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The effectiveness of the WTO dispute settlement
system: A statistical analysis

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**THE EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT
SYSTEM: A STATISTICAL ANALYSIS**

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Abstract

The dispute settlement system (DSS) of the World Trade Organization (WTO), which is considered as the “Jewel in the Crown” of the WTO, is also the busiest of its kind. While this no doubt reflects its success, the system is far from perfect, and has drawn criticism both from within and without the ranks of its users. This paper presents a statistical analysis of over twenty years of WTO DSS, with a particular emphasis on questions of effectiveness.

Questions examined include:

- Who are the member states using the WTO DSS? Is it used equally by developed, developing and least developed countries? Are poor countries more likely than rich ones to settle cases? Is there a correlation between the Gross Domestic Product (GDP) or GDP per capita of WTO members and the extent to which they use the system?
- What is the extent of compliance with binding recommendations of the DSB by member states? Are compliance disputes bona fide disputes about the meaning of a DSB ruling, or are they part of delaying tactics? Who are the members that do comply and who are the ones that do not?
- How long do DSS procedures take on the average, from consultations request to adoption of recommendations? Has this time changed over time, from when the system began until today?

Finally, the paper will address the problem of the Appellate Body’s inability to remand the case to the original panel for reconsideration and determination of relevant facts. It will examine how often this lack of authority frustrates the system’s ability to conclude the DSS procedures with a clear ruling on all the disputed issues.

Keywords

World Trade Organization; Dispute Settlement; Effectiveness; Compliance; Developing Countries

JEL classification

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Introduction*

The dispute settlement system of the World Trade Organization (WTO) is widely considered the “Jewel in the Crown” of the WTO.¹ It is one of the rare areas in public international law where we have a mechanism that provides binding third-party adjudication of disputes between sovereign states. With close to six hundred cases in its twenty-two years of existence,² it is also probably the busiest international dispute settlement system in the world. By way of comparison, the International Criminal Court exists about 15 years, and has dealt with only 23 cases and issued six verdicts.³ The International Tribunal for the Law of the Sea is in existence as long as the WTO and has to date dealt with 25 cases.⁴ The only system that competes with the WTO in number of cases is that of international investment arbitration.⁵ Hence, on the one hand, the wide use of the WTO dispute settlement system no doubt reflect its success and the fact that the member states have confidence in it to resolve their trade disputes. On the other hand, the system is far from perfect, and has drawn criticism both from within and without the ranks of its users.

Already at the Marrakesh Ministerial Conference in 1994, when the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) was adopted, the Ministers decided to review the DSU and complete the review by 1999.⁶ Accordingly, the review of the DSS system was initiated in the Dispute Settlement Body (DSB) of the WTO in 1997. It held extensive discussions on various issues, many suggestions for improvement were raised by member states, but no agreement could be reached by 1999. In 2001, the Ministers at the Doha Ministerial Conference once again took up the need to complete the review of the DSU in order to improve and clarify the mechanism, and decided that this

* Professor and Former Dean; Jean Monnet Chair of EU Law & Institutions; Chairman, Center for Commercial Law; Faculty of Law, Bar Ilan University, Israel; Fernand Braudel Senior Fellow, European University Institute, Italy. The research that is presented in this article was originally prepared and presented for a conference organized by Tsinghua University, Beijing, named “WTO at 20 : Multilateral Trading System, Dispute Settlement and Developing Countries” in July 2015; an updated version was presented at the 18th Biennial Conference of the International Academy of Commercial and Consumer Law, held in Kuyushi University, Japan, in July 2016, and finally a paper with the further expanded and updated findings and discussion was presented at the European University Institute in May 2017. The research has been conducted with the excellent research assistance of my students Inbal Ronel and Avital Haitovitch, to which I am extremely grateful. I also want to thank Dr. Shlomit Ya’ari from Bar Ilan University for helping me with the correlation calculations and to Dr. Orli Oren Kolbinger for her good advice. Thanks is also due to Professors Oren Perez, Ernst-Ulrich Petersmann, Hans W. Micklitz and Petros Mavroidis for their helpful comments. The regular caveats apply.

¹ See for instance in the press release by WTO Director-General Pascal Lamy, on the occasion of the system reaching the milestone of having the 400th trade dispute brought to it, in November 2009: “The dispute settlement system is widely considered to be the jewel in the crown of the WTO”. He also noted that the fact that it has dealt with so many disputes is a “vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes.” WTO, 2009 Press Releases, PRESS/578 (6 November 2009) WTO Disputes Reach 400 Mark, available here: https://www.wto.org/english/news_e/pres09_e/pr578_e.htm

² In May 2017, the total number of cases brought to the WTO dispute settlement system stood at 580, made up of 524 regular cases, and 56 DSU Article 21.5 cases (compliance disputes). The figures are based on statistics collected by the commercial website Worldtradelaw.net : <http://worldtradelaw.net/databases/basicfigures.php> (visited on May 5, 2017).

³ The figures are from the Court’s official website: <https://www.icc-cpi.int/about> (visited on May 5, 2017).

⁴ The figures are from the Tribunal’s official website: <https://www.itlos.org/en/cases/> (visited on May 5, 2017).

⁵ According to recent figures released by UNCTAD, as of 1 January 2016, the total number of publicly known arbitrations against host countries pursuant to international investment agreements (IIAs) has reached nearly 700 (see: <http://investmentpolicyhub.unctad.org/isds>). However, that figure covers about 30 years (since 1987), so in terms of cases per year, the WTO still has a higher rate, although judging from the surge of investment arbitrations over the last few years (70 in 2015 alone), it seems that this will soon change. It should be noted, however, that these arbitrations are not all conducted in one institution, but rather in several institutional and non-institutional frameworks.

⁶ Ministerial Conference ‘Decision on the Application and Review of the Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes’, 1994.

should be done by May 2003. By that time, member states had made proposals on several improvements and amendments to the system, and a draft legal text had been prepared by the Chairman of the Special Session of the DSB.⁷ Although it had been expressly agreed that the DSU review would *not* be part of a Doha Round “single undertaking”, members have been unable to finalize the review and reach agreement on the required amendments.

Most recently, in November 2016 the chair of the DSB outlined to members the scope, sequencing, and structure of work ahead on the DSU review, with an initial focus on 12 thematic issues.⁸ The aim is to complete as much work as possible by July 2017, at which point he would invite Members to take stock of progress made. Such possible outcomes could then be put to Members' joint consideration, at the WTO's 11th Ministerial Conference in late 2017, to approve all, some, or none of the possible outcomes.⁹

In view of that, it is both timely and helpful to take an objective look at how the system is faring and in particular to examine some of the parameters of its effectiveness. This paper therefore presents some statistics that have been compiled and analyzed by the author with questions of effectiveness in mind.

In order to be effective, the system needs to be able to provide easy access to all member states,¹⁰ rich and poor alike, to resolve disputes in a relatively short time, and to ensure that rulings are complied with within a reasonable period of time.¹¹ This understanding is supported by the DSU, where members declared that “[t]he prompt settlement” of disputes is “essential to the *effective* functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”¹² The DSU also declared that the objectives of the dispute settlement system of the WTO is to provide “security and predictability to the multilateral trading system”, to “preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements.”¹³ To base the examination of the effectiveness of the WTO dispute settlement system on the goals set out in its foundational instrument – the DSU – and goals that derive implicitly from these stated goals, is in line with the Goal-Based Approach to effectiveness of international courts developed by Yuval Shani.¹⁴

⁷ The Chairman of the Special Session, on 28 May 2003, circulated a draft legal text on his own responsibility. The text contained Members' proposals on a number of issues, including: enhancing third-party rights; introducing an interim review and remanding at the appeals stage; clarifying and improving the sequence of procedures at the implementation stage; enhancing compensation; strengthening notification requirements for mutually-agreed solutions; and strengthening special and differential treatment for developing countries at various stages of the proceedings. See []. There had also been other proposals by member states that were not included in the proposed text because of lack of sufficient support, such as accelerated procedures for certain disputes; improved panel selection, procedures; increased control by Members on the panel and Appellate Body reports; clarification of the treatment of amicus curiae briefs; and modified procedures for retaliation, including collective retaliation or enhanced surveillance of retaliation.

⁸ The thematic issues are: Third party rights; Panel composition; Remand; Mutually agreed solutions; Strictly confidential information; Sequencing; Post-retaliation; Transparency and amicus curiae briefs; Timeframes; Developing country interests, including special and differential treatment; Flexibility and Member control; and Effective compliance. Some of these issues are dealt with in this study.

⁹ See the website of the WTO: https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm (visited on May 8, 2017).

¹⁰ One should note that autonomous entities of member states are eligible for full membership in the WTO provided that they have a separate customs territory with full autonomy in the conduct of their external commercial relations. Hence, when I use the term “member states”, it refer to such entities as well (for instance, Hong Kong, China, as well as the European Union).

¹¹ For a similar approach to the effectiveness of the WTO dispute settlement system, see Donald McRae, “Measuring the Effectiveness of the WTO Dispute Settlement System”, 3 *Asian Journal of WTO & International Health Law and Policy* 1 (2008).

¹² Article 3.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the Agreement Establishing the World Trade Organization (emphasis added).

¹³ *Ibid.*, para. 3.2.

¹⁴ For a presentation of the approach, see Yuval Shani, “Assessing the Effectiveness of International Courts: A Goal-Based Approach”, 106 *American Journal of International Law* 225 (2012). On the source of an organization's explicit and implicit goals, as set out by its mandate providers, see p. 232 and pp. 240-247.

Hence, the questions that this paper will examine statistically are the following:

1. Who are the member states that are using the WTO dispute settlement system? Is it being used equally by developed, developing and least developed countries? Are poor countries more likely than rich ones to settle cases? Is there a correlation between the Gross Domestic Product (GDP) or GDP per capita of WTO member countries and the extent to which they use the system?
2. What is the extent of compliance with binding recommendations of the DSB by member states that have been ordered to “bring their measures into compliance” with covered agreements?¹⁵ Who are the members that do comply and who are the ones that do not? Is there a correlation between the number of times certain member states fail to comply and their participation in the dispute settlement system or with their share in world trade?
3. How long do dispute settlement procedures take on the average, from consultations request to adoption of recommendations? Has this time changed over time, from when the system began until today?
4. Finally, the paper will address the problem of the Appellate Body’s inability to remand the case to the original panel for reconsideration and determination of relevant facts. It will examine how often this lack of authority frustrates the system’s ability to conclude the dispute settlement procedures with a clear ruling on all the disputed issues.

This is not to say that these are the only questions that are relevant for the effectiveness of a dispute settlement system, in general, or of the WTO’s system, in particular. One could certainly think of several additional questions that are relevant and that ought to be further examined in future research. For instance, considering that the task of the system is “to clarify the existing provisions of [the WTO] agreements”, one may want to examine to what extent the jurisprudence of the panels and the AB have achieved this objective. Do member states and their legal advisors obtain clear answers from this jurisprudence on what the meaning of these provisions is and how one is to go about to implement them? One may also want to examine to what extent it is providing “security and predictability to the multilateral trading system”. Another important and related parameter may be whether the system provides what criminal lawyers call “general deterrence”. In other words, does the system induce other member states tempted to violate one of their obligations not to do so. True, “general deterrence” is not an objective that is mentioned expressly in the DSU. However, one may argue that it is included in the objective of providing “security and predictability to the multilateral trading system”, and of “preserv[ing] the rights and obligations of Members under the covered agreements”. While all these questions are no doubt important, they are not part of the questions examined in the present research. Some of them have been explored in other articles, and many of them will probably require more than a statistical analysis in order to provide reliable answers. “Rome wasn’t built in a day” and one research cannot answer all questions. Some will have to be left for future research.

The figures presented in this paper, unless indicated otherwise, are based on information published by the WTO on its official website and by the service WorldTradeLaw.net, and are updated to May 2017, unless indicated otherwise in the text. The paper deals only with inter-governmental disputes under the DSU, and not with other types of disputes settlement mechanisms provided for by the WTO system.¹⁶

¹⁵ In this research, I use the initiation of compliance procedures and requests for suspension of benefits as proxy for compliance, based on the assumption that if the member state that prevailed in the dispute is unhappy with the compliance or lack thereof of the member state that was ordered to comply, it will not sit idle. Rather, it will initiate compliance procedures and/or submit a request for suspension of benefits. One could of course try to design a research that examines *actual* compliance and measures it in each and every case. However, that is a more complicated task, which is outside the scope of the current research.

¹⁶ For instance, the WTO Agreement on Preshipment Inspection provides in Article 4 for “independent review procedures” to resolve disputes between preshipment inspection entities and exporters, and the Agreement on Government Procurement, in Article XVIII, provides for domestic review procedures, either judicial or administrative, that have to be “timely, effective, transparent and non-discriminatory”, where a supplier can challenge a decision by a government procurement

The number of cases over the years

A dispute between two WTO member states is formally initiated by a request for consultations under DSU Article 4. A member who receives such request for consultations is obliged to accord it sympathetic consideration and afford adequate opportunity for the consultations.¹⁷ If the consultations fail to settle a dispute within 60 days, the complaining party has the right to request the establishment of a dispute settlement panel.¹⁸ In some cases, approximately 20% of the whole,¹⁹ the consultations lead to a mutually agreed resolution of the dispute. In most cases, however, the dispute is referred to a panel.

Between January 1, 1995, when the WTO dispute settlement system became functional, and December 31, 2016, the system has dealt with 573 requests for consultations.²⁰ It has issued over 350 dispute settlement decisions.

Figure 1 – Number of cases 1995-2016

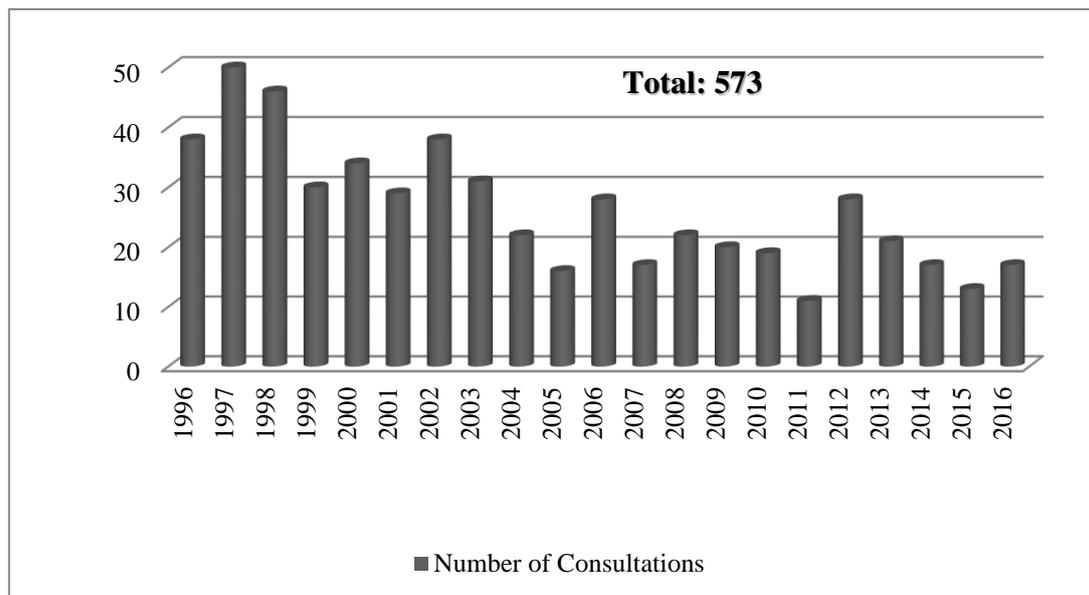


Figure 1 above shows a high number of cases dealt with during the first few years of the WTO (an average of 37.8 cases per year during 1995-1999), with the numbers going down gradually after that, settling at around 19 cases per year on average for the last ten years (2007-2016).²¹ The explanation for this trend is probably that in the period leading up to the conclusion of the Uruguay Round, when it was clear that a more effective dispute settlement system, compared to that of the GATT, was likely to take effect soon, many potential complaints were put “on hold” awaiting the new system. Once the new mechanism came into effect and proved itself during its first year of activity, many of those complaints

entity. There are also countries where provisions of WTO agreements can be invoked before a domestic court. All these procedures are not inter-governmental, but between a private entity, usually a trader, and a government agency.

