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## TABLE OF CONTENTS

<b>ABBREVIATIONS</b> .....	3
<b>INTRODUCTION</b> .....	4
 <b>CHAPTER I. INTRODUCTION TO THE WTO DISPUTE SETTLEMENT SYSTEM</b>	
1.1. The main characteristics, functions, objectives, structure and key features of Dispute Settlement System.....	6
1.2. The effectiveness of the WTO Dispute Settlement System.....	11
 <b>CHAPTER II. DISPUTE SETTLEMENT INSTITUTIONS, PROCEDURES AND IMPLEMENTATION MEASURE</b>	
2.1. Dispute settlement Body.....	17
2.2. Panels.....	21
2.3. Appellate Body.....	28
2.4. Arbitration.....	30
2.5. WTO Dispute Settlement Proceedings.....	33
 <b>CHAPTER III. WTO DISPUTE SETTLEMENT CONFLICTS AND REFORMS</b>	
3.1. Appellate Body crisis and reforms.....	37
3.2. The Covid-19 crisis in the global economy and trade. The possible benefits and limits....	49
3.3. The legal issues of the Dispute Settlement.....	52
 <b>CONCLUSION</b> .....	 53
<b>BIBLIOGRAPHY</b> .....	54
<b>ABSTRACT (in English)</b> .....	60
<b>ABSTRACT (in German)</b> .....	62

## **ABBREVIATIONS**

**WTO** – World Trade Organisation

**GATT** – The General Agreement on Tariffs and Trade

**DSU** – Treaty of Understanding of Rules and Procedures Governing the Settlement of Disputes (also referred to as the Dispute Settlement Understanding)

**DSB** – Dispute Settlement Body

**DS Registry** – Dispute Settlement Registry

**ECJ** – European Court of Justice

**EU** – the European Union

**AB** – Appellate Body

**TTIP** - Transatlantic Trade and Investment Partnership

**RTA** - Regional Trade Agreements

**PTA** - Plurilateral Trade Agreements

**MPIA** – Multi-party interim arrangement

## INTRODUCTION

International trade law was developing as private commercial law based on mutual recognition of freedom of contract, private property, judicial remedies, and arbitration. Even though a global trading system based on multilateral trade law did not appear after World War II in the context of decolonisation and accession to the General Agreement on Tariffs and Trade (GATT) and the Agreement establishing WTO.<sup>1</sup> Furthermore, when WTO member breaches the rules, trade sanctions are the remedy of choice. Such sanctions are imposed on offending country member by other members that have taken the initiative to address the violation.<sup>2</sup> The retribution must be approved by the WTO members, a complicated process is to establish the violation and arbitration to determine whether the retaliation is 'equivalent' or 'proportionate' to the damage caused by the reimbursement. The arbitrators must apply legal criteria to estimate damage caused by a WTO violation.<sup>3</sup> Without the ability to resolve disputes, the system would not be effective, as these rules could not be enforced. The WTO system underlines the rule of law which makes the trade system more secure and effective with more clearly identified rules. Certainty and predictability to the multilateral trading system is a central objective of the WTO dispute settlement system.<sup>4</sup>

The WTO dispute settlement system is a key role in clarifying the legal obligations, which contains in the various WTO agreements under duress.<sup>5</sup> In addition, the Uruguay round negotiations were about developing an active dispute settlement system, which resulted in the WTO Dispute Settlement Understanding (DSU). The mechanism had two basic components: first, a negative consensus about injunction for any disputing parties to block the panel formation or the adoption of a ruling by the arbitrators; and second,

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<sup>1</sup> Ernst-Ulrich Petersmann, 'Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement' (2018) 21 *Journal of International Economic Law* 105.

<sup>2</sup> Chad P. Brown & Joost Pauwelyn, *The Law, Economic and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press, 2010) 1.

<sup>3</sup> *Ibid.*, (n2) 1.

<sup>4</sup> World Trade Organisation, 'A Unique Contribution'

< [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) > accessed 27 March 2022

<sup>5</sup> Rufus Yerxa and Bruce Wilson, *Key Issues in WTO Dispute Settlement* (Cambridge University Press, 2009) 15.

a two-stage ruling procedure, in which the legal reasoning of the panels could be appealed.<sup>6</sup>

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<sup>6</sup> Bernard M. Hoekman & Petros C. Mavroidis, , ‘To Appellate Body or Not to Appellate Body? Dispute Settlement in WTO Reform ‘(2020) 23 *Journal of International Economic Law* 703.

## CHAPTER I. INTRODUCTION TO THE WTO DISPUTE SETTLEMENT SYSTEM

### 1.1. The main characteristics, functions, objectives, structure and key features of Dispute Settlement System

The Dispute settlement system is the core of the international and multilateral trade. Moreover, the rule of law is underlined by the WTO's procedure. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by panel and endorsed or rejected by the WTO's full membership.<sup>7</sup>

It is important to mention, that the former GATT 1947 had numerous drawbacks, without fixed timetables, to block ruling was on daily-basis, and high number of cases have been protracted for years. The unilateralism, under the old GATT regime, had caused an erosion of the legal order of world trade relations and thus became a central topic in the Uruguay Round which led to improvement of the dispute settlement mechanism.<sup>8</sup> The Uruguay Round agreement introduced a process with clear structure and discipline with flexible deadlines set in various stages of the procedure.<sup>9</sup> The Uruguay Round Agreement it was a possibility for the losing party to block the adoption of the ruling. Regardless, according to the old GATT provisions, ruling could only be adopted by positive consensus, meaning that a single objection could block the ruling.

Nowadays, under the DSU all rulings are automatically adopted unless there is a negative consensus. Any country which has expressed its will to block ruling must to persuade all other WTO members including its opponents.<sup>10</sup> While the present WTO system is mandatory and enforceable, previous GATT system contained diplomatically-based rules relied on the goodwill of the parties.<sup>11</sup>

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<sup>7</sup> World Trade Organisation, 'Understanding the WTO (2011) <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)> accessed 23 October 2021.

<sup>8</sup> Peter Van Den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organisation, Text, Cases and Materials* (4<sup>th</sup> ed., CUP 2017) 183.

<sup>9</sup> *ibid* (n2) 61.

<sup>10</sup> Yang Guohua, Bryan Mercurio, Li Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (Kluwer Law International, 2005) 154.

<sup>11</sup> Chad P. Brown & Joost Pauwelyn (n 2) 1.

Under the former GATT 1947 the inefficient dispute settlement system had led to destruction of the judicial order of trade relations in the world and as a result turned into a central subject matter in the Uruguay Round. It caused a significant reinforcement of the dispute settlement mechanism. According to official data, more than 400 complaints were launched since its existence which resulted in more than 200 panel and Appellate Body reports.<sup>12</sup>

Throughout the lifetime of the WTO existence, dispute settlement system is well known as the most significant characteristic of the World Trade Organisation.<sup>13</sup> The primary rules of WTO dispute settlement are set out in Annex II WTO agreement Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU). It covers all disputes arising out of the WTO Agreements and of the ‘covered agreements’, which are subject to special and additional rules and procedures.<sup>14</sup> In essence, within the WTO legal system, dispute settlement system is considered as procedural law. This system plays a key role into defined and enforced legal obligations contained in various WTO agreements. What is more, the jurisprudence that emerged from dispute settlement system has been heavily criticised by the public and private sectors among the WTO members.<sup>15</sup>

What is more, if negotiation about compensation with the complainant was failed, dispute settlement system is a multilateral mechanism based on rules, rulings and recommendation in order to settle disputes between members of the WTO, which parties must take into account and comply them. Moreover, covered agreements which was implemented, ensures a *consistent and integrated dispute settlement system*. Former ‘GATT a la carte’, contained separate dispute settlement rules and stipulated various set of signatories. In some cases, the covered agreements contain ‘special and additional rules and procedures’ on dispute settlement (Article 1(2) and Appendix II of the DSU). Such rules and procedures was developed to address the specifics of disputes under a particular covered agreement.<sup>16</sup>

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<sup>12</sup> Gary Clayde Hufbauer, ‘Rules of International Trade, Investment and Financial Systems’ (2014) Journal of International Economic Law 838.

<sup>13</sup> Yang Guohua, (n10) 87.

<sup>14</sup> Rufus Yerxa and Bruce Wilson, (n 5) 440.

<sup>15</sup> Bruce Wilson, *The WTO Dispute Settlement System and its Operation: a brief overview of the first ten years* (Cambridge University Press 2005) 16.

<sup>16</sup> Gary Clayde Hufbauer, (n 12) 838.

Furthermore, members who are eligible to participate in process of settling a dispute were determinate by the DSU. The Member governments of the WTO member states are the only participants in the DSS, which entitled to take part in the process either as parties or as third parties. It is very important to note, that the WTO Secretariat, or other international organisations and private individuals or companies and governments are not eligible to initiate proceedings.<sup>17</sup>

The process takes place when the Member State deems that another Member State in violating a multilateral WTO agreement or a commitment. The Article 3(8) of the DSU states that:

*“In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.”*

Furthermore, as was mentioned above, the system of dispute settlement applies to all disputes brought under the WTO Agreements which considered as ‘covered agreements. In many cases, the complainant raises provisions which includes more than one covered agreement.<sup>18</sup>

The main **object and purpose** of the WTO DSS is the immediate dispute resolution between WTO Members in accordance with WTO legislation.<sup>19</sup> Moreover, Article 3 of the DSU stipulates the main **objective** of the WTO DSS, which provides **security and predictability** to the trading system.<sup>20</sup> Moreover, international trade is a movement of goods and services between Members, and this trade is not operated by States, but rather by private economic operators. Participants in these markets should to be stable according to the law, regulations and rules applicable to activities, especially long-term

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<sup>17</sup> Center for Strategic International Studies CSIS <<https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis>> accessed 23 October, 2021

<sup>18</sup> Ibid (n17).

<sup>19</sup> Peter Van Den Bossche & Werner Zdouc, (n 8) 183.

<sup>20</sup> WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (2<sup>nd</sup> edn., Cambridge University Press, 2017) 5.



trade agreements .<sup>21</sup> To clarify the existing provisions of those agreements founded on *rules of interpretations of public international law*, members acknowledge that it carried out to preserve the rights and obligations of Members under the covered agreements<sup>22</sup> Security is the main factor of member's confidence in the ability of the WTO dispute settlement mechanism. To reach this goal, the DSU provides the basis for a quick rules-oriented dispute resolution system applying the provisions of the WTO Agreements. Furthermore, the dispute settlement system provides for settling dispute relates to failure to comply with the WTO Agreement which was argued by a WTO member, by means of independent findings and confirmation by the political organs of the WTO.<sup>23</sup>

The rights and obligations in the covered agreements cannot be reduced by recommendations and rulings of the DSB. In addition, recommendations or rulings should be addressed to achieve a *satisfactory settlement* to this issue according to rights and obligations under this DSU and covered agreements. Before the case can be brought, a Member must comply with its judgements regardless of whether the matter will be resolved in its favour. <sup>24</sup>

Although the main aim of the system is not to make decisions or to develop jurisprudence, rather, the priority is to resolve disputes, in the best case by way of a mutually agreed solution, which is in line with the WTO Agreement. With regard to adjudication is only possible if the parties of a dispute are unable to make an agreed solution. At a first stage of any dispute through formal consultations, the DSU provides a framework in which the parties should always try at least to negotiate. A bilateral settlement is possible for both parties, who are encouraged to make efforts in this way even when the case has progressed to adjudication stage. <sup>25</sup>

A decision, which is mutually acceptable to the parties in a dispute and compatible with the covered agreements is *clearly to be preferred*. When there is no mutually agreed solution, the main goal of DSB is to ensure that the relevant measures are withdrawn if

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<sup>21</sup>ibid 5.

<sup>22</sup> Ibid 5.

<sup>23</sup> WTO, *Japan v Alcoholic Beverages II - Report of Appellate Body* (1996) WT/DS8/AB/R para. 31.

<sup>24</sup> World Trade Organisations, *Dispute Settlement Understanding: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 3.

<sup>25</sup> DSU, Article 3 (7).

these are found to be incompatible with the provisions of such agreements.<sup>26</sup> According to Section 301 Trade Act of the United States<sup>27</sup>, the DSU is the most meaningful tool of the WTO in preserving the security of the multilateral trading system.<sup>28</sup> Article 23.1 of the DSU states:

*‘When Members seek the redress of a violation of obligations or other nullifications or impairment of benefits under the covered agreements or an impediment of the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding’. Pursuant to Article 23.2 of the DSU, WTO Members may not take retaliation measures unilaterally in case of violation of the WTO law.<sup>29</sup>*

As has already been mentioned, the WTO dispute settlement system considers regarding the rights and obligations that arise from the provisions of the WTO Agreement. All disputes listed in Appendix 1 (so-called covered agreements) of the DSU may be brought before the WTO dispute settlement mechanism.<sup>30</sup>

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<sup>26</sup> WTO, ‘A Mutually Agreed Solutions’

[https://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/m6\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/repertory_e/m6_e.htm) accessed 5 November 2021

<sup>27</sup> WTO, *United States, Section 301-310 of the Trade Act of 1974- Panel Report* (2000) WT/DS152/14

<sup>28</sup> Bossche, (n 8) 188.

<sup>29</sup> Bossche (n 8) 189.

<sup>30</sup> WTO Secretariat, (n 20) 6.

## 1.2. The effectiveness of the WTO Dispute Settlement System

To begin with, a dispute arises where respondent breached the rules of a legal requirement contained in a particular provision of the WTO Agreement. To establish the fact of violation of the WTO obligations, a complainant must (i) prove the allegations; and (ii) prove that the disputing provision caused an obligation that the respondent, do not fulfil. The provisions of the WTO Agreement are often developed in a general applicability and to cover a number of specific cases which is not possible to predict and settle all specific cases that may arise.<sup>31</sup>

The Dispute Settlement System has been in effect since January 1995. High expectations were relied on the system, regarding protection, in order to give some guarantee of the less developed Members of the organisation.<sup>32</sup> The WTO's first Director General, Renato Ruggiero said in his interview:

*'...the Dispute Settlement system is in many ways the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy...By reducing the scope of unilateral actions, it is also an important guarantee of fair-trade for less powerful countries.'*<sup>33</sup>

However, data demonstrate rates with different results. Developed countries was the most active players of the DSS, such as Canada, EU, Japan and US – over 60% of all complaints. A very low index of using of DSS by less developed countries caused inflammatory discussions among participants about whether the DSS is ahead of smaller and impoverished countries.<sup>34</sup> Three-quarters of the members did not put into service the system since its establishment. This debate is part of North-South tensions within WTO, which will come to the first place in the run up to a new round of multilateral trade negotiations.<sup>35</sup>

A positive thought about the WTO dispute settlement effectiveness was kept by most scholars. However, some have an opposite opinion and step aside the general Western consent and concentrate on some fields where the effectiveness of the WTO dispute

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<sup>31</sup> WTO Secretariat (n 20) 8.

