. 1 (1944): 109.

Mitchell, Andrew D., and Tania Voon. "Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?" *Global Governance* 15, no. 3 (2009): 343–357.

Mohammed Hasan, Qaraman. "The Role of Advisory Centre on World Trade Organization Law (ACWL) in Supporting Developing Countries Regarding the Dispute Settlement Mechanism." *International Journal of Social Sciences & Educational Studies* 3, no. 2 (2016): 118-128.

Moon, Don. "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data." *International Interactions* 32, no. 3 (2006): 201–228.

Neuhold, Hanspeter. *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*. Brill Nijhoff, 2015.

Nguyen, Trien, Perroni, Carlo and Wigle, Randall. “An Evaluation of the Draft Final Act of the Uruguay Round.” *The Economic Journal* 103, no. 421 (1993): 1540–1549.

Nielsen, Lynge. “Classifications of Countries Based on Their Level of Development: How It Is Done and How It Could Be Done.” IMF Working Paper WP/11/31. International Monetary Fund, February 2011. https://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf.

Nottage, Hunter. "Developing Countries in the WTO Dispute Settlement System." GEG Working Paper No. 2009/47. Oxford: University of Oxford, Global Economic Governance Programme, 2009.

O'Connor, Bernard, and Margareta Djordjevic. “Practical Aspects of Monetary Compensation: The US–Copyright Case.” *Journal of International Economic Law* 8, no. 1 (2005): 127–142.

Ochieng, David Ouma, and David S. Majanja. “Sub-Saharan Africa and WTO Dispute Settlement: The Case of Kenya.” In *Dispute Settlement at the WTO: The Developing Country Experience*, edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz, 301-341. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511663192.011.

Orakhelashvili, Alexander. “Political Life of Treaties: Indeterminacy, Interpretation and Political Consequences.” *Chinese Journal of International Law* 20, no. 3 (2021): 545–560. https://doi.org/10.1093/chinesejil/jmab026.

Orrego Vicuña, Francisco. “Mediation.” Oxford Public International Law, last updated December 2010. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e61.

Palmeter, David, and Petros C. Mavroidis. *Dispute Settlement in the World Trade Organization: Practice and Procedure*. 2nd ed. Cambridge University Press, 2004.

Papa, Mihaela. “Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?” *Journal of International Dispute Settlement* 4, no. 1 (2013): 83-109. https://doi.org/10.1093/jnlids/ids022.

Park, Nohyoung and Shadikhodjaev, Sherzod. “Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility.” Journal of World Trade 41, no. 6 (2007): 1273-1258.

Park, Rob. “Putting the Best in Best Efforts.” *University of Chicago Law Review* 73, no. 2 (2006): 705-729.

Paugam, Jean-Marie, and Anne-Sophie Novel. "Why and How Differentiate Developing Countries in the WTO? Theoretical Options and Negotiating Solutions." Paper prepared for the Ifri/AFD conference "Trade for Development: The Future of Special and Differential Treatment of Developing Countries," Paris, October 28, 2005.

Pauwelyn, Joost. “A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?” *European Journal of International Law* 14, no. 5 (2003): 907–951. https://doi.org/10.1093/ejil/14.5.907.

Pauwelyn, Joost. *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. Cambridge University Press, 2003.

Pauwelyn, Joost. *Optimal Protection of International Law: Navigating between European Absolutism and American Voluntarism*. Cambridge University Press, 2008.

Pellet, Alain. “Judicial Settlement of International Disputes.” Oxford Public International Law, last updated July 2013. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e54.

Petersmann, Ernst-Ulrich. *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*. Martinus Nijhoff, 1997.

Petersmann, Ernst-Ulrich, ed. *International Trade Law and the GATT/WTO Dispute Settlement System*. Studies in Transnational Economic Law 11. London: Kluwer Law International, 1997.

Petersen, Thieß, and Cora Jungbluth. “Globalization Report 2018: Who Benefits Most from Globalization?” New Perspectives on Global Economic Dynamics, June 8, 2018. https://ged-project.de/globalization/globalization-report-2018-who-benefits-most-from-globalization/.

Pham, Hansel T. “Developing Countries and the WTO: The Need for More Mediation in the DSU.” *Harvard Negotiation Law Review* 9 (2004): 331-366.

Polaski, Sandra. *The Future of the WTO*. Policy Outlook: Trade, Equity, and Development Project. Carnegie Endowment for International Peace, September 2006.