¹⁷ DSU Article 4.2.

¹⁸ DSU Article 4.7.

¹⁹ See below, section 5.

²⁰ This number includes both standard disputes and compliance disputes under DSU Article 21.5. For standard disputes, the number is 518. One should note, that often several member states submit requests for consultations with another member state regarding the same matter. If the dispute goes to a panel, the requests will usually be consolidated and litigated before the same panel. Hence, the number of “matters” raised by these 518 requests for consultations is lower. According to the classification of Leitner and Lester, the number of matters raised between 1995-2016 is 386 (Kara Leitner & Simon Lester, “WTO Dispute Settlement 1995-2016: A Statistical Analysis”, 20 *Journal of International Economic Law* 171 (2017) at p. 172).

²¹ To be precise: 19.2 cases on average for the last five years (2012-2016), and 18.5 for the last ten years (2007-2016).

were filed, leading to a more heavy docket.²² One could also speculate that the proper functioning of the system, probably also clarified some unclear provisions and deterred states from disregarding their obligations, which in turn led to less complaints and requests for consultations.

Who are the users of the system?

In this section, we are presenting data that shows who the users of the WTO dispute settlement system are. It is important to remember that only WTO member states can initiate a dispute settlement procedure under the DSU, and only states can serve as respondents to such procedures. In other words, only states can “sue” or be “sued”. What is of most interest to us here, is whether rich countries use the system more than poor ones, and whether the numbers indicate that there is some kind of entrance barrier for Least Developed Countries.

Table 1 below shows who the most active users of the dispute settlement system are, and how often they have used it.

Table 1 – The 10 Most Active Users²³

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

This table shows that the United States and the European Union are by far the biggest users of the system, almost 4-5 times more than the next biggest users, Canada, China, India and Brazil. It also shows, that out of the ten most active users, four are defined as developed countries (US, EU, Canada and Japan), accounting for more than 66% of the total cases of these ten users.²⁶ However, in order to get a more accurate picture, we need to look at all of the users, and not just the ten most active ones.

²² For a similar explanation, see William J. Davey, “The First Years of WTO Dispute Settlement: Dealing with Controversy and Building Confidence”, in *A History of Law and Lawyers in the GATT/WTO* (G. Marceau, Ed.) (Cambridge University Press, 2015) p. 351.

²³ The order in the table is based on the total number of cases where the member state has been either complainant or respondent (third column). The number of cases where the state was a third party was only used to rank states with the same number of Complainant + Respondent cases. Source: WTO, “Disputes by Members”, published on its website: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (visited May 9, 2017).

²⁴ The numbers for the EU are based on the cases where the EU has been indicated as the party to the proceeding, as opposed to one of its member states. There are, however, several cases where single EU member states have been indicated in the case as the complainant (1) or respondent (28), even after they were members of the European Union. If we were to include those cases in the Table 1, the numbers for the EU would be: As Complainant – 98; As Respondent: 112.

²⁵ It should be recalled that China has not been a WTO member since 1995, like the other countries that appear on the list, but only since December 2001.

²⁶ US, EU, Canada and Japan served as either complainants or respondents 518 times out of the 781 times that the ten most active users served as either.

This is what we will do now, by grouping the users into various categories based on their development status.

Figure 2 below illustrates who are the WTO member states that have used the system since its inception, by initiating one of the procedures. In this figure, we use the WTO's own categorization into three types of member states: Developed Countries, Developing Countries and Least Developed Countries (LDCs). The problem with this division is that the status of a "Developing Country" is based on self-declarations of the states, and several states which normally would not be classified as such, insist on maintaining their status as a "developing country" in order to enjoy certain benefits under WTO agreements.²⁷ Later, I will therefore employ a more objective classification.

Figure 2 – Initiators of the dispute settlement process by types of members (1995-2015)

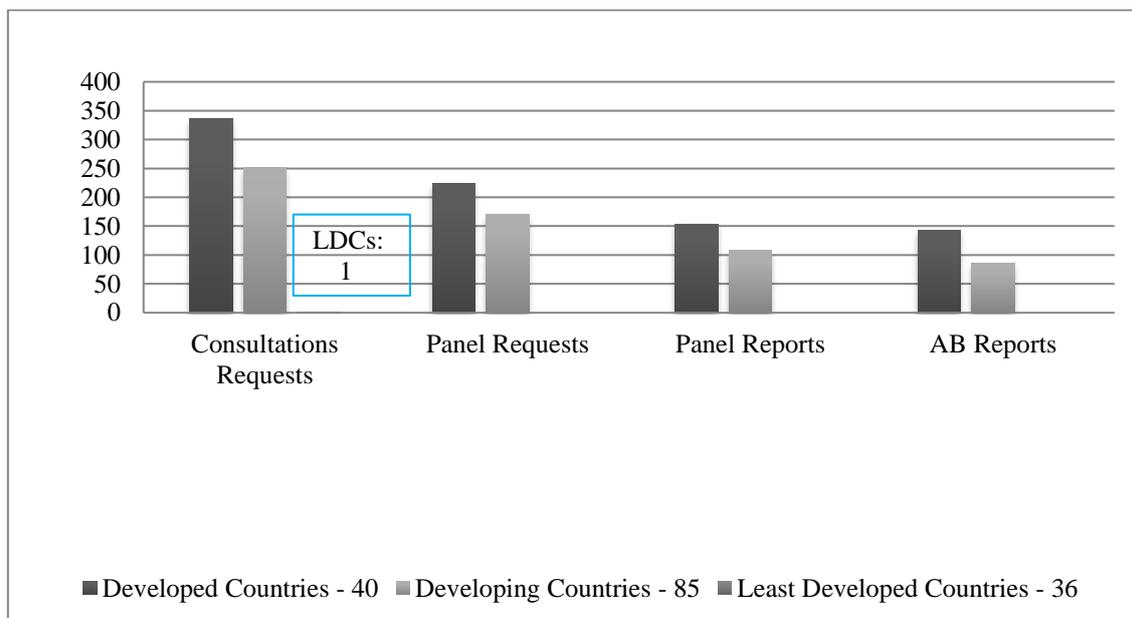


Figure 2 confirms that the developed countries are the most active users of the WTO dispute settlement system, as initiators of the various stages in the process: Request for Consultations, Panel Request, Panel Reports and Appellate Body (AB) Reports. While member states are not the "initiator" of a panel report or an AB report in the strict sense, the number of AB reports serve as a proxy for the fact that member states of a certain category filed an appeal against a panel report and pursued the appeal procedure until a report by the AB was issued. Likewise, the number of panel reports indicate that member states of a certain category pursued the panel procedure throughout the process until a panel report was issued.

It should be noted that although developed countries constitute less than 25% of all WTO member states (161), they account for 57% of all Requests for Consultations, 56.7% of all Panel Requests, 58.5% of all Panel Reports, and 62.7% of all AB Reports. Developing countries, which constitute about 53% of all WTO member states, account for only 42.7% of all Requests for Consultations, 43.3% of all Panel Requests, 41.5% of all Panel Reports, and 37.3% of all AB Reports.

²⁷ One example of such a state that is quite active in the WTO dispute settlement system is the Republic of Korea. It maintains a "Developing Country" status in the WTO, even though it is a member of the Organization for Economic Cooperation and Development (OECD), widely considered as an organization for economically developed countries, and its GDP per capita (nominal) for 2016 is \$29,539, the 26th highest in the world. Another example is Israel, another OECD member, with GDP per capita (nominal) of \$37,262, the 24th highest in the world. Israel, however, has not been involved in any WTO dispute as a complainant or as respondent. (GDP per capita figures and rankings are based on calculations of the International Monetary Fund, available at its website: www.imf.org.)

But the greatest disproportion we find in relation to LDCs. Although they constitute about 22% of all WTO member states, they account for only about 0.17% of all Requests for Consultations, and 0% of all Panel Requests, Panel Reports and AB Reports. In other words, except for one single case where an LDC submitted a request for consultations,²⁸ we have seen no participation whatsoever of LDCs in the WTO's dispute settlement system. It is true that LDCs also are small economies with a low share of world trade. Nevertheless, their share in world trade amounting to about 0.5%²⁹ is much higher than their share in dispute settlement procedures, which is almost non-existent.³⁰ A more proportional share would amount to at least three Requests for Consultations and two Panel Requests (based on share in world trade),³¹ or 129 Requests for Consultations, 87 Panel Requests, 58 Panel Decisions, and 50 AB Reports (based on the number of LDC member states).³² In this context, one needs to keep in mind that the LDC status is not self-declaratory. It is based on objective criteria of gross national income per capita, a human resources weakness criterion, and an economic vulnerability criterion, and it is determined by the United Nations.³³

A similar, and even more compelling, pattern we find when we examine participation in the system as respondents, as shown in Figure 3.

²⁸ This single case was a request for consultations submitted by Bangladesh to India in the matter of anti-dumping measures imposed by India on batteries from Bangladesh (DS306). The request was withdrawn after a mutually agreed solution was reached between the parties and the anti-dumping measure in question was terminated by India's customs authorities in January 2005.

²⁹ WTO, *International Trade Statistics 2015*, p. 60. Available here: https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf

³⁰ A somewhat different approach to showing the disproportion of the shares of LDCs and developing countries in WTO dispute settlement initiation can be found in a communication by Mexico to the DSB from 2007 in relation to the ongoing review of the DSU. There Mexico compares the number of complaints certain countries and groups of countries have initiated to their reliance on trade (as measured in relation to the size of their economy, i.e., trade as a percentage of GDP). It shows that while for the US, the reliance on trade is 29%, and the number of complaints (at the time of the communication) was 75, for LDCs the reliance on trade is 63%, while the number of complaints was 0. For the African Group of countries, the reliance on trade is 72%, while the number of complaints was also 0. For India, the reliance on trade is 25%, but the number of complaints was 15. WTO, "Diagnosis of the Problems Affecting the Dispute Settlement Mechanism – Some Ideas by Mexico" TN/DS/W/90, 16 July 2007, on p. 4.

³¹ A similar approach, of linking the rate of participation in the dispute settlement system to a country's share in world trade, based on the assumption that the more it trades, the higher are the chances that it will run into a dispute, can be found in Henrik Horn, Petros C. Mavroidis & Håkan Nordström, "Is the Use of Dispute Settlement System Biased?", in Petros C. Mavroidis & Alan O. Sykes (eds.), *The WTO and International Trade Law / Dispute Settlement* (Elgar Publishing: Cheltenham, United Kingdom, 2005), pp. 454-486.

³² According to the model for predicting number of dispute initiations developed by Francois, Horn & Kaunitz (*infra* note 41, at p. 28) the LDCs ought to have initiated 2 disputes, when acting individually, and 4.3, if acting collectively, as part of a union.

³³ LDC criteria are reviewed every three years by the Committee for Development Policy of the UN Economic and Social Council (ECOSOC). Countries may "graduate" out of the LDC classification when indicators exceed the fixed criteria. As of today, the classification applies to 50 countries (see: http://www.nationsonline.org/oneworld/least_developed_countries.htm), but only 36 of them are WTO members.

Figure 3 – Respondents in WTO DSU procedures by types of members (1995-2005)

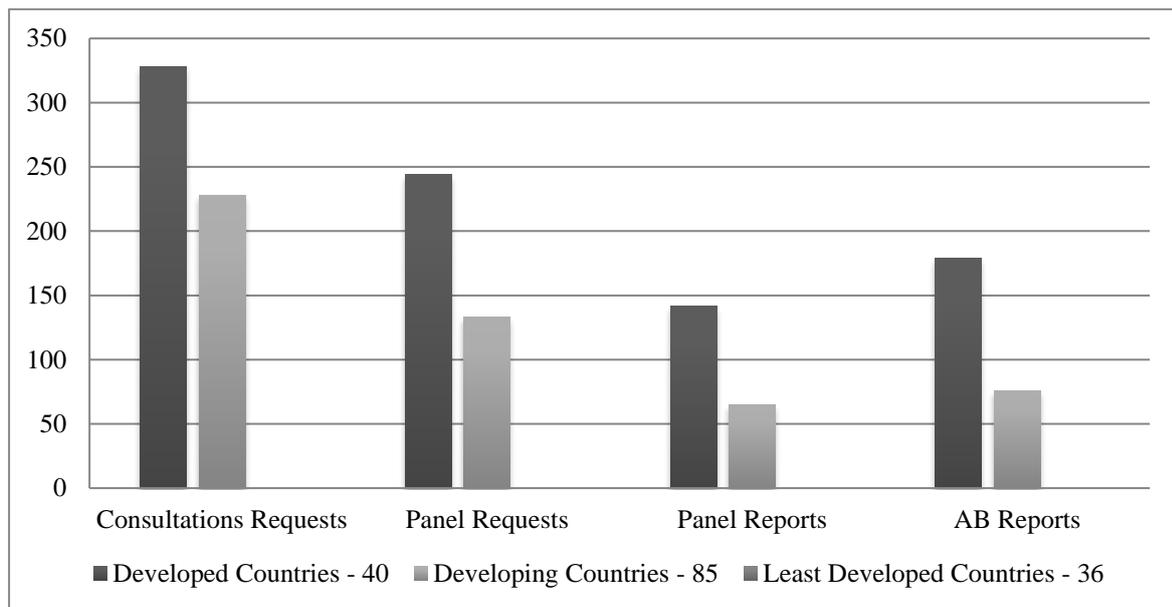


Figure 3 shows that developed countries are also the ones that are sued most: 59% of all Requests for Consultations are directed towards them; 64.7% of all Panel Requests are directed against them; in 68.6% of all Panel Reports they are the respondents; and in 70% of all AB Reports they are the respondents. Hence, the dominance of the developed countries in WTO dispute settlement procedures is even more pervasive as respondents than as complainants. That may also say something about the level of compliance or lack thereof on their part.

In view of the problematic nature of the WTO categorization, I have examined participation in the system according to a different and more objective criteria, namely the World Bank's 4-tier classification according to gross national income per capita ("Atlas Method"): "high income"; "upper middle income"; "lower middle income"; and "low income".³⁴ It is obviously not the only classification possible, and other studies have used other classifications,³⁵ but it is an objective one that best reflects the wealth of the countries. The findings for the types of countries' participation as complainants are shown in Figure 4.³⁶

³⁴ For more information on the World Bank's classification methodology, see <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>. For the sake of this research, I have used the relevant classification for the year that the action in question took place: for a request for consultation, the year the request was submitted; for panel request, the year it was requested; for panel decisions, the year it was issued; and for AB decisions, also the year it was issued. To give the reader a better idea of the classification, here are the criteria for 2015: A "High Income Country" is one where the GNI per capita is \$12,736 or more (in this category we have 60 WTO members). An "Upper Middle Income" country is one where the GNI per capita is between \$4,126 and \$12,735 (in this category we have 38 WTO members). A "Lower Middle Income" country is one where the GNI per capita is between \$1,046 and \$4,125 (in this category we have 41 WTO members). Finally, a "Low Income Country" is one where the GNI per capita is \$1,045 or less (in this category we have 24 WTO members). For these calculations, we used a set of 163 WTO members.

