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WTO dispute settlement system: reform and development

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INTRODUCTION

World Trade Organization (**WTO**) is a global international organization and platform which maintains trade relations between its member states. The WTO dispute settlement system is a crucial part of the organization, allowing states to resolve their disputes arising out of international trade relations. Even though the dispute resolution mechanism has proved to be successful, just like any other complex system, it has its deficiencies.

Aside from the general overview of the dispute settlement system, the master thesis focuses on organizational, functional, and legal obstacles which WTO Member States have been facing during the resolution of trade conflicts, i.e. the thesis addresses (1) issues of correlation between WTO system and regional integration associations as well as prospects of their overlapping; (2) current crisis caused by the US blockage of re-appointment of WTO Appellate Body members; and (3) constraints affecting participation of developing states in the system.

Overall, the master thesis evaluates WTO's crisis which the dispute resolution system (**DRS**) is currently facing, its angles and evolution as well as possible ways to overcome it. The crisis is primarily connected to systematic issues existing within the adjudication mechanism and the blockage of the Appellate body – the so-called "second instance" of the system, by the US. Due to these obstacles, Appellate Body faced certain constraints precluding it from adjudicating on new appeals from first-instance panel reports, and thus, it has been paralyzed, and the number of disputes brought to the WTO has drastically decreased.[1]

Considering the current political climate, the operation of the most significant quasi-judicial platform for international trade relations between states must not be disrupted. The fact that the WTO dispute settlement system cannot function at full capacity leaves trade disputes between states unresolved and therefore creates a dangerous gap in international trade introducing more damage to the global economy. The **relevance of the master thesis** lies in the reformation of the dispute settlement

[1] Understanding WTO dispute settlement statistics, Dispute settlement activity - some figures. URL: https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

mechanism which would bring the system “back to life” and subsequent development prospects.

In this vein, **the purpose of the research** is to analyze the current state of the WTO dispute resolution system and to assess the prospects of its transformation and improvement. To conduct the analysis, **the following objectives are set** to be fulfilled:

– to examine the structure and functional division within the dispute resolution system;

– to assess the statistical analysis of the WTO dispute resolution mechanism operation;

– to evaluate the development of the WTO dispute resolution system;

– to assess recommendations rendered by academic scholars regarding the reformation of the system;

– to research and evaluate the development prospects of the WTO dispute resolution system;

– to evaluate the main issues which WTO Member states face during participation in the resolution of trade disputes.

The methodological framework of the research encompasses academic and practical papers of the following scholars and practitioners: Johannesson L., Cottier T., Al Shraideh S., Hoekman B. M., Mavroidis P. C., Furculiță C., Davey W., Isachenko T., Saveliev O., Zhang W., Sabelnikov L.V., Rachkov I.V., Trunk-Fedorova M.P., Smbatyan A.S., Boklan D., etc.

1. OVERVIEW OF THE WTO DISPUTE SETTLEMENT MECHANISM.

1.1. What is the WTO dispute settlement mechanism?

The WTO dispute resolution system (**DRS**) is a unique and comprehensive international platform where WTO members can resolve disputes arising out of their trade relations. The process is regulated by the Dispute Settlement Understanding (**DSU**) – a special agreement[2] consisting of rules and procedures for adjudication of disputes. DSU was a key outcome of the Uruguay rounds - the global trade negotiations which led to the formation of the WTO - whereas DRS is generally regarded as the WTO's "jewel in the crown" because of its remarkable benefits.[3]

The uniqueness of the DRS is reflected in its compulsory nature outlined in Article 23 of the DSU. According to that provision, WTO members must follow the Dispute Settlement Body's rulings determined due to the findings of the Panel and Appellate Body. Whenever parties are unable to resolve the dispute amicably – through negotiations, they turn to the DRS to get results rendered by an independent adjudicator.[4] The key factor here is that the enforcement of these results is inseparably tied up with the parties' obligation to comply with the WTO panel report under the WTO law. In case the losing party fails to fulfill its obligations under the report, it then faces retaliation measures which can be quite severe under certain circumstances.[5] Thus, DRS is the only mechanism in international trade relations that allows states to resolve their disputes by impartial adjudication and rely on effective enforceability.

It stands to mention that DRS is not entirely new to the international community. DRS stems from fifty years of experience in trade dispute resolution under the General Agreement on Tariffs and Trade 1947 (**GATT**). The GATT system used to be quite efficient when dispute settlement was more of a diplomatic character rather than judicial.[6] However, as time went by, the need for the latter grew exponentially.

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[2] DSU, Dispute Settlement Rules: Understanding of Rules and Procedures Governing the Settlement of Disputes, 1994. // Marrakesh Agreement Establishing the World Trade Organization. – Annex 2. – 1869 U.N.T.S. 401. – 33 I.L.M. 1226. – 1994.

[3] Isachenko T., Saveliev O. WTO dispute settlement System: Overcoming the Crisis and Reformation // International Processes. – Vol. 17. – 2019. – № 4 (59). – pp. 22-35.

[4] Ibid.

[5] Ibid.

[6] Rachkov I.V. World Trade Organization: law and institutes: schoolbook. – Moscow: Law and Public Policy Institute, 2019. – at p. 40.

Moreover, only a unanimous agreement of all contracting parties could have given crucial decisions an effect inside the system legal. Due to the complexities of international trade relations, this proved to be a challenging subject. Consequently, an important adjustment was introduced, and DRS acquired another distinguishing characteristic – the negative consensus rule: "whereby all WTO Members had to object to prevent the adoption of a panel report."[7] There is a distinction between positive and negative consensus. Positive consensus is established when no WTO Member present at the decision-making session formally disagrees with the proposed decision.[8] This is the WTO's fundamental decision-making regulation. Any Member, even if acting independently can stop decisions from being implemented. However, once the DSB establishes panels, adopts panel and Appellate Body findings, and authorizes retaliation, the decision will have to be implemented until a consensus challenges it – a "negative" consensus.[9] In other words, the DSB automatically decides to continue with the decision until there is a consensus rejecting it. As a result, the negative consensus is essentially a hypothetical scenario that has never taken place.[10]

Thus, the DRS has two distinctive aspects: an effective enforceability mechanism and *de facto* very small chances to block a WTO panel report. The duration of procedures within the WTO also adds to their effectiveness: on average it takes about a year and a half to resolve one dispute (without consultations and appeals).

Statistics indicate that the outcomes of the WTO DRS functioning appear to be beneficial. Up until today, more than 500 cases were referred to the WTO, with over half of them being settled by consultations.[11] Overall, a WTO panel adjudicated 40% of disputes, with 70% of those being appealed to the Appellate Body.[12] The DSB approved the right to adopt retaliatory measures in just 15 situations.[13] Thus, the

[7] Innerebner L. F., Singla T. The Appellate Body Deadlock at the WTO: Identifying Solutions Within the DSU and Beyond // Diritto del Commercio Internazionale. – 2019. – №. 1. – at p. 76.
[8] Bahri A., Boklan D. The WTO's Collapsing Judicial and Legislative Wings: Is 'Consensus' the Real Elephant in the Room? // Global Trade and Customs Journal. – 2022. – Vol. 17. – №. 2.
[9] Ibid.
[10] Ibid.
[11] Isachenko T., Saveliev O. WTO dispute settlement System: Overcoming the Crisis and Reformation // International Processes. – Vol. 17. – 2019. – № 4 (59). – pp. 22-35.
[12] Ibid.
[13] Ibid.