Pössel, Jens. “A Human Rights Approach to ‘Sustainable Development' within the World Trade Organization.” In *Developing Countries and the WTO: Policy Approaches*, edited by Gary P. Sampson and W. Bradnee Chambers, 192–228. United Nations University Press, 2008.

Potipiti, Tanapong. “How to Sell Retaliation in the WTO.” SSRN Scholarly Paper, 2006. https://doi.org/10.2139/ssrn.933767.

Reisman, Michael, and Mark Weidman. “Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and Their Application in the Uruguay Round and NAFTA.” *Journal of World Trade* 29, no. 3 (1995): 5–38.

Renouf, Yves. “A Brief Introduction to Countermeasures in the WTO Dispute Settlement System.” In *Key Issues in WTO Dispute Settlement: The First Ten Years*, edited by Bruce Wilson and Rufus Yerxa, 110–122. Cambridge: Cambridge University Press, 2005. https://doi.org/10.1017/CBO9780511754340.012.

Ricardo, David. *On the Principles of Political Economy and Taxation*. 2nd ed. Joseph Milligan, 1819.

Rodrik, Dani. “Industrial Policy for the Twenty-First Century.” SSRN Scholarly Paper. Rochester, NY, November 1, 2004. https://papers.ssrn.com/abstract=666808.

Rolland, Sonia E. “Developing Country Coalitions at the WTO: In Search of Legal Support.” *Harvard International Law Journal* 48, no. 2 (2007): 483-551.

Rolland, Sonia E. *Development at the World Trade Organization*. Oxford University Press, 2012.

Rosenberg, Barbara, Gregory Shaffer, and Michelle Ratton Sanchez. “Winning at the WTO: The Development of a Trade Policy Community within Brazil.” Working paper, 2008.

Sampson, Gary P. “The World Trade Organization after Seattle.” *The World Economy* 23, no. 9 (2000): 1097–1117.

Sampson, Gary P. *The WTO and Sustainable Development*. United Nations University Press, 2005.

Scheuermann, Philipp. *Normative Conditions to Make WTO Law More Responsive to the Needs of Developing Countries*. Herbert Utz Verlag, 2009.
Schwarzenberger, Georg. “Myths and Realities of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties.” *Virginia Journal of International Law* 9, no. 1 (1969): 205-227.
Schwartz, Warren F., and Alan O. Sykes. “The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization.” *The Journal of Legal Studies* 31, no. S1 (2002):179-204. https://doi.org/10.1086/340406.
Shaffer, Gregory C. *Defending Interests: Public-Private Partnerships in WTO Litigation*. Rowman & Littlefield, 2003.
Shaffer, Gregory C., James J. Nedumpara, and Aseema Sinha. “Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity.” SSRN Scholarly Paper. Rochester, NY, February 4, 2014. https://doi.org/10.2139/ssrn.2390673.
Shaffer, Gregory C., Michelle Ratton Sanchez, and Barbara Rosenberg. “The Trials of Winning at the WTO: What Lies behind Brazil's Success.” *Cornell International Law Journal* 41, no. 2 (2008): 8-49.
Shaffer, Gregory C. “The Challenges of WTO Law: Strategies for Developing Country Adaptation.” *World Trade Review* 5, no. 2 (2006): 177-198. https://doi.org/10.1017/S1474745606002746.
Shaffer, Gregory, Manfred Elsig and Sergio Puig. “The Extensive (but Fragile) Authority of the WTO Appellate Body.” *Law and Contemporary Problems* 79, no. 1 (2016): 237–273.
Shaffer, Gregory C., Victor Mosoti, and Asif Qureshi. “Towards a Development-Supportive Dispute Settlement System in the WTO.” ICTSD Resource Paper No.5 (2003).
Shaffer, Gregory C., and Ricardo Meléndez-Ortiz, eds. *Dispute Settlement at the WTO: The Developing Country Experience*. Cambridge: Cambridge University Press, 2010.
Shahin, Magda. "WTO Dispute Settlement for a Middle-Income Developing Country: The Situation of Egypt." In Dispute Settlement at the WTO: The Developing Country Experience, edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz, 275–300. Cambridge University Press, 2010.
Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*. 3rd ed. Vol. 2. Liberty Fund, 1981.
Smith, James. “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement.” *Review of International Political Economy* 11, no. 3 (2004): 542–573.
Srinivasan, T. N. “Developing Countries in the World Trading System: From GATT, 1947, to the Third Ministerial Meeting of WTO, 1999.” *The World Economy* 22, no. 8 (1999): 1047-1064. https://doi.org/10.1111/1467-9701.00247.
Steger, Debra P. “Afterword: The ‘Trade and …' Conundrum—A Commentary.” *American Journal of International Law* 96, no. 1 (2002): 135-145. https://doi.org/10.2307/2686130.
Stevens, Christopher. “The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO.” IDS Working Paper 163, 2002.
Stewart, Terence P., and Sandra K. Jorgensen. “The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?” *Global Trade and*

Customs Journal 8, no. 11–12 (2013): 390-412. https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/8.11/GTCJ2013052.