³⁵ For a different classification based on political-economic groupings, see Louise Johansson & Petros Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics", *EUI Working Papers RSCAS 216/72*, on p 5-6.

³⁶ For the purpose of this analysis and the one in the next section (correlation between GDP and GNI per capita and number of initiations) I have adjusted the number of initiations to the amount of time a state has been a WTO member. Hence, I have adjusted upwardly the number of initiations for China, considering that it has not been a member since the establishment of the WTO, like most other WTO members, but only 14 years. Likewise for Russia, who only joined in 2012.

Figure 4 – Initiators of dispute settlement by income classification of members (1995-2016)

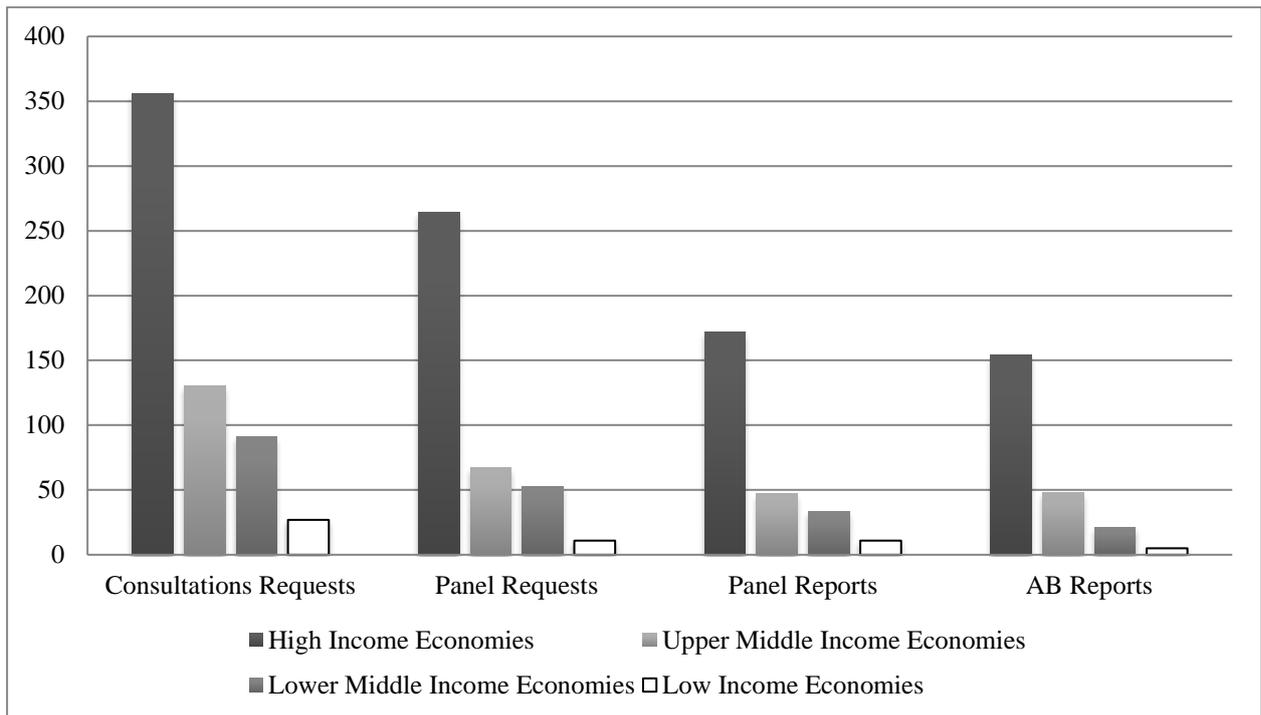
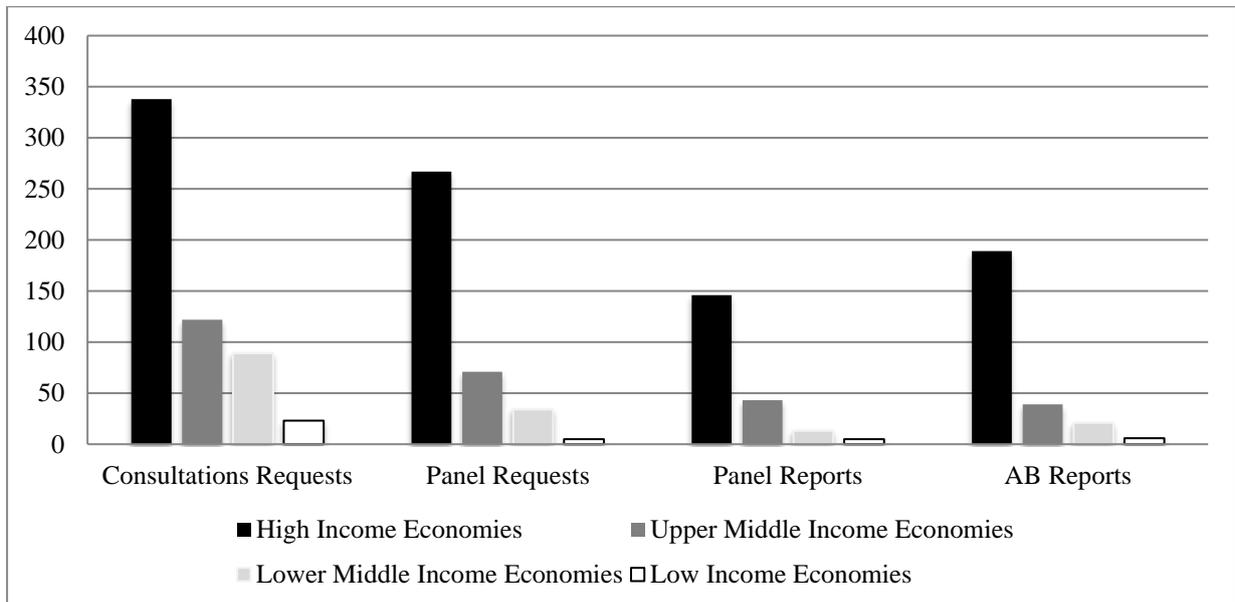


Figure 5 – Respondents in dispute settlement by income classification of members (1995-2016)



The numbers in Figures 4 and 5 tell a similar and even more convincing story than the one told by Figures 2 and 3. High Income Countries are responsible for no less than 58.9% of all Requests for Consultations, 66.8% of all Panel Requests, 65.4% of all Panel Reports, and 67.5% of all AB Reports. This is so, although in terms of their number, they comprise only 36.8% of all WTO members. Upper Middle Income Countries are responsible for 21.5% of all Requests for Consultations, 17% of all Panel Requests, 17.9% of all Panel Reports, and 21.1% of all AB Reports. These figures are slightly lower than the proportion of these countries in the total numbers of WTO members, which stands at about 23%. Lower Middle Income Countries are responsible for only 15.1% of all Requests for Consultations, 13.4% of all Panel Requests, 12.5% of all Panel Reports, and 9.2% of all AB Reports. This is

considerably lower than the number of such countries, which comprise more than 25% of all WTO members. Finally, we have the Low Income Countries which are responsible for only 4.5% of all Requests for Consultations, 2.8% of all Panel Requests, 4.2% of all Panel Reports, and 2.2% of all AB Reports. This is an extremely low level of participation for a group of countries that comprise almost 15% of all WTO members.³⁷

As respondents, High Income Countries are responsible for an even greater dominance of the dispute settlement system, with 59.1% of all Requests for Consultations, 70.1% of all Panel Requests, 70.5% of all Panel Reports, and 74.1% of all AB Reports. Upper Middle Income Countries have a share as respondents that is lower than their proportion among WTO members³⁸ and the share of Lower Middle Income Countries is even lower than that.³⁹ Low Income Countries participate only very rarely.⁴⁰

What could be the explanation for the extremely low participation of Low Income Countries⁴¹ (and next to non-participation of LDCs)? And how could one explain the disproportionately low participation of Lower Middle Income Countries?

One could suggest the following explanations, which have also be discussed in the literature:⁴² First, this finding may be connected to the legal and administrative costs associated with pursuing a dispute settlement procedure in the WTO (the “participation costs hypothesis”). Except for the super-powers, most WTO members do not have enough in-house expertise in order to file a complaint and to litigate it before a WTO panel, the Appellate Body, and possibly also before a compliance panel and implementation arbitrator. They therefore need to hire outside legal counsel, which can be quite expensive,⁴³ and they need to be willing to commit their in-house legal counsel and other government officials to invest a significant amount of time and efforts to work on the case together with the outside counsel. Poor countries may not have the financial and administrative means to pursue such costly

³⁷ India is the country that is responsible for all of the AB reports of the Low Income Countries (5) and the biggest chunk of their Panel reports (8). India was a Low Income country until 2006. In 2007 it became a Lower Middle Income country. Hence, if we were to disregard India, we have an extremely low participation rate for the Low Income Countries.

³⁸ Their share as respondents to Requests for Consultations is 21.3%, as respondents in Panel Requests – 18.8%, as respondents in Panel Reports – 20.1%, and in AB Reports, 15.3%, while they comprise about 23% of all WTO members.

³⁹ Their share as respondents to Requests for Consultations is 15.6%, as respondents in Panel Requests – 9%, as respondents in Panel Reports – 6.3%, and in AB Reports, 8.2%, while they comprise about 15% of all WTO members.

⁴⁰ The participation of Low Income Countries as respondents in WTO dispute settlement procedures are between 4%-1% although they comprise almost 15% of WTO member states.

⁴¹ But see Joseph Francois, Henrik Horn & Niklas Kaunitz, *Trading Profiles and Developing Country Participation in WTO Dispute Settlement System* (International Center for Trade and Sustainable Development, December 2008), who claim that Low Income Countries (excluding LDCs) actually have a disproportionately *high* share in dispute settlement activity (on p. 26). This conclusion, however, (apart from the fact that it relates to a different group of countries than the one I refer to, which includes LDCs), is based on the authors’ proposed model for predicting participation in the dispute settlement system, which is based on their estimates of legal capacity, trade patterns and other determinants.

⁴² See, for instance, Francois, Horn & Kaunitz, *supra* note 41, at pp. 3-4.

⁴³ An LDC and some developing countries can receive legal advice on WTO law for free, and support in WTO dispute settlement proceedings at discounted rates for subsidized prices, from the Advisory Centre on WTO Law (ACWL) based in Geneva. However, not all developing countries are members in the ACWL, and the ACWL will of course not cover the costs of the country’s own legal and administrative staff that will have to work on the case together with the ACWL.

procedures.⁴⁴ A Communication from a group of African member states in relation to the DSU review appears to support this explanation.⁴⁵

Secondly, there may also be political costs involved in confronting another WTO member, especially if it is a powerful country (the “power hypothesis”). A poor country may be less able to bear such costs and less willing to cause frictions in its international relations. It may also be less able to deter acts of political or economic retaliation by the targeted state, such as a cut in aid or in special trading status.⁴⁶ Finally, since the enforcement mechanism of the system, when the losing member state refuses to comply, is based on retaliation, poor countries, with small economies, may be deterred from initiating a complaint, considering their limited retaliatory power. Although our 4-tier grouping of WTO members is based on GNI *per capita*, and not collective GNI or GDP, it should be noted that *on average* the GDP of the group of Low Income Countries is significantly lower than that of all the other groups, less than one tenth of the next group, the Lower Middle Income Countries.⁴⁷ And this group in turn has an average GDP that is less than one third of the Upper Middle Income Countries.⁴⁸ Thus, these two lower groups represent economically weak and vulnerable countries that are less able to bear the costs that may be associated with a formal dispute settlement procedure in the WTO. There is some support in the empirical literature that these considerations have an impact.⁴⁹

Finally, traders and government officials of Low Income Countries and of Lower Middle Income Countries may, on average, be less sophisticated than those from High Income and Upper Middle Income Countries (the “legal capacity hypothesis”). They may therefore be less familiar with the quite complex provisions of GATT and the other WTO agreements, and of the inter-governmental dispute settlement mechanism that the WTO provides. The traders may be less likely to recognize a violation of

⁴⁴ Bütler & Hauser mention rents and costs accrued during the long litigation process as an important determinant of the payoffs of both the complainant and the plaintiff in a dispute case (M. Bütler & H. Hauser “The WTO Dispute Settlement System: A First Assessment from an Economic Perspective”, 16 *Journal of Law, Economics and Organization* 503 (2000). Also Nordström is of the opinion that the cost of using the system is a reason for the limited participation of LDCs (Håkan Nordström, “The World Trade Organization Secretariat in a Changing World” 39 *Journal of World Trade* 819 (2005)).

⁴⁵ During negotiations on the improvement and clarification of the DSU in 2002, the African Group argued that the low participation rate of African Members, many of which are classified as LDCs, “...is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the [Dispute Settlement System]” (TN/DS/W/15, 2002, p. 1).

⁴⁶ With “retaliation”, I mean subtle actions, not amounting to clear violations of international trade rules, taken by a state that has been targeted by a WTO complaint and directed against the complainant’s interests. For instance, most LDCs are receiving foreign aid from developed countries and even from several developing countries (such as China, Korea and Israel). Such foreign aid can be withdrawn or reduced by the donor country, if it feels by a WTO complaint. Likewise, LDCs and most developing countries enjoy unilateral trade benefits when exporting to developed countries, under the Generalized Scheme of Preferences (GSP). However, the GSP granting country is free to exclude certain countries or to limit their preferences for various reasons. This may therefore serve as a deterrent for such countries to initiate dispute settlement procedures, at least against developed countries from which they receive such benefits.

⁴⁷ The average GDP of the Low Income Countries is \$12.37 billion, whereas the average GDP of the Lower Middle Income Countries is \$139.39 billion. The average GDP of the Upper Middle Income Countries is \$489.11, which is about 3.5 times that of the Lower Middle Income Countries. Finally, the average GDP of the High Income Countries is \$1,799 billion, which is almost 3.7 times that of the Upper Middle Income Countries and 145 times higher than the Low Income Countries. Hence, the gaps between the GDPs of the various groups are huge.

⁴⁸ See *ibid.*

⁴⁹ Zejan and Bartels examine two aspects of aid dependence: one is whether aid will decrease after an aid-receiving state has initiated a trade dispute against a donor state. The other is whether there is a lower probability that an aid-dependent member state will initiate a complaint against a state that grants it foreign aid. The ordinary least squares regressions used to test the first aspect confirmed robustly the hypothesis and indicated that the correlation is statistically significant. This suggests that donors tend to penalize developing countries that seek to protect their interests in the multilateral trade system. The probit regressions, however, which was used to examine the second aspect, provided less robust but nevertheless supportive results for the hypothesis that the amount of aid received affects the probability of initiating a dispute (Pilar Zejan and Frank L. Bartels, “Be Nice and Get your Money – An Empirical Analysis of World Trade Organization Disputes and Aid”, 40 *Journal of World Trade* 1021-1047 (2006).)

those provisions, to bring it to the knowledge of the relevant government official and to be able to convince such official that there is a venue where the government could pursue the complaint in order to benefit the trader. In the absence of such a well-informed dialogue between traders and government officials, a complaint is not likely to be brought. Hence the low numbers of complaints.⁵⁰ This explanation has found some support in empirical research.⁵¹

Is there a correlation between GDP and GNI per capita and number of complaints filed?