<sup>32</sup> Petros C. Mavroidis, 'Is the Use of the WTO Dispute Settlement System Biased?' (1999 CEPR Discussion Paper) 1

<sup>33</sup> Ibid 1.

<sup>34</sup> Mavroidis, (n32) 2.

<sup>35</sup> Ibid 2.

settlement can be questioned, fields of remedies and sanctions, access to dispute resolution and considerations of complex factual, economic and scientific testimony.<sup>36</sup> In addition, some experts suggested how measure the effectiveness of dispute settlement in light of WTO dispute settlement objectives. The WTO dispute settlement system envisages not only punishment, but also transfer the measure to the line which is closed to civil remedy model. That's means that sanctions can be imposed only if unlawful conduct was not ceased or the necessary compensation was failed. Nevertheless, 'compensation' under the WTO is an incentive to get rid of any offending measures and bring its laws into compliance.<sup>37</sup> The limited effectiveness of dispute settlement in terms of remedies lies in the fact that it does not provide any remedy for the complaining Member other than removal of the offending measure and the forms of sanctioning, compensation and retaliation, are largely ineffective. Therefore, some members are unenthusiastic about process, which takes years, cost a lot of money and at the result have lacks of effective remedies at the end of the process. Thus, the force of these factors count on the available alternatives, and the political consequences, which will lead to dispute settlement with another WTO Member.<sup>38</sup>

In fact, a dispute between two WTO members set up by a request for consultations provided for by Article 4 of the DSU, which states that member who acquired such a request is obliged to take it into consideration.<sup>39</sup> The complaining party is entitled to request the establishment of a panel if the consultation at the first stage failed and no common solution was reached in the controversial issue within 60 days.<sup>40</sup> According to the statistic, approximately 20 % of all cases reached a mutually agreed resolution of the dispute during the consultation. In 80% cases, disputes are referred to a panel. Since WTO DSS establishment, and up to December 31, 2020, the system has dealt with 573 requests for consultations. It has issued over 350 dispute settlement decisions.<sup>41</sup>

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<sup>36</sup> Donald McRae, 'Measuring the effectiveness of the WTO Dispute Settlement System' (2008), 3, Asian Journal of WTO & International Health and Policy, 1 <[https://heinonline.org.uaccess.univie.ac.at/HOL/Page?collection=journals&handle=hein.journals/aihlp3&id=3&men\\_tab=srch\\_results](https://heinonline.org.uaccess.univie.ac.at/HOL/Page?collection=journals&handle=hein.journals/aihlp3&id=3&men_tab=srch_results)> accessed 6 November 2021

<sup>37</sup> Ibid 2.

<sup>38</sup> McRae, 2

<sup>39</sup> DSU, Article 4.2

<sup>40</sup> DSU, Article 4.7

<sup>41</sup> Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis', (2018) (Transnational Commercial and Consumer Law: Current Trends in International Business Law (Kono, Hiscock & Reich eds.) 143 <[https://www.researchgate.net/publication/324670448\\_The\\_Effectiveness\\_of\\_the\\_WTO\\_Dispute\\_Settlement\\_System\\_A\\_Statistical\\_Analysis](https://www.researchgate.net/publication/324670448_The_Effectiveness_of_the_WTO_Dispute_Settlement_System_A_Statistical_Analysis)>, accessed 6 November 2021

Table 1. depicts numerous of cases handle during the years of the WTO establishment (an average of 37.8 cases per year during 1995-2020), with the numbers decline gradually.<sup>42</sup>

Table 1. Request for Consultations.<sup>43</sup>

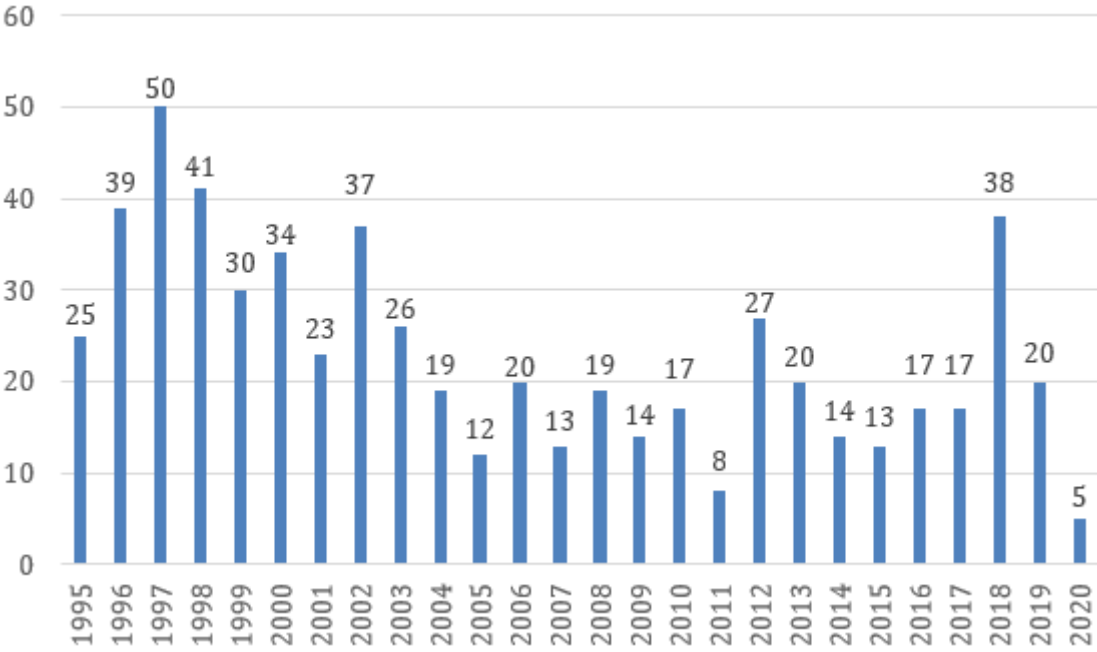
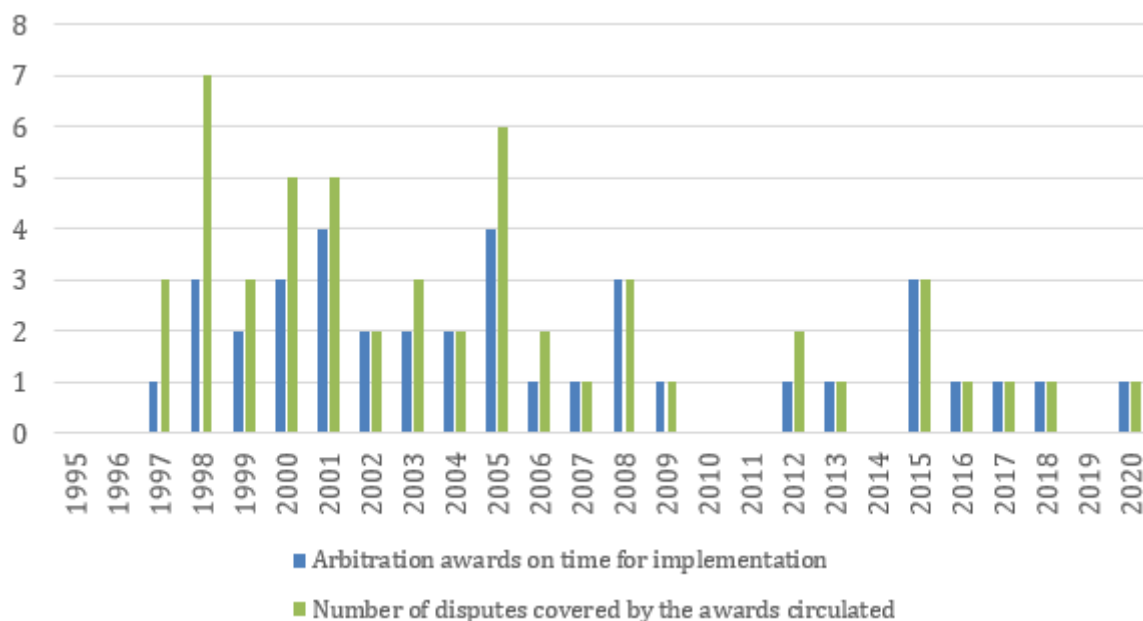


Table 2. Number of arbitrations on the period for implementation of the DSU.<sup>44</sup>

<sup>42</sup> Ibid 6.

<sup>43</sup> WTO, ‘Dispute Settlement activity – some figures’ <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispustats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm)> accessed 6 November 2021

<sup>44</sup> WTO, ‘Dispute Settlement activity – some figures’ <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispustats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm)> accessed 6 November 2021



The WTO ensures stability and security to global trade through a set of rules founded on binding market access commitments.<sup>45</sup> The US and the EU are the most often guests of the dispute settlement system, whether involved as applicants or respondents in general 279 and 187 cases. While the system is not superlative, it has served these two members well in defence their commercial interests.<sup>46</sup>

What is more, the EU is plaintiff of 25 disputes and defendant in 22 disputes. These disputes relate to trade relationships between EU and Argentina, Brazil, Columbia, India, Indonesia, Malaysia, the Philippines, Saudi Arabia, Thailand, Turkey and the United States. Moreover, the EU is the complainant in four cases between the EU and Algeria, the Republic of Korea, the South African Customs Union, and Ukraine respectively.<sup>47</sup>

Table 3. Participation of the 15 largest developing economies in the WTO dispute settlement system, 1995 to October 2019.<sup>48</sup>

<sup>45</sup> Anabel Gonzalez, Euijin Jung, ‘Developing countries can help restore the WTO’s dispute settlement system’, (2020) PIIE Policy Brief 20-1, <<https://voxeu.org/content/developing-countries-can-help-restore-wto-s-dispute-settlement-system>> accessed 6 November 2021

<sup>46</sup> Ibid.

<sup>47</sup> Appellate Body Report, ‘Overview of the EU’s active dispute settlement cases: WTO cases involving the EU as a complainant or defendant, cases under bilateral agreements, and cases under the Trade Barriers Regulation’, [2021], 5 <[https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159429.docx.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159429.docx.pdf)> accessed 18 December 2021

<sup>48</sup> WTO Dispute Settlement Gateway, <[www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm)>, accessed 12 November 2021

Table 3.

<b>Economy</b>	<b>As complainant</b>	<b>As respondent</b>	<b>As complainant and respondent</b>	<b>Third party</b>
China	21	44	65	177
India	24	32	56	162
Brazil	33	16	49	145
Mexico	25	15	40	105
Korea	21	18	39	127
Indonesia	11	14	25	42
Thailand	14	4	18	96
Turkey	5	12	17	95
South Africa	0	5	5	21
Vietnam	5	0	5	33
United Arab Emirates	2	1	3	12
Malaysia	1	1	2	23
Saudi Arabia	0	2	2	49
Hong Kong	1	0	1	22
Singapore	1	0	1	56
<b>Total of the 15 economies</b>	<b>164</b>	<b>164</b>	<b>328</b>	<b>1,165</b>

Arising the effectiveness of the dispute settlement process requires careful action. Two years ago, some issues, including implementation question, did not solve, and governments indicated that they are going to fulfil their obligations risen by the dispute settlement reports. Firstly, such judgements counted on the question asked.<sup>49</sup> For instance, the first question should be asked by complaint party whether it is effective to make the resolution of cases easier or how jurisprudence is developed from the perspectives of ensuring stability while resolving ambiguities in the rule structure.<sup>50</sup> Second question is how effectively the results of dispute settlement cases have been implemented. Finally, the extent to which the results of the dispute settlement process have been accepted, politically and publicly.<sup>51</sup>

<sup>49</sup> John H. Jackson, 'The Role of Effectiveness of the WTO Dispute Settlement Mechanism', (2000) 2000-1 Brookings Institution Press 179-236.

<sup>50</sup> Ibid 210.

<sup>51</sup> Jackson (n 49) 210.

The first two questions can be answered by the WTO's high score of case resolution. The WTO is worth the highest award for the attribute of its jurisprudence. On the other hand, there are some significant implementation issues, and some problems regarding political acceptance.<sup>52</sup> Another issue is caseload, and there is a risk of overloading the system.<sup>53</sup>

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<sup>52</sup> Carolyn B., Pamela D, Walther, 'The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform', (2000) 31 (3) Law and Policy in International Business 709

<sup>53</sup> Ibid 36.



## CHAPTER II. DISPUTE SETTLEMENT INSTITUTIONS, PROCEDURES AND IMPLEMENTATION MEASURE

### 2.1. Dispute settlement Body (DSB)

The legal order of the WTO is based on a set of separate agreements which have preserved a certain level of autonomy. In fact, some agreements provide for specific rules and procedures but most of them deal with the issue of consultation and dispute resolution.<sup>54</sup> DSU contains general rules on dispute settlement procedure, which dealt with disputes, occurs with the WTO Agreements and ‘covered agreements’. In that case, special and additional rules and procedures shall prevail.<sup>55</sup>

Among the institutions involved in dispute resolution, such as Dispute Settlement Body, a Panel and the Appellate Body can be identified. Although the WTO has charged with the adjudication, at the first instance to Panels, and at the appellate level to the Appellate Body, the DSB plays an active role in the DSS.<sup>56</sup> Moreover, despite numerous of writing on dispute settlement in the WTO, the limited attention has been paid to the Dispute Settlement Body. To begin with, DSB is considered as a diplomatic body, which compose of WTO members’ representatives, with spokespersons.<sup>57</sup>

Furthermore, such the political institutions as DSB is a powerful and efficient tool in solving global-scale commercial issues at the same time assure a greater degree of legal security in multilateral relations. The evidence of such effectiveness is resolving legal disputes in time, and relatively low amount of disputes.<sup>58</sup>

In accordance with to Article 2 DSU the DSB is established for administration rules and procedures, the consultation and disputes settlement provisions of the covered agreements.<sup>59</sup> Furthermore, functions of the DSB is prescribed by Article 2.1 of the DSU, which stipulates that it administers the rules and procedures of the DSU, and has authority to adopt panels; establish panel and AB reports; conduct observations of implementation

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<sup>54</sup> Rudiger Wolfrum, Peter-Tobias Stoll, Karen Kaiser, *WTO – Institutions and Dispute Settlement* (Vol. 2 Leiden: Brill Nijhoff 2006)

<sup>55</sup> Yerxa, Rufus H., *Key issues in WTO dispute settlement: first ten years* (Cambridge University Press 2015) 25

<sup>56</sup> Bossche (n 8) 228.