system allows avoiding of trade wars by encouraging conflict settlement at an early stage.[14]

The most active users of the WTO dispute settlement system are the United States and the European Union (who cumulatively have launched 40% of all disputes, on average).[15] Mexico, Canada, India, and Brazil use it less frequently. Access to big markets has always been a priority for WTO members. Hence, the US and the EU are the most common respondents (in total, 46%).[16] The lowest number of disputes were initiated by India, China, and Argentina.[17] Russian Federation, to date, has been engaged in 11 disputes as a respondent and 8 disputes as a claimant. In these instances, the European Union is the most commonly involved state counterparty. Thus, Russia appears to be a relevantly rare participant in WTO dispute resolution proceedings compared, for instance to China or USA. However, it often takes part as a third party in disputes between other WTO members – more than 80 cases.[18] WTO law experts[19] legitimately clarify the significant number of disputes wherein Russia has gotten involved as a third party because of the need to obtain sufficient expertise in this category of disputes and to actively participate in the practice development of interpretation and application of WTO agreements.[20]

Overall, the dispute settlement proceedings have two main stages: (1) the dispute is submitted to the WTO panel – a kind of a first instance court that is competent to consider "factual record, as well as the relevant legal discipline"[21]; (2) unsatisfied with first instance's results a party concerned resorts to the Appellate body (**AB**) - a second instance body which does not review beyond the understanding of the legal issues. WTO panels are composed *ad hoc* for each particular dispute, whereas the AB is an institutional body operating permanently.

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[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Map of disputes between WTO Members. URL: https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?country_selected=RUS&sense=e.
[18] Ibid.
[19] Ispolinov A.S., Kadysheva O.V. Crisis in the WTO dispute settlement system: Looking for Alternatives // Zakon. – 2020. – № 10. – С. 136 - 144.
[20] Ibid.
[21] Johannesson L., Mavroidis P. C. The WTO dispute settlement system 1995-2016: a data set and its descriptive statistics // Journal of World Trade. – 2017. – Т. 51. – №. 3. – at p. 1.

To be specific, the dispute between WTO members arises from the alleged violation of the obligations under the various WTO agreements. First of all, the DSU requires that WTO members settle the dispute peacefully. They should hold consultations for a period of sixty days. Whenever it is impossible for parties to settle, they submit a request to the Dispute Settlement Body of the WTO (**DSB**) to establish a panel to decide the case. All negotiations conducted are confidential which is reflected in the DSU.[22] In particular,[23]

Provision of the DSU	Text
Article 4	"[c]onsultations shall be confidential..."
Article 5	"[g]ood offices, conciliation and mediation" also "...are confidential"
Article 14	"panel's deliberations shall be confidential"
Article 18	"written submissions to the panel or Appellate Body shall be treated as confidential..."

Table 1.

Thus, confidentiality maintains throughout the entire negotiating process, from negotiations between partners to interaction with the AB. This limits the chance of other WTO members acquiring information about strategies and other details of the discussions.

Consequently, the DSB holds two meetings with regard to the establishment of the panel: (1) during the first meeting "respondent has the opportunity to veto the process"[24]; (2) at the second one – the negative consensus rule applies, i.e. the panel will be established unless the entire DSB including the complainant decides by negative consensus that the panel shall not be established. Thus, the process of panel establishment is *de facto* automatic.

After the panel is composed, an exchange of submissions and oral hearings takes place. Subsequently, the panel renders an interim report to the parties commenting on

[22] DSU, Dispute Settlement Rules: Understanding of Rules and Procedures Governing the Settlement of Disputes // Marrakesh Agreement Establishing the World Trade Organization. – Annex 2.– 1994.
[23] Ibid.
[24] Innerebner L. F., Singla T. The Appellate Body Deadlock at the WTO: Identifying Solutions Within the DSU and Beyond // Diritto del Commercio Internazionale. – 2019. – №. 1. – at p. 77.

certain findings and conclusions which should be addressed.[25] In this way, parties can ensure that their key arguments are reflected adequately and correctly.[26] Lastly, the panel delivers a final report that, once approved by the DSB, becomes mandatory for the parties concerned. The report must be adopted within the period of twenty days and no later than sixty days from its delivery to WTO Members. Within that time frame, (1) one of the parties may file an appeal, or (2) the DSB can determine unanimously not to approve the report.[27] Thus, each disputing party may appeal the DSB ruling with the AB. The beneficial part of the system is that panels are composed under the preferences of WTO members and the WTO Secretariat, while the AB has a "fixed" composition, and its members serve for a four-year term, renewable only once.

Introduction of the AB into the DRS was a prospective solution "for parties losing their political right to block adoption of panel reports".[28] Its operation and administration are regulated by Article 17 of the DSU regarding jurisdiction, qualification of adjudicators, conduct of appeals, etc. AB consists of seven persons, but only three AB members hear the case and can "uphold, modify, or reverse the panel's legal findings and conclusions."[29] The AB is prohibited from increasing or reducing the scope of the obligations and rights stipulated in the covered agreements, pursuant to Article 19 of the DSU, i.e. it cannot set up new standards of law. In order to enhance this institution's autonomy, AB's members must not represent the interests of any state, and they must comprise representatives of both developed and developing nations.[30]

Incidentally, the DSU firmly limits AB's competence. The tribunal is overseen by the DSB, and its authority is established by DSU, which states that an appeal is "limited to issues of law covered in the panel report and legal interpretations developed by the panel".[31] The "legal frame" is the following: AB has jurisdiction over the dispute once the notice of appeal is submitted to the DSB, and loses it as the body adopts AB's

[25] Article 15.2-3 DSU.
[26] Article 15.1 DSU.
[27] Article 16.4 DSU.
[28] Steger D. P. The founding of the Appellate Body // Ottawa Faculty of Law Working Paper. – 2017. – № 2017-33. – at p. 1.
[29] Innerebner L. F., Singla T. The Appellate Body Deadlock at the WTO: Identifying Solutions Within the DSU and Beyond // Diritto del Commercio Internazionale. – 2019. – №. 1. – at p. 78.
[30] Ibid.
[31] Article 17.6 DSU.

report. Thus, the DSB is a political entity that manages and regulates the dispute resolution system: it determines the issues of panel formation, approves panel and AB findings, and permits suspension of concessions.

Subsequent stages of the dispute settlement mechanism can be generally defined as surveillance of implementation and possible adoption of retaliation measures. Article 21 of the DSU provides for immediate adoption of the DSB's decisions stating that it is critical to ensure successful conflict settlement.[32]

Procedural control is extensive and thorough. To begin with, a respondent must submit his implementation plans to the DSB within a certain time period (generally, it is a timeframe of 30 days needed to implement DSB's recommendations and rulings or it may be a reasonable period of time, i.e. a period proposed by the claimant, a mutually agreed period - within 45 days, or finally a period established by the Panel - within 15-18 months).[33] If the parties are unable to come to a settlement, the DSB issues a binding ruling, which can set up a period of 15 months. Subsequently, the DSB supervises the fulfillment of its decision by outlining it as a subject matter at its meetings on a regular basis while the respondent is required to provide relevant information on implementation.[34]

Conflict resolution mechanisms are outlined in Articles 3 and 21 of the DSU. The first approach is defined as the dismissal of a measure taken by the respondent that is inconsistent with WTO regulations. The other alternative is compensation which can take the form of any acceptable benefits in trade policy provided for losses caused or for failure to execute recommendations and decisions within an appropriate time period. For instance, in case increasing rates of import duty on a certain product cannot be avoided, compensation might be in a form of a sufficient decrease in the respondent's levies on another product essential to the claimant's exports.[35] When the first two measures are insufficient (or the compensation claim remains unresolved