Finally, I have examined whether there is a statistic correlation between the number of times a WTO member state has initiated dispute settlement procedures by filing a Request for Consultations, and such member's GDP or GNI per capita (Atlas Method).⁵² Since the data is not normally distributed and has outliers, the non-parametric Spearman's rank correlation coefficient was used. The correlation coefficient for the association between GNI per capita and the number of times the country filed a Request for Consultations was 0.411, which reflects a statistically significant correlation, although not very strong.⁵³ The correlation coefficient for the association between GDP and the number of times the country filed a Request for Consultations was 0.677, which is much stronger. Figure 6 below shows the correlation on a graph, reflected by the increasing trend between the GDP and the number of dispute settlement initiations.⁵⁴

Thus, a country's GDP is a stronger indicator of its propensity to initiate a complaint at the WTO dispute settlement system than its GNI per capita.⁵⁵

What may be the explanation for this finding? Again, it may be connected to the high legal and administrative costs associated with pursuing dispute settlement procedures in the WTO that we discussed in the previous section. Here the national GDP is more important than the GNI per capita. Also, the political costs involved in confronting another WTO member are harder to bear for a country with a low GDP (and a small population) than one with a high one. Again, it is the national GDP that matters here, more than the GNI per capita. Finally, this finding could also be explained in relation to the prevailing state's ability to enforce the ruling in its favor by the threat, or actual use, of retaliation ("suspension of concessions"). The larger the GDP of such country, the more credible is the threat, and as noted, this may have bearing on the state's willingness to initiate a complaint in the first place.

⁵⁰This explanation is suggested and tested by H. Horn, P. Mavroidis & H. Nordström, "Is the Use of the WTO Dispute Settlement System Biased?", *CEPR Discussion Paper Series* No 2340 (1999), on p. 14.

⁵¹For instance, Horn, Mavroidis & Nordström, *ibid.*, use the size of countries' WTO delegations in Geneva as a proxy for countries' legal capacity and ability to detect and challenge violations. They find that countries with more legal capacity litigate more, controlling for trade interests. However, this relationship is rather weak in their study.

Guzman & Simmons, on the other hand, include the number of embassies abroad, countries' nonmilitary government expenditures, and an index for the quality of government bureaucracies and conclude that the capacity hypothesis is better supported than the power hypothesis, but also find that poorer complainants have tended to focus on the big targets, where the potential gains are bigger, a strategy that is consistent with a tight capacity constraint, rather than a fear of retaliation (Andrew T. Guzman & Beth Simmons, "Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes", 34 *Journal of Legal Studies* 557 (2005)).

⁵²As explained above in footnote 36, the number of initiations has been adjusted according to the amount of time a country has been a WTO member.

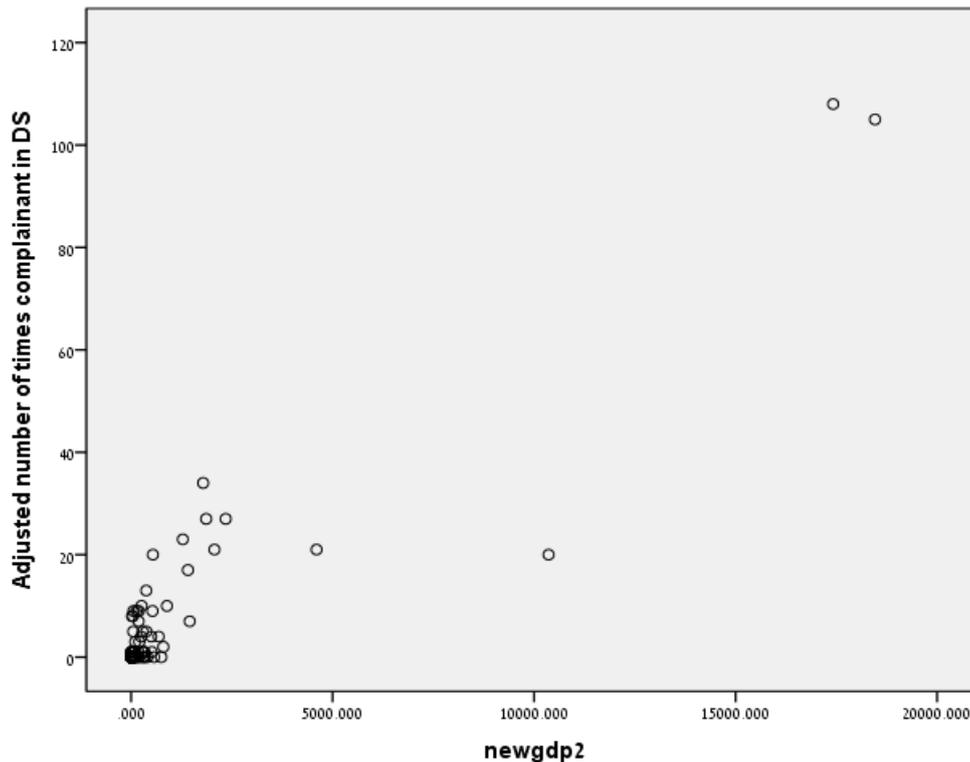
⁵³A coefficient of 1 reflects a perfect monotonic correlation, whereas a coefficient of 0 indicates that there is no correlation whatsoever. The closer the coefficient is to 1, the stronger the correlation. Thus, a coefficient of 0.677 indicates a stronger correlation than 0.411. Theoretically, there could also be a negative coefficient of down to -1. That means that as the X values increase, the Y values tend to decrease.

⁵⁴A similar, but not identical, finding was reached by Francois, Horn and Kaunitz, *supra* note 41, at p. 16, based on data from the first 12 years (1995-2006). They see GDP as a proxy for legal capacity. However, it may also be a proxy for the ability to bear legal and political costs, as I postulate in my analysis.

⁵⁵A similar finding was reported by Horn, Mavroidis & Nordstrom, *supra* note 50, at p. 18.

A case in point is Israel. It is one of the High Income Countries with a relatively low GDP,⁵⁶ and it has never initiated a complaint in the WTO. It has also never been targeted by such a complaint. Its two biggest trading partners are the United States and the European Union. It would be very reluctant to initiate a complaint against any of these super-powers, in particular against the United States. Likewise we have a group of 13 other High Income Countries with a relatively low GDP that have never initiated a complaint, nor been targeted by one.⁵⁷ There are also another four countries in this group of High Income Countries with a low GDP that have only initiated a complaint once.⁵⁸

Figure 6 – Correlation between GDP and number of initiations



Is there a higher propensity for poorer countries to settle?

After a Request for Consultations has been submitted, and in the course of these consultations, or later on, the parties to the dispute may reach an agreement to settle the case. This happens frequently, and in such case, there is no need to initiate or to conclude a panel procedure. I was interested in examining whether poorer countries have a higher propensity to settle than richer countries. My findings are presented in Table 2 below.

⁵⁶ Israel's GNI per capita is \$34,990 and its GDP is \$304 billion, much less than the average GDP of the group of High Income Countries, which is \$1,799 billion.

⁵⁷ This group includes the following countries, in addition to Israel: Bahrain, Barbados, Brunei Darussalam, Iceland, Kuwait, Liechtenstein, Macau, Oman, Qatar, Seychelles, St. Kitts & Nevis, Trinidad & Tobago, and United Arab Emirates. None of them has ever filed a Request for Consultations, and only one of them has been complained against (Trinidad & Tobago). All of these countries have a GDP of around 400 billion or less (most of them significantly less than that sum).

⁵⁸ These four WTO members are: Antigua and Barbuda, Hong Kong, Singapore and Uruguay.

Table 2 – Percentage of Parties that Agree to Settle or Terminate the Case (1995-May 2017)

	Percentage of Complainants that Settled	Percentage of Respondents that Settled
High Income Countries:	17.96% (74/412) ⁵⁹	15.79% (63/399)
Upper Middle Income Countries:	17.05% (22/129) ⁶⁰	17.07% (21/123)
Lower Middle Income Countries:	20.25% (16/79) ⁶¹	18.18% (12/66)
Low Income Countries	0 (0/0)	0 (0/0)

As one can see, the figures do not lend strong support to the hypothesis that poorer countries tend to settle more than rich ones, in order to save costs. The percentage of complainants that agree to withdraw their complaint after a mutually agreed solution was reached is only slightly higher for Lower Middle Income Countries (20.25%) than for High Income Countries (17.96%) – less than 2.5% - and not significant enough to draw conclusions. That is particularly so, considering that Upper Middle Income Countries tend to settle slightly less (17.05%) than High Income Countries, so there does not seem to be any correlation between income and propensity to settle. Only a small difference can be seen in relation to *respondents* that agree to settle, where the rate for High Income countries (15.79%)⁶² is slightly lower than that of Upper Middle Income Countries (17.07%),⁶³ which in turn is slightly lower than that of

⁵⁹ The cases where High Income Countries agreed to settle the case where they served as complainants are these (where a dispute involved more than one complainant, the name of the complainant that is a High Income Country has been indicated in parentheses) : DS1, DS5, DS6, DS7, DS13, DS14, DS16(US), DS20, DS21, DS27(US), DS28, DS35(Argentina), DS35(Australia), DS35(Canada), DS35(New Zealand), DS35(US), DS36, DS37, DS39, DS40, DS42, DS43, DS72, DS73, DS74, DS82, DS83, DS85, DS86, DS89, DS91, DS92, DS93, DS94, DS96, DS102, DS106, DS115, DS119, DS124, DS125, DS151, DS158(US), DS171, DS193, DS193, DS196, DS199, DS210, DS227, DS232, DS235, DS240; DS247, DS255, DS261, DS287, DS292, DS293, DS297, DS305, DS309, DS311, DS323, DS326, DS354, DS358, DS369, DS372, DS373, DS378, DS391, DS469, DS481. (Also the denominator – 412 – relates to the total number of times that a High Income Country has requested consultations within the WTO dispute settlement system, since its establishment until May 28, 2017. The same applies to the numbers for the other types of member states).

⁶⁰ The cases where Upper Middle Income Countries agreed to settle the case where they served as complainants are these (where a dispute involved more than one complainant, the name of the complainant that is a Upper Middle Income Country has been indicated in parentheses) : DS12, DS16, DS23, DS27(Ecuador), DS27(Mexico), DS35(Thailand), DS105, DS158(Mexico), DS158(Panama), DS181, DS190, DS228, DS237, DS250, DS281, DS329, DS344, DS348, DS359, DS361, DS364, DS382.

⁶¹ The cases where Lower Middle Income Countries agreed to settle the case where they served as complainants are these (where a dispute involved more than one complainant, the name of the complainant that is a Lower Middle Income Country has been indicated in parentheses) : DS16 (Guatemala), DS16(Honduras), DS19, DS27(Guatemala), DS27(Honduras), DS32, DS158(Guatemala), DS158(Honduras), DS284, DS298, DS306, DS313, DS327, DS374, DS404, DS429.

⁶² The cases where High Income Countries agreed to settle the case where they served as respondents are these: DS5, DS6, DS7, DS12, DS13, DS14, DS16, DS19, DS20, DS21, DS23, DS27, DS28, DS32, DS35, DS37, DS39, DS40, DS42, DS72, DS73, DS82, DS83, DS85, DS86, DS89, DS105, DS106, DS115, DS119, DS124, DS125, DS151, DS158, DS171, DS190, DS193, DS196, DS210, DS228, DS235, DS247, DS250, DS261, DS281, DS287, DS292, DS293, DS297, DS311, DS313, DS323, DS326, DS344, DS354, DS361, DS364, DS369, DS382, DS391, DS469, DS404, DS429. It should be noted, that when several complainants joined in one complaint against one respondent, this was counted as one case.

⁶³ The cases where Upper Middle Income Countries agreed to settle the case where they served as respondents are these: DS1, DS43, DS181, DS198, DS199, DS227, DS232, DS237, DS240, DS255, DS284, DS298, DS309, DS329, DS348, DS358, DS359, DS372, DS373, DS374, DS378.

Lower Middle Income Countries (18.18%).⁶⁴ but the difference is not very significant. I should note that the numbers above relate to mutually agreed solutions notified by the involved member states to the DSB at any stage of the procedures, including where such agreement was reached after a panel and AB report.

Compliance with DSB rulings: what is the motivation for Article 21.5 procedures?

Since we have dealt with how the various types of countries use the dispute settlement system, we shall now proceed to present some findings with regards to the compliance patterns of the system. In this connection, one should recall what DSU Article 21.1 stipulates:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

In order to understand what will follow, it could be helpful to recall how the compliance system of the DSU works. The following paragraphs will describe it briefly.

If a complaint has been accepted, in full or partly, a dispute settlement panel, or, in case of an appeal, the Appellate Body, has most likely recommended that the respondent member state “bring the [non-conforming] measure into conformity” with the relevant WTO agreement.⁶⁵ Under the “negative consensus” rule, such a recommendation will be deemed to have been adopted automatically by the DSB within 60 days of the date that the panel report was circulated to WTO members,⁶⁶ or 30 days in case of an AB report, unless the DSB decides by consensus not to adopt it.⁶⁷ “Consensus” here means “including the winning party” that will have to agree to waive its right to have the report adopted, in order to prevent adoption. This almost never happens.

DSU Article 21.3 then provides that at a DSB meeting held within 30 days after the date of adoption of the report, the member to whom the recommendation is directed shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings (for instance, because legislative amendments are required), the member concerned shall have “a reasonable period of time” in which to do so. The duration of such period of time can be determined either by agreement between the parties to the dispute, or through arbitration.

If the member concerned has taken measures to comply with the DSB rulings but the complainant member considers these measures as non-satisfactory, it can bring such dispute to a so-called “compliance panel”, also known as “Article 21.5 Procedures”, after the DSU provision that created them. Such dispute shall, wherever possible, resort to the same panel that decided the original dispute.⁶⁸

The next station on the road to compliance with the DSB ruling, in the case that the member concerned fails to bring the inconsistent measure into compliance, is so-called “suspension of concessions”.⁶⁹ This is WTO jargon for retaliatory trade sanctions by the affected member state. However, such suspension needs authorization by the DSB⁷⁰ and it must be at a level “equivalent to the level of the nullification or

⁶⁴ The cases where Lower Middle Income Countries agreed to settle the case where they served as respondents are these: DS36, DS74, DS91, DS92, DS93, DS94, DS96, DS102, DS305, DS306, DS327, DS481.

⁶⁵ See DSU Article 19.1.

⁶⁶ See DSU Article 16.4. That is, provided that the panel report was not appealed.

⁶⁷ See DSU Article 17.14.

⁶⁸ DSU Article 21.5.

⁶⁹ See DSU Article 22.2.

⁷⁰ *Ibid.*

impairment” caused by the non-compliance.⁷¹ When a dispute arises on whether the suspensions proposed are at the appropriate level, or whether they comply with the principles and procedures prescribed by the DSU, this dispute can be referred to arbitration, either by the original panel or by an arbitrator appointed by the WTO’s Director General. This is known as an Article 22.6 Procedure.