<sup>57</sup> Joshua Paine, ,The WTO’s Dispute Settlement Body as a Voice Mechanism ‘(2019) 20 Journal of World Investment & Trade 820.

<sup>58</sup> Marcelo D. Varela, ‘The Effectiveness of the Dispute Settlement Body of the World Trade Organisation’ (2009) 8 Journal of International Trade and Policy 100.

<sup>59</sup> Rufus Yerxa (n 5) 26.

of rulings and recommendations; authorize supervision of concessions and other obligations under the covered agreements.<sup>60</sup>

The DSB is considered as one of the of the General Council of WTO and, consist of all WTO Member States.<sup>61</sup> According to Article IV WTO Agreements:

*‘The General Council shall convene as appropriate to discharge responsibilities of the DSB provided for in the DSU. The DSD may have its own chairman and shall establish such rules of procedure ad it deems necessary for the fulfilment of those responsibilities.’*

Together with members, the DSB is headed by ambassador who is chosen from among the representatives of the Members at the beginning of the year and who is leading the proceedings of DSB meetings.<sup>62</sup> Overall, from the beginning, the DSB is empowered to implement working practices in order to deal with practical issues such as submissions of notice and paperwork when terms provided by the law might fall out on non-working day.<sup>63</sup> The role of the DSB is to enable WTO Members to indicate believes and to hand over their comments on the legal illumination of a panel and AB. In order to have a certain influence on the process and to have control over panel and AB action, members are also eligible to rise any procedural matters connected to the operation of the DSU.<sup>64</sup>

The DSB must take actions in terms set by legislations. Moreover, the DSB meetings are held systematically as often as necessary in order to achieve the best result within the deadlines. There are two types of meetings: regular meetings and special meetings. Schedule such meetings are set out once a month.<sup>65</sup> Special meetings are held at the request of a member to meet a certain deadline if no regular meetings are scheduled for this period. In practice DSB has two meetings per month, one regular and one special.<sup>66</sup>

The DSB takes decisions based on **‘positive’ consensus**. The meaning to consensus is clearly defined by DSU, as being achieved if no WTO Member, present at the meeting

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<sup>60</sup> Wolfrum (n54) 279.

<sup>61</sup> Yerxa (n 5) 28.

<sup>62</sup> WTO, Dispute Settlement Body <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm)>, accessed 4 December 2021.

<sup>63</sup> Yerxa (n 5) 28.

<sup>64</sup> Rufus Yerxa and Bruce Wilson (n 5) 28.

<sup>65</sup> Ibid 26.

<sup>66</sup> Ibid 26.

when the decision is taken, formally objects to the proposed decision.<sup>67</sup> This means that decision has been taken, if no one opposes, the chairperson announces that the decision has been taken.<sup>68</sup>

Moreover, the consultation process can help to find out the facts of the controversial situations between members involved. In the same way, consultation can lead to mutually acceptable dispute resolution. The information acquired during consultations may give the means to complainant to emphasis on the scope of the issue for which he strives for establishment of a Panel.<sup>69</sup> The bilateral consultations between the parties is the first step in a formal dispute (Article 4.5 of the DSU),<sup>70</sup> which provide parties the opportunity to discuss disputed matter and to achieve the right solution during the process (Article 4.5 of the DSU). A formal notice of disputes outline is given to the respondent during consultations which gives the opportunity to the complainant to refine the dispute which set out in the panel request.<sup>71</sup> After complaint is filed, parties have 60 days to negotiate and resolve the conflict.<sup>72</sup> Thus, Panel has no authority to investigate the eligibility of the consultation process.<sup>73</sup>

In *Korea-Taxes on Alcoholic Beverages*<sup>74</sup> the panel concluded that:

*'... the WTO jurisprudence so far has not recognised any concept of 'adequacy' of consultations were in fact held, or were at least requested, and that a period of 60 days has elapsed from the time consultations were requested to the time a request for a panel was made... The consultations are a critical and integral part of the DSU.'*<sup>75</sup>

The request for consultations formally starts a dispute in the WTO and give the rise to application of the DSU and the relevant provisions of the covered agreements. Such request is directed to the respondent and notified all WTO bodies in charge to supervise the agreements in question, stipulated in Article 4.4 of the DSU.<sup>76</sup> Members send only a written text of notification to the Secretariat, which in turn share it to the specified bodies and prepares all documents to be distributed between members.<sup>77</sup>

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<sup>67</sup> Wolfrum (n54) 279.

<sup>68</sup> *ibid* 279.

<sup>69</sup> Wolfrum (n 54) 279.

<sup>70</sup> *Ibid* 24.

<sup>71</sup> WTO Secretariat (n 20) 24.

<sup>72</sup> *Ibid*, 24

<sup>73</sup> Wolfrum (n 54) 279.

<sup>74</sup> WTO, *Korea-Taxes on Alcoholic Beverages – Panel Report* (1999) WT/DS75

<sup>75</sup> WTO, *Korea-Taxes on Alcoholic Beverages – Panel Report* (1999) WT/DS75, para 10.19

<sup>76</sup> Yerxa (55) 27.

<sup>77</sup> *Ibid* 27.

It is important to note, a request for consultations must give the reasons for the request which should include the measures at issue and indicating the legal basis for the complaint (Article 4.4 of the DSU).<sup>78</sup>

What is more, each Member State has the opportunity to challenge the Panel's to the Appellate Body. The AB is composed of various experts, who are also endorsed by Member States, and who have more restricted jurisdiction.<sup>79</sup> Appeals are generally determined final stage, however, parties of the process have the ability to make additional agreements, along with monitoring the application of Panel and AB decisions.<sup>80</sup> Ultimately, failure to comply with the decision of DSB may outcome WTO General Council which issue a decision, to allow party to implement trade sanctions against another State in error. The WTO General Council is guided by the requirement that proposed sanctions be proportionate to the violations committed by the offender Member State and not be retaliatory.<sup>81</sup>

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<sup>78</sup> *ibid* 27.

<sup>79</sup> Alexandra R Harrington, 'Brief on the World Trade Organisation's Dispute Settlement Body and the Sustainable Development Goals', (2020), 15 (1) MJSDL, 23

<sup>80</sup> *Ibid* 27.

<sup>81</sup> Harrington (n 79) 27.

## 2.2. The WTO Dispute Settlement Panels

To begin with, the panel stage is the first of formal WTO dispute settlement. The DSU demonstrate a clear advantage for political rather than judicial dispute settlement.<sup>82</sup> Panels are not permanent bodies but rather ad hoc bodies created to settle a certain dispute and after they reached the goal panels will be dissolved.<sup>83</sup>

If the dispute cannot be resolved by consultations in accordance with Art. 4 DSU, DSB appoints Panels at the second meeting. At the first meeting of the DSB, when the principle of positive consensus was applied, in accordance with the Art. 6.1 DSU, the Member concerned may still block the establishment of a Panel. Different from GATT 1947, decision-making in the DSB is reversed, whereas consensus of the contracting parties was essential for the creation of a Panel. Nowadays, to establish a Panel at the second meeting is an obligation of DSB if it does not decide to do opposite – ‘**negative**’ **consensus** or so called the ‘right to a Panel’.<sup>84</sup>

Moreover, the Panel aids the DSB make rulings or recommendations. At the same time, its decision is hard to reverse since the Panel’s report can only be rejected or refused by consensus in the DSB. The panel’s findings have to be based on the agreements cited. The panel’s final report should be completed within 6 months and in some case the in three months.<sup>85</sup>

Moreover, in *EC-Bananas III* case, the Appellate Body found that:

*‘It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and second, it informs the defending party and the third parties of the legal basis of the complaint.’<sup>86</sup>*

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<sup>82</sup> Markus Wagner, ‘Panel: Dispute Settlement of the World Trade Organisation (WTO)’, (2020) ResearchGate [https://www.researchgate.net/publication/342732929\\_Panel\\_Dispute\\_Settlement\\_System\\_of\\_the\\_World\\_Trade\\_Organization\\_WTO](https://www.researchgate.net/publication/342732929_Panel_Dispute_Settlement_System_of_the_World_Trade_Organization_WTO) accessed 8 January.2022

<sup>83</sup> Ibid 231.

<sup>84</sup> Peter-Tobias Stoll, Frank Schorkopf, *WTO – World Economic Order, World Trade Law* (Boston: Martinus Nijhoff 2006) 77.

<sup>85</sup> Yetty Komalasari Dewi, ‘The WTO Dispute Settlement System Issues on Implementation’ (2008) Vol. 5 2 Indonesian Journal of International Law 224

<sup>86</sup> WTO, *EC-Bananas III – Report of Appellate Body* (1997) WT/DS27/ARB, para. 142.

Under the DSU, the panel must ‘make an objective assessment of the matter before it, including the facts of the case and make other conclusions as the DSB will help in making the recommendations or in giving the rulings provided for in the covered agreements.’<sup>87</sup>

The ‘specific measure at issue’ count on respondent possibility to defend. Specific measure is regarded as sufficiently identified, when the respondent has obtained an adequate notice of such measure<sup>88</sup> In compliance with the requirements, panel must provide a concise conclusion of the legal basis of the claim for a broad presentation of the issue. <sup>89</sup> In EC-Bananas III case, the AB found that the list of the articles of the agreements allegedly violated met the minimum requirements of the DSU. <sup>90</sup>

What is more, in *Korea-Dairy case*, the AB in its ruling depicts the above articles provide numerous obligations, the list of articles of current agreement, may not comply with Article 6.2 of the DSU. In addition, the AB came to conclusion, that the question of concerned of articles sufficiency must be examined on the matter and the ability of the provisions of the panel request, which has been violated is taken into consideration.<sup>91</sup> The AB thus outlined the standards of respondent’s ability to defend.<sup>92</sup>

Furthermore, in *EC-Tube & Pipe Fittings case*, the Panel investigated if the possibility to defend was prejudiced by the lack of specificity in the panel’s request. The Panel found that it was obvious from the engagement of the European Communities in claiming its views in different stages of the panel proceedings that the ability of the EC defence did not prejudiced over the proceedings. <sup>93</sup> It is important to note, that Article 6.2. of the DSU contains a requirement about specified claim in the panel request.<sup>94</sup>

According to the Article 7.1 of the DSU, unless the parties come to agreement within 20 days from panel foundation, following reference should have being taken into account: to examine relevant provisions, namely the name of the agreements, cited in the dispute; the matter referred to the DSB, such document has to contain name of the parties.<sup>95</sup> Thus, terms of reference is only if claim is specified in the panel request. In

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<sup>87</sup> Carlos M. Vazquez, John H. Jackson, ‘Some Reflections on compliance with WTO dispute settlement decisions’ (2002) Georgetown University Law Centre

<sup>88</sup> Bossche (n 8) 232.

<sup>89</sup> Ibid 232.

<sup>90</sup> WTO, *EC-Bananas III – Report of Appellate Body* (1997) WT/DS27/ARB, para. 141.

<sup>91</sup> WTO, *Korea-Dairy - Report of Appellate Body* (1999) WT/DS98/AB/R, para. 127.

<sup>92</sup> Bossche (n 8) 232.

<sup>93</sup> WTO, *EC-Tube or Pipe Fittings – Dispute Settlement Body Report* (2003) WT/DS219/R, paras. 7.22-7.24.

<sup>94</sup> Article 7 of the DSU

< [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#7](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#7) > accessed 8 January 2022

<sup>95</sup> Ibid, 232.

*EC-Tube or Pipe Fittings*, the panel investigated that Brazil's claims under Articles 6.9, 6.13, 9.3, and 12.1 of the Anti-Dumping Agreement does not belong to terms of reference as these provisions was not identified in the panel request.<sup>96</sup>

Equally important, in its ruling AB stated in *Brazil- Desiccated Coconut*, the terms of reference are significant in case where, firstly, terms of reference achieve the significant due process aim, parties and third parties are able to receive important information regarding the claims at issue, so that to provide an opportunity to give response to the plaintiff. Secondly, setting up the authority of the panel by determining exact claims at issue.<sup>97</sup>

Furthermore, panels consist of three well-qualified candidates, which are chosen among academics, lawyers and members of government delegations to the WTO, who are not parties to the dispute.<sup>98</sup>

*The panel members should be selected with a view to ensuring the independence of the members, providing a sufficiently diverse background and a wide spectrum of experience (Article 8.2 of the DSU).*

Panellists perform their duties as individual, not as representatives of their governments. Other members are not entitled to give some instructions to panellist or to make an influence on them. The disputing parties, by consensus, choose the candidates to panel, on the advice of the Secretariat.<sup>99</sup>

*'The potential losing party cannot obstruct the setting up of a panel by not cooperating in this procedure, as it happened in the past. If the parties cannot agree on the composition of the panel within 20 days following the establishment of the panel, either of the parties can request that the Director-General determines the composition of the panel by appointing the panellists whom the Director-General considers most appropriate (Article 8 of the DSU).'*

In addition, the DSU includes exceptional rules concerning both developing countries and least developed countries, which refer to the principle of special and differential

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<sup>96</sup>WTO, *EC-Tube or Pipe Fittings – Dispute Settlement Body Report* (2003) WT/DS219/R, para. 7.14.

<sup>97</sup> WTO, *Brazil-Desiccated Coconut – Report of Appellate Body*, (1996), WT/DS22/AB/R para. 186

<sup>98</sup> Bossche (n 8) 232.