Subedi, Surya P. "The Road from Doha: The Issues for the Development Round of the WTO and the Future of International Trade." *International & Comparative Law Quarterly* 52, no. 2 (2003): 425–446. https://doi.org/10.1093/iclq/52.2.425.

Subramanian, Arvind, and Shang-Jin Wei. "The WTO Promotes Trade, Strongly but Unevenly." NBER Working Paper No. 10024. National Bureau of Economic Research, October 2003.

Sykes, Alan. "Optimal Sanctions in the WTO: The Case for Decoupling (and the Uneasy Case for the Status Quo)." SSRN Scholarly Paper. Rochester, NY, August 6, 2009. https://doi.org/10.2139/ssrn.1444589.

Tanaka, Yoshifumi. *The Peaceful Settlement of International Disputes*. Cambridge University Press, 2018.

Taslim, Mohammad Ali. "How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim." In *Dispute Settlement at the WTO: The Developing Country Experience*, edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz, 230–248. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511663192.008.

Trebilcock, Michael J., and Robert Howse. "Trade and Developing Countries." In *The World Trading System: Critical Perspectives on the World Economy*, edited by Robert Howse and Petrus Van Bork, 199–232. Routledge, 1998.

Tussie, Diana. *The Less Developed Countries and the World Trading System: A Challenge to the GATT*. Pinter, 1987.

Ukpe, Aniekan, and Sangeeta Khorana. "Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development." *Journal of International Trade Law and Policy* 20, no. 2 (2021): 83-100. https://doi.org/10.1108/JITLP-08-2020-0052.

Ullman, Rebecca. "Enhancing the WTO Tool Kit: The Case for Financial Compensation." *Richmond Journal of Global Law and Business* 9, no. 2 (2010): 167-197.

Van Damme, Isabelle. *Treaty Interpretation by the WTO Appellate Body*. Oxford: Oxford University Press, 2009.

Vazquez, Carlos M., and John H. Jackson. "Some Reflections on Compliance with WTO Dispute Settlement Decisions." *Law and Policy in International Business* 33, no. 4 (2002): 555–568.

Vidigal, Geraldo. "Re-assessing WTO Remedies: The Prospective and the Retrospective." *Journal of International Economic Law* 16, no. 3 (2013): 505-534.

Wade, Robert Hunter. "What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space.'" *Review of International Political Economy* 10, no. 4 (2003): 621-644. https://doi.org/10.1080/09692290310001601902.

Whalley, John. "Non-Discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries." *The Economic Journal* 100, no. 403 (1990): 1318-1328. https://doi.org/10.2307/2233979.

Whalley, John. "Special and Differential Treatment in the Millennium Round." SSRN Scholarly Paper. Rochester, NY, May 1, 1999. https://doi.org/10.2139/ssrn.165809.

Wilcox, Clair. *A Charter for World Trade*. Macmillan, 1949.
Wilkinson, Rorden, and James Scott. "Developing Country Participation in the GATT: A Reassessment." *World Trade Review* 7, no. 3 (2008): 473–510.
Wolf, Martin. "Two-Edged Sword: Demands of Developing Countries and the Trading System." In *Power, Passions, and Purpose: Prospects for North-South Negotiations*, edited by Jagdish N. Bhagwati and John Gerard Ruggie, 201–230. MIT Press, 1984.
Wolfe, Robert. "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor." *Journal of International Economic Law* 12, no. 4 (2009): 835–858.
World Bank. *Global Economic Prospects and the Developing Countries*. World Bank, 1996.
World Trade Organization. *A Handbook on the WTO Dispute Settlement System*. 2nd ed. Cambridge University Press, 2017.
Yamazawa, Ippei. *Economic Development and International Trade: The Japanese Model*. East-West Centre, 1990.
Yang, Pei-kan. "Some Thoughts on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in the WTO Dispute Settlement." *Asian Journal of WTO and International Health Law and Policy* 3, no. 2 (2008): 423-464.
Zangl, Bernhard. "Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO." *International Studies Quarterly* 52, no.4 (2008): 825–854.
Zimmermann, Claus D. "The Neglected Link between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies." *Trade, Law and Development* 4, no. 1 (2012): 251–267.