The figures that follow will present statistics related to members’ use of the Article 21.5 procedures aimed at determining whether compliance measures taken by the member concerned are indeed satisfactory and amount to compliance with the DSB ruling and the relevant WTO agreements. The question that I wanted to explore is whether disputes on compliance measures always reflect a good-faith disagreement between the parties on how to understand the ruling of the WTO panel or AB, as well as the relevant provisions in the agreements. Or, perhaps, they are used by the member that is required to comply as a means to delay compliance and to raise the price of enforcement against it through the WTO system?⁷²

The reason delay tactics can pay off is that in the WTO system there is no way to compel a member that has been found to violate its trade obligations to compensate the wronged trade partners for the losses they have suffered as a result thereof.⁷³ The only remedy the system provides to date is one that is aimed at inducing compliance from now and onwards.⁷⁴ Since a member state often derives benefits from its violations, whether economic or political benefits or both, and that is often what caused it to violate in the first place, the longer it can stall compliance the more benefits it will capture. Conversely, the member whose benefits have been nullified or impaired continues to suffer losses until full compliance is achieved. Hence, a member state who manages to establish a reputation of one that always uses delay tactics when it loses a case, not only captures the trade benefits during the stalling period, but also raises the cost of enforcement against it, thus deterring other member states from initiating dispute settlement procedures against it. Such member states may therefore prefer to strike a halfway compromise with this state, instead of embarking on lengthy and costly dispute settlement procedures.

⁷¹ DSU Article 22.4.

⁷² That compliance procedures are often used as a means to delay compliance was already speculated by William Davey, *supra* note 22, on p. 125 (“Prospective retaliation gives the losing country an incentive to delay the time of reckoning as long as possible and probably explains the extensive delays in the system as well as the frequent use of Article 21.5 compliance proceedings.”) My figures lend support to this speculation.

⁷³ This lack of a real remedy of compensation for losses suffered has been the topic of much academic discussion. See, for instance, Marco Bronckers & Naboth van den Broeth, “Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement”, 8 *J. of Int’l Econ. Law* 101 (2005). A proposal for financial compensation was also made by a group of African member states as part of the Doha Development Agenda. See Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding, Proposal by the African Group* TN/DS/W/15 (September 25, 2002). The possibility of “compensation” is mentioned in DSU Article 22.1, but only as a temporary and *voluntary* measure. In other words, a member state cannot be compelled to compensate another member state for injury suffered. Compensation can only be part of a mutually agreed solution, and in most cases, it does not involve monetary compensation, but rather alternative trade concessions.

⁷⁴ The possibility of compensation is mentioned in DSU Article 22. However, it does not refer to financial compensation for past losses, but rather to alternative concessions that the two member states can agree on as a temporary substitute for the withdrawal of the inconsistent measure.

In the period that we examined (1995-2016), there have been 36 reports issued by compliance panels.⁷⁵ Only three of those found full compliance by the member concerned.⁷⁶ There are perhaps 3-4 more cases where the member concerned was found to have complied in a significant part, while still found to be non-compliant in some matters.⁷⁷ Hence, in 33 cases, which comprise almost 92% of the compliance procedures, the panel found that the member concerned had not complied fully with the DSB ruling. With such a high percentage of non-compliance, it is hard to believe that in all of these cases there was a genuine legal question before the panel, with equally strong arguments for each side that could have gone both ways.

One should add that in many cases, when the member states are found to be non-compliant, they file an appeal on this finding to the AB, thus further delaying the resolution of the dispute. And several times, prevailing members are forced to initiate a second recourse to compliance procedures in their efforts to achieve full compliance. This will happen usually when the member concerned has introduced new implementation measures that it claims amount to compliance, after the first ones were found to be inconsistent.

Out of these 33 cases with findings of non-compliance, 21 ended up with requests from the DSB to authorize suspension of concessions.⁷⁸ That represents 64%.⁷⁹ In other words, we have a very high share of cases where even after it has been established that the members concerned have not complied fully, these members continue to maintain their refusal to comply, often even to the point of suffering economic consequences. This finding also lends support to the assumption that the issue in many of these proceedings is not one of legal uncertainty as to the meaning of the ruling, but rather one of unwillingness, or political inability, to comply with the ruling.

Compliance with DSB Rulings: who complies and who doesn't?

As explained above, if a member state that has lost in a dispute settlement procedure continuously fails to comply with the DSB ruling, the prevailing member state may decide that the only way to induce

⁷⁵ These are the disputes where Article 21.5 panel reports with substantial findings on whether there is compliance or not have been issued (the name of the member that requested the compliance panel is in brackets): DS27(EU); DS27(Ecuador); DS18(Canada); DS126(US); DS46(Canada); DS70(Brazil); DS58(Malaysia); DS132(US); DS108(EU); DS46 – 2nd Recourse(Canada); DS113(New Zealand); DS103(US); DS103 – 2nd Recourse(US); DS113 – 2nd Recourse(New Zealand); DS141(India); DS212(EU); DS207(Argentina); DS245(US); DS108 – 2nd Recourse(EU); DS257(Canada); DS277(Canada); DS264(Canada); DS268(Argentina); DS285(Antigua & Barbuda); DS267(Brazil); DS312(Indonesia); DS27 – 2nd Recourse(Ecuador); DS27 – 2nd Recourse(US); DS294(EU); DS322(Japan); DS316(US); DS353(EU); DS384(Canada); DS386(Mexico); DS397(China); DS381(Mexico); DS414(US). There have been 56 consultations requests to date under Article 21.5. However, many of these proceedings were settled before a panel was established or before it issued a report. There are also several proceedings that are ongoing now (May 2017) and reports have yet to be issued.

⁷⁶ The disputes where full compliance was found were: DS212(EU); DS46(Canada) and DS58(Malaysia). In cases where there have been appeals on the compliance panels' findings, we have considered the final outcome, as determined by the AB.

⁷⁷ For instance, in DS141(India), the panel ruled that the EU's implementation was not inconsistent with its obligations, but the AB reversed some of these findings and found partial non-compliance, which the EU was asked to rectify.

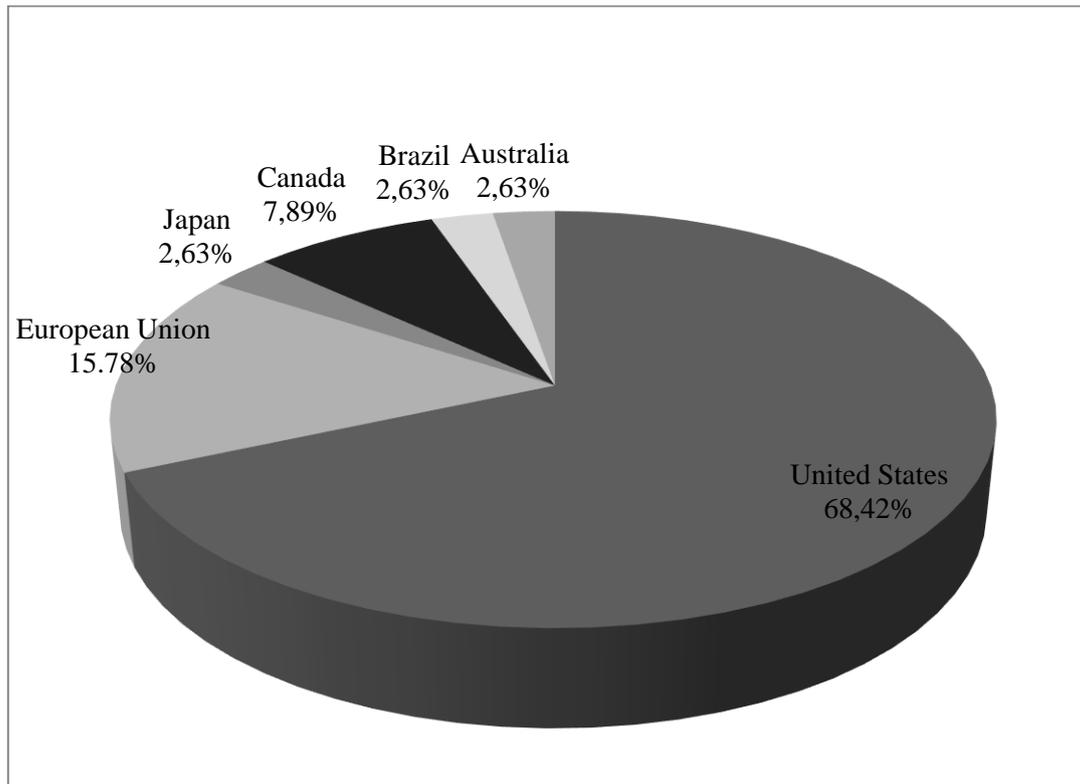
⁷⁸ The following are the 21 disputes out of the 33 disputes where a compliance panel had determined non-compliance, that also involved a request for suspension of concessions: DS27(Ecuador); DS18(Canada); DS46(Canada); DS108(EU); DS113(New Zealand); DS103(US); DS103 – 2nd Recourse(US); DS113 – 2nd Recourse(New Zealand); DS245(US); DS257(Canada); DS277(Canada); DS264(Canada); DS268(Argentina); DS285(Antigua & Barbuda); DS267(Brazil); DS294(EU); DS322(Japan); DS316(US); DS384(Canada); DS386(Mexico); DS381(Mexico). In some of these cases, a mutually agreed solution was reached soon after the request for suspension of concessions had been approved, or sometimes even before it was approved.

⁷⁹ The more accurate percentage is actually 66% (21/32), because in one of the disputes (DS27(EU)), it was the non-compliant party (the EU) that requested the compliance panel, asking it to rule that it had complied. The request was denied by the panel, who did not think that the EU had proven compliance, but one naturally cannot expect a request for suspension by the EU against itself here. The request for suspension by Ecuador against the EU has already been counted once.

compliance is to ask for suspension of concessions. During the time period that was examined (1995-2015) there were 38 suspension requests submitted to the DSB. Using suspension requests as a proxy for non-compliance (based on the reasonable assumption that if a losing member state fails to comply, the prevailing state will submit a suspension request), this indicates a total compliance rate of about 80%.⁸⁰ On the one hand, this is not a bad rate and explains why member state have confidence in the system and use is often. On the other hand, 20% non-compliance is not an insignificant percentage, in particular when, as we will see, it is not proportionally distributed among all member states.

The member states that were the targets of suspension requests, and how many times they were so targeted, is described by Figure 7 below.

Figure 7 – Targets of Suspension Requests



⁸⁰ Between the relevant years (1995-2015) there were, according to the figures of worldtradelaw.net, 141 WTO disputes where at least one violation was found. These are the cases where compliance is required. These disputes involved 192 complainants (several disputes had more than one complainant). The 38 suspension requests submitted during 1995-2015 involved 27 distinct disputes (several disputes involved more than one complainant and each one of them submitted a request for suspension of benefits). If we divide the number of disputes where at least one violation was found (141) by the number of disputes where suspension requests were eventually submitted (27), the result is 19.1% non-compliance. This reflects a compliance rate of 80.9%. An alternative approach is to divide the number of prevailing complainants, in other words the number of complainants involved in disputes where at least one violation was found (192), by the number of suspension requests (38), the result is not much different, namely 19.8% non-compliance. This reflects a compliance rate of 80.2%. Often, but not always, states will comply after a suspension request has been submitted, and maybe after suffering its consequences for some time, so if we were to add this belated compliance, we would have an even higher compliance rate. On the other hand, there are probably also cases where a member state refrains from submitting a suspension request, despite non-compliance, for whatever reason, such as various geopolitical considerations, so these cases may offset each other.

Figure 7 indicates that the United States holds a disproportional share of the number of suspension requests, namely more than two thirds of them (68%).⁸¹ The US also holds a disproportionate share in the number of compliance procedures (44% of those that went to panels and had reports issued;⁸² 38% of all Article 21.5 consultations requests).⁸³ The US share in world imports amounts only to 13.8%,⁸⁴ which of course is considerably lower than its high share of compliance procedures and suspension requests. The US was also the respondent in a relatively high proportion of all issued panel reports, namely in 38% of them (78 out of 207). However, this high rate of US participation as respondent to complaints on trade violations is still much lower than its share in suspension requests. During the years we checked, there were 75 complainants that prevailed over the US.⁸⁵ These are the cases where there is a potential for suspension requests in case of non-compliance. Indeed, 26 of these complainants ended up submitting suspension requests against the US.⁸⁶ That corresponds to 34.6% of the total. In other words, more than one third of the complainants who prevailed over the US in dispute settlement procedures, were forced to turn to trade sanctions in their effort to obtain compliance by the US.

The next biggest “sinner” in the WTO is the European Union, which was the target of 15.8% of the suspension requests.⁸⁷ EU’s share in compliance panels is 16.7%⁸⁸ and in compliance consultations requests – 20%.⁸⁹ Those percentages are slightly higher than the EU’s share in world imports, which

⁸¹ Out of the 38 suspension requests, 26 were filed against the United States. This is the list of cases where requests for suspension were submitted against the US (the name of the requesting state is in brackets): DS108(EU); DS136(EU); DS160(EU); DS162(Japan); DS217(Japan); DS217(India); DS217(EU); DS217(Brazil); DS217(Korea); DS217(Chile); DS234(Canada); DS234(Mexico); DS257(Canada); DS264(Canada); DS267, SCM4.10(Brazil); DS267, SCM7.9(Brazil); DS268(Argentina); DS277(Canada); DS285(Antigua); DS294(EU); DS322-23(Japan); DS322-24(Japan); DS353(EU); DS384(Canada); DS386(Mexico); DS408(Indonesia).

⁸² For the US share of the compliance procedures where panel reports were issued, our examination includes all reports issued between 1995-2015 where there was a ruling on the dispute (compliance – yes, or no?). These cases are the following disputes (the name of the requesting state is in brackets) out of a total of 36: DS381(Mexico); DS386(Mexico); DS384(Canada); DS353(EU); DS322(Japan); DS294(EU); DS267(Brazil); DS285(Antigua); DS268(Argentina); DS264(Canada); DS277(Canada); DS257(Canada); DS108(EU) 2nd Recourse; DS212(EU); DS108(EU); DS58(Malaysia).

⁸³ For the US share of all Article 21.5 consultations requests, I used all consultations requests recorded between 1995 and April 6, 2017, except those that were submitted by the member state itself that is to comply. These cases are the following disputes (the name of the requesting state is in brackets) out of a total of 50: DS437(China); DS381(Mexico) 2nd Recourse; DS381(Mexico); DS386(Mexico); DS384(Canada); DS353(EU); DS344(Mexico); DS322(Japan); DS294(EU); DS282(Mexico); DS267(Brazil); DS285(Antigua); DS268(Argentina); DS264(Canada); DS277(Canada); DS257(Canada); DS108(EU) 2nd Recourse; DS212(EU); DS108(EU); DS58(Malaysia); DS99(Korea).

⁸⁴ Source: WTO <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=S&Country=US> (for year 2015). I preferred to use the US share in world imports and not the combined import and export share (which is lower), because the majority of complaints are initiated against a country’s import policies, and not its export policies.

⁸⁵ In some panel procedures, we have multiple complainants in one procedure (who all complain about the same measure of the respondent state). When such complainants prevail in the case, each one of them is entitled to submit a suspension request. We have therefore counted the numbers of prevailing complainants and used that number as our denominator.

⁸⁶ Those 26 cases are listed in note 81 above.

⁸⁷ This is the list of cases where requests for suspension were submitted against the EU (the name of the requesting state is in brackets): DS26(US); DS27(US); DS27(Ecuador); DS48(Canada); DS291(US); DS316(US).

⁸⁸ For the EU’s share of the compliance procedures where panel reports were issued, our examination (as with the US) includes all reports issued between 1995-2015 where there was a ruling on the dispute (compliance – yes, or no?). These cases are the following disputes (the name of the requesting state is in brackets) out of a total of 36: DS397(China); DS316(US); DS27(US); DS27(Ecuador) 2nd Recourse; DS141(India); DS27(Ecuador).