<sup>99</sup> Ibid 230.

treatment of these countries.<sup>100</sup> It is result from the application of this principle which contained in all WTO trade agreements and include the rights that are comparatively broader than those of developed countries. Most compelling evidence contains in clause 10 of Article 8 DSU which sets out the procedure for establishment of panels: in the case of a dispute between two country members, the panel must include at least one developing country panel member if such country request so.<sup>101</sup>

Furthermore, special procedures, which includes less developed country members obligate the developed countries to offer their good offices, conciliation and mediation in dealing with matters under dispute settlement procedures.<sup>102</sup> These recommendations are mainly related to the fact that participation in proceeding is difficult for the less developed countries due to various cost, and they are not able to obtain a sufficient defence within the WTO.<sup>103</sup>

Of course, all expenses, including travel and per diem for panellists are covered by the WTO budget. In addition to this, panellists receive an honorarium for their service. However, this fee is not as high as fees usually paid in international arbitration private lawyers representing parties in proceedings.<sup>104</sup> The Secretariat should suggest the nomination of panel's candidates unless there are compelling reasons. However, very often parties reject nominated candidates proposed by Secretariat without reasons. If the agreement was not reached by the parties within 20 days, each party may request the Director-General to appoint the panellists within 10 days of request.<sup>105</sup>

The terms of reference stipulated by Article 7 of the DSU are normal standards unless the parties agree other within 20 days after panel has been established. However, in case of disagreement of parties on terms of reference, the Chairman can draw up special terms of reference in consultation with the parties.<sup>106</sup>

Must be remembered, the DSB is no longer involved, after the panels proceedings started, except suspension of proceedings by panel's decision and in case where the panel is not able submit its reports within six months, DSB must be notified. Panel's report must be accepted or challenged within 60 days. In practice, the parties of the dispute

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<sup>100</sup> Alua Sharipbekkyzy, Amirbekova , 'Legal Issues of Developing Countries in the WTO Dispute Settlement system' (2015) Vol. 6 (5) Mediterranean Journal of Social Science, 50

<sup>101</sup> Ibid, 51

<sup>102</sup> Amirbekova (n 100) 51.

<sup>103</sup> Ibid, 51.

<sup>104</sup> Bossche (n 8) 231.

<sup>105</sup> Ibid 231.

<sup>106</sup> DSU Article 7.



make decision about carrying a panel report to the DSB for adoption. In the event of an appeal, the term withdrew from the agenda after the appeal process completed. What is more, until the appeal process not finished, the panel report is rescheduled.<sup>107</sup> Within 30 days after sharing, the DSB should adopt the AB report. In addition, the DSB has the power to decide by consensus not to adopt the report of the panel or AB, however in practice it adopted automatically.<sup>108</sup> If the parties is aware that the report is not sufficient or clear they can decide not to place the report for adoption. The party to the dispute whose measures are found to be inconsistent, on the DSB meetings within 30 days should inform its intentions in respect of implementation of the DSB's rulings and recommendations. Monitoring progress of implementation is the next step, which means that the party of a dispute must submit a status report on the progress of implementation. This report appears on agenda until implementation has taken place or problem has been resolved.<sup>109</sup>

What is more, when the panel deals with particular disputes has to examine the factual and legal facts of the case and submit a report to the DSB.<sup>110</sup> The report contains the following aspects: procedural and factual facts of the dispute; the claims; arguments of the parties and third parties; the interim review; findings and conclusions. The applicability of provisions and reason of investigations along with recommendations should be summarised in the report. In a few cases, parties filed an appeal on report before AB because the panel's findings and recommendations were not sufficiently reasoned.<sup>111</sup>

***In Argentina – Footwear (EC)***, the AB found as follows:

*'In this case, the panel conducted extensive factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentina authorities as well as other evidence presented to the panel, and provided extensive explanations of how and why it reached its factual and legal conclusions. Although, the Argentina may not agree with the rationale provided by the panels, and we do not ourselves agree with all of its reasoning,*

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<sup>107</sup> Yerxa (n5) 27.

<sup>108</sup> *ibid* 27.

<sup>109</sup> Yerxa (n55) 27.

<sup>110</sup> World Trade Organisation, 'WTO Bodies involved in the dispute settlement process. Panels', < [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c3s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s3p1_e.htm) > accessed 8.01.2022

<sup>111</sup> Bossche (n 8) 243.

*we have no doubt that the panel set out, in its report, a 'basic rationale' consistent with the requirements of Article 12.7 of the DSU.*<sup>112</sup>

The developing country which involved in a dispute, the panel in its report should summarise how the panel pay attention on the provisions of special or differential treatment that such country Member has raised before.<sup>113</sup> For instance, it is illustrated in panel report on **India-Quantitative Restrictions**, where was found that:

*'In this instance, we have noted that Article XVIII: B as a whole, on which our analysis through this section is based, embodies the principle of special and differential treatments in relations to measures taken for balance-of-payments purposes. This entire part G therefore reflects our consideration of relevant provisions on special and differential treatment, as does Section VII of our report (suggestion for implementation).'*<sup>114</sup>

In case of irreconcilable measures with the covered agreement of a party in a dispute, the Member concerned should be recommended to bring that measure in compliance with the agreement. A panel's recommendations and rulings are not compulsory and become binding after adoption by the DSB.<sup>115</sup> Panel members may express their own opinion anonymously, in the panel's report, whether they agree or not. Panel reports are provided in English, French and Spanish and it available to the public.<sup>116</sup>

According to the Article 27.1 of the DSU, the WTO Secretariat is liable for assisting the panels on historical, legal and procedural aspects and of providing secretarial and technical support.<sup>117</sup> The Secretariat works to ensure a certain coherence among the panels, as it is not permanent body. Additionally, the Secretariat supports a body that is usually consist of one secretary and one lawyer, where one belongs to the Secretariat, the other to the Legal Affairs Division. The Rules Division help the panels with trade disputes remedies such as anti-dumping and subsidies.<sup>118</sup> Most compelling evidence is

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<sup>112</sup> WTO, *Argentina-Footwear (EC) – Report of Appellate Body*, (1999), WT/DS126/R, para. 149

<sup>113</sup> Bossche (n 8) 243.

<sup>114</sup> WTO, *India-Quantitative Restrictions – Panel Report* (1999), WT/DS90/R, para. 5.157.

<sup>115</sup> Bossche (n 8) 244.

<sup>116</sup> Ibid 244.

<sup>117</sup> DSU Article 27.1

<sup>118</sup> More detailed information is provided on the official website of WTO

< [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm) > accessed 8.01.2022

when in a dispute involving a measure from SPS, employees are from Agriculture and Commodities. The Legal Affairs Division is also involved to cooperate with panel. Panels deal with cases related to trading, subsidies, countervailing duties and anti-dumping are.

As mentioned above, the main aim of the Secretariat is to assist panel and it is a subject of the Rules of Conduct, and its obligations are based on independence, fairness and confidence.<sup>119</sup>

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<sup>119</sup> Bossche (n 8) 244.

### 2.3. Appellate Body

To begin with, the Appellate Body is a permanently functioning body consist of seven candidates that decides on settling of appeals against panels reports. The AB has the authority to confirm, reverse or reject legal findings and conclusions of a panel. At the moment, the AB is unable to investigate appeals on a regular basis. The term of service of the last AB candidate expired on 30 November 2020.<sup>120</sup> Under the DSU, Panels and the AB have precise authority. Must be remembered, according to the Uruguay Round the AB as an independent and standing body to reinforce resolution of dispute.<sup>121</sup>

The main reason of the AB establishment is the automatic acceptance of reports since the DSU was adopted. Under the current DSS, members personally have no power to avert adoption of a panel report unless it would be decided by consensus.<sup>122</sup> This removes the previous ability for the party who lose to block the adoption of the report, but also the possibility to block reports in case of disagreement. Moreover, according to Article 17.6 of the DSU, the AB has the power to examine the legal issues and the legal context.<sup>123</sup>

Each Member State is entitled to appeal the panel decision in a claim. The AB consist of various qualified experts; however, their jurisdiction is limited. However, Member States have power to make additional agreements and take steps follow the implementation of the Panels and AB decisions. As mentioned above, Member States may have recourse to further options or support from DSB system in case of problems in the implementation process. After all, failure to comply with a DSB ruling can be result in adoption a decision by the General Council in allowing the Member State which interests were infringed to impose trade sanctions on the respondent state.<sup>124</sup>

At the same time, AB members serve a four-year term one candidate from each WTO country members. In addition, three members responsible for the case, who was chosen randomly to handling the dispute. This is formally called division.<sup>125</sup>

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<sup>120</sup> The US blocked of appointments to the Appellate Body, the highest instance, as a result the AB is unable to hear new appeals, no disputes cannot be resolved. More information can be found on the official website of WTO, 'Dispute Settlement: Appellate Body', [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) >accessed 8.01.2022

<sup>121</sup> WTO Secretariat (n 20) 32.

<sup>122</sup> Ibid, 32.

<sup>123</sup> Ibid, 32.

<sup>124</sup> Alexandra R Harrington (n 79) 27.

<sup>125</sup> Ibid, 27

Above all, during the appeal process the legal interpretations and conclusions concerned are limited. Decisions are taken by majority of votes.<sup>126</sup>

Article 17.3 of the DSU provides with the required qualifications of AB members:

*‘The Appellate Body shall be composed of persons of recognised authority, who have demonstrated expertise in law, international trade and the subject matter of the agreement in question. They shall not be affiliated with any government.’*

Hence, the Appellate Body members should have a specific knowledge to give the opportunity to settle the legal issues and interpretations. In its decision, the DSB stated:

*‘The success of the WTO will depend on the appropriate composition of the Appellate Body, and it should be staffed with individuals of the highest calibre.’<sup>127</sup>*

The conduct of the AB and the Secretariat is governed by DSU which underline that the members of AB must be independent, and impartial and avoid conflicts of interest. Moreover, a Chairperson is elected for a term of one year, which can be extended for another year and he is liable for the overall management of the business of AB.<sup>128</sup>

In conclusion, the Panel along with AB produce reports rather than binding judgements as it does not create binding precedents and it is only applicable to the WTO Members.<sup>129</sup>

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<sup>126</sup> Harrington (n 79) 28.

<sup>127</sup> Bossche, Peter van den, *The law and policy of the World Trade Organisation: text, cases and materials* (Cambridge University Press 2005) 245.

<sup>128</sup> WTO, ‘Dispute Settlement: Appellate Body’,

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm)> accessed 29.01.2022

<sup>129</sup> Dewi, (n 85) 224.

## 2.4. Arbitrations

First of all, the scope of the DSS powers is subject of debate on how legally binding the rules of WTO should be.<sup>130</sup> Adjudication is an alternative replacement of AB and panel. Under Article 25 of the DSU if the parties prefer, they can choose arbitration, which is a subject to the consent of the parties. These awards are mandatory and cannot be challenged.<sup>131</sup>

Moreover, in arbitration two specific situations and question in the process are commonly used. At the first situation a respondent request arbitration because the nature of the retaliatory measures suggested by the interpretation of specific questions in the process of implementation and its decision is binding.<sup>132</sup> Each member, and it is no matter current or former, acts as an arbitrator. At the second situation a respondent such request it objects to the retaliatory measures which suggested by complainant.<sup>133</sup> In the contexts of reinforcement these two forms of conciliation are limited to the clarification of particular issues. In addition to legal employees economist from the Economic Research and Statistic Division is included.<sup>134</sup>

What is more, arbitration is the best way for parties, who are devastated with long-term litigation and enormous costs.<sup>135</sup>

Despite arbitration's benefits, before panel disputed parties rely mostly on adjudication. Except otherwise provided by Understanding, arbitration has only been used once, in dispute between the US and EU about the amount of nullification caused by regime that was previously found to be inconsistent.<sup>136</sup>

On 30 April 2020, the WTO Members was presented to the DSB of the Multi-Party Interim Appeal (MPIA). This was an ideal way out from the paralysis of the Appellate Body in 2017 by US.<sup>137</sup> Some opponents proposed to present the arbitration process under Article 25 DSU to enable panel reports, so called 'the Anderson Proposal', which

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<sup>130</sup> Simon Lester, 'Can Interim Arbitration Preserve the WTO Dispute System?', (2020) Free Trade Bulletin <https://www.cato.org/free-trade-bulletin/can-interim-appeal-arbitration-preserve-wto-dispute-system> accessed 12 February 2022

<sup>131</sup> Lester (n 132).

<sup>132</sup> WTO Secretariat (n 20) 34.

<sup>133</sup> Ibid 34.

<sup>134</sup> Ibid 35.

<sup>135</sup> Bashar H. Malkawi, 'Arbitration and the World Trade Organisation. The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding' (2007) 24(2) Journal of International Arbitration 182

<sup>136</sup> Ibid 182.

<sup>137</sup> Xiaoling Li 'DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body', (2020) 15 10 Global Trade and Customs Journal 461.

has arisen much discussion and attention. In 2019 the EU submitted the draft of ‘Interim Appeal Arbitration pursuant to Article 25 DSU’, so called ‘the EU Proposal’, which adopted the Anderson Proposal with some enhancement. Moreover, the EU also signed bilateral agreements with Canada and Norway to introduce DSU Article 25 DSU appeal arbitrations.<sup>138</sup> The termination of the AB on the 2019 has a negative impact on DSS as a losing party may appeal the panel report into the void and accelerated way to get out of the difficult situation, and now there has been a gradual support for this Article 25. The former member of the Appellate Body, James Bacchus told in an interview:

*‘Now it seems to be the best option, given all the lousy options we have left’*

On 2020 ministers of 17<sup>th</sup> Members issued a joint announcement, with high intention to cooperate in developing a MPIA based on Article 25 DSU.<sup>139</sup> DSU Article 25 is general and flexible, and at the same time the Article 25 developed by Members could be substantially different. For those who refer to arbitration, will be two possible alternatives: arbitration performed by the adjudicatory body; or by ad hoc tribunals - on case by case basis. In first alternative part is a will not to rehearse basic features of the AB, such as collegiality and the rule of precedent.<sup>140</sup> The second alternative has three models which is up to arbitrator selection process: the WTO panel-model, the Permanent Court of Arbitration-model and the classical arbitration. Roughly speaking, both the Anderson Proposal along with the EU Proposal proposed arbitration to be performed by tribunals. Unlike the original EU Proposal, the MPIA follows the AB model.<sup>141</sup>

Furthermore, In *US – Certain European Communities Products*<sup>142</sup>, the panel found that Article 25 of the DSU provides for arbitration as a means of resolving WTO related disputes and stated the following:

*‘Although the panel (the AB) procedure is the most commonly used WTO dispute settlement procedure, Article 25 of the DSU, for instance, expressly provides for arbitration as a means of resolving WTO related disputes. There is no reason why the assessment of the compatibility of an implementing measure with WTO law could not*

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<sup>138</sup> Ibid 462

<sup>139</sup> Xiaoling (n 137) 461.