[32] Article 21 DSU.
[33] Innerebner L. F., Singla T. The Appellate Body Deadlock at the WTO: Identifying Solutions Within the DSU and Beyond // Diritto del Commercio Internazionale. – 2019. – №. 1. – at p. 78.
[34] Ibid.
[35] Sabelnikov L.V. WTO Dispute Settlement System and Practice // Russian International Business Bulletin. – № 3. – 2015. – at pp. 64-65.

within 20 days), the DSB may respond by revoking a concession granted previously in the course of international trade liberalization.[36]

The standard remedy under the WTO DRS is the cancellation of incompatible measures.[37] The appropriate time to carry out Panel or AB reports is a maximum of 15 months from the date of their adoption.[38] In other words, it is a recommendation for conformity. It also stands to mention that adjudicating bodies give the defending Member State enough leeway to choose the appropriate remedy.[39] Thus, WTO members have a certain discretion when it comes to bringing their measures into compliance with WTO obligations. However, the question here is whether there is still disagreement among parties to the dispute regarding the adequacy of the implementing measure. If the complaining state believes the measure is insufficient, the only option is to ask a panel to resolve the matter.[40]

It should be noted that compensation is considered trade compensation in the sense of decreased tariffs or restrictions on imports.[41] Compensation is often regarded as an alteration of trade concessions made by the respondent in order to pay for its misconduct.

Typically, disputing parties cannot reach an amicable agreement under the "compliance-compensation-retaliation"[42] remedy system, and the respondent is hesitant to follow WTO regulations. The fact that trade compensation is used exclusively when the parties reach an understanding of the scope and amount of compensation only complicates the system. Thus, the suspension of concessions or other obligations, i.e. retaliation, is the most crucial remedy under the WTO's DSU.

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[36] Ibid.
[37] Mavroidis P. C., Remedies in the WTO legal system - between a rock and a hard place // European Journal of International Law. – Vol. 11. – 2000. – p. 778.
[38] Article 21.3(c) of the DSU.
[39] Mavroidis P. C., Remedies in the WTO legal system - between a rock and a hard place // European Journal of International Law. – Vol. 11. – 2000. – p. 778.
[40] Zhang W. The Hierarchy of Remedies Under the WTO Dispute Settlement System and Its Impact // 3rd International Conference on Judicial, Administrative and Humanitarian Problems of State Structures and Economic Subjects (JAHP 2018). – Atlantis Press, 2018. – at p. 722.
[41] Bagwell K., Remedies in the WTO: an economic perspective // Department of Economics Discussion Paper Series. – № 0607-092007. – 2007. – p. 12.
[42] Zhang W. The Hierarchy of Remedies Under the WTO Dispute Settlement System and Its Impact // 3rd International Conference on Judicial, Administrative and Humanitarian Problems of State Structures and Economic Subjects (JAHP 2018). – Atlantis Press, 2018. – at p. 722.

The most prevalent type of retaliation is an increase in customs tariffs on certain items that benefit the export interests of the respondent. Retaliation may be a preferable strategy to encourage conformity with WTO standards in specific situations. In Hudec's opinion, this measure should be viewed as a penalty meant to encourage compliance via "economic suffering", rather than as a source of temporary reimbursement.[43] In terms of stimulating compliance, retaliation can be characterized as a much more successful remedy than trade compensation.[44] In any way, the complainant receives certain advantages from the fact that the Member State can penalize the respondent if it is authorized by the DSB.

In summary, the WTO dispute settlement process is a multi-stage procedure that nevertheless considers the interests of disputing parties and, eventually, all WTO Member States, irrespective of their status within the global economy.

1.2. Correlation between the WTO and regional bodies of international adjudication.

Before analyzing WTO's current crisis relating to appeal proceedings, attention should be paid to another issue contributing to the system's effectiveness – the correlation between the WTO and regional bodies of international adjudication. Dispute settlement crisis is a systematic issue, and a potential shift from WTO towards regional associations could become a part of it.

1.2.1. Regulation of relations between WTO and regional organizations.

Naturally, the establishment of the WTO system had to address the issue of regional economic integration. According to Smbatyan A.S., it was critical to not just formulate rules for regional associations' compliance with WTO norms, but also to give the proper control functions to the organization. Thus, Article XXIV of the General Agreement on Tariffs and Trade (GATT)[45] and Article V of the General Agreement on Trade in Services seem to indicate that the WTO has the authority to supervise the establishment and operation of free trade zones, customs unions, and

[43] Hudec R.E. The adequacy of WTO dispute settlement remedies: a developing country perspective // Development, Trade and the WTO: The World Bank. – 2002. – p. 89.
[44] Ibid.
[45] GATT 1994: General Agreement on Tariffs and Trade // Marrakesh Agreement Establishing the World Trade Organization. – Annex 1A. – 1994.

other forms of regional economic groupings (GATS).[46] In addition, GATT and GATS set forth the requirements that integration organizations have to comply with when they are founded. For example, according to GATT Article XXIV(5)(a), trade regulations applied to third countries before the creation of a customs union should not be higher or more stringent than those imposed on its member territories before the establishment of that union.

Furthermore, regional integration agreements must be communicated to the WTO Committee on Regional Trade Agreements (CRTA) for an assessment of their conformity with GATT Article XXIV criteria. The CRTA[47] examines individual regional agreements. It is also tasked with evaluating the agreements' systemic implications for the multilateral trading system. Nonetheless, Smbatyan A.S. believes that over a half-century of GATT Article XXIV implementation demonstrates unequivocally that the Committee's functional results are useless.[48] Maintaining the fulfillment of rules regulating the creation and operation of regional integration associations requires the following in practice. Whenever a WTO member believes that its interests have been infringed in the establishment or operation of an integration association, the DSB initiates proceedings at the request of the WTO member in accordance with the DSU. A panel is established to hear the dispute, and the result can then be appealed (currently, there are restrictions regarding the appeal proceedings which will be reviewed later in the thesis).[49]

Whenever non-compliance with WTO regulations is proven, responsible states must address the problem within a time period set by the DSB. In case they fail to do so, a claimant has an alternative option to temporarily suspend the concessions offered to the members of the integration organization.[50] Alternatively, respondents may

[46] GATS: General Agreement on Trade in Services // Marrakesh Agreement Establishing the World Trade Organization. – Annex 1B. – 1994.
[47] WTO document, Committee on Regional Trade Agreements, WT/L/127. 1996. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/127.pdf&Open=True.
[48] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.
[49] Ibid.
[50] Ibid.

provide the claimant with trade concessions in which the latter is interested as compensation.[51]

There are two approaches to the correlation between WTO DRS and regional trade agreements, as observed by Nikolaos Lavranos.[52]

The first, monist approach contends that the WTO allows its members to create regional integration organizations as long as they constitute the "subsystem" of the WTO.[53] Thus, the WTO prevails over regional organizations. Pursuant to the second, dualistic perspective, the WTO and regional organizations are separate from one another.[54] The connection between the WTO and regional economic groups can be characterized by collaboration and coordination on the one hand and competition on the other. In a nutshell, such connections are primarily horizontal.[55] In Lavranos's opinion, the second perspective is more accurate since the DSU does not define the primacy of the WTO system over the dispute settlement procedures of regional organizations. In reality, "there can be no formal hierarchy between them."[56]

Regarding the dualistic viewpoint, the author agrees with Smbatyan. Contrary to popular belief, WTO agreements and agreements made within the framework of regional trade accords have equal legal force; the former does not take precedence over the latter.[57] Nevertheless, the regional integration regulatory structure is inextricably linked to WTO laws, because the latter oversees the majority of fields in international commerce in products, services, intellectual property protection, and investment.