⁸⁹ For the EU’s share of all Article 21.5 consultations requests, I used all consultations requests recorded between 1995 and April 6, 2017, except those that were submitted by the member state itself that is to comply. These cases are the following disputes (the name of the requesting state is in brackets) out of a total of 50: DS397(China); DS316(US); DS27(US); DS27(Ecuador) 2nd Recourse; DS27(Panama); DS27(Nicaragua); DS27(Honduras); DS141(India); DS27(Ecuador); DS27(Ecuador, Guatemala and others).

amounts to 14.36%.⁹⁰ It also corresponds roughly to the proportion of cases in which the EU was a respondent to complaints on trade violations where panel decisions were issued (18.36%).⁹¹

If, however, we compare the number of times that Developing Countries were respondents in panel procedures to their share in suspension requests, we get a very different picture. Developing Countries were the respondent in 65 out of 207 issued panel reports, which corresponds to 31.4%. In contrast, there has only been one suspension requests that has targeted a developing country, namely Brazil,⁹² corresponding to less than 3%. There were 52 complainants that prevailed over Developing Countries, where therefore the potential for a suspension request existed. But, as noted, only one of those complainants had to revert to such a request. One could assume that in all other cases, the developing country complied with the DSB ruling and eliminated the non-consistent measure.⁹³

Likewise, China is an emerging superpower on the international arena. It is considered the world's biggest exporter, and its share in world imports amounts to 10.06%,⁹⁴ only somewhat lower than the US.⁹⁵ China has been a respondent in 12 out of the 130 panel reports issued since China joined the WTO in 2001. That amounts to 9.23%, approximately the same proportion as China's share in world imports. However, the number of suspension requests that have been filed against China is zero. Its share in compliance panels is 2.8%⁹⁶ and in compliance consultations requests – 4%.⁹⁷ In fact, until 2014, there was never any request for compliance consultations filed against China, and now there are two. One wonders if what is happening is that China is learning from the US, EU and Canada how to take advantage of the system,⁹⁸ or perhaps it is a way of retaliating against the US. If so, we might also see a first request for suspension of concessions against China, soon, which would be an unfortunate development.

When China acceded to the WTO, many scholars and policy makers were very skeptical about the willingness and ability of China to comply with international trading rules,⁹⁹ and some even predicted that its accession could cause “a flood of complaints” that would disrupt the dispute settlement system

⁹⁰ Source: <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=E28> (share in imports for year 2015).

⁹¹ The EU was a respondent in 38 out of 207 issued panel decisions.

⁹² DS46 Brazil – Aircraft (Canada).

⁹³ The Developing Countries' share in compliance consultations requests is 20% (including those of China and Korea), which is also lower than their share as respondents in panel procedures (10 requests out of 50). Their share in compliance procedures where a panel report was issued is lower: only 16.7% (6 out of 36).

⁹⁴ Source: <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=CN&> (China's share in imports for 2015).

⁹⁵ China's share in world exports is 13.8%, so for imports and exports combined, China's and US's shares in world trade are about the same.

⁹⁶ For China's share of the compliance procedures where panel reports were issued, our examination (as with the US and the EU) includes all reports issued between 1995-2015 where there was a ruling on the dispute (compliance – yes, or no?). There was only of case like that out of 36: DS414(US).

⁹⁷ For China's share of all Article 21.5 consultations requests, I used all consultations requests recorded between 1995 and April 6, 2017, except those that were submitted by the member state itself that is to comply. These cases are the following disputes (the name of the requesting state is in brackets) out of a total of 50: DS427(US); DS414(US).

⁹⁸ Indeed, Marcia Harpaz in her 2010 article about China's participation in the WTO dispute settlement system, argues that China's initial reluctance to participate in formal dispute settlement has its roots in Chinese Confucian culture that views litigation as bad faith, and that what caused this to change is a process of socialization, i.e., a process by which the newcomer becomes incorporated into organized patterns of interaction and learns from the more experienced participants what is the “proper” and acceptable way of behavior. See Marcia Don Harpaz, “Sense and Sensibilities of China and WTO Dispute Settlement”, 44 *Journal of World Trade*, pp. 1155 (2010). Just like this process led China in 2006 to start initiating formal complaints against other WTO member states, it may have led it to delaying compliance with DSB rulings in 2014, and may in the future lead it to delay compliance to the point of suspension of concession requests being filed against it.

⁹⁹ See Harpaz, *ibid.* at p. 1168.

and “threaten the long-time viability of the WTO”.¹⁰⁰ However, China’s record on compliance, at least for now and at least as measured by the number of suspension requests filed against it, seems to be perfect.

Suspension requests are the “last station” on the long winding road of the WTO dispute settlement procedures and they represent the targeted member state’s unwillingness to submit to the system and to respect its international obligations. Suspension of concessions are not the goal of any complainant, but merely a last-resort means to induce the other party to live up to its commitments and to maintain the trade liberalization bargain embedded in the Marrakesh Agreement establishing the WTO. John Jackson taught us that while the diplomacy of the 1947 GATT was “power oriented”, the post-Marrakesh WTO is “rule oriented”.¹⁰¹ It would seem, however, that some of the powerful member states are not so keen on abandoning the use of their power even within what is supposed to be a rule-oriented dispute settlement system.

How long do WTO dispute settlement procedures take?

An important component of a dispute settlement system’s effectiveness is the time that it takes for it to resolve a dispute. “Justice delayed is justice denied”, is a well-known legal maxim. This is true even in a system that compensates for past injuries. So much more in one where no such compensation is available. The drafters of the DSU were well aware of the need for “the **prompt** settlement” of disputes, and that it is “essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”¹⁰² They therefore set out what was meant to be a tight timetable for each of the stages in the process, and they took measures to prevent the ability of members to block its progression, which had been plaguing the 1947 GATT system.¹⁰³

Hence, DSU Article 4.7 allots 60 days for the consultations procedure, after which the complaining party may request the establishment of a panel. The composition and establishment of the panel must be completed within 45 days at most.¹⁰⁴ DSU Article 12.8 provides that the period from the date of the panel’s composition until it issues its final report “shall, as a general rule, not exceed six months.” In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report within three months. DSU 12.9 provides that if the panel is unable to meet these deadlines, it may extend the time required. However, the provision stipulates that “[i]n no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.” For the appellate review, the DSU provides that it should normally be concluded within 60 days, and “[i]n no case shall the proceedings exceed 90 days.”¹⁰⁵ Members are given 20 days to consider the report before

¹⁰⁰ Ostry, Sylvia, 'WTO Membership for China: To Be or Not to Be?', in Deborah Z. Cass, Brett G.

Williams and George Barker (eds), *China and the World Trading System – Entering the New Millennium* (Cambridge University Press, 2003) 31-40 at 37.

¹⁰¹ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge: MIT Press, 1989) 110–11; and John H. Jackson, “The Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation”, 90(1) *American Journal of International Law* 60 (1997).

¹⁰² DSU Article 3.3.

¹⁰³ Participants in the negotiations of the DSU recall that the time table was taken directly from the time table of US section 301 (unilateral) procedures as demanded by the US.

¹⁰⁴ DSU footnote 5 provides that the meeting of the DSB to establish a panel shall be convened within 15 days of the request of the member state to do so. DSU Article 8.7 allots the parties to the dispute 20 days from the establishment of the panel to agree on its composition. If they cannot agree, the Director-General of the WTO will compose the panel, and this must be done within 10 days. So the longest this process can take, if these provisions are followed is 45 days, from the request to establishment of a panel to its composition.

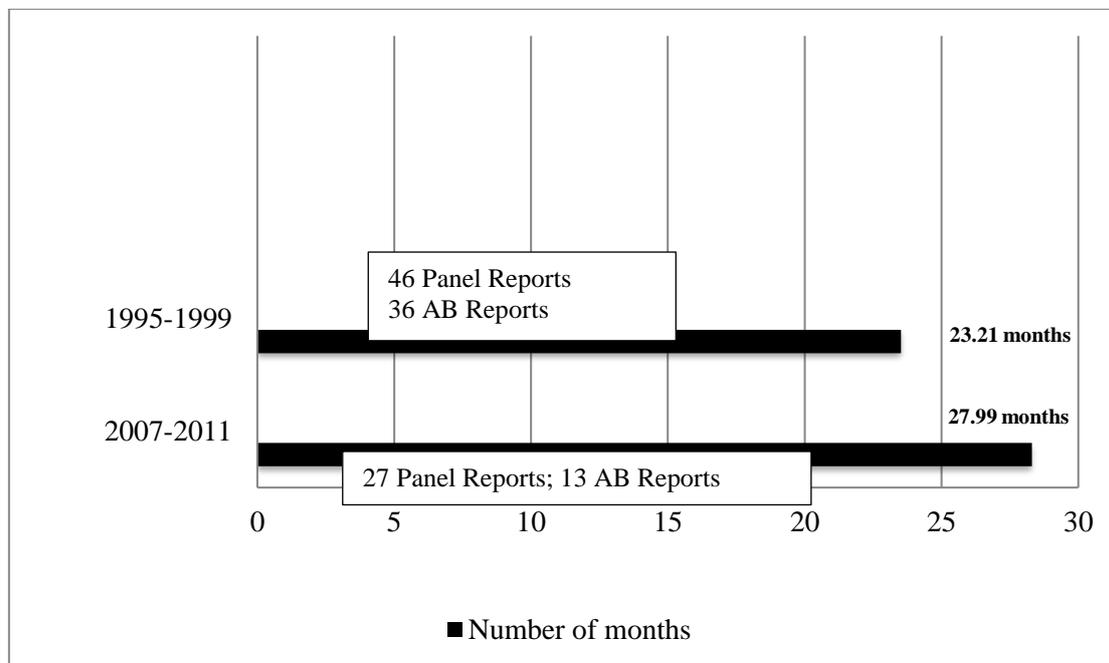
¹⁰⁵ DSU Article 17.5.

it is being considered for adoption by the DSB.¹⁰⁶ Adoption by the DSB of a panel report shall occur within 60 days,¹⁰⁷ and of an AB report within 30 days.¹⁰⁸

If we combine all these stages, we will reach a maximum duration of about 12 months from consultations to adoption for regular panel procedures, and 15 months at most, if the panel extended the period. Where the panel report was appealed, we will reach a maximum duration of 15-16 months, or 18-19 months if the panel extended the period.

In view of that, we will now turn to examine the actual duration of dispute settlement procedures in the WTO. We will also examine whether there has been any change in this respect over the years. For this purpose, we examined all consultations requests submitted during the WTO's first five years (1995-1999) that went to a panel and culminated with a panel report.¹⁰⁹ We then measured the time between the date of such request and until adoption by the DSB (whether the panel report had been appealed or not). Then we did the same for all consultations requests submitted between 2007-2011¹¹⁰. The results of the examination are shown in Figures 8 and 9, where Figure 8 shows the average durations for these two periods, and Figure 9 shows the division of the disputes according to the length of the procedures, for both time periods. Figure 8 also shows how many panel procedures and AB procedures took place for the consultations requests submitted within each 5-year period.

Figure 8 – Duration of DSU procedures – Past and present: time from consultations request to adoption



¹⁰⁶ DSU Article 16.1.

¹⁰⁷ DSU Article 16.4.

¹⁰⁸ DSU Article 17.4.

¹⁰⁹ In other words, we did not include those requests that were settled during consultations or before the panel could rule on the dispute, but only those where a substantive panel report was issued. There were 58 such requests, out of the 185 consultations requests submitted during the years 1995-1999 (from DS1 to DS185). Some of them were resolved by one consolidated panel report.

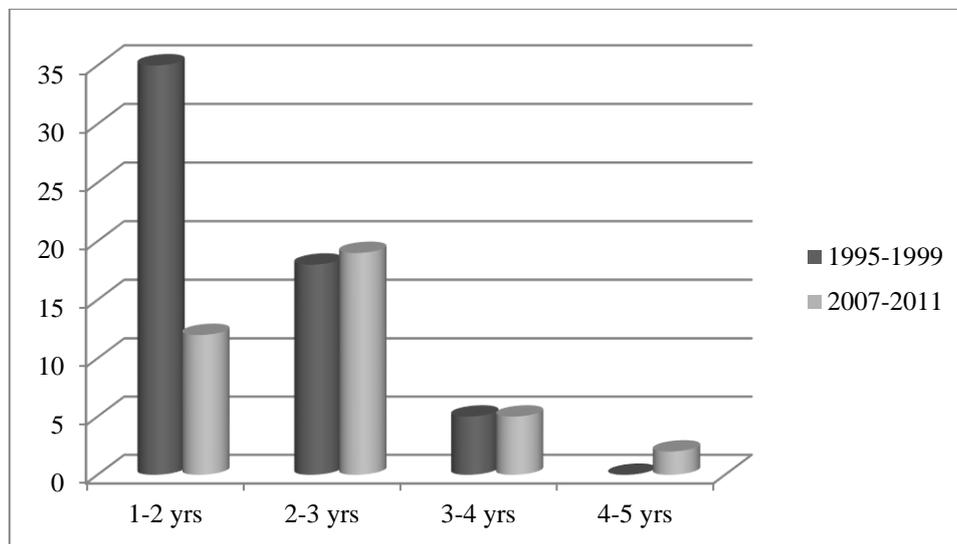
¹¹⁰ During the years 2007-2011, there were 38 requests for consultations that ended with substantive panel reports (i.e., those where the panel ruled on the dispute, not those where it only recorded the parties' mutually agreed solution). These panel procedures ended with 27 reports (some related to consolidated disputes).

Figure 8 shows that from the outset, the WTO dispute system was unable to resolve disputes within the timeframe that the drafters of the DSU had tried to impose. The average (not the maximum!) duration from consultations request to adoption was much longer than the maximum 15-19 months prescribed by the DSU for a process including an AB appeal, namely: 23.21 months for disputes that started between 1995-1999, and 28 months for those that started between 2007-2011.¹¹¹ Keep in mind that this average includes also cases that did not go to appeal, where the maximum duration was prescribed to be shorter.

Figure 8 also shows that the delay in the resolution of disputes is not getting shorter, but, on the contrary, is getting worse. This, despite the fact that the system is dealing with less cases than in the early years. The decreasing numbers of disputes can be seen also in Figure 1 above. Specifically, for our examined periods there were 46 panel reports issued for consultations requests made between 1995-1999,¹¹² and only 27 for consultations requests made between 2007-2011.¹¹³ Of the 46 panel reports of the first period, 36 were subject to full appeal procedures¹¹⁴, and out of the 27 panel reports of the later period, only 13 were subject to full appeal procedures.

Another perspective on the deterioration in the system’s ability to fulfil its objective of “prompt settlement” of disputes, can be seen in Figure 9, which groups the disputes from both periods according to their duration.

Figure 9 – Duration of DSU procedures – past and present



¹¹¹ The average duration from consultations request to adoption for the 58 requests for consultations submitted between 1995-1999, which were resolved by a panel or AB report, was 705.89 days, which is equal to 23.21 months. The average duration for consultations submitted between 2007-2011 was 851.34 days, which is equal to 27.99 months.

¹¹² The consultations requests filed between 1995-1999 for which substantive panel reports were issued (i.e., those where the panel ruled on the dispute and did not only report a mutually agreed solution) were as follows: DS2; DS8,10 and 11; DS24; DS33; DS31; DS27; DS50; DS26; DS56; DS69; DS54, 55, 59 and 64; DS79; DS58; DS18; DS75 and 884; DS99; DS76; DS126; DS46; DS70; DS90; DS103 and 113; DS34; DS87 and 110; DS98; DS121; DS132; DS108; DS114; DS138; DS139 and 142; DS160; DS136; DS170; DS156; DS165; DS161 and 169; DS166; DS179; DS155; DS141; DS122; DS177 and 178; DS184; DS176; DS146 and 175.