<sup>140</sup> Ibid 461.

<sup>141</sup> Xiaoling (n 137) 461.

<sup>142</sup> WTO, *US-Certain EC Products* – Report of Appellate Body [2000] WT/DS165/R

*be decided through arbitration under Article 25, as one of the WTO dispute settlement procedures.*<sup>143</sup>

Moreover, In order to find a mutually acceptable solution, members may engage in consultations or have recourse to mediation and good offices.<sup>144</sup>

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<sup>143</sup> WTO, *US-Certain EC Products* – Report of Appellate Body [2000] WT/DS165/R, para. 6.119

<sup>144</sup> George A. Papaconstantinou & Luigi F. Pedreschi, ‘Alternative Dispute Settlement and the Jurisprudential Legacy of the World Trade Organisation’s Appellate Body’ (2022) 56 2 *Journal of the World Trade* 261.



## 2.5. WTO Dispute Settlement Procedure

Stages of dispute settlement procedure provided by DSU such as: Consultations; Panel Proceedings, Appellate Review Proceedings; Implementation and enforcement of the recommendations and rulings of the panel and/or the Appellate Body.

**Consultations.** This procedure provides an opportunity for the parties to discuss to find a satisfactory solution through. In this way, the respondent is formally informed of the general outlines to be presented later upon the panel request.<sup>145</sup> Such request is a legal precondition for a panel proceeding. In case of failure to resolve the dispute within 60 days of request, the complainant is entitled to request a panel's decision. By the same token, if there is no reaction of respondent on a request, or respondent refuses to accept consultations, the complainant is entitled to waive consultations and establish a panel upon the request.<sup>146</sup>

If there is a failure in resolving dispute at the initial consultation, the parties can find a solution to a dispute through mutual agreement at the last stage of the proceedings. Additionally, in dispute settlement system consultations play an effective role in resolution of dispute and the adjudication and enforcement are necessary. Together with good offices, conciliation and mediation, consultations are the main extrajudicial and diplomatic element of the WTO.<sup>147</sup>

What is more, the legislative framework and regulations for a request initiate a dispute and lead provisions of the Understanding along with provisions of the agreements concerned. At the same time, the DSB and the Councils and Committees is liable for monitoring the agreements concerned.<sup>148</sup> The notification has to be sent by the members to the WTO Secretariat, indicating the other relevant councils or committees. Such request informs all members and the public its subject matter.<sup>149</sup>

**Panel Proceedings.** In case of failure, or whether the consultation is not taking place the complaining party is entitled to establish a panel. Director-General has to settle a panel within two months if one of the parties to the dispute do not deny a panel member. The list of potential candidates is provided by Secretariat. Furthermore, the factual and

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<sup>145</sup> WTO Secretariat, (n 20) 51.

<sup>146</sup> Ibid 51.

<sup>147</sup> WTO official website, 'The Process – Stages in a typical WTO dispute Settlement Case' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c6s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s2p1_e.htm)> accessed 12 February 2022

<sup>148</sup> Ibid 51.

<sup>149</sup> WTO Secretariat (n 20) 52.

judicial aspects of the dispute is issued to the panel, and panel evaluates session with the parties to the dispute and additional information with experts' findings. The outline of the procedure is included in the report.<sup>150</sup> Moreover, the report should be submitted within 182 days. In case of necessity, the panel is obliged to submit reports to the parties within 90 days, however, in practice the process last one year. If there is a delay, the DSB should be informed in writing of the reasons and provide the report. The functioning of panel could put on hold the request of the plaintiff within one year. During this one year the parties have an opportunity to find a solution to solve the dispute. If no way out has been found, the process shall resume.<sup>151</sup>

***Appellate Review Proceedings.*** The AB revise the legal subject and confirms, amends or reverse the panel's legal findings and conclusions. Working Procedures for Appellate Procedures set out the detailed standard operating procedures of the AB, which was developed by the AB, in coordination with the Chair of the DSB and Director – General.<sup>152</sup> Appellate procedure same as panel proceeding begins with written notifications of the parties to the DSB about appeal.<sup>153</sup> During two weeks after submitting such notice, other parties may join the appeal by filing brief from other appellants. Within 25 any party who would like to respond to the allegation of errors of law, should rise such appeal in the appellant's brief.<sup>154</sup>

Furthermore, the department responsible for the appeal shall provide hearing which held 30 days after the filing of notice. The main aim of such hearing is to present and argue a case before the division. After the presentations, the participants to the dispute give clear answer to the questions from the Division. A brief statement is given by participants at the end of the oral hearing.<sup>155</sup>

As mentioned above, the division sign up the report. The appeal could be withdrawn by the appellant. Within one month reports of the AB and panel as confirmed, amended or repealed by the AB, shall be adopted by the DSB.<sup>156</sup>

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<sup>150</sup> Ibid 53.

<sup>151</sup> The Panel Stage, < [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s3p5\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p5_e.htm)> accessed 12 February 2022

<sup>152</sup> Bossche, (n 127) 273.

<sup>153</sup> ibid 273.

<sup>154</sup> The Process – Stages in a typical WTO dispute Settlement Case: Appellate Review, < [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s5p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p1_e.htm) > accessed 12 February 2022

<sup>155</sup> Bossche, (n 127) 274.

<sup>156</sup> Ibid 274.

***Implementation and enforcement of the recommendations and rulings of the panel and/or the Appellate Body.*** It must be acknowledged, the WTO system facilitates the settlement of disputes and the obtaining of a judicial decision.<sup>157</sup> Member concerned must inform the DSB within one month of the adoption of the report of the panel and AB of its intention regarding the implementation of the recommendations and rulings.<sup>158</sup> However, under Article 21.3 of the Understanding if there is no compliance with rulings and recommendations, the parties has a rational period to do so. If reaching an agreement within a reasonable implementation period failed, the complainant may refer to arbitration.<sup>159</sup> The arbitrator is selected by mutual consensus, and in case of disagreement within 10 days, the WTO Director-General appoints an arbitrator if one of the parties requested.<sup>160</sup>

In addition, the DSB supervise the implementation of adopted rulings and recommendations and each member of WTO may raise the issue of recommendation before the DSB.<sup>161</sup> Starting 6 months after the deadline introduction, the issue is transferred to the DSB meeting and remains on the agenda until it is resolved. The status report should be submitted to the DSB.<sup>162</sup>

In case of failure of implementation, then WTO provides two possible options of dispute resolution such as compensation or suspension of the concession or other obligations by the complainant.<sup>163</sup> If the Member fails to abide the rulings and recommendations of the DSB, the Article 22 DSU becomes applicable. Para. 2 Article 22 of the DSU states:

*'If the Member concerned fails to bring the measure found to be inconsistent with the covered agreement into compliance therewith or otherwise comply with the recommendations and rulings... such Member shall, if so requested enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensations'.*<sup>164</sup>

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<sup>157</sup> Dewi (n 85) 235.

<sup>158</sup> Bossche (n 127) 275.

<sup>159</sup> *ibid* 275.

<sup>160</sup> Bossche, (n 127) 278.

<sup>161</sup> *ibid* 278.

<sup>162</sup> *ibid* 279.

<sup>163</sup> Rufus Yerxa and Bruce Wilson (n 5) 234.

<sup>164</sup> Article 22 of the DSU.

The compensation must be consistent with the covered agreement in case of reaching mutual agreement. If no compensation has been agreed, the DSB can suspend concessions or other obligations. The DSB must authorise this during one month of the expiry of the reasonable period of time.<sup>165</sup>

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<sup>165</sup> WTO, 'A unique contribution', < [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) > accessed 19 February 2022

## CHAPTER III. WTO DISPUTE SETTLEMENT CONFLICTS AND REFORMS

### 3.1. Appellate Body crisis and reform

Today, the operation of dispute settlement is in danger since the United States put blockade of the new judges to the AB appointment. US justified their actions because of their concerns about US sovereignty. The US is most often user of the dispute settlement system most often challenge subsidies that considers as illegal. The US filed 123 cases, and in 86% of cases US achieved success and in 25% of cases US performed as defender. At the most cases US took part in the AB stages. The US has opposed the use of the dispute settlement system since the WTO began.<sup>166</sup>

Most compelling evidence took place in 2011 where the US did not reappoint US official Jennifer Hillman to the AB. Another example took place in three years later, where US blocked an appointment of James Gathii, Kenyan, and in 2016, Korean law professor Seung Wha Chang<sup>167</sup> Moreover, any kind of attempts to reform the system in order to replace of AB did not reach success. In addition, the terms of last candidates of AB Mr. Ujjal Singh Bhatia (India) and Mr. Thomas R. Graham (US) expired and the AB is restricted to hear appeals. To address the crisis, the *Scholl Chair* has classified and compiled analyses of the AB situation.<sup>168</sup>

In its report, the US emphasised that the AB did not follow the mutually agreed rules has undermined trust in line of free and fair trading system.<sup>169</sup> Blocking the functioning of AB infringe the WTO's obligations to abide good faith with the DSU rules.<sup>170</sup>

It is important to note, former director *Werner Zdouc* was convinced that an issue was not the members of AB, but the AB Secretariat:

*'the most powerful international official no one has ever heard of, exerts undue influence on the AB, including by writing or revising draft appeal reports'*.<sup>171</sup>

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<sup>166</sup> Marek Wasinski, 'US on WTO Reform: Aiming to Contain China' (2019) 59 (1305) PISM 1.

<sup>167</sup> Henry Gao, 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Agreement' (2021) 24 Journal of International Economic Law 534

<sup>168</sup> Gary Clayed Hoffbauer, 'Rules of International Trade, Investment and Financial System' (2014) Journal of International Economic Law, 838.

<sup>169</sup> Center for Strategic & International Studies CSIS <<https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis>> accessed 12 March 2022

<sup>170</sup> Chang-fa Lo, Junji Nakagawa, , The Appellate Body of the WTO Reform ' (2020) Springer 21.

<sup>171</sup> Henry Gao 'A Rule-Based Solutions to the Appellate Body crisis and why the MPIA would not work' (2021) 2 Institutional Knowledge at Singapore Management University 6.

Former director was convinced, first step to reform should be review and revise all documents submitted AB. However, his suggestion was not successful. The view was supported by US government, as well as by two former AB members.<sup>172</sup>

Many proposals have been suggested by both WTO members and scholars and solution to this problem are widely discussed.<sup>173</sup> WTO Director General **Roberto Azevedo** was convinced that there is no progress and no solution. **South Korea** stated that dispute settlement system underlines the operation of organisation and argued it will be mistake if dispute settlement system will be lost.<sup>174</sup> Moreover, two possible solutions suggested to evade the US blockade and allow mandatory WTO dispute settlement to continue after 2019. Under one variant, Members should vote on the appointment of members to AB, while another solution would the AB will be included in modifying its procedural rules to allow continuation of binding dispute resolution after it has become inoperable.<sup>175</sup>

What is more, **Peter Jan Kuijper** in case of failure to reach consensus, the WTO Agreement is superior to the DSU, as such agreement allows for votes by the General Council and the Ministerial Conference. He proposed an appointment of the AB candidates by the General Council.<sup>176</sup> **Jennifer Hillman** suggested to interpret the DSU to allow the appointment of ABMs without consensus. Her argument was built on Article 2.4 of the DSU, consensus as the only means for a ‘decision by the DSB’.<sup>177</sup> **Ernst-Ulrich Petersmann** argued that voting is not an exceptional measure but the right of members:

*‘WTO members are legally obliged to overcome the illegal ‘blocking’ of appointments to AB posts.’*<sup>178</sup>

However, proposed way out have no strong justification as they contradict of the clear condition lay out in the DSU for the DSB to decide. As a general rule, decision-making

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<sup>172</sup> Hanry Gao (n 167) 536.

<sup>173</sup> Ibid 539.

<sup>174</sup> Fortnam, Brett ‘WTO members at odds over plurilateral initiatives, worried about Appellate Body crisis’ (2018) Inside US Trade Report  
<[https://searchproquestcom.uaccess.univie.ac.at/docview/2154192626?rfr\\_id=info%3Axri%2Fsid%3Aprimo](https://searchproquestcom.uaccess.univie.ac.at/docview/2154192626?rfr_id=info%3Axri%2Fsid%3Aprimo)> accessed 13 March 2022

<sup>175</sup> Geraldo Vidigal, ‘Living without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis’ (2019) Journal of World Investment & Trade 862

<sup>176</sup> Ibid.

<sup>177</sup> Vidigal (n 175) 863.

<sup>178</sup> Ibid, 863.

by consensus while providing for fallback procedures that gives the opportunity to WTO members to prevail the opposition of those who refuse. The main exception from this rule will be DSB decision-making, in particular the appointment of members to the AB. The Understanding stipulates that consensus is only reached when at the meeting of the DSB there is no candidate to the AB position.<sup>179</sup> The second type of solution is to use the power of the AB to reform their workflow in order to continue dispute settlement proceedings after the AB itself is no longer operational.