1.2.2. Prospects of jurisdictional conflicts.

It should be noted that the DSU makes no requirement for a conflict to be resolved by national judiciary bodies before filing a complaint with the DSU, i.e. there is no necessity to exhaust domestic (regional) appeal procedures before filing the

[51] Ibid.
[52] Lavranos N. The Brazilian Tyres Case: Trade Supersedes Health // Trade L. & Dev. – 2009. – T. 1. – P. 231. URL: http://docs.manupatra.in/newsline/articles/Upload/124BAF9C-4682-4D8A-B88E-465398A49B45.pdf.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.

complaint.[58] Moreover, neither the WTO panels nor the AB has the jurisdiction to dismiss WTO-related claims. As a result, the DSB's interaction with regional judicial authorities is horizontal, and there is a potential conflict of jurisdiction between both, as the complainant may have a formal right to bring a claim before both the DSB and a regional judicial authority in certain cases.[59]

The issue of interrelation between DSB and regional bodies is now left overlooked due to the existing crisis at the WTO DRS. Even though there are a few precedents in WTO practice for resolving disputes directly related to regional integration aspects, some experts predict that it could become problematic in the future.[60]

Prior to the Appellate Body's crisis, disputing states usually chose the WTO DRS rather than regional platforms. Since many regional integration treaties are substantially based on WTO law, they basically contain the same rules. In this regard, in most cases, it is within the claimant's discretion to go to a regional body to challenge a breach of regional obligations, or to use the WTO system to claim violations of one WTO law. Many states, however, resort to the WTO rather than regional dispute resolution institutions for the following reasons.[61]

The general efficiency of the WTO dispute settlement process is a crucial factor first and foremost. In contrast to other international judicial organizations, the WTO system, for example, creates explicit and suitable time limits for adjudication. Although these time constraints have not always been followed in the past few years, it can be claimed that conflicts are typically resolved within an appropriate period of time.[62] While regional systems have shorter time frames than the WTO system, the latter nonetheless operates within a framework that meets complainants' expectations of a beneficial procedure.[63]

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[58] Ibid.
[59] Ibid.
[60] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.
[61] Trunk-Fedorova M.P. Dispute settlement under free trade agreements: an alternative to the mechanism of the World Trade Organization? // Mezhdunarodnoye pravosudiye. – 2019. – № 3. – P. 102 - 113.
[62] Ibid.
[63] Ibid.

Additionally, one of the reasons the claimant chooses the WTO is that it has a defined procedure, which contributes greatly to the consistency of decisions, whereas using a regional procedure might result in unforeseen and potentially detrimental results for the complainant.[64]

Furthermore, the effectiveness of the system at the stage of implementing DSB decisions should be emphasized. The fraction of decisions that are executed is relatively high. According to experts, the DSB's decisions were completely implemented in roughly 80% of cases.[65] This appears to be caused by the potential omitting of concessions and other duties related to a WTO Member who fails to meet with the DSB's decisions, which is a kind of "economic leverage" on the respondent.[66] Although states do not frequently use concession suspension in practice, the possibility of its application disciplines the losing party. Another explanation of why regional organizations' members choose the WTO is the WTO Secretariat, which offers skilled legal assistance in preparing the case file as well as legal counsel to the Panel and Appellate Body during the proceedings.[67] Generally, regional trade institutions do not contain a permanent secretariat that undertakes similar responsibilities.

Another feature of the WTO system is the ability to file an appeal. To shorten the procedure, the regional forums do not include this aspect. Many governments see the establishment of the Appellate Body as a benefit of the WTO system since it allows them to appeal against the decision of the arbitral panel with which they disagree.[68] However, due to the Appellate Body's current crisis, this benefit is no longer relevant.

Evidently, there are other reasons why parties to Free Trade Agreements (**FTAs**) and other regional trade agreements favor the WTO framework.[69] For example, the so-called reputational consequences of failing to implement the decision of the panel or

[64] Ibid.
[65] Reich A. The effectiveness of the WTO dispute settlement system: A statistical analysis //Transnational Commercial and Consumer Law. – Springer, Singapore, 2018. – C. 10-11.
[66] Trunk-Fedorova M.P. Dispute settlement under free trade agreements: an alternative to the mechanism of the World Trade Organization? // Mezhdunarodnoye pravosudiye. – 2019. – № 3. – P. 102 - 113.
[67] Ibid.
[68] Ibid.
[69] Ibid.

the AB. Such a failure may harm the respondent's reputation - it would resonate throughout the WTO multilateral trading system.[70]

As previously mentioned, the WTO DRS is now in a critical state. The reason for this is the US's hostile stance toward the Appellate Body as a WTO member. For several years, the US has blocked the nomination of new members of the AB, preventing them from filling the vacancies left by the outgoing members of this body. These circumstances have created certain conditions for regional integration associations to become more appealing for the resolution of trade disputes. The details of the crisis will be addressed in the thesis's following chapter.

In the context of the interrelation of dispute resolution procedures, ones that are probably of most interest – are cases involving Mexico's restrictions on soft beverages and its prohibition on the export of retreaded tires into Brazil. Mexico set a 20% tax on soft drink imports that utilize sugar substitutes other than sucrose. Since imports of important US items into Mexico were substantial, the imposed measures had a major effect on US economic interests.[71] Consequently, the United States lodged a complaint with the DSB, alleging that Mexico violated GATT Article III, which requires WTO members to give foreign goods national treatment.[72]

Mexico contended that, despite having prima facie jurisdiction, the panel should have rejected the case[73] because the measures in question should be evaluated in the light of the greater problem of access to the US market, and the DSB should suggest that the opposing parties transfer the case to arbitration pursuant to the provisions of Chapter XX of the North American Free Trade Agreement (**NAFTA**).[74]

The panel dismissed Mexico's claim, evaluated the merits of the case, and decided that Mexico was in breach of its commitment to treat US goods as national. During the appeal process, the arbitrators noted that "[t]he power of an international

[70] Davey W.J. Dispute Settlement in the WTO and RTAs: A Comment // Regional Trade Agreements and the WTO Legal System / Ed. by L. Bartels, F. Ortino. New York: Oxford University Press. – 2006. – P. 343 - 357, 356.
[71] Ibid.
[72] Ibid.
[73] Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages. – WT/DS308/AB/R. – para. 45. – 2006.
[74] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.

court to consider the question of its own jurisdiction and to determine its existence in any dispute brought before it is a well-known rule."[75]

The Appellate Body then referred to another case, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,[76] emphasizing that while arbitral panels have some flexibility in defining their own methods of operation, this discretion does not apply to altering the DSU's substantive terms, i.e. nothing in the DSU gives an arbitration panel the right to neglect or change the DSU's explicit conditions.[77]

After reviewing several of DSU provisions regulating arbitral panels, including provisions 11 and 23, the AB determined that there was no cause to argue with the panel's conclusion that WTO arbitral institutions are allowed to decide whether or not to exercise their authority.[78] The Appellate Body found that no NAFTA dispute resolution proceedings were initiated, as Mexico had contended throughout the DSB hearings.[79] Thus, the AB indicated that there was no legal barrier to the dispute's review. At the same time, the AB retained an insignificant sum of money for future use, stating that it is uncertain if there may be additional scenarios in which current legal obstacles may preclude the panel from determining the merits of the issue at hand.[80] To put it another way, the AB did not rule out the potential of such legal impediments.