¹¹³ The consultations requests filed between 2007-2011 for which substantive panel reports were issued, were as follows: DS362; DS366; DS363; DS383; DS375, 376 and 377; DS392; DS367; DS402; DS379; DS382; DS371; DS397; DS404; DS396 and 403; DS398, 394 and 395; DS405; DS415, 416, 417 and 418; DS406; DS381; DS422; DS384 and 386; DS413; DS414; DS425; DS412 and 426; DS427; DS400 and 401.

¹¹⁴ By “full appeal procedures” I mean those that culminated in an AB report.

As one can see, in the early days, most disputes (over 60%) were resolved within 2 years.¹¹⁵ About 31% were resolved within 2-3 years; and 9% within 3-4 years. No dispute required more than that. In the later period, however, only 32% were resolved in less than 2 years, and 50% required 2-3 years. About 13% required 3-4 years to be resolved and more than 5% required between 4 and 5 years.¹¹⁶ The AB has almost never managed to issue a report within the 60 days prescribed by the DSU.¹¹⁷ One needs to keep in mind that these periods do not include the time it takes to obtain compliance by the losing party, which in 2007 was calculated to amount to an average of 292 days from adoption.¹¹⁸

Since 2011, the situation is continuing to deteriorate and delays are getting worse. I examined all of the consultations requests submitted in 2013 (20 requests).¹¹⁹ To date,¹²⁰ these requests have produced 8 panel reports,¹²¹ 7 of which went to appeal.¹²² The average duration of those 8 cases, from consultations request to adoption was 33.83 months, which is almost 6 months more than the average for 2007-2011. Only one of those cases was adopted within two years of its initiation,¹²³ three took 2-3 years to resolve,¹²⁴ and four took 3-4 years.¹²⁵ The average duration for this year is likely to increase even further, considering that there are at least two ongoing cases where a panel report is yet to be issued.¹²⁶

An in-depth and comprehensive examination of the reasons that cause the deterioration in the WTO system's ability to provide prompt dispute settlement services is beyond the scope of the present article.¹²⁷ However, some preliminary observations can be made. At least some of the causes of the delay are alluded to in the official descriptions of the dispute settlement procedures. For instance, in several recent cases, after the panel has been established and composed, the start of the proceedings is delayed for several months. The Chair of the Panel then informs the DSB that the delay is caused because of "a lack of available experienced lawyers in the Secretariat".¹²⁸ Another cause that is mentioned is "the

¹¹⁵ By "resolved" I mean that a binding resolution was adopted by the DSB. 35 disputes (consultations requests) out of 58 were thus resolved in less than 2 years.

¹¹⁶ 12 disputes out of 38 took less than 2 years; 19 out of 38 took 2-3 years; 5 took 3-4 years, and 2 disputes required between 4 and 5 years.

¹¹⁷ In 2007, according to the Communication by Mexico, the Appellate Body has issued its report within the timeframe of 60 days only 5 out of 64 times (7.8%) (WTO, "Diagnosis of the Problems Affecting the Dispute Settlement Mechanism – Some Ideas by Mexico", *supra* note 30, p. 14). Horn, Johannesson & Mavroidis in 2011 reported 6 such cases out of 127 (Henrik Horn, Louise Johannesson & Petros C. Mavroidis, "The WTO Dispute Settlement System 1995-2010, Some Descriptive Statistics", 45 *Journal of World Trade* no. 6 (2011): 1107, at p. 1136.

¹¹⁸ *Ibid.*, at p. 11.

¹¹⁹ DS455-DS474. There is no point in examining requests for consultations submitted later than that, because most of them will not have been completed (i.e., culminated in panel and AB reports that have been adopted).

¹²⁰ As of writing this on May 15, 2017.

¹²¹ The disputes where panel reports were issued are the following: DS456; DS457; DS460; DS461; DS464; DS468; DS471; and DS473.

¹²² All of the disputes listed in the previous footnote went to appeal except for DS468.

¹²³ DS468 took 628 days from request to adoption.

¹²⁴ DS457, DS460 and DS473, took 840, 867 and 1,042 days respectively.

¹²⁵ DS456, DS461, DS464 and DS471 took 1346, 1100, 1124 and 1286 days respectively.

¹²⁶ In DS458 and DS467, the joint panel was composed in April 2014 and is expected to issue its report in May 2017. The report will probably be appealed, so we are looking at several more months. In DS472, a panel was established and composed in 2015, but a report has not yet been issued.

¹²⁷ For a discussion of the difficulties in meeting the timelines, see Davey, *supra* note 22, p. 352 under the heading "Timelines". However, that article discusses the early years of WTO dispute settlement, and are less relevant to the problems we see today.

¹²⁸ For instance, in DS464 *United States – Anti-Dumping and Countervailing Measures on Residential Washers from Korea*, the panel was composed on June 20, 2014. On December 15, 2014, the Chair of the Panel informed the DSB that the beginning of the panel's work was delayed as a result of a lack of available experienced lawyers in the Secretariat. See: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds464_e.htm. The same reason was invoked in DS461 *Colombia –*

unavailability of panelists”.¹²⁹ Finally, there is also mentioning of delays in the circulation of reports caused by the need to translate them to the other WTO official languages,¹³⁰ which hints to an overload on the translation services. All of these reasons, except perhaps for the lack of panelists (which I find hard to understand¹³¹), are problems that can be solved by hiring more staff. That however is a decision that may be subject to budgetary considerations, and hence to the approval of the Committee on Budget, Finance and Administration and of the Council of Ministers.¹³² In other words, if member states are unwilling to approve the hiring of more experienced lawyers and more translators to support the dispute settlement system, the problem is likely to persist. The shortage in senior lawyers has been blamed on a 2011 decision by then-Director General Pascal Lamy to freeze all staff promotions to senior grades and recruit only at the most junior levels, the purpose being to address budget constraints and correct a top-heavy structure of grades of staff in the Secretariat.¹³³ The result is that as senior lawyers leave the WTO, either due to retirement or departure, only junior lawyers are hired in their place. Some also blame the policy for actively driving senior lawyers to leave, as it eliminated the opportunity to advance within the organization and move up the pay scale. That being said, in 1995, when the WTO was created, it only had ten lawyers, and now it employs almost sixty lawyers.¹³⁴

On the other hand, there may be other problems that need to be addressed, such as the length of panel and AB reports and the lack of restrictions on the length of submissions and number of exhibits that parties may submit. It seems that both are growing over the years, and of course, there is a connection between the two. What is surprising is that these delays are getting worse even though the number of disputes have gone down considerably (almost by half) over the last few years, compared to the first five years of the WTO.¹³⁵ It may be that the complexity of the cases is increasing, and the number of parties involved in each case, but that is something that needs to be empirically verified.¹³⁶ Another

Measures Relating to the Importation of Textiles, Apparels and Footwear , see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds461_e.htm .

¹²⁹ In DS473 *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, the panel was composed on June 23, 2014. Six months later, on December 10, 2014, the Chair of the Panel informed the DSB that the start of the proceedings was delayed owing to *the unavailability of panelists* and a lack of available experienced Secretariat lawyers, and that the panel expected to issue its final report to the parties only by the end of 2015. See https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds473_e.htm . See also DS453 *Argentina – Measures Relating to Trade in Goods and Services*, where those two reasons were invoked to justify a delay of six months, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds453_e.htm .

¹³⁰ See for instance DS267 *United States – Subsidies on Upland Cotton* , where Chairman of the Appellate Body gave several reasons for the delay in the circulation of the report, and among them “the increased burden on the Appellate Body as well as the translation services”. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm This reason is also invoked in DS461 *Colombia – Measures Relating to the Importation of Textiles, Apparels and Footwear* , see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds461_e.htm . In this case, the duration of the proceedings from consultations request to adoption was three full years (June 2013-June 2016).

¹³¹ I know personally several highly qualified trade experts that have never been asked to serve as panelists, or who were once panelists and have not been called again for many years. It is hard to believe that no panelists can be found. Rather it may be that the Secretariat is looking for a certain type of panelists that they can't find.

¹³² See Article VII of the Agreement Establishing the World Trade Organization.

¹³³ Scott S. Linicome & Davida L. Connon, “WTO Dispute Settlement – Long Delays Hit the System” *White & Case, Client Alert* (June 2014), p. 3. Available here: <https://www.whitecase.com/sites/whitecase/files/files/download/publications/wto-dispute-settlement-long-delays-hit-the-system.pdf>.

¹³⁴ Johannesson & Mavroidis, *supra* note 35, p. 11, footnote 19.

¹³⁵ As shown in Section 2 above: between 1995-1999, we had an average of 37.8 disputes every year, while between 2002-2016, there were only 19.2. Therefore the claim by Linicome and Connon, *supra* note 133, linking it to an increase in cases is not so convincing. They look only at the last ten years (2004-2014), and there see a certain increase of cases. They fail however to see that during the first ten years of the WTO (1995-2004), we had on average much more cases than in 2013-2014.

¹³⁶ Horn, Johannesson & Mavroidis, *supra* note 117, provided evidence to the effect that the number of claims raised per dispute does not affect the overall duration of the process. [Check further!]

reason may be the increased involvement of private lawyers, who tend to raise much more legal arguments, including several procedural challenges on issues such as panel jurisdiction and failure to fulfill preliminary requirements.

Just as on the panel level, what is needed is more experienced Secretariat lawyers to assist the panels, on the AB level one may want to consider increasing the number of AB members from 7 to 9, in order to allow it to hear more appeals concurrently.¹³⁷

The appellate body's inability to remand a case to the panel

Background to the problem

One of the procedural flaws of the WTO dispute settlement system is that the Appellate Body lacks the authority to remand a case to the original panel, in order to make the factual findings required to complete the legal analysis. DSU Article 17.6 provides that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." The job of a panel, on the other hand, is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case".¹³⁸ In other words, there is division of labor, which is very common in judicial systems, between the first instance (the panel) and the appeal instance (the AB), where the establishment of the facts of the case is in the sole authority of the first instance, and the appeal is limited to issues of law. However, when you have such a division of labor, the appellate instance must also be authorized to remand a case to the first instance, in order to make a new fact finding that is required by a different interpretation of the law determined by the appellate instance. Unfortunately, whether on purpose or by omission, the DSU did not give the AB such an authorization. DSU Article 17.13, which sets out the authority of the AB, only authorizes it to "uphold, modify or reverse the legal findings and conclusions of the panel."

Because of this lack of authority, in many cases the WTO dispute settlement system is unable to deliver a final resolution of the dispute. This will happen when the AB disagrees with the panel's legal interpretation and reverses it, and where the new interpretation requires the establishment of facts that are not found in the panel's report. In such a situation, the AB might reach the conclusion that it is unable to complete the legal analysis because of lack of relevant facts, and the dispute remains in essence "up in the air" and without a final resolution, at least on this specific point.

The findings

In order to find out how serious of a problem this is, I have examined the number of cases where this failure occurred. I found that out of the 122 decisions that were issued by the AB between 1995-2015, in 27 decisions the AB was unable to complete the analysis, after having reversed the panel's legal interpretation.¹³⁹ That amounts to 22.1% of all AB decisions. Furthermore, in almost half of those cases, this failure to resolve all of the disputed issues occurred in relation to more than one issue.¹⁴⁰ It also

¹³⁷ This has been suggested by DG Azevedo in remarks before the DSB, as recounted by Ambassador Fernando De Mateo, who served as Chairman of the DSB in 2014 in a speech delivered at the Graduate Institute of International and Development Studies, on 24 March 2015, under the heading: "8th Annual Update on WTO Dispute Settlement", available here: https://www.wto.org/english/tratop_e/dispu_e/fmateo_14_e.htm

¹³⁸ DSU Article 11.

¹³⁹ These are the cases where the AB was unable to complete the analysis: DS18; DS98; DS142; DS169; DS184; DS113 – Art. 21.5 Proceeding; DS244; DS257; DS268; DS267; DS277; DS294; DS315; DS320; DS321; DS316; DS367; DS377; DS386; DS426; DS436; DS437; DS449; DS384; DS430; DS457.

¹⁴⁰ These are the cases where this occurred for more than one issue: DS18; DS98; DS169; DS184; DS244; DS268; DS294; DS294 – Art. 21.5 Proceedings; DS321; DS316; DS436; DS437. These are 12 cases out of 27, amounting to 44.44%.

seems that the problem is becoming more prevalent over the years. Whereas during the first ten years (1995-2004), the failure occurred in about 14% of the decisions,¹⁴¹ during the last ten years that were examined (2006-2015) it occurred in no less than 34.7% of the decisions,¹⁴² in other words, in more than a third of the cases. Hence, the claim by one member state in its communication to the Special Session of the DSB in relation to the review process of the DSU that “[t]he issue of remand has not been a major problem in practise” [sic], is not substantiated by the facts.¹⁴³

Demonstration of the problem: DS449

In order to illustrate how the issue of remand can be a major obstacle to the AB’s ability to resolve a dispute and to make the necessary recommendations based on its binding interpretation of the relevant legal provisions, it may be helpful to describe one of the 27 cases where this failure occurred. The case I have chosen for this purpose is DS449 *United States – Countervailing and Antidumping Measures on Certain Products from China*.¹⁴⁴ This is one of many cases dealt with by the WTO dispute settlement mechanism in the field of trade remedies (antidumping and countervailing measures) imposed by member states and challenged by other member states whose exporters have been targeted by such measures.

This dispute involves a provision of the U.S. countervailing duty (CVD) law relating to the treatment of non-market economies (NMEs), and its application in some 25 different CVD proceedings.¹⁴⁵ The background to the dispute is that in the early 1980s, the U.S. Department of Commerce (USDOC) decided not to apply CVDs to NME countries, but only antidumping duties. In 1986, the U.S. Court of Appeals for the Federal Circuit (CAFC), in the *Georgetown Steel* case, upheld the USDOC decision.¹⁴⁶ In 2006/2007, the USDOC changed its practice and decided to start applying CVDs to NMEs. In 2011, in the *GPX V* case,¹⁴⁷ the CAFC concluded that the USDOC's decision to apply CVDs to NMEs is in violation of the relevant U.S. statute. Before that ruling took effect, the U.S. Government petitioned for a rehearing *en banc*, which effectively prevented the ruling from becoming binding until the conclusion of the rehearing. While the rehearing was pending, in 2012 Congress passed the so-called "GPX legislation", which amended the existing CVD statute,¹⁴⁸ in order to prevent the need to repeal all of the CVDs that had been imposed on NMEs.¹⁴⁹ The new provision not only allows, but actually requires the

¹⁴¹ Between 1995-2004, it occurred in 9 out of a total of 64 AB decisions issued during those years.

¹⁴² Between 2006-2015, it occurred in 17 out of a total of 49 AB decisions issued during those years.

¹⁴³ WTO, “Diagnosis of the Problems Affecting the Dispute Settlement Mechanism – Some Ideas by Mexico” TN/DS/W/90, 16 July 2007, on p. 20. This conclusion is based on the claim made on p. 19 of the same document, according to which: “There has been only one case in which the Appellate Body has been unable to make any finding because of lack of factual findings on the part of the panel.” The case indicated in the footnote to this sentence is WT/DS103/AB/RW, WT/DS113/AB/RW, which is *Canada – Milk Dairy*. However, as we have shown, this is not correct. Until 2007, the date of the communication, there had been 13 cases in which the AB was unable to complete the analysis (or to remand the case to the panel). I should add that putting that mistake aside, Mexico’s communication reflects a very helpful and methodologically systematic approach to DSU review that should be commended.