Another scholar, *Steve Charnovitz* proposed a rule that, in the case of a non-operating AB, each panel report will be upheld:

*'the contest of the appeal' will automatically take place on the same day that the appeal is filed*.<sup>180</sup>

Moreover, this type of solution overrides the obligations of the AB to hear the disputes.<sup>181</sup> As a matter of fact, any reform has both progressive as well as conservative implications, based on improving the system of rules.<sup>182</sup>

Reform proposed by numerous academic commentators as well as members caused negotiations to be a long-lasting and complicated process as shown by the Doha Round. There are doubts that such difficulties impelled members to resort to Regional Trade Agreements (RTAs) instead, thus, it further deteriorates and undermines the multilateral non-discriminatory trade system of the WTO.<sup>183</sup> Nevertheless, RTA negotiations can also be problematic, as evidenced, for example, the public debate and political controversies surrounding the Transatlantic Trade and Investment Partnership (TTIP), the accelerated proliferation of free trade agreements (FTAs), multilateral trade agreements (PTAs, RTAs), is considered as reducing the role of the WTO.<sup>184</sup> In the review debate, very different proposals were presented by WTO members, covering almost all DSU provisions, some

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<sup>179</sup> Vidigal (n 175) 864.

<sup>180</sup> Steve Charnovitz, 'How to Save WTO Dispute Settlement from the Trump Administration' (2017) International Economic Law and Policy Blog <<https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>> accessed 13 March 2022

<sup>181</sup> Vidigal (n 175) 870.

<sup>182</sup> Friedl Weiss, *The WTO – A Suitable Case for Treatment? Is It Reformable?* (Ch 7 2016), 124

<sup>183</sup> Friedl Weiss (n 182) 119.

<sup>184</sup> Antonio Segura Serrano, *The Reform of International Economic Governance* (1<sup>st</sup> edn. Ch 23, 2016)

of which are very controversial.<sup>185</sup> The EU and other member's proposals based on previous EU and Canadian papers presenting ideas for reforming and modernising the WTO. The AB is the key to security of the trading system and without an appropriate enforcement system, rules can no longer function effectively.<sup>186</sup> Moreover, the proposal addresses the following five issues:

- ***Transitional rules for outgoing Appellate Body Members.*** To amend Article 17.2 of the DSU in order to allow an AB member who leaves his post to complete the settlement of appeal in which has already heard during his term of office.
- ***The 90-day issue.*** It is proposed to amend the 90-day rule in Article 17.5 of the Understanding by offering for reinforce consultation and obligation for the AB, and it would give the parties the opportunity to the exceed the 90-day timeframe. New Zealand's Ambassador of WTO, David Walker was appointed as a facilitator by the Chair of the General Council and task with improving the operating of AB.<sup>187</sup>
- ***The meaning of municipal law as an issue of fact.*** It is proposed in order to provide certainty a footnote should be added to Article 17.6 Understanding, the question of law and the legal interpretations developed by the panel do not cover the meaning of a party's actions, but rather the panel's findings.
- ***Findings that are not necessary for the resolution of the dispute.*** Was proposed that Article 17.12 of the DSU should be amended, an issue raised should be transferred to the appeal to the extent necessary to solve the dispute.
- ***The issue of precedent.*** It is proposed that a new DSU 17.15, be added to any WTO member may express its opinion on the adopted AB reports during the meeting.<sup>188</sup>

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<sup>185</sup> Wolfgang Weiss, 'Reforming the Dispute Settlement Understanding' (Cambridge University Press, 2008) 269.

<sup>186</sup> Mena Reform, 'Belgium: WTO Reform: EU Proposes Way forward on the Functioning of the Appellate Body' (2018) 26 Gale Academic OneFile  
<[https://gogale.com.uaccess.univie.ac.at/ps/retrieve.do?tabID=T004&resultListType=RESULT\\_LIST&searchResultsType=SingleTab&searchType=AdvancedSearchForm&currentPosition=1&docId=GALE%7CA563411664&docType=Article&sort=RELEVANCE&contentSegment=ZONE-MOD1&prodId=AONE&contentSet=GALE%7CA563411664&searchId=R1&userGroupName=43wien&inPS=true&ps=1&cp=1](https://gogale.com.uaccess.univie.ac.at/ps/retrieve.do?tabID=T004&resultListType=RESULT_LIST&searchResultsType=SingleTab&searchType=AdvancedSearchForm&currentPosition=1&docId=GALE%7CA563411664&docType=Article&sort=RELEVANCE&contentSegment=ZONE-MOD1&prodId=AONE&contentSet=GALE%7CA563411664&searchId=R1&userGroupName=43wien&inPS=true&ps=1&cp=1)> accessed 13 March 2022

<sup>187</sup> WTO 'Proposals to reform the WTO Appellate Body' (2018)  
<[https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157514.pdf](https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf)> accessed 13 March 2022

<sup>188</sup> Terence Stewart 'Proposals for WTO Dispute Settlement Reform – A First Step but Not Enough' (2018) WITA <<https://www.wita.org/blogs/proposals-for-wto-dispute-settlement-reform-a-first-step-but-not-enough/>> accessed 13 March 2022



- ***Independence of Appellate Body members.*** It is proposed to amend DSU 17.2 to broaden the term of an AB member to 6 or 8 years, and restrict the term of office to one term.
- ***Efficiency and ability to deliver.*** The amendment of DSU 17.1 was proposed, in order to expand the amount of the AB members. This would improve the efficiency and internal organisation of the AB. Proposes to amend DSU 17.3 to state that AB ‘shall not engage in any other professional activity’. Proposes to modify Article 17.8 Understanding ‘the terms and conditions of employment’ of AB.<sup>189</sup>
- ***Transitional rules for outgoing Appellate Body members.*** It is proposed to modify DSU 17.2, a AB member who retires shall hold office until he will be replaced.<sup>190</sup>

Former WTO Deputy Director General **Andy Stoler** suggested, firstly the measures should be taken to reinforce Member instructions to AB that they are barred from reviewing factual aspects of panel reports<sup>191</sup> Secondly, in any case where the AB, fails to comply with the requirements of Article 17.6 in its report, a procedure should be provided for an appellant party to request conciliation and amendment of the AB report before the DSB.<sup>192</sup>

**MPIA.** The another proposal about reform of AB was highlighted by **Pieter Jan Kuijper**, former Director of the Legal Affairs Division of the WTO Secretariat. He proposed a solution outside the WTO in his blog ‘The Real Friends of Dispute Settlement’:<sup>193</sup>

*‘As soon as the US would have caused the membership of the AB blockage, which make impossible to deliver AB reports. It would contain a procedure for appellate review only, or even complete dispute settlement procedure, based on existing provisions of the DSU with a few changes. Provisional application of this treaty should be possible in order to ensure that it would become operational very quickly. The members of AB would resign and be taken over as members of the Appellate Tribunal of the new treaty, to be joined by newly selected members.’<sup>194</sup>*

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<sup>189</sup> Terence Stewart (n 188).

<sup>190</sup> *ibid*

<sup>191</sup> Dencho Georgiev and Kim Van der Borgh ,*Reform and Development of the WTO Dispute Settlement System* (Cameron May Ltd, 2006) 443.

<sup>192</sup> *Ibid* 443.

<sup>193</sup> Hanry Gao (n 175) 539.

<sup>194</sup> Pieter Jan Kuijper, ‘Guest Post from Pieter Jan Kuijper on the US Attack on the Appellate Body’ (2017) International Economic Law and Policy Blog

Kuijper's proposal, however, was difficult to implement in short time otherwise the new treaty is required. However, this issue was solved by lawyers from the law company of Sidley Austin, and the idea of arbitrators under Article 25 DSU was encouraged by former AB Chair **James Bacchus**.<sup>195</sup> In January 2020 WTO members proclaimed their work on 'emergency measure' that would allow appeals in disputes between WTO panels, in the form of a multi-sided interim appeals system that would replace AB until it become fully operational.<sup>196</sup> In a final step, in July 2020 ten arbitrators were appointed to hear appeals under the MPIA.<sup>197</sup> Since the AB is no longer operational, it allows participants to benefit from an appeal process.<sup>198</sup> WTO member can join the MPIA.<sup>199</sup> Moreover, Trade Commissioner **Phil Hogan** said in the interview:

*'With the agreed pool of arbitrators, the interim appeal arrangement for the WTO disputes is now up and running. It shows that participating WTO members are willing to take concrete action to preserve an independent dispute settlement system with an appeal function. We can now turn our attention to finding a solution to the underlying problems through reform of the WTO AB and other aspects of the WTO system that need improvement.'*<sup>200</sup>

Nevertheless, the WTO has met the dispute settlement needs of its members with the efficient functioning of panel and AB procedure. Article 25 of the DSU sets out the necessary provisions of the arbitration agreement, the initiation of proceedings, and enforcement of arbitral awards. Based on the principle of autonomy, the agreement is the ground for the initiation of arbitration under Article 25. Arbitration does not rely on the conduct of the DSB.<sup>201</sup>

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< <https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuijper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html> > accessed 14 March 2022

<sup>195</sup> Hanry Gao (n 171) 540.

<sup>196</sup> Ibid 541.

<sup>197</sup> Geneva Trade Platform, 'Multi-Party Interim Appeal Arbitration Arrangement' <[https://wtoplurilaterals.info/plural\\_initiative/the-mpia/](https://wtoplurilaterals.info/plural_initiative/the-mpia/)> accessed 21 March 2022

<sup>198</sup> European Commission, 'The WTO multi-party interim appeal arrangement gets operational' (3 August 2020)

< <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176> > accessed 14 March 2022

<sup>199</sup> Geneva Trade Platform (n197).

<sup>200</sup> European Commission (n 198).

<sup>201</sup> Abid Shah Jillani & Ximei Wu, 'Article 25 as an Alternative Way to Resolve the Crisis of the WTO Dispute Settlement Mechanism: A Chinese Perspective' (2021) 1 CWR 153.

However, WTO Members are not experienced with arbitration under Article 25 DSU and only one case has been resolved<sup>202</sup> in 2001, *United States – Section 110(5) of the US Copyright Act Recourse to Arbitration under Article 25 of the DSU*:

*‘... is being notified to the DSB and the TRIPS Council where any Member may raise any point relating thereto, pursuant to Article 25.3 of the DSU. The award is being circulated as an unrestricted document from November 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Document.’*<sup>203</sup>

It is important to mention, the MPIA is structured in three parts. The first part released the form of a political contact to the DSB which contains the core principles and essential elements of the MPIA’s appeal mechanism. The second part contains a model for agreed procedures for conciliation under Article 25 of the DSU. The third part of the MPIA concerns the selection process of MPIA arbitrators.<sup>204</sup>

Nowadays, in disputes, parties filed a notice under Article 25 agreeing to invoke the MPIA. To resolve their dispute both party should challenge the report of the panel.<sup>205</sup>

Furthermore, in some cases, parties have recently submitted a joint request for under Article 25 of Understanding. The joint request is important for activation the MPIA, as the MPIA is not a treaty, which is not mandatory.<sup>206</sup>

***Canada – Measure Concerning Trade in Commercial Aircraft – Communication from Brazil***, from 2021. In 2017 Brazil requested consultations with Canada with respect to measures concerning trade in commercial aircraft.<sup>207</sup> On February 2021 parties came to mutually agreed solutions.

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<sup>202</sup> Carline Glöckle, ‘Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO’s Appellate Body?’ (2020) Völkerrechtsblog International Law & International Legal Thought <<https://voelkerrechtsblog.org/bridging-the-gap-the-mpia-as-a-valuable-short-term-solution-to-the-impasse-of-the-wtos-appellate-body/>> accessed 22 March 2022

<sup>203</sup> WTO, *United States – Section 110(5) of the US Copyright Act Recourse to Arbitration under Article 25 of the DSU – Report of Appellate Body* (2001) WT/DS160/ARB25/1, para.1.

<sup>204</sup> Carline Glöckle, (n 202).

<sup>205</sup> Geneva Trade Platform (n 197).

<sup>206</sup> Ministry of Foreign Trade and Tourism of Peru, ‘Let’s Go to Arbitration! A solution to the WTO Appellate Body Impasse?’ (2020) Regulating for Globalisation, Trade, Labour and EU Law Perspectives <<http://regulatingforglobalization.com/2020/10/05/lets-go-to-arbitration-a-solution-to-the-wto-appellate-body-impasse/>> accessed 22 March 2022

<sup>207</sup> WTO, *Canada – Measure Concerning Trade in Commercial Aircraft – Communication from Brazil – Dispute Settlement Body Review* (2021) WT/DS522/23 para. 1.

*‘With respect to the above-mentioned dispute for which a panel was established on 29 September 2017, Brazil hereby notifies its decision to withdraw the complaint.’<sup>208</sup>*

Another case which came to mutually agreed solutions and recently notified arbitration under Article 25 of the DSU is ***Canada – Measure Governing the Sale of Wine***, parties notified a mutually agreed solutions on May 2021. In its panel report:

*‘... the Panel concludes its work by reporting that a mutually agreed solution to this dispute has been reached between the parties.’<sup>209</sup>*

In ***Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico***:

*‘Mexico and Costa Rica have notified the Panel of an amendment to the Procedures for Arbitration under Article 25 of the DSU. In light of the above, both parties respectfully request that Members be notified of this version of the Procedures for Arbitration, by circulating them in the DS documents series for this dispute.’<sup>210</sup>*

In ***Columbia – Anti – Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands***,

*,In order to give effect to communication in this dispute the EU and Columbia mutually agree pursuant to Article 25.2 of the DSU to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties in dispute.’<sup>211</sup>*

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<sup>208</sup> Ibid, para. 1.

<sup>209</sup> WTO, *Canada – Measure Governing the Sale of Wine – Panel Report* (2021), WT/DS537/R, para. 3.9.

<sup>210</sup> WTO, *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico – Dispute Settlement Report* (2021) WT/DS524/5/Rev.1

<sup>211</sup> WTO, *Columbia – Anti – Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands – Dispute Settlement Body Review*, (2021) WT/DS591/3/Rev.1 para.1

The MPIA based on the WTO rules on appeals, however, it is not intended to replace the WTO AB.<sup>212</sup> The MPIA has several drawbacks, the most important of which are the following:

The first problem is that WTO Members are denied their right to appeal. According to para. 2 of the MPIA Arrangement, participating Members will not appeals under Article 16.4 and 17 of the DSU.<sup>213</sup> If they resort to MPIA is unclear whether this prohibition is binding.<sup>214</sup>

The second question concerns the binding nature of MPIA awards. Even though the MPIA has moved away from its previous position of setting binding precedents, it is binding only for the parties to the disputes. The MPIA provides that the award is communicated to the DSB, but not adopted, thus, the binding force cannot come from DSB. Instead, it becomes binding only if the parties agree to abide. Moreover, by removing requirements for acceptance by the DSB, awards would be impossible for disputing parties to reject it, making the MPIA more binding as an extrajudicial mechanism than the AB.<sup>215</sup>

My aim in this paper is to examine legal issues of crisis and suggest possible solutions. From my point of view, MPIA is the way out of these issues, however the challenge for the WTO is whether its diversity of Members and need for consensus makes any forward movement on these issues in the upcoming period.<sup>216</sup> After two years without functioning AB, the dispute settlement system slowed down but not suspended. During last year a few cases initiated, but its amount remains lower than before.<sup>217</sup> Since the appellant loses the arbitration, it is most reasonable for him to withdraw from the arbitration, but he cannot do so because the MPIA does not provide such a right.<sup>218,219</sup>

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<sup>212</sup> European Commission, 'Interim appeal arrangement for WTO disputes becomes effective' (30 April 2020) < <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143> > accessed 14 March 2022.