It is critical to emphasize that: (1) the DSU does not expressly prohibit panel jurisdiction from being rejected: the AB reached these conclusions by analyzing the provisions on the powers of arbitral panels to settle the dispute referred to them.

However, an alternative interpretation approach may have generated the opposite judgment; [81] (2) the DSU is quiet on other international bodies of justice,

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[75] Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages. – WT/DS308/AB/R. – para. 45. – 2006.
[76] Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products. – WT/DS50/AB/R. – 1998. – DSR 1998:I. – 9.
[77] Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages. – WT/DS308/AB/R. – para. 47. – 2006.
[78] Ibid. – para. 53.
[79] Ibid.
[80] Ibid. – para. 54.
[81] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.

without even discussing claim admissibility. The agreement is written as though the DSB's authority could never completely or partially overlap with those of other institutions. The following disagreement demonstrates the possibilities of such overlap.

Uruguay, a member of MERCOSUR - the Southern Common Market, a regional integration initiative that includes Argentina, Brazil, Paraguay, and Uruguay, as well as Venezuela and Bolivia, started arbitration proceedings within the organization in 2001, challenging the legitimacy of Brazil's ban on recycled tire imports. The restriction was deemed unlawful by an *ad hoc* arbitration body in 2002, causing Brazil to take remedial measures.[82] Brazil, in particular, made concessions on Mercosur member-country imports of the goods in question, but the management of deliveries from other nations remained the same. The judgment was taken within the context of the Mercosur treaty and had no implications for third countries.[83] However, in reaction to Brazil's actions, the EU filed a complaint with the WTO DSB, and the matter was considered by both organizations.

During the panel proceedings, the EU claimed that Brazil was at least partly accountable for the dispute that it lost in the MERCOSUR arbitration procedure because it did not use the "health and safety ground of restrictive measures"[84] to safeguard its interests, despite knowing that the Montevideo Treaty presents an analogous exception, which is comparable to the one laid out in GATT Article XX(b).[85] The panel disregarded this claim, deeming it improper to evaluate in detail Brazil's claims in the MERCOSUR proceedings or foresee the outcome of the case in light of Brazil's chosen litigation approach during the aforementioned procedures.[86] At the same time, the panel highlighted that, while Brazil's suggested MERCOSUR defense strategy failed to convince the MERCOSUR arbitral tribunal, it did not look illogical.[87]

[82] Panel Report, Brazil-Measures Affecting Imports of Retreated Tyres, WTO. – WT/ DS332/R. – 2007. – Para. 7.276.
[83] Ibid.
[84] Ibid.
[85] Treaty of Montevideo, Instrument Establishing the Latin American Integration Association. – 1980. URL: https://treaties.un.org/doc/Publication/UNTS/Volume%201329/volume-1329-I-22309-English.pdf.
[86] Panel Report, Brazil-Measures Affecting Imports of Retreated Tyres, WTO. – WT/ DS332/R. – 2007. – Para. 7.276.
[87] Ibid.

Since the AB addressed Brazil's legal strategy before the *ad hoc* MERCOSUR arbitration, and highlighted that Brazil should have applied a defense analogous to that established by GATT, some international law experts assert that the AB was in fact "crowning itself as the ultimate authority on trade."[88] The key argument made by the experts was that this self-glorification infringed on Brazil's sovereign right to defend its rights in other conflict settlement forums. To put it plainly, this judgment looks questionable.[89] The AB, similar to a panel, has the right to make any arguments relevant to the dispute at hand, including an assessment of the disputing parties' advocacy approach in comparison to other bodies of justice. These evaluations do not suggest that the DSB is seeking to become the supreme court.[90]

Thus, even though there are a few instances when the issue of jurisdictional conflict arose, the prospects of its further growth are worth considering since the current state of the WTO DRS is compromised due to the crisis of the Appellate Body. Whenever WTO Member states will feel the need to address regional aspects of trade disputes more thoroughly, there is a possibility that they choose to resort to regional integration forums.

1.2.3. Free Trade Agreements.

Free trade agreements (**FTA**) should be given special consideration to understand the extent to which the WTO dispute settlement system influences regional systems. The quasi-arbitral system, for example, that was established in the North American Free Trade Agreement (**NAFTA**),[91] called for the formation of arbitration groups to settle specific disputes, a system designed after the WTO dispute resolution mechanism.

Overall, as it was mentioned above and according to Trunk-Fedorova M.P., most free trade agreements now include dispute resolution processes based on the model of

[88] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.
[89] Ibid.
[90] Ibid.
[91] The North American Free Trade Agreement of 8 December 1993. URL: https://www.italaw.com/sites/default/files/laws/italaw6187%286%29.pdf.

WTO panels' adjudication, although with some adjustments.[92] However, it should be emphasized that some states enter into agreements that do not include a separate arbitral procedure, but instead provide for consultations in case of a dispute.[93]

The aforementioned adjustments to regional dispute resolution under FTAs are the following. (1) The absence of appeals is one of the differences between regional dispute settlement mechanisms and the WTO system. As a result, only arbitration panels can settle disputes. At the same time, once an arbitration panel renders its decision, it does not need to be authorized by any other authority (unlike the way the WTO DSB authorizes the reports of WTO panels and the AB). The elimination of the necessity to approve decisions limits the political component, which is present in the DSU, but in a symbolic form.[94] (2) Many FTAs include lower time limitations for cases: usually, it should not be more than five months after a nomination of all arbitral panel members. At the same time, Article 12.8 of the DSU provides that the panel's assessment of a dispute should not take more than six months from the appointment of adjudicators and may be prolonged in exceptional instances.[95] (3) Many regional trade agreements include requirements about the transparency of the dispute resolution process, such as open hearings,[96] while the DSU stipulates that the process is confidential.

Thus, dispute settlement mechanisms featured in modern FTAs are based on the well-established WTO panel system, with regional agreements addressing some deficiencies of the WTO mechanism as well as developments, depending on the interests of the individual contracting states.

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[92] Trunk-Fedorova M.P. Dispute settlement under free trade agreements: an alternative to the mechanism of the World Trade Organization? // Mezhdunarodnoye pravosudiye. – 2019. – № 3. – P. 102 - 113.

[93] Free Trade Agreement between Montenegro and the Republic of Turkey of 26 October 2008. URL: https://ticaret.gov.tr/data/5bfbfa0513b8762fa4955ca7/Karadag-TR-Mon%20FTA%20ENGLISH.pdf.

[94] Trunk-Fedorova M.P. Dispute settlement under free trade agreements: an alternative to the mechanism of the World Trade Organization? // Mezhdunarodnoye pravosudiye. – 2019. – № 3. – P. 102 - 113.

[95] DSU, Dispute Settlement Rules: Understanding of Rules and Procedures Governing the Settlement of Disputes, 1994. // Marrakesh Agreement Establishing the World Trade Organization. – Annex 2. – 1869 U.N.T.S. 401. – 33 I.L.M. 1226. – 1994. – Art. 12.8.

[96] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, of 1 July 2011. – Art. 14.14. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01).