Websites:
ACWL, at: https://www.acwl.ch/, last visited: Mar. 30, 2022.
Alain Pellet, *Judicial Settlement of International Disputes*, Oxford Pubic International Law, Article last updated: July 2013, at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e54
Ana Cristina Campos, *Chancellor: Brazil placed as great country after new status at WTO*, Agenciabrasil, March 20, 2019, at: https://agenciabrasil.ebc.com.br/en/internacional/noticia/2019-03/chancellor-brazil-placed-great-country-after-new-status-wto
"Beijing Academy of International Economy and Trade(北京国际经济贸易学会)", accessed April 5, 2023, http://www.gjjmxh.com/gjjmxh/index.html.
Briefing note: Monitoring Mechanism, World Trade Organization, at: https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_monit_mecha_e.htm, last visited: Mar. 23, 2022.
Change of WTO status will be of benefit: minister. Taipei Times, Oct. 15, 2018, at: https://www.taipeitimes.com/News/biz/archives/2018/10/15/2003702380
China's economy is now the world's second largest, BBC News, February 14, 2011, at: https://www.bbc.com/news/av/business-12445925
Consultations, The Process — Stages in a Typical WTO Dispute Settlement Case, World Trade Organization, at:

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm#txt2, last visited: Nov. 3, 2021

Developing countries in WTO dispute settlement, World Trade Organization, available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm, last visited: 17 April 2022.

Development: legal provisions, World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm, last visited: 20. 03. 2022.

Dispute settlement activity — some figures, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm, last visited: Dec. 27, 2021.

Disputes by agreement, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm, last visited: Jan. 17, 2022.

"Dispute Settlement - Appellate Body Members," accessed July 25, 2022, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

Dispute settlement reports within the framework of GATT 1947, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm, last visited: Jan. 29, 2022.

Dispute Settlement System Training Module: Chapter 1, Introduction to the WTO Dispute Settlement System, 1.2 The Dispute Settlement Understanding, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s2p1_e.htm, last visited: Nov. 15, 2021.

Dispute Settlement System Trading Module: Annex III, Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a3s1p1_e.htm, last visited: Nov. 25, 2021.

EU Concept Paper on WTO Reform, European Commission, Sept. 18, 2018, at: http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

Executive Office of the President, *Reforming Developing-Country Status in the World Trade Organization, 84 FR 37555,* Federal Register, July 31, 2019, at: https://www.federalregister.gov/documents/2019/07/31/2019-16497/reforming-developing-country-status-in-the-world-trade-organization

Focus, the WTO's newsletter (N. 12, August/September 1996), World Trade Organization, 1996, at: https://www.wto.org/english/res_e/focus_e/focus12_e.pdf, p. 7.

GATT Disputes: 1948-1995, Volume 1, World Trade Organization, 2018, at: https://www.wto.org/english/res_e/booksp_e/gatt4895vol1_e.pdf.

GATT the Ninth Session of the Contracting Parties and the Review of the GATT, 25th October 1954

"GDP per Capita (Current US$) - China | Data," accessed April 6, 2023, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN.

Generalized System of Preferences, UNCTAD, at: https://unctad.org/topic/trade-agreements/generalized-system-of-preferences, last visited: 20. 03. 2022.

Human Development Index (HDI), UNDP, at: http://hdr.undp.org/en/content/human-development-index-hdi, last visited: Aug. 04, 2021.

Human Development Report 2009, UNDP, 2013, at: https://hdr.undp.org/en/content/human-development-report-2009

Human Development Report 2015, UNDP, 2015, at: https://www.undp.org/publications/human-development-report-2015

Introduction to the WTO dispute settlement system, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm, last visited: Nov. 20, 2021

Imports/Exports, World Integrated Trade Solution, at: https://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/2003/Summary, last visited: Jan. 4, 2022.

Jean-Pierre Cot, *Conciliation*, Oxford Public International Law, Article last updated: April 2006, at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e20

Korea promoted to developed nation by Unctad, Korea JoongAng Daily, Jul. 4, 2021, at: https://koreajoongangdaily.joins.com/2021/07/04/business/economy/Unctad-developed-country-developing-country/20210704185600398.html

Least Developed Countries (LDCs), United Nations Department of Economic and Social Affairs, at: https://www.un.org/development/desa/dpad/least-developed-country-category.html, last visited: Aug. 05, 2021.

Least-developed countries, World Trade Organization, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, last visited: Aug. 03, 2021.

Members, ACWL, at: https://www.acwl.ch/members-introduction/, last visited: Mar. 30, 2022.