<sup>213</sup> WTO, Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU para 2. (2020)

<sup>214</sup> Gao (n 175) 13.

<sup>215</sup> Ibid, 13.

<sup>216</sup> Geneva Trade Platform, 'Multi-Party Interim Appeal Arbitration Arrangement' < [https://wtoplurilaterals.info/plural\\_initiative/the-mpia/](https://wtoplurilaterals.info/plural_initiative/the-mpia/) > accessed 14 March 2022

<sup>217</sup> Washington Publishers, 'Dispute Settlement in 2022: Reckonings for Section 232 Tariffs, MPIA?' (2022) 40 (1) Inside US Trade ProQuest 1 <

<https://www.proquest.com/docview/2617264267?parentSessionId=7hdrPZeb915uUTvKQOk7u%2F%2FDqKKQmXNnqckubywiK4c%3D&pq-origsite=primo&accountid=14682> > accessed 14 March 2022

<sup>218</sup> Henry Gao, 'How to Game the MPIA, or, How to Avoid Being Taken Advantage of in the MPIA' (2020) International Economic Law and Policy Blog < <https://ielp.worldtradelaw.net/2020/06/how-to-game-the-mpia-or-how-to-avoid-being-taken-advantage-of-in-the-mpia.html> > accessed 14 March 2022

<sup>219</sup> ibid < <https://ielp.worldtradelaw.net/2020/06/how-to-game-the-mpia-or-how-to-avoid-being-taken-advantage-of-in-the-mpia.html> > accessed 14 March 2022

To examine MPIA and previous appeal proceeding, the right to withdraw under the Rule 30 which, could have be denied by the AB, and thus there seems to be no way to stop a withdrawal.<sup>220</sup> However, I strongly support the opinion that the MPIA ruling should not be more binding than panel report.<sup>221</sup>

Furthermore, according to the Understanding the panel's ruling should be presented in 6 months, but practice shows it can last three years.<sup>222</sup> Many researches turned to AB, as it is a balance of market access. However, a little attention is paid to the panel stage.<sup>223</sup> I fully endorse the view of the Thomas Cottier which suggested the introduction of permanent panel chairs, to ensure continuity and respect by the Secretariat and AB; partial professionalization of the panel phase would also allow for the introduction of referral powers in complex cases; current restrictions due to third country participation should be left behind; members or panel work in their personal capacity.<sup>224</sup> In my opinion, the reform must look at the panel and the appellate procedure together and used the special advantages of both procedures, as they differ in structure, functioning, and legitimacy.<sup>225</sup>

It is important to mention, the administration of new US President Joe Biden finally changed its position in response to Russia's invasion to Ukraine. It made the world more aware of global issues and interconnectedness.<sup>226</sup> Today, the state of international trade is back in the spotlight. The Biden's administration has finally recognised the importance of strong trade relations and now US holds consultations with the EU to expand cooperation in trade and technology, as well as in other areas such as agriculture.<sup>227</sup>

The most immediate economic impact of the crisis was a sharp rise in commodity prices. Despite their small share in world trade and production, Russia and Ukraine are important suppliers of vital commodities such food, energy and fertilisers, whose supply

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<sup>220</sup> Gao (n 218) 18.

<sup>221</sup> Ibid 18.

<sup>222</sup> Thomas Cottier, 'Recalibrating the WTO Dispute Settlement System: Strengthening the Panel Stage' (2020) Centre for International Governance Innovation < <https://www.cigionline.org/articles/recalibrating-wto-dispute-settlement-system-strengthening-panel-stage/> > accessed 14 March 2022

<sup>223</sup> *ibid*

<sup>224</sup> Cottier (n 222).

<sup>225</sup> Thomas Cottier, 'Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review' (2021) 24 *Journal of International Economic Law* 515.

<sup>226</sup> Anne O. Krueger, 'Will the Ukraine War Revive the WTO?' (2022) Project Syndicate The World's Opinion Page < <https://www.project-syndicate.org/commentary/wto-dispute-settlement-new-trade-issues-friend-shoring-by-anne-o-krueger-2022-05> > accessed 28 June 2022

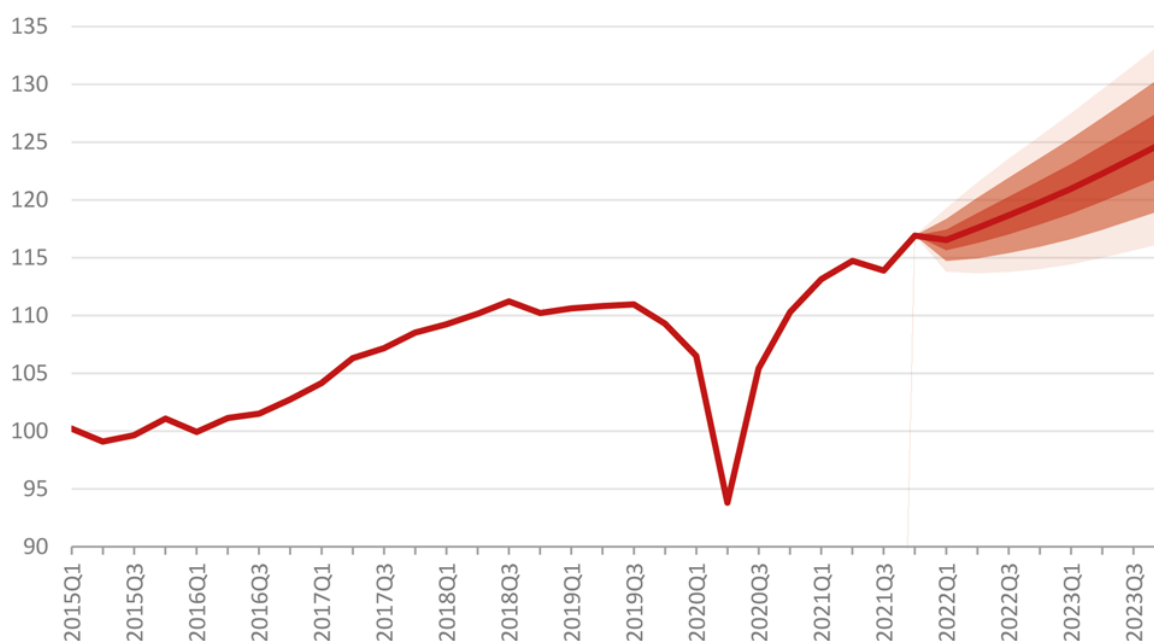
<sup>227</sup> *ibid*

is now threatened by the war.<sup>228</sup> Grain shipments through the Black Sea ports have already been blocked, with potentially dire consequences for food security in poor countries. Another issue is inflation, which caused a record increase for electricity, gas and products, which is the biggest crisis of the decade. However, the war is not the only factor weighing on world trade at the moment, Covid – 19 has hurt the world trade. This could lead to a renewed shortage of productive resources and higher inflation.<sup>229</sup>

Moreover, **Director-General Ngozi Okonjo-Iweala** said:

*‘Smaller supplies and higher prices for food mean that the world’s poor could be forced to do without.’*<sup>230</sup>

Chart 1. Volume of world merchandise trade, 2015Q1 – 2023Q4<sup>231</sup>



This Chart illustrates quarterly world merchandise trade volume estimates through the end of 2023. Given current GDP assumptions, merchandise trade volume growth in 2022.<sup>232</sup>

<sup>228</sup> WTO, ‘Russia-Ukraine Conflict Puts Fragile Global Trade Recovery at Risk’ (2022) <[https://www.wto.org/english/news\\_e/pres22\\_e/pr902\\_e.htm](https://www.wto.org/english/news_e/pres22_e/pr902_e.htm)> accessed 28 June 2022

<sup>229</sup> ibid

<sup>230</sup> ibid

<sup>231</sup> WTO (n233).

<sup>232</sup> WTO (n 233).

To summarise, the current crisis over the appointment of AB threatens to WTO AB, dysfunctional and prevents the WTO's binding and compulsory dispute settlement system from continuing to function. Solutions aimed at evade the US blocking of appointments are both fragile and dangerous, as they jeopardise the delicate balance struck in the WTO Agreements between creating an enforcement mechanism without blocking, on the one hand, and giving members control over the creation of new obligations, when they adopt it, on the other hand.<sup>233</sup> Moreover, the settlement of trade disputes is one of the core tasks of the WTO. The WTO has one of the most active international dispute settlement mechanisms in the world.<sup>234</sup>

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<sup>233</sup> Bencho Georgiev, (n 191) 444.

<sup>234</sup> World Trade Organization, 'Dispute Settlement'

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)> accessed 14 March 2022.



### 3.2. The Covid-19 crisis in the global economy and trade. The possible benefits and limits.

The Covid-19 restriction and trade crisis, hit the WTO at a time when organisation was not in a good shape.<sup>235</sup> In 2020, the WTO has announced a forecast for world trade, stated that trade will decline by between 13% and 32%.<sup>236</sup>

Moreover, due to ongoing pandemic situation, possible controversies provided by some indicators:

Firstly, restrictive measures on trade was adopted.<sup>237</sup> Secondly, patent protection may be damaged while members gave permission to the unauthorized medical production without compulsory licenses which may cause a raise to claims under TRIPS Agreement.<sup>238</sup>

There is an issue to comply with the covered agreements, the dispute settlement system can be used as a means to cancel or reduce the benefits arising from the agreement.<sup>239</sup> Because of the “all-affecting” WTO rules, may be presented to the WTO dispute settlement system, but the only question is whether the system will be able to deliver a fruitful outcome in the light of the Covid-19.<sup>240</sup>

It is important to mention, the decision of ministers from 164 countries on WTO’s 12<sup>th</sup> Ministerial Conference during the pandemic was controversial. There were serious concerns about the legitimacy of decisions taken under these conditions. Members who do not have commercial flights from their countries may not be able to travel.<sup>241</sup>

Moreover, Australia placed the topic of ‘Covid-19 and dispute settlement’ on the agenda of DSB meeting, where concerns about delays in dispute settlement procedures as a result of the Covid-19 were discussed. Australia urged panels to consider alternative

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<sup>235</sup> Diorgio Sacerdoti, ‘The WTO Dispute Settlement System in 2020: Facing the Appellate Body Paralysis’ (2020) 30 IYIL 381.

<sup>236</sup> Sebastien Jean, ‘How the Covid-19 Pandemic is Reshaping the Trade Landscape and What to Do About It’ (2020) 55 *Inter economics* 135.

< <https://www.intereconomics.eu/contents/year/2020/number/3/article/how-the-covid-19-pandemic-is-reshaping-the-trade-landscape-and-what-to-do-about-it.html> > accessed 22 March 2022

<sup>237</sup> Padideh Ala’I & Clemence D. Kim, ‘The WTO and Pandemics’ (2021) 36 *American University International Law Review* 1035.

<sup>238</sup> Hsien Wu, ‘WTO Dispute Settlement in the Wake of Coronavirus Disease 2019 (Covid-19): Exploring the Possible Benefits and Limits of Contemporary Mechanisms’ (2020) 13 *Contemporary Asia Arbitration Journal* 291.

<sup>239</sup> Hsien Wu (n238) 294.

<sup>240</sup> *Ibid*, 294.

<sup>241</sup> Jane Kelsey, ‘Divided and Paralysed, can the WTO negotiate a pandemic recovery plan that is fair for all?’ (2021) *The Conversation* < <https://theconversation.com/divided-and-paralysed-can-the-wto-negotiate-a-pandemic-recovery-plan-that-is-fair-for-all-172484> > 25 March 2022.

arrangements, in consultation with parties, to ensure that dispute procedures can continue to move forward expeditiously despite the challenge posted by the current restrictions.<sup>242</sup>

In case of, in-person events are not possible, WTO members should identify the challenges they in order to hold remote or virtual hearings<sup>243</sup> Furthermore, the main contributions that the WTO dispute settlement system are interpretation and clarification of existing rules through the dispute review process. Adjudicators as an independent and impartial third-party review claims and arguments.<sup>244</sup>

In addition, in 2021 many trade-restrictive measures, officially adopted remain in force.<sup>245</sup> Firstly, trade crisis has shown a more substantial and quick recovery of international commerce. Secondly, the new US Biden administration came to mutually agreed solution on the new director general, *Ms. Ngozi Okojweala*.<sup>246</sup>

A concept paper, submitted by 47 countries also states that developing countries should not be sued before the WTO's DSB for taking trade measures that are essential to the current pandemic.<sup>247</sup> Such moratorium on trade measures should be maintained only temporarily for the duration of the Covid-19 crisis.<sup>248</sup> To make dispute settlement proceeding more flexible, the members suggested to hold of virtual and hybrid panel hearings, in order to ensure prompt settlement of disputes.<sup>249</sup>

To summarise, at the DSB meeting in 2022, members acknowledge the commitments made by 12<sup>th</sup> Ministerial Conference to secure operating dispute settlement system by 2024, MC12 Outcome Document was adopted.<sup>250</sup> At the meeting Mexico presented the

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<sup>242</sup> Terence P. Stewart, 'The Effect of Covid-19 on the Operation of WTO Dispute Settlement Panels – Australia and Others Raise at the September 28 Dispute Settlement Body Meeting' (2020) WITA < <https://www.wita.org/blogs/covid-effect-wto-dispute-settlement/>> accessed 25 March 2022

<sup>243</sup> Terence P. Stewart (n 242).