In addition to the crisis of the WTO system, there is a new stage in the development of regional trade forums. Basically, it started when the EU initiated a dispute settlement procedure under the FTA when Ukraine adopted quantitative export restrictions. Notably, the dispute could have been resolved through the WTO system on the grounds of Ukraine's violation of Article XI of the GATT, but the EU intentionally chose the mechanism established by the FTA.[97]

In 2019, the EU began consultations with Ukraine regarding imposing quantitative restrictions on the export of unprocessed timber.[98] The dispute occurred as a result of Ukraine's ban on timber exports (since 2005 and up to 2017 Ukraine had been imposing certain restrictions concerning different wood species). According to the EU, these measures violated Article 35 of the Association Agreement between the EU and Ukraine,[99] which expressly prohibits the implementation of export restrictions and analogous measures.

Another notable case is the dispute between the EU and the Southern African Development Community (**SADC**) that emerged within the framework of the Economic Partnership Agreement (**EPA**).[100] The EU started consultations with the SADC[101] in 2019 on specific safeguard measures for poultry meat, which has a detrimental impact on EU imports of frozen chicken meat. According to the EU, the additional customs charge imposed by SADC violated the requirements of the EU-SADC Agreement.[102] The WTO might have addressed this matter, but there is an issue: if the EU went to the WTO, it could only challenge the restrictions adopted by

[97] Trunk-Fedorova M.P. Dispute settlement under free trade agreements: an alternative to the mechanism of the World Trade Organization? // Mezhdunarodnoye pravosudiye. – 2019. – № 3. – P. 102 - 113.
[98] Panel request for consultations concerning the restrictions applied by Ukraine on exports of certain wood products, Note Verbale, Delegation of European union to Ukraine. – 2019. URL: http://trade.ec.europa.eu/dodib/docs/2019/june/tradoc_157943.pdf.
[99] Association Agreement of 21 March 2014 between the European union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. – 2014. URL: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&from=EN.
[100] Economic Partnership Agreement between the EU and the Southern African Development Community. – 2016. URL: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf.
[101] EU asks for formal consultations with Southern African Customs Union on trade in poultry // Official site of the European Commission. – 2019. URL: http://trade.ec.europa.eu/doclib/press/index.cfm?id=2031.
[102] Request for consultations with Southern African Customs Union on trade in poultry, Note verbale. – 2019. URL: http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157928.pdf.

individual SADC member states; it could not make a claim directly against the SADC since it is not a WTO member.[103]

According to Trunk-Fedorova M.P., we can draw a connection in this context with the Eurasian Economic Union (EEU), whose acts were challenged in the WTO through proceedings against individual EEU member states – WTO members.[104] The respondent in the instance of SADC is an integration association that introduced the contested measure. It is a party to the FTA with the EU. Therefore, using the regional mechanism in this scenario allows for dispute resolution against the subject of international law itself that implemented the challenged policy.[105]

The preceding disputes only indirectly addressed the issue of conflict of jurisdictions. However, there is reason to believe that the issue of jurisdictional conflicts between the DSB and regional justice bodies will worsen over time.[106] Although the activities of the latter and the WTO's DSB differ significantly in terms of procedure, the same principles govern their operation. As a result, the development of rules to avoid duplication of proceedings appears to be necessary.[107] In this context, Joost Pauwelyn proposed that, in order to avoid duplicative procedures, regional integration treaties should include a forum exclusion clause stating that "once a dispute has been submitted to the WTO or a regional justice body, the same issue cannot be reexamined by a different judicial body."[108]

Since it has the most powerful authority in the field of international trade dispute resolution and appropriate intellectual capital, the DSB is primarily accountable for the problem of overlapping proceedings: DSB arbitrators are among the most prominent experts in the field of international trade law. As a result, the WTO's DSB should establish the primary strategy for the creation of new concepts and proposals.[109]

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[103] Trunk-Fedorova M.P. Dispute settlement under free trade agreements: an alternative to the mechanism of the World Trade Organization? // Mezhdunarodnoye pravosudiye. – 2019. – № 3. – P. 102 - 113.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Pauwelyn J., Legal Avenues to "Multilateralising Regionalism": Beyond article XXIV / Conference on Multilateralising Regionalism, Centre for Economic Policy Research. – 10-12. – 2007. – p. 34.
[109] Smbatyan A.S. WTO and Regional Integration Associations: Correlation of Legal Forces in the Settlement of Trade Disputes // Russian Foreign Trade Bulletin. – 2011. – №8. URL: https://cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-sootnoshenie-pravovyh-sil-v-uregulirovanii-torgovyh-sporov.

At the absolute least, the WTO's DSB should collaborate closely with regional international justice authorities, take into consideration the horizontal character of current interactions, and avoid asserting legal dominance.[110] As a result, the best solutions may be developed and their adoption will be beneficial to the improvement of the international legal system's integrity and the efficacy of international adjudication.

Thus, the review of the correlation between the WTO dispute settlement system and regional economic associations allows us to draw the following conclusions:

1. Internal relations between member states of such associations are greatly influenced by WTO and its Dispute Settlement Body due to states' ability to file a complaint with the DSB in case their economic rights are infringed. That is the first instance of jurisdictions overlap that is of vital nature since certain regional associations also create platforms or forums for the resolution of internal disputes.
2. Most adjudication procedures of regional trade agreements, including FTAs, are often based on the WTO dispute settlement system grasping its well-established practice and making adjustments to certain provisions in the interests of its contracting parties.
3. The current state of the WTO DRS influences its members' choice as to what forum they need to choose to get efficient results. The fact that *de facto* there is no appellate instance at the WTO generally evens this dispute resolution system with similar regional mechanisms.

To summarize, the future of the WTO DRS relies on WTO member-state collaboration. Global asymmetry of political and economic power precludes the DRS from improving positively. While governments resort to temporary solutions to preserve trade connections, DRS's systemic flaws remain unsolved. In any case, the issue of system development is crucial.

[110] Ibid.

2. REFORM OF THE WTO DISPUTE SETTLEMENT MECHANISM.

For the past several years the WTO dispute settlement mechanism has been facing certain obstacles which are generally regarded as a "crisis".[111] Since 2017 United States has been blocking the re-appointment of the AB's members. On December 11, 2019, the number of AB members dropped below three. As a result, the threshold minimum for AB's membership was never reached, and AB lost its competence to adjudicate on new appeals from first-instance panel reports. Thus, up until today the AB has been paralyzed, and the crisis has led to a drastic decrease in the number of disputes brought to the WTO.[112]

2.1. Prerequisites for the WTO dispute settlement mechanism crisis.

The US began to manifest its objections at the beginning of the Doha Round negotiations in 2001 - the most recent round of trade negotiations among WTO members. Its goal was to achieve reform of the international trading system by lowering trade barriers and revising trade rules. Its representatives have made numerous proposals regarding (1) increasing flexibility and ability of member-states to control the dispute settlement process, and (2) tightening the rules of interpretation.[113] However, WTO members did not reach consensus on the issue. As a result, the US began to block AB's activities. The main issue within the dispute resolution system for the US was AB's construction of rules and regulations that significantly affect the conditions of competition between the United States and other major trading players.[114]

Under Article 2.4 of the DSU, whenever the DSB reaches a decision in line with the Understanding, it must be done by consensus, which means that a decision is deemed reached if none of the DSB members participating in the meeting formally disagrees with the suggested decision. According to Article 17.2 of the DSU, the DSB

[111] Van den Bossche P., Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.
[112] Ibid.
[113] Isachenko T., Saveliev O. WTO dispute settlement System: Overcoming Crisis and Reformation // International Processes. – Vol. 17. – 2019. – № 4 (59). – pp. 22-35.
[114] Ibid.

has the authority to re-appoint or appoint new members of the AB. Thus, consensus is also required in such cases.