Ministry of Commerce Announcement No. 10 of 2005 - Announcement on the termination of the Japanese laver import management measures trade barriers investigation, “商务部公告 2005 年第 10 号 关于终止日本紫菜进口管理措施贸易壁垒调查的公告,” accessed March 24, 2023, http://www.mofcom.gov.cn/aarticle/b/c/200502/20050200019196.html.

“Ministry of Commerce of the People’s Republic of China (中华人民共和国商务部)”, accessed April 2, 2023, http://www.mofcom.gov.cn/mofcom/shezhi.shtml.

Pascal Lamy, *The Place of the WTO in the International Legal Order*, World Trade Organization, Jun. 15, 2008, at: https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm

Philippe Benoit & Kevin Tu, *Is China Still a Developing Country? And Why It Matters for Energy and Climate*, Colombia SIPA, Centre on Global Energy Policy, July 23, 2020, at: https://www.energypolicy.columbia.edu/research/report/china-still-developing-country-and-why-it-matters-energy-and-climate.

“Organisational Structure,” ACWL, accessed March 21, 2023, https://www.acwl.ch/organisational-structure/.

"Policy Advisory Committee of the Ministry of Commerce(商务部政策咨询委员会)," accessed April 5, 2023, http://zys.mofcom.gov.cn/article/zxw/202004/20200402953374.shtml.

Provisional Rules on Foreign Trade Barrier Investigation, No. 31, 2002. "中华人民共和国对外贸易经济合作部令（二oo二年第 31 号）对外贸易壁垒调查暂行规则_2003 年第 9 号国务院公报_中国政府网," accessed March 24, 2023, http://www.gov.cn/gongbao/content/2003/content_62654.htm.

Report of the International Law Commission to the General Assembly on the Work of its Thirtieth Session, United Nations Document A/33/10(1978),1978, at: https://legal.un.org/ilc/sessions/30/

South Korea decides to give up developing country status at WTO, The Korea Times, Oct. 25, 2019, at: http://www.koreatimes.co.kr/www/nation/2021/09/356_277676.html.

Special and Differential Treatment Provisions, World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, last visited: Mar. 05, 2022.

"Technical Expertise Fund," ACWL, accessed March 21, 2023, https://www.acwl.ch/technical-expertise-fund/.

The Doha Round, The World Trade Organization, at: https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#declaration, last visited: Mar. 28, 2022

"The Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928, Permanent Court of International Justice (PCIJ)," para. 125, accessed December 9, 2022, http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm.

The process — Stages in a typical WTO dispute settlement case, World Trade Organization, at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm, last visited: Dec. 10, 2021.

"The Services of the ACWL," ACWL, 5–7, accessed October 5, 2022, https://www.acwl.ch/wpfb-file/services_of_the_acwl-pdf-2/.

Trade and development, The World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/devel_e.htm, last visited: Nov. 01, 2021

"Trade Barriers Regulation (TBR)" Text, European Commission - European Commission, accessed March 24, 2023, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_434.

United Nations Document, General Assembly Resolution A/RES/34/150, 1979, at: https://undocs.org/en/A/RES/34/150

UN list of least developed countries, UNCTAD, at: https://unctad.org/topic/least-developed-countries/list, last visited: Jan. 16, 2022.

What is Arbitration, International Intellectual Property Organization, at: https://www.wipo.int/amc/en/arbitration/what-is-arb.html, last visited: Jan. 31, 2022.

Who are the developing countries in the WTO? World Trade Organization, at: https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, last visited: Aug. 3, 2021.