<sup>244</sup> Hsien Wu, (n238) 297.

<sup>245</sup> Diorgio Sacerdoti (n235) 383.

<sup>246</sup> Ibid, 383

<sup>247</sup> Kirtika Suneja, 'Don't Drag developing Nations to WTO on Covid-19 Time Measures: India, Cuba, 44 Others' (2022) The Economic Times < <https://economictimes.indiatimes.com/news/economy/foreign-trade/dont-drag-developing-nations-to-wto-on-covid-time-measures-india-cuba-44-others/articleshow/89625008.cms> > accessed 27 March 2022

<sup>248</sup> PTI, 'Developing Nations Should Not be Dragged to WTO Disputes On Taking Steps To Deal With Pandemic' (2022) Financial Express < <https://www.financialexpress.com/economy/developing-nations-should-not-be-dragged-to-wto-disputes-on-taking-steps-to-deal-with-pandemic/2436056/>> accessed 27 March 2022

<sup>249</sup> WTO, 'Members Pledge Flexible Arrangements in WTO Dispute Proceedings during Covid Pandemic' <[https://www.wto.org/english/news\\_e/news20\\_e/dsb\\_18dec20\\_e.htm](https://www.wto.org/english/news_e/news20_e/dsb_18dec20_e.htm) > accessed 27 March 2022

<sup>250</sup> WTO, 'Members welcome MC12 commitment to address dispute settlement' < [https://www.wto.org/english/news\\_e/news22\\_e/dsb\\_30jun22\\_e.htm](https://www.wto.org/english/news_e/news22_e/dsb_30jun22_e.htm)> accessed 14 October 2022

proposal about beginning the selection process to the AB. However, the US did not support the proposal.<sup>251</sup>

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<sup>251</sup> *ibid*

### 3.3. The legal issues of the WTO Dispute Settlement and possible solutions.

WTO dispute settlement is very successful system and in many cases has led to compromises in trade between the contracting states. The biggest problem is that the dispute settlement system faces systemic and legitimacy issues. While the dispute settlement has led to good trade relations and the resolution of disputes, imposition of trade sanctions and failure of dispute settlement to enforce the report due to their domestic law have sometimes led to a restriction of the trade.<sup>252</sup>

A domestic legislation is the key issue, which is the point of dispute between the parties. Under the Article 16:4 of the WTO Agreement each Member shall ensure that its laws and regulations conform to its obligations. For instance, a complaint will not address whether an internal tax imposed by the respondent on a particular import shipment is consistent with Article 3:2 of the GATT 1994.<sup>253</sup> It would challenge the internal revenue law such as inconsistency with Article III:2 of the GATT 1994 if the law imposes different internal taxes on two different types of products, such as shochu and vodka. In this case, several issues related to domestic legislation shall be examined. The most important issue, however, is whether the domestic law is mandatory or discretionary in providing for an act that is in violation of WTO law.<sup>254</sup>

Non-binding decisions such as compulsory arbitration, mediation and voluntary conciliation, may be taken to settle disputes, between the parties for which there is no legislative jurisdiction before the arbitral tribunal, so that domestic laws may also be protected to decide on their jurisdiction. The parties can settle the dispute amicably before going to a forum are much more complicated and where trade sanctions are imposed if the other member states do not implement the binding decisions.<sup>255</sup>

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<sup>252</sup> Dharmapuri Selvakumar Madhumitha, 'WTO – Analysis of Issues with the Dispute Settlement Mechanism' (2020) 11 (4) Scientific Research <<https://www.scirp.org/journal/paperinformation.aspx?paperid=105762> > accessed 28 April 2022

<sup>253</sup> WTO, 'Legal Issue Arising in WTO Dispute Settlement Proceedings' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c10s8p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c10s8p1_e.htm) > accessed 28 April 2022

<sup>254</sup> Ibid.

<sup>255</sup> Dharmapuri Selvakumar Madhumitha (n 252).

## CONCLUSION

Under the WTO, the rules and procedures of dispute settlement remain the same for all member.<sup>256</sup> Moreover, one of the key achievements of the Uruguay Round negotiations was increasing legalisation of the GATT dispute settlement process, culminating in the establishment of the DSU in 1995.<sup>257</sup>

The history of the WTO has resulted in a system that enabled to import markets through multilateral trade and to maintain that market access.<sup>258</sup> In view of the opposite positions of WTO members, especially on the status of developing countries and the arbitrations, the chance for reform is restricted.<sup>259</sup>

In summary, the main advantages of the dispute settlement include: the enforcement of the international system; agreement between the parties concerned, as opposed to mere penalties for harm suffered; the amicable settlement of disputes; the establishment of precedents and increased legal stability; issues of interpretation; it enables governments to overcome internal resistance.<sup>260</sup>

Indeed, the WTO's DSM is one of its most successful functions. The complainant's trading partner would be notified by the WTO in order to set direct negotiations. If the responded country was found to have violated WTO rules, it could either change its behaviour or appeal to AB.<sup>261</sup> The decisions of AB was binding on the parties. In addition, a group of 25 WTO members agreed on an Multi-Party Interim Appeal Arbitration Agreement that follows a procedure similar to the DSM.<sup>262</sup>

Moreover, after so long of destructive US trade policies, the US President's administration has finally recognised the importance of the WTO. The current war in Ukraine has change relations between the worlds and all member states must strive to expand trade and technology cooperation.<sup>263</sup>

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<sup>256</sup> Chad P. Bown, 'Participation in WTO Dispute Settlement: Compliance, Interested Parties and Free Riders' (2005) 19 (2) Oxford University Press 287.

<sup>257</sup> *Ibid* (n193) 287.

<sup>258</sup> Chad P. Bown, 'Self-enforcing trade: developing countries and WTO dispute settlement' (Brookings Institution Press 2009) 238.

<sup>259</sup> Damian Wnukowski, 'WTO Reform: Challenges and Perspectives' (2019) 58 (1304) PISM 1.

<sup>260</sup> Marcelo D. Varella (n 58) 104.

<sup>261</sup> Krueger (226).

<sup>262</sup> *Ibid*.

<sup>263</sup> *ibid*

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# MASTER THESIS ABSTRACT

**Khrystyna Ruda**

**Title:**

Dispute Settlement: Understanding, Development and Reform

**Supervisor:** Ass. Prof. Dr. Gabriel M. Lentner

**Key terms**

WTO, dispute, Appellate Body, reform, crisis, Covid-19, dispute settlement system, Panel, proceeding, MPIA, trade, Arbitration, Dispute Settlement Body, mechanism, agreement, report, ruling, pandemic, DSU

## ABSTRACT

In Master Thesis described dispute settlement as a central pillar of the multilateral system. Without settling the dispute, the rule-based system would not be effective as rules cannot be enforced. A central objective of the WTO dispute settlement system is to provide security and predictability to the multilateral system.

The first Chapter provides a general overview of Dispute Settlement System, its main features, functions, objectives and main characteristics of the WTO dispute Settlement System. Moreover, this Chapter explains the main WTO dispute settlement rules set out in the separate treaty ‘Understanding of Rules and Procedures Governing the Settlement Disputes’. The WTO dispute settlement system is already being described as the most important feature of the new WTO.<sup>264</sup> The DSU also defines the parties entitled participate in dispute settlement proceedings.<sup>265</sup> The only participants in the dispute settlement system are the Member governments of the WTO, which can participate either as parties or as third parties.<sup>266</sup>

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<sup>264</sup> United Nations Conference, “WTO Dispute Settlement” (2003)

< [https://unctad.org/system/files/official-document/edmmisc232add11\\_en.pdf](https://unctad.org/system/files/official-document/edmmisc232add11_en.pdf) > accessed 11 August 2022

<sup>265</sup> Bossche (n 128) 270.

<sup>266</sup> Ibid, 270

The second Chapter deals with the parties involved in the dispute settlement procedure, such as the Dispute Settlement Body, Panels, Appellate Body and Arbitrators. This chapter also describes the procedure step by step. Among the institutions involved in WTO dispute settlement, a distinction can be made between political institutions, such as the Dispute Settlement Body, and independent, quasi-judicial institutions, such as Panels and the permanent Appellate Body.<sup>267</sup> While the WTO has entrusted dispute settlement to panels in first instance, and to the Appellate Body in appeal instance, the DSB continues to play an active role in the WTO dispute Settlement system.<sup>268</sup> Although much has been written about dispute settlement in the WTO, little attention has been paid to the Dispute Settlement Body. DSB is a diplomatic body composed of representatives of all WTO members, and is responsible, among other things, for establishing panels, adopting panels and AB reports, and authorising the suspension of concessions.<sup>269</sup>

The third Chapter analyses the Appellate Body crisis and provides an overview of the proposals for reforming WTO dispute settlement made by both WTO members and academics. It provides an overview of the functioning of the WTO dispute settlement system to date and discusses several reforms and various ways to improve the effectiveness of remedies for non-compliance with WTO rulings.<sup>270</sup> What is more, the Covid-19 economic and trade crisis, which began in 2020 hit the WTO at a time when the organisation was certainly not in a good state. Respect for its rules has reached a low level, as states increasingly resort to unilateral restrictive measures of dubious legality and bilateral agreements that disregard multilateral obligations.<sup>271</sup>

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<sup>267</sup> WTO, 'WTO Bodies involved in the dispute settlement process'  
< [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm) > accessed 11 August 2022

<sup>268</sup> Peter Van den Bossche, 'The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication' (2 WTI Working Paper 2021)

<sup>269</sup> Ibid, 270

<sup>270</sup> Jean (n 238) 135.

<sup>271</sup> Hsien Wu (n 238) 294.

## ANNOTATION ZUR MAGISTERDISSERTATION

**Khrystyna Ruda**

### **Titel:**

Streitbeilegung: Verständnis, Entwicklung und Reform

**Wissenschaftlicher Betreuer:** Prof. Dr. Gabriel M. Lentner

### **Schlagwörter**

WTO, Streit, Berufungsinstanz, Reform, Krise, Covid-19, Streitbeilegungssystem, Kollegium der Schiedsrichter, Verfahren, MPIA (Mehrseitiges intermediäres Berufungsschiedsgericht), Handel, Schiedsgericht, Streitbeilegungsgremium, Mechanismus, Abkommen, Bericht, Lösung, Pandemie, DSU (Streitbeilegungssystem)

## ANNOTATION

Die Magisterdissertation beschreibt die Streitbeilegung als zentrales Element eines multilateralen Systems. Ohne Streitbeilegung wird ein regelbasiertes System nicht effektiv sein, da es unmöglich wird, die Regeln durchzusetzen. Der Hauptzweck des WTO-Streitbeilegungssystems besteht darin, die Sicherheit und Berechenbarkeit des multilateralen Systems zu gewährleisten.

Das erste Kapitel gibt einen Überblick über das Streitbeilegungssystem, seine Hauptmerkmale, Funktionen, Ziele und Besonderheiten des WTO-Streitbeilegungssystems. Darüber hinaus erläutert der Abschnitt die Grundregeln für die Beilegung von WTO-Streitigkeiten, die in einem separaten Vertrag „Verständnis der Regeln und Verfahren zur Streitbeilegung“ festgelegt sind, in dem es heißt, dass eine zügige Streitbeilegung für das wirksame Funktionieren der WTO und die Aufrechterhaltung eines Gleichgewichts der Rechte und Pflichten aller Mitglieder erforderlich ist. Das WTO-Streitbeilegungssystem wurde bereits als das wichtigste Merkmal der neuen Welthandelsorganisation (WTO) bezeichnet. Darüber hinaus bestimmt die DSU die Parteien, die berechtigt sind, am Streitbeilegungsverfahren teilzunehmen. Die einzigen Teilnehmer am Streitbeilegungssystem sind die Regierungen der WTO-Mitgliedstaaten, die entweder als Partei oder als Dritte an dem Verfahren teilnehmen können.

Das zweite Kapitel befasst sich mit den an der Streitbeilegung beteiligten Parteien, wie dem Streitbeilegungsgremium, dem Kollegium der Schiedsrichter, der Berufungsinstanz und den Schiedsrichtern. In diesem Kapitel wird auch das Verfahren Schritt für Schritt beschrieben. Zu den Institutionen, die an der Beilegung von WTO-Streitigkeiten beteiligt sind, gehören politische Institutionen wie das Streitbeilegungsgremium und unabhängige gerichtliche Institutionen wie das Kollegium der Schiedsrichter und die ständige Berufungsinstanz. Obwohl die WTO die erstinstanzlichen Streitigkeiten den Kollegien der Schiedsrichter und auf der Berufungsebene der Berufungsinstanz übertragen hat, spielt DSB weiterhin eine aktive Rolle im WTO-Streitbeilegungssystem. Trotz umfangreicher Arbeiten zur Streitbeilegung in der WTO wurde dem Streitbeilegungsgremium nur wenig Aufmerksamkeit geschenkt. DSB ist ein diplomatisches Gremium, das sich aus Vertretern aller WTO-Mitglieder zusammensetzt und unter anderem für die Einsetzung von Kollegien der Schiedsrichter, die Entgegennahme der Berichte von Kollegien der Schiedsrichter und Schiedsgerichten und die Gewährung von Genehmigungen zur Aussetzung von Zugeständnissen zuständig ist.

In Kapitel drei wird die Krise der Berufungsinstanz analysiert und es werden Vorschläge für eine Reform des WTO-Streitbeilegungssystems sowohl von den WTO-Mitgliedern als auch von der Wissenschaft geprüft. Hier wird die Funktionsweise des bestehenden Streitbeilegungssystems untersucht und einige Reformen und verschiedene Möglichkeiten zur Verbesserung der Wirksamkeit von Rechtsmitteln bei Nichteinhaltung von WTO-Entscheidungen erörtert. Darüber hinaus traf die Wirtschafts- und Handelskrise im Zusammenhang mit Covid-19, die im Jahr 2020 begann, die WTO zu einem Zeitpunkt, als die Organisation sicherlich nicht in Bestform war. Die Achtung der Regeln ist auf ein niedriges Niveau gesunken, da die Staaten zunehmend einseitige restriktive Maßnahmen von fragwürdiger Rechtmäßigkeit und bilaterale Vereinbarungen ergreifen, die multilaterale Verpflichtungen ignorieren.