When the term of an AB member from the Republic of Korea, Mr. Seung Wha Chang was up for renewal in May 2016, the US representative at the DSB meeting expressed his objections. The official reasoning was that Mr. Chang had exceeded his mandate as a member of the AB and, in several appeals (including ones to which the US was a disputing party), had raised issues that were not necessary to resolve a particular dispute: "The United States also was concerned about the manner in which this member had served at oral hearings, including that the questions posed had spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties."[115] In essence, the US claimed that Mr. Chang's activities as an AB member amounted to judicial activism that exceeded the authority granted to members of the AB under the DSU.[116]

As for Korea, it has declared that it will oppose the selection of new Appellate Body members until Mr. Chang's case is settled.[117] Mr. Chang's term ended on May 31, 2016, as did the term of another member of the AB – China's representative. As a result, at the time, the Appellate Body had 5 acting members left. It should be noted, however, that the AB's members' workload was constantly increasing due to the large number of appeals. By 2019 terms of all five Appellate Body members expired, making appeals to the WTO *de facto* impossible.[118]

Many WTO members reacted negatively to the US position for the following reasons. First and foremost, the issue of the Appellate Body's independence was raised. The fact that one of the WTO's largest and most economically strong members may prohibit Appellate Body members from being elected again for a second term may have an influence on the decisions taken by Appellate Body members during their first term.

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[115] Dispute Settlement Body, Minutes of Meeting / WT/DSB/M/379. – 2016. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/M379.pdf&Open=True.
[116] Ibid.
[117] Trunk-Fedorova M.P. The Appellate Body of the World Trade Organization: perspectives of development // Mezhdunarodnoye pravosudiye. 2018. – № 1. – P. 112 - 121.
[118] Ibid.

Second, it was uncertain how the United States established who was accountable for the choices it asserts were taken with undue authority.[119] The appeal is considered by a panel of three members of the Appellate Body, all of whom sign the judgement. Furthermore, in line with Rule 4 of the Appellate Review Working Procedures, all issues mentioned in the appeal are analyzed by all AB members to ensure consistency of practice.[120] Thus, the decision is reached by the three members of the Appellate Body who are assigned to a certain appeal, while other members of the AB are also involved in the discussion at the stage of its adoption.[121]

Overall, other states have responded to US pressure with moderation, limiting their participation to verbal comments about the significance of DRS and debate of US arguments. The EU made concrete suggestions for dispute resolution reform in 2018, which may be viewed as the start of a negotiating process. These initiatives were founded on the EU's overall approach to reform, which is that reform should begin with procedural changes.[122] This course, however, did not convince the US from reconsidering its relatively unfavorable views on AB's restoration. Although several of WTO members have voiced support for the DRS system and shown that they are prepared to address the problem, the chances of meeting US demands appear to be vague.

Probably, the fact that currently there are 21 unresolved disputes pending before the AB is one of the most problematic issues for the DRS. While it is unknown whether the AB's work will ever be restored, these disputes are in "legal limbo" since "as long as appellate review is pending, there is no legally binding resolution of the dispute"[123] pursuant Article 16.4 of the DSU. In the future, once or if the AB will be operational again, it will take quite some time to deal with that remaining workload prior to reviewing any new appeals.

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[119] Ibid.

[120] Working Procedures for Appellate Review / WT/AB/WP/6. – 2010. URL: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

[121] Trunk-Fedorova M.P. The Appellate Body of the World Trade Organization: perspectives of development // Mezhdunarodnoye pravosudiye. 2018. – № 1. – P. 112 - 121.

[122] Isachenko T., Saveliev O. WTO dispute settlement System: Overcoming Crisis and Reformation // International Processes. – Vol. 17. – 2019. – № 4 (59). – pp. 22-35.

[123] Van den Bossche P., Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.

United States' actions were not the only trigger of the crisis in the DRS.[124] Over the years WTO dispute settlement process has been becoming more and more complex. Thus, the workload grew rapidly due to claims of WTO's inconsistency raised in each dispute, "rising complexity of measures challenged and legal arguments made".[125] Evidently, the DRS did not have enough resources to manage such a development. A The main reason for that was the following: WTO's encouragement to resolve disputes peacefully, through negotiations, was no longer a priority for WTO members seeking "solutions to their trade disputes and concerns about insufficient or missing legal standards through litigation rather than negotiation," which has "resulted in the resolution of sensitive trade issues through adjudication".[126] Thus, United States' actions were just a part of a complex systematic problem.

In order to get a better perception of the "crisis" issue, we suggest to look into the US position regarding WTO DRS a little closer.[127] According to the claims of US representatives, the Appellate Body's "judicial overreach" is largely condemned. The US stance on the problem amounts to: (1) incorrect reading of WTO laws that expose the US to responsibilities that it has never acquired; and (2) examining factual findings of panels beyond the scope of Article 17.6 of the DSU; (3) giving previous AB's reports a binding precedential status. These concerns while being essentially political have contributed to WTO's perception by the international community and have put the existence of this unique international adjudication system at risk. Overall, while the United States hold a strong position regarding the future of the DRS, the prospects of the crisis resolution are currently unclear.

2.2. Current state of the WTO dispute resolution system.

When the terms of two of the remaining three AB members expired on December 10th, 2019, two major issues arose: (1) it was unclear what was the fate for

[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] United States Trade Representative, Report on the Appellate Body of the World Trade Organization. – 2020. URL: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_th e_World_Trade_Organization.pdf. (Accessed on December 17, 2022).

those appeals filed before the deadline but left unresolved, and (2) what options did the disputing parties have with regard to panel reports rendered after December 10th.[128]

According to the rule outlined in paragraph 15 of the Working Procedures for Appellate Review,[129] appeals filed but not yet evaluated as of December 10, 2019, were still considered by the remaining members of the AB during 2020-2021. Initially, the plan was that according to the rule, an AB member whose mandate has expired would continue to participate in the evaluation of appeals filed prior to the expiration of his mandate with the permission of the AB and notification of the WTO DSB. As of that date, there were 14 such complaints, including the complaint of Russia and the EU against the panel decision in case DS476,[130] as well as four complaints regarding disputes where the US appeared as a respondent.[131]

However, these terms have been harshly criticized by the United States, which has consistently opposed such *de facto* extensions of authority without the proper authorization of the WTO DSB, i.e. all WTO members. In order to reinforce their position, the US blocked the adoption of the WTO's two-year budget in November 2019, insisting on decreasing both the cost of remuneration to AB members and the cost of the AB Secretariat in light of the substantial fall in the number of AB members.[132] To put it another way, if the remaining AB members were willing to review appeals they had already accepted, they would have had to do it for free.

WTO administration's efforts to negotiate a settlement with the US in the form of a specific list of four appeals to be agreed upon by WTO members and funded were fruitless. As a result, adjudication on the one case was agreed upon: the Australia - Tobacco Products and Packaging.[133] Despite the US warnings and budgetary

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[128] Ispolinov A.S., Kadysheva O.V. Crisis in the WTO dispute settlement system: Looking for Alternatives // Zakon. – 2020. – № 10. – С. 136 - 144.

[129] Working Procedures for Appellate Review / WT/AB/WP/6. – 2010. URL: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

[130] European Union - Energy Package and its Member States - Certain Measures Relating to the Energy Sector. – 2018. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds476_e.htm.