Whose WTO is it anyway? World Trade Organization, at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm, last visited: Jan. 25, 2022.
World Development Indicators 2009, The World Bank Group, 2009, at: https://openknowledge.worldbank.org/handle/10986/4367
"WTO | Brazil - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/brazil_e.htm.
"WTO | China - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/china_e.htm.
"WTO Disputes," ACWL, accessed March 24, 2023, https://www.acwl.ch/wto-disputes/.
WTO disputes reach 400 mark, World Trade Organization, Nov. 6, 2009, at: https://www.wto.org/english/news_e/pres09_e/pr578_e.htm
"WTO | Disputes - Dispute Settlement CBT - Participation in Dispute Settlement Proceedings - Amicus Curiae Submissions - Page 1," accessed July 3, 2022, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm.
"WTO | India - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/india_e.htm.
"WTO | Ministerial Conferences - Cancún 5th Ministerial - Briefing Notes - Special and Differential Treatment," accessed September 14, 2022, https://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief21_e.htm.
"WTO | Ministerial Conferences - Hong Kong 6th Ministerial - Briefing Notes - Dispute Settlement," accessed March 7, 2023, https://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief10_e.htm.
"WTO | Nigeria - Member Information," accessed March 31, 2023, https://www.wto.org/english/thewto_e/countries_e/nigeria_e.htm#disputeCases.
"WTO | Secretariat and Budget Overview," accessed September 30, 2022, https://www.wto.org/english/thewto_e/secre_e/intro_e.htm.
"WTO | The Doha Round," accessed July 28, 2022, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.
"WTO | The WTO in Brief," accessed September 6, 2022, https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm.
"WTO | Understanding the WTO - Whose WTO Is It Anyway?," accessed September 7, 2022, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.
"WTO | Working at the WTO," accessed March 31, 2023, https://www.wto.org/english/thewto_e/vacan_e/iypp_e.htm#WTO_Support.
"WTO | WTO Chair Programme," accessed April 4, 2023, https://www.wto.org/english/tratop_e/devel_e/train_e/chairs_prog_e.htm.
$383 million humanitarian plan to address 'living nightmare' in Lebanon, United Nations UN News, October 1, 2021, at: https://news.un.org/en/story/2021/10/1101962

Documents:
The Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928, Permanent Court of International Justice (PCIJ).
United Nations Charter, signed on 26 June 1945

The General Agreement on Tariffs and Trade, 1947
The Havana Charter for an International Trade Organization, signed on March 24, 1948.
REPORT OF REVIEW WORKING PARTY IV ON ORGANIZATIONAL AND FUNCTIONAL QUESTIONS, L/327, 22 February 1955.
PART IV TRADE AND DEVELOPMENT, Decision of 29 November 1957, 6S/18.
REPORT OF THE PANEL ON URUGUAYAN RECOURSE TO ARTICLE XXIII, Report adopted on 16 November 1962, (L/1923 - 11S/95).
UNCTAD, Final Act, United Nations Document, E/CONF.46/141, 1964.
PROPOSALS FOR AMENDMENTS TO THE GENERAL AGREEMENT, COM.TD/F/W.l, 27 April 1965.
The Decision on Procedures under Article XXIII, GATT BISD, 14S/18, 1966
Report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM.TD/F/4, 4 March 1966.
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1967 Anti-dumping Code), BISD, 15th Supplement, 1968
Vienna Convention on the Law of Treaties, 1969
Neumeister v. Austria, Eur. Court H.R., Series A, No. 17 (1974),
Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258 (S.D.N.Y. 1978).
THE UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE, Adopted on 28 November 1979 (L/4907).
Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, 28th November 1979 (L/4903, BISD 26S/203)
Ministerial Declaration, L/5424, November 29, 1982.
Decision on Dispute Settlement Procedures of 30 November 1984, GATT BISD, 31S/9, 1984.
WTO/GATT Ministerial Declaration on the Uruguay Round, Declaration of 20 September 1986.
Minutes of Meeting, C/M/215, 25 November 1987
Improvements to the GATT Dispute Settlement Rules and Procedures, Decision on 12 April 1989, BISD 36S/61.
COMPENSATION IN THE CONTEXT OF GATT DISPUTE SETTLEMENT RULES AND PROCEDURES, Note by the Secretariat, MTN.GNG/NG13/W/32, 14 July 1989
Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, August 21, 1990.
Marrakesh Declaration of 15 April 1994
The General Agreement on Tariffs and Trade, 1994
The General Agreement on Trade in Services, 1995
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Agreement on Subsidies and Countervailing Measures, 1995.
Agreement on Safeguards, 1995.
The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1995.
Technical barriers to trade, 1995.
Agreement on Import Licensing Procedures, 1995
Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995.
Understanding on Rules and Procedures Governing the Settlement of Disputes, 1995.
Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/7, 27 October 1995.
MINISTERIAL DECLARATION, WT/MIN(96)/DEC, 18 DECEMBER 1996.