¹⁴⁴ *United States – Countervailing and Antidumping Measures on Certain Products from China – Report of the Panel* WT/DS449/R, 27 March 2014.

¹⁴⁵ Section 1 of US Public Law No. 112-99¹⁴⁵ (PL 112-99), introducing the new Section 701(f) of the United States Tariff Act of 1930, *United States Code*, Title 19, Chapter 4.

¹⁴⁶ *Georgetown Steel Corporation v. United States*, 801 F.2d 1308, 1310 (Fed. Cir. 1986).

¹⁴⁷ *GPX International Tire Corporation v. United States*, 666 F.3d 732 (Fed. Cir. 2011).

¹⁴⁸ United States Public Law No. 112-99, An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes, 126 Stat. 265 (13 March 2012).

¹⁴⁹ This was confirmed in a Letter from the Secretary of Commerce and the U.S. Trade Representative to the Chairman of the House Ways and Means Committee (January 18, 2012), explaining why the GPX Legislation was necessary. The letter said, that since the Federal Court in *GPX V* had found that USDOC did not have the authority to impose CVDs on NME

USDOC to apply CVDs to NMEs, when certain conditions are fulfilled. Of importance for this case is that the statute applies to CVD proceedings initiated on or after November 20, 2006, even though the statute did not take effect until March of 2012. As a result, all of the CVD proceedings conducted against NMEs during these six years were retroactively legalized and the CVDs imposed by them could continue to be in effect.¹⁵⁰

One of the focal points of the dispute was GATT Article X:2, which is part of a provision that deals with transparency in the publication and administration of trade regulations, and provides as follows:

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

Before the Panel, China argued among other things that in enacting the GPX Legislation with retroactive effect, the US violated this provision. The Panel, in a majority decision, found that China had failed to establish its claims under GATT Article X:2, although it found violations of various provisions of the Subsidies Agreement.¹⁵¹ China appealed the Panel majority's interpretation of GATT Article X:2 and requested that, if overturned, the Appellate Body complete the legal analysis.

In examining the function of GATT Articles X:1 and X:2, the AB explained that these provisions "are meant to ensure that traders are made aware of measures that may have an impact on them, so that they have time to become acquainted with, and to adapt to, the new measures."¹⁵² It recalled the AB's observation in a previous case that "Article X:2 embodies the principle of transparency, which has due process dimensions."¹⁵³

Both the Panel and the AB agreed that the terms "advance in a rate of duty" and "a new or more burdensome requirement" require that a comparison be made between the new "measure of general application" and some previous baseline. The Panel had understood the phrase "under an established and uniform practice," to be the one that defines this baseline, and that therefore the relevant comparison should be "between the new rate [of duty] effected by the measure at issue and the rate that was previously applicable under an established and uniform practice."¹⁵⁴ Since, as a matter of fact, the CVD duties were applied to NME countries before the GPX Legislation was passed (regardless of whether they were legal under US law or not), the Panel's majority opinion reached the conclusion that there had not been an "advance in a rate of duty" nor any "new or more burdensome requirement".¹⁵⁵

The AB, in contrast, pointed out that the context of Article X:1 "suggests that the starting point of the analysis of municipal law should, normally, be the published measure of general application, rather than the practice."¹⁵⁶ It rejected the Panel's reading of the phrase "under an established and uniform practice," to be the one that defines this baseline for comparison with all of the types of measures mentioned in the provision. Rather, the baseline is "normally to be found in published measures of general

countries, and if this ruling had become binding, "Commerce [would have been] required to revoke all CVD orders and terminate all CVD proceedings involving non-market economy countries". (Panel Report, *supra* note 144, para. 7.220).

¹⁵⁰ *Ibid.*

¹⁵¹ Panel Report, *supra* note 144, para. 7.396. The provisions that had found to be violated were Articles 19.3, 10, and 32.1 of the Agreement on Subsidies and Countervailing Measures.

¹⁵² *United States – Countervailing and Antidumping Measures on Certain Products from China – Report of the Appellate Body* AB-2014-4, 7 July 2014, para. 4.65.

¹⁵³ *Ibid.*, para 4.66. The AB was referring to its decision in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, at p. 21.

¹⁵⁴ Panel Report, *supra* note 144, para. 7.155.

¹⁵⁵ *Ibid.*, paras. 7.199 and 7.208.

¹⁵⁶ Appellate Body Report, *supra* note 152, para. 4.91.

application",¹⁵⁷ which essentially means the law that was in force before the new measure was introduced. In order to conduct such a comparison, it stated, "a panel ... will need to ascertain the meaning of the published measure of general application under municipal law."¹⁵⁸ Hence, a panel must consider the meaning of the measure whose consistency is being challenged, as well as the meaning of the prior municipal law that serves as the baseline of comparison, to determine whether there has been a "change." It noted that the dissenting Panelist in this dispute had found that the relevant comparison was between the U.S. Tariff Act prior to the enactment of the amendment as compared with the U.S. Tariff Act as it existed following the enactment and official publication of the new provision.¹⁵⁹ The AB also "disagree[d] with the Panel to the extent that it left open the possibility that an unlawful practice of an administering agency could constitute a relevant baseline of comparison under Article X:2."¹⁶⁰ It did "not see how an unlawful practice ..., which may be overturned by a domestic court decision, could create expectation among traders over and above the published measure of general application with which it fails to comply."¹⁶¹ Traders, it said, "cannot be expected to rely on a practice if it conflicts with the published law or with court rulings."¹⁶² In other words, the Panel should not have compared the new law to the previous practice of USDOC, but to the meaning of the law in force at the time.

It was here that the AB ran into trouble. Being of the opinion that what matters is the practice of USDOC, the Panel had refrained from making explicit and detailed findings regarding the content and meaning of the prior applicable law. The AB, on the other hand, had reversed the Panel's interpretation of Article X:2, and held that the relevant baseline for comparison is the meaning of the law in force prior to the enactment of the retroactive GPX Legislation. In order to complete its analysis, as China had requested it to do, the AB needed to establish what the US CVD law with respect to NMEs was prior to the amendment, both before and after 2006. The AB tried to do that on the basis of the Panel record, but found that it did not have enough evidence at hand, in particular since this issue was highly disputed between the parties, with contradicting opinions by legal experts submitted. For these reasons, the AB concluded that it was unable to complete the analysis and arrive at a conclusion as to whether the amendment changed the US CVD law.¹⁶³ The AB stressed that this occurred "because the Panel, as a consequence of its erroneous interpretation of the relevant baseline of comparison under Article X:2, and its consequential focus on the USDOC's practice after 2006, did not adequately examine all relevant elements of US countervailing duty law that would have assisted [the AB] in arriving at a conclusion on the basis of the correct interpretation of Article X:2."¹⁶⁴

Thus, at the culmination of a long process of litigation,¹⁶⁵ the procedures had come to an end without the system having provided a binding answer to one of the central issues in dispute between the parties:

¹⁵⁷ *Ibid.*, para. 4.96.

¹⁵⁸ *Ibid.*, para. 4.97.

¹⁵⁹ *Ibid.*, footnote 475.

¹⁶⁰ *Ibid.*, para. 4.109.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, paras. 4.182-4.183.

¹⁶⁴ *Ibid.*, para. 4.182.

¹⁶⁵ The request for consultations in this case was submitted in September 2012, and the AB Report was adopted by the DSB about two years later in July 2014. However, the present dispute arose as a sequence to a prior dispute between the parties regarding "double remedies". That dispute was brought to the WTO by China's request for consultations submitted in September 2008 (DS397). After both panel procedures and an AB appeal, the DSB adopted the recommendations resulting from this dispute in March 2011. It was there that the AB had ruled that "double remedies" are inconsistent with Article 19.3 of the SCM Agreement. As a result, the AB ruled that the four investigations at issue in that case had been dealt with by USDOC in a WTO inconsistent manner and that the US had to take measures to comply in those investigations. The present dispute (DS449) was brought by China in order to force the US to do the same in relation to another 25

Was the GPX Legislation consistent with GATT Article X:2 or not? China was deprived of its right to get a binding ruling on that question and of the prospect of the DSB requiring the US to bring its actions into conformity, if the GPX Legislation were to be found inconsistent. The US, too, had the right to know whether its legislation was WTO consistent or not, or whether it could be challenged again by China or by another NME. If the AB had been authorized to remand the case to the Panel, the latter could have completed its fact-finding mission and resolved the dispute. One of the anomalies of the system is that the case could return to the original panel, but only in order to resolve a dispute on whether the panel's (or the AB's) rulings had been complied with.¹⁶⁶ To complete the resolution of the underlying dispute itself, however, for that the case cannot unfortunately be returned to the original panel.

Conclusions

This article has presented the results of a statistical analysis of several aspects of the WTO dispute settlement system, with a particular emphasis on effectiveness. The system has until now been very busy, which would seem to reflect that member states have confidence in the ability of the system to resolve disputes and to uphold their rights under the trade bargain embedded in the WTO agreements. At the same time, the system is far from perfect and there is a keen interest of many member states to improve its effectiveness and solve some problems that have emerged.

Our examination shows a significant decrease in the number of cases dealt with by the system over the years, with an average of 37.8 cases per year during the first five years (1995-1999), and around 19 cases per year on average for the last ten years (2007-2016). As for the users, the numbers show a clear dominance of developed countries, and in particular the US and EU, both as complainants and even more so as respondents alleged by other member states not to have complied with their obligations under the covered agreements (compliance *a priori*). Developing countries, which constitute about 53% of all WTO member states, account for only about 40% of complainants, and even less of respondents. What is most troubling, however, is that Least Developed Countries are almost non-existent in the system. The characterization of the most active users is even more evident when using the World Bank's categorization of states according to their gross national income per capita. Indeed, the paper shows a correlation between such income and the number of initiations of dispute settlement procedures, and an even stronger correlation between GDP and number of initiations. However, once a poor country has decided to initiate proceedings, it is not more likely to settle than richer countries.

We then turned to the problem of compliance with DSB rulings (compliance *a posteriori*). Our figures showed that a vast majority of compliance procedures result in findings of non-compliance. More than two thirds of them also end up with requests for suspension of benefits. These findings raise doubts on whether the background to compliance procedures is a bona fide disagreement about what constitutes compliance, or delaying tactics by the state found to be non-compliant.

On the reasonable assumption that when a member state refuses to comply with a binding ruling, a suspension request will be filed against it, the numbers show a total compliance rate with DSB recommendations of about 80%. An examination of all of the suspension requests also showed that the United States was the country most frequently targeted by such requests, namely in more than two thirds of them (68%). The EU was targeted in 15.8% of them, and China in none. Although Developing

investigations against Chinese imports, which were also suspect of having imposed "double remedies", and in order to have the GPX Legislation declared to be WTO inconsistent.

¹⁶⁶For a dispute on whether there has been compliance with a DSB recommendation, the parties can go to dispute settlement procedures under DSU Article 21.5, which provides that such a dispute shall "wherever possible resort to the original panel."

Countries were the respondent in almost one third of all panel procedures, there has only been one suspension requests that has targeted a developing country.

Based on the notion that the effectiveness of a dispute settlement system is also determined by the time it takes to resolve a dispute, we then turned to examine the duration of DSU procedures over the years since the WTO was established. We found that the average duration from the request for consultations to adoption of the DSB recommendations was much longer than the maximum prescribed by the DSU, namely: 23.21 months for disputes that started between 1995-1999, and 28 months for those that started between 2007-2011. What is worrying is that the duration of proceedings is increasing steadily over the years, and has reached an average of almost 34 months for disputes that started in 2013. Both the WTO Secretariat and the AB admit publicly that they are unable to comply with the timetables imposed by the DSU and lately member states are forced to wait between 6-12 months for a panel procedure to begin. The reasons for this deterioration is discussed in the text.

The final issue examined was the problem of the AB's lack of authority to remand a case to the original panel in order to complete its fact-finding mission, once the AB has reversed the Panel's legal interpretation. As a result, the system is unable to resolve all of the issues that have been brought to it. Our examination showed that this has occurred in as much as 22.1% of all AB decisions, and that the problem is becoming more prevalent over the years. We then demonstrated why this is a serious problem by reference to one of the many cases where this has occurred, namely DS449 *United States – Countervailing and Antidumping Measures on Certain Products from China*.

The findings of this research should inform the review of the DSU that is ongoing now and be taken into account when deciding what needs to be amended and improved in the WTO dispute settlement system. Among other things, member states need to find ways to make the system more accessible to poor countries, both at the stage of detecting injurious violations against them, and at the stage of initiating complaints and litigating them. This involves also financial and technical assistance to developing countries and would constitute an appropriate part and parcel of the Doha Round which has been labelled the “Doha Development Agenda”.

Measures need to be taken to improve the enforcement methods of DSB recommendations and to prevent delaying tactics. The current approach of only providing prospective remedies need to be revisited and incentives should be introduced to encourage prompt implementation of recommendations.¹⁶⁷ Clearly, no amendments introduced to the DSU could change the asymmetric power distribution among WTO members, but they could address it better and try to reduce the opportunities to take advantage of it in an abusive manner within the dispute settlement system.

The ever-increasing duration of dispute settlement procedures also needs to be addressed. One way would be by hiring more experienced lawyers for the Secretariat to assist in the procedures, and more translators to streamline the translation process. However, this may not be the only way to go about it. It is possible that the Secretariat is already gaining too much influence on the procedures and even on their outcome,¹⁶⁸ and that ways should be sought to allow panelists to draft the reports, as arbitrators do in most other systems. One needs to consider ways of shortening the monstrous length of the panel reports, more like what they were during the GATT era, and even during the first years of the WTO. Perhaps letting panelists do the drafting, would accomplish that goal.

¹⁶⁷ See for instance the proposals discussed by William J. Davey, “Compliance Problems in WTO Dispute Settlement”, 42 *Cornell Journal of International Law* (2009) Issue 1, Article 5, at pp. 126-128. Available at: <http://scholarship.law.cornell.edu/cilj/vol42/iss1/5> .

¹⁶⁸ On this, see Petros C. Mavroidis, “Taking Care of Business: The Legal Affairs Division from GATT to the WTO”, in *A History of Law and Lawyers in the GATT/WTO –The Development of the Rule of Law in the International Trading System* (G. Marceau, ed.) (Cambridge University Press, 2015) 236, at pp. 239-240; and Håkan Nordström, “The WTO Secretariat in a Changing World” 39 *Journal of World Trade* 819 (2005).

Finally, the DSU needs to be amended so as to grant the AB the power to remand cases back to the panel, where it reaches the conclusion that it is unable to complete the analysis. The original panel will then be required to complete its fact-finding mission within an accelerated timeframe and to apply the correct rules as set out by the AB on the facts of the case. This will require some deliberations on how to formulate the new procedures properly, but considerable work has already been done to this effect.¹⁶⁹ Such an amendment will enhance the system's effectiveness, as it will avoid the now frequent occurrences where the dispute is "left in the air" with central questions remaining unresolved.

¹⁶⁹ See WTO, Special Session of the Dispute Settlement Body, "Report by the Chairman, Ambassador Ronald Saborío Soto to the Trade Negotiations Committee", TN/DS/25 (21 April 2011), pp. 38-39, and the relevant provisions in the proposed text in Annex 1: "17.12(b) Where the Appellate Body finds that there is not a sufficient factual basis to complete the analysis with respect to certain issues, it shall in its report provide a detailed description of the [types of] findings that are required to complete the analysis with respect to those issues."