Preparations for the 1999 Ministerial Conference, WT/GC/W/162, 1 April 1999
Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251.
The Responsibility of States for Internationally Wrongful Acts, 2001
Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 16 March 2001
PREPARATIONS FOR THE FOURTH SESSION OF THE MINISTERIAL CONFERENCE, WT/GC/W/442, 19 September 2001, para. 1.
Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, World Trade Organization, Nov. 20, 2001.
CONTRIBUTION OF THE EUROPEAN COMMUNITIES AND ITS MEMBER STATES TO THE IMPROVEMENT OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/1, 13 March 2002
Judgment of the Court (Fifth Chamber) of 7 March 2002. Commission of the European Communities v Republic of Finland. C-169/00.
PROPOSAL TO REVIEW ARTICLE 22.7 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, TN/DS/W/3, 21 March 2002
NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, Proposal by the African Group, TN/DS/W/15 25 , September 2002
Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/17, 9 October 2002
NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING, TN/DS/W/19, Dispute Settlement Body Special Session, 9 October 2002
Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/23, 4 November 2002.
DISPUTE SETTLEMENT UNDERSTANDING PROPOSALS: LEGAL TEXT, TN/DS/W/47, 11 February 2003.
Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/33, 23 January 2003
SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY, TN/DS/9, 6 June 2003.
Doha WTO Ministerial Declaration of 22 December 2005, WT/MIN(05)/DEC
Working procedures for appellate review, WT/AB/WP/6, 16 AUGUST 2010
Monitoring Mechanism on Special and Differential Treatment, Ministerial Decision of 7 December 2013, WT/MIN(13)/45 WT/L/920, 2013
World Bank Group and World Trade Organization, The Role of Trade in Ending Poverty, 2015.
The World Bank, Trade and Poverty Reduction: New Evidence of Impacts in Developing Countries, Dec. 11, 2018.
European Commission, Reforming the WTO towards a Sustainable and Effective Multilateral Trading System, 2021

WTO Disputes:

ITALIAN DISCRIMINATION AGAINST IMPORTED AGRICULTURAL MACHINERY, Report adopted on 23 October 1958 (L/833 - 7S/60)
REPORT OF THE PANEL ON URUGUAYAN RECOURSE TO ARTICLE XXIII, Report adopted on 16 November 1962, (L/1923 - 11S/95).

Panel report, United Kingdom—Dollar Area Quotas, L/3891 - 20S/236, adopted on 30 July 1973
Panel report, EEC—Apples I, L/5047 - 27S/98, adopted 10 November 1980.
Note by the Chairman, India—Import Restrictions on Almonds, c/154, adopted on 20 April 1988.
Panel report, EEC—Dessert Apples, L/6491 - 36S/93, adopted on 22 June 1989.
NORWAY - PROCUREMENT OF TOLL COLLECTION EQUIPMENT FOR THE CITY OF TRONDHEIM, Report of the Panel adopted by the Committee on Governement Procurement on 13 May 1992 (GPR.DS2/R).
Panel report, EEC - Member States' Import Regimes for Bananas, DS32/R, adopted on 3 June 1993
UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA, Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 27 October 1993 (SCM/162)
Panel report, EEC - IMPORT REGIME FOR BANANAS, DS38/R, 11 February 1994, not adopted.
Appellate Body Report, Japan—Alcoholic Beverages II, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 04 October 1996.
Appellate Body report, US—Wool Shirts and Blouses, WT/DS33/AB/R, adopted on 25 April 1997
Arbitration Award, EC — Bananas III, WT/DS27/15, 7 January 1998
Mutually Acceptable Solution on Modalities for Implementation, Japan-Alcoholic Beverages II, WT/DS10/20, 12 January 1998.
Appellate Body report, EC—Hormones (US), WT/DS26/AB/R; WT/DS48/AB/R, adopted on 16 January 1998
Arbitration Award, EC — Hormones (US), WT/DS26/15; WT/DS48/13, 29 May 1998.
Appellate Body report, EC—Computer Equipment, WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R, adopted on 22 June 1998
Panel report, EC—Poultry, WT/DS69/R, adopted on 23 July 1998
Appellate Body report, Australia—Measures Affecting Importation of Salmon, WT/DS18/AB/R, adopted on 20 October 1998
Panel Report, Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico, WT/DS60/R, adopted 25 November 1998.
Arbitration Award, Indonesia—Autos (Article 21.3(c)), WT/DS54/15 ; WT/DS55/14 ; WT/DS59/13 ; WT/DS64/12, 7 December 1998
Arbitration Decision, EC — Hormones (US), WT/DS26/ARB, 12, July 1999.
Panel Report, Brazil – Export Financing Program for Aircraft, WT/DS46/R, adopted 20 August 1999.
Appellate Body Report, Canada – Aircraft, WT/DS70/AB/R, adopted on 20 August 1999.
Panel report, India — Quantitative Restrictions, WT/DS90/R, adopted on 22 September 1999
Panel Report, Australia – Subsidies to Producers and Exporters of Automotive Leather, WT/DS126/ RW, adopted 11 February 2000.
Arbitration Decision, EC — Bananas III, WT/DS27/ARB/ECU, 24 March 2000.
Article 22.6 Arbitration Decision, EC—Bananas III, WT/DS27/ARB/ECU, authorization to retaliate granted on 18 May 2000
Arbitration Award, Chile—Alcoholic Beverages (Article 21.3(c)), WT/DS87/15 ; WT/DS110/14, 23 May 2000

Request for Consultations by the European Communities, UNITED STATES – SECTION 306 OF THE TRADE ACT OF 1974 AND AMENDMENTS THERETO, WT/DS200/1 , G/L/386 , 13 June 2000.
Panel Report, United States – Import Measures on Certain Products from the European Communities, WT/DS165/R, circulated 17 July 2000
Panel Report, EC — Bed Linen, WT/DS141/R, adopted 12 March 2001.
Panel report, EC—Asbestos, WT/DS135/R, adopted on 5 April 2001.
Notification of Mutually Acceptable Solution, Turkey-Textiles, WT/DS34/14, 19 July 2001
Arbitration Award, Argentina—Hides and Leather (Article 21.3(c)), WT/DS155/10, 31 August 2001
Arbitration Award, US — Section 110(5) Copyright Act, RECOURSE TO ARBITRATION UNDER ARTICLE 25 OF THE DSU, WT/DS160/ARB25/1, 9 November 2001
Appellate Body Report, US-Shrimp (Article 21.5 - Malaysia), WT/DS58/RW, adopted on 21 November 2001
Appellate Body report, US—Line Pipe, WT/DS202/AB/R, adopted on 15 February 2002
Panel report, US—Offset Act (Byrd Amendment), WT/DS217/R; WT/DS234/R, adopted on 16 September 2002
Appellate Body Report, EC—Sardines, WT/DS231/AB/R, adopted on 26 September 2002
Arbitration Award, Chile—Price Band System (Article 21.3(c)), WT/DS207/13, 17 March 2003
Arbitration award, US—Offset Act (Byrd Amendment (Article 21.3(c)), WT/DS217/14, WT/DS234/22, adopted on 13 June 2003
Notification of a Mutually Satisfactory Temporary Arrangement, *US – Copyright*, WT/DS160/23, 26 June 2003
Panel report, US—Steel Safeguards, WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R, adopted on 11 July 2003
Appellate Body report, US—Steel Safeguards, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R, adopted on 10 November 2003
Appellate Body report, EC-tariff preference, WT/DS246/R, adopted on 1 December 2003
Appellate Body report, EC—tariff preference, WT/DS246/AB/R, adopted on 1 December 2003
Award of Arbitrator, US-Offset Act (Byrd Amendment) (Article 21.3 (c)), WT/DS217/14 ; WT/DS234/22, 13 June 2003
Panel report, Mexico—Telecoms, WT/DS204/R, adopted on 2 April 2004
Arbitration award, EC—Tariff Preferences (Article 21.3(c)), WT/DS246/14, adopted on 20 September 2004
Appellate Body Report, US-Oil Country Tubular Goods Sunset Reviews, WT/DS268/AB/R, adopted on 17 December 2004
Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB/R, adopted on 24 March 2006
Panel report, EC—Approval and Marketing of Biotech Products, WT/DS291/R; WT/DS292/R; WT/DS293/R, adopted on 21 November 2006
Panel report, US—Oil Country Tubular Goods Sunset Reviews (Art. 21.5), WT/DS268/RW, adopted on 11 May 2007
Panel report, Turkey—Rice, WT/DS334/R, adopted on 22 October 2007

Arbitration Award, US — Gambling, WT/DS285/ARB, 21 December 2007
Appellate Body Report, US-Stainless Steel, WT/DS344/AB/R, adopted on 20 May 2008
Panel report, Philippines—Distilled Spirits, WT/DS396/R; WT/DS403/R, adopted on 20 January 2012
Panel report, Dominican Republic—Safeguard Measures, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, adopted on 22 February 2012
Appellate Body report, China—GOES, WT/DS414/AB/R, adopted on 18 October 2012
Notification of a Mutually Agreed Solution, *US – Upland Cotton*, WT/DS267/46, 23 October 2014
Panel report, US—Animals, WT/WT/DS447/R, adopted on 31 August 2015
Panel report, Russia—Measures concerning traffic in Transit, WT/DS512/R, adopted on 7 June 2017
Panel report, Korea — Radionuclides (Japan), WT/DS495/R, adopted on 22 February 2018.
Panel report, Brazil—Taxation (Japan), WT/DS472/R, WT/DS497/R, adopted on 11 January 2019