[131] Ispolinov A.S., Kadysheva O.V. Crisis in the WTO dispute settlement system: Looking for Alternatives // Zakon. – 2020. – № 10. – С. 136 - 144.

[132] Statements by the United States at the Meeting of the WTO Dispute Settlement Body. – 2019. URL: https://gpa-mprod-mwp.s3.amazonaws.com/uploads/sites/25/2021/06/Nov22.DSB_.Stmt_.as-deliv.fin_.public.pdf.

[133] Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/AB/R, WT/DS441/AB/R. – 2020. URL: https://www.wto.org/english/tratop_e/dispu_e/435_441abr_e.pdf.

constraints, the remaining members of the AB heard the appeals in two other cases anyway, including Canada's complaint against the US.[134] In its report, the AB agreed with the panel's conclusion that the United States had violated its WTO obligations. The US' reaction to the AB's findings was scathing. The US asserted in a statement circulated on March 5th, 2020, that the document submitted by the three AB members was not an AB report within the meaning of the DSU for the following reasons.[135]

To begin with, in the US' opinion, the report was prepared by individuals who continue to sit and evaluate appeals in the absence of legally valid grounds, i.e. without the consent of the WTO DSB. Moreover, the timeline of this appeal was indeed unusual, lasting 528 days instead of the required 90 days. On this basis, the United States urged to reinstate GATT practice and approve the report by a positive consensus, threatening to otherwise openly neglect the recommendations contained in this illegitimate, in their opinion, text.[136] As it was mentioned above positive consensus rule is fundamentally different from the present negative consensus rule, under which report clearance is automatic, as previously stated. The positive consensus decision is made in the absence of direct opposition from all WTO members.[137] Naturally, the losing party will easily prevent the report from being adopted.

Thus, no legal certainty existed regarding the legality and legitimacy of the reports prepared by the remaining three AB members on the appeals received by December 10th, 2019. Everything depended on the parties' agreed-upon position in each particular case. As a result of the evident legal issues, Morocco and Turkey withdrew their previously filed appeals in the Rolled Steel dispute[138] on December 10th, 2019 and agreed to accept the panel's report as approved.

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[134] United States - Countervailing Measures on Supercalendered Paper from Canada, WT/DS505/AB/R. – 2020. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds505_e.htm.

[135] Communication from the United States, United States - Countervailing Measures on Supercalendered Paper from Canada, WT/DS505. – 2020. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=286292,286293,265625,264654,264482,263318,263214,262588,261047,261045&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[136] Ispolinov A.S., Kadysheva O.V. Crisis in the WTO dispute settlement system: Looking for Alternatives // Zakon. – 2020. – № 10. – C. 136 - 144.

[137] Footer M. E. Role of Consensus in GATT/WTO Decision-making //Nw. J. Int'l L. & Bus. – 1996. – T. 17. – P. 653.

[138] Morocco - Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey, WT/DS513/10. – 2020. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds513_e.htm.

Ideally, future operation of the appeal instance of the WTO DRS depends on resolution of USA's procedural concerns provided that their political position will not interfere with the process of re-appointment of AB's members.

In this vein, Innerebner L. F. and Singla T.[139] proposed possible solutions to address the existing issue of prolongation of the AB members' term within the WTO DRS, in particular the issue of whether an outgoing member may finish any appeal proceedings exceeding member's term.

According to Lester S.[140] statistical analysis of AB reports indicates that in average it takes between 131 to 259 days for the AB to render a final report whereas Article 17.5 of the DSU prescribes a 90-days period for such submission. In Lester's opinion "in this context, Rule 15 of the Working Procedures assumes great significance"[141] which stipulates that an outgoing AB member "with the authorization of the Appellate Body and upon notification to the DSB"[142] once assigned for particular appeal proceeding may "complete the disposition of appeal [and] shall for that purpose only, be deemed to continue to be a Member of the Appellate Body."[143] As a result whenever the appellate proceedings are extended, AB members serve "on a single case up to one year after their term had officially expired."[144]

In order to address the prolongation problem, Innerebner L. F. and Singla T. offer to take a closer look at the proposal made by the Institute of International Economic Law (**IIEL**) at Georgetown University[145] and by the European Union.[146]

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[139] Innerebner L. F., Singla T. The Appellate Body Deadlock at the WTO: Identifying Solutions Within the DSU and Beyond // Diritto del Commercio Internazionale. – 2019. – №. 1. – pp. 100-103.

[140] Lester S., The Timing of Appellate Body Report Circulation. – 2018. URL: http://worldtradelaw.typepad.com/ielpblog/2018/06/the-timing-for-circulating-appellate-bo- dy-reports.html.

[141] Ibid.

[142] Body A. Working Procedures for Appellate Review. – WT/AB/WP/6. – 2010. – Rule 15. URL: https://wto.hse.ru/data/2014/03/12/1333360556/WP6.pdf.

[143] Ibid.

[144] Lester S., The Timing of Appellate Body Report Circulation. – 2018. URL: http://worldtradelaw.typepad.com/ielpblog/2018/06/the-timing-for-circulating-appellate-bo- dy-reports.html.

[145] IIEL, Georgetown University, IIEL Issue Brief, Transition on the WTO Appellate Body: A Pair of Reforms. – 2018. URL: http://georgetown.app.box.com/s/ jwcvlz2thwtv3dhgdne0nkfk3vlpv3sf.

[146] EU, Communication of 10 December 2018. – WT/GC/W/752/Rev.1 (18-7773) URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W752R1.pdf&Open=True; Communication of 26 November 2018. – WT/GC/W/753 (18-7418) URL: https://docsonline.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249937,249918,249919,249678,249534,249527,249457,249426,249402,249403&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False.

Generally, their proposal amounts to the following statements: (1) instead of allocating cases as they are initiated, which allows AB members to serve on all cases they were assigned to, terms of outgoing AB members should only be prolonged when oral hearings have already begun;[147] and (2) to avoid a similar crisis for the AB, Article 17 of the DSU should be revised to include a specific provision allowing AB members to keep serving their term even after it has expired until the DSB appoints new adjudicators.[148] This rule may encourage WTO members to initiate a prompt and effective selection and designation process.[149] The IIEL approach also focuses on developing procedural instruments to prevent WTO members from obstructing the process: the WTO Member who nominated the outgoing AB member should be precluded from blocking the appointment of the new AB member, and any AB member's term extension should be no longer than two years.[150] Interestingly, these recommendations also propose to raise the number of AB members from seven to nine, as well as to change their qualification to top full-time judges. The proposed strategy was, nevertheless, not approved by the US.[151]

To date, the operation of the WTO's appeal stage is still undecided. A.S. Ispolinov and O.V. Kadysheva provided an overview of potential approaches for resolving the crisis. Firstly, it is the refusal of the disputing parties to appeal as, either on the basis of a special agreement, or by refusing to appeal and so assuring the panel report's entry into force. That is exactly what happened in the case Russia - Transit, when both parties, Russia and Ukraine, did not file an appeal for various reasons.[152]

The second possibility is that a disputing party files an appeal being unsatisfied with the panel report anyway. In this case, the appeal sent to the AB will stay pending until the AB resumes its work. As a result, panel's report, including recommendations to the losing party to comply with the decision, will be disregarded due to the fact that

[147] Ibid.
[148] Ibid.
[149] Innerebner L. F., Singla T. The Appellate Body Deadlock at the WTO: Identifying Solutions Within the DSU and Beyond // Diritto del Commercio Internazionale. – 2019. – №. 1. – pp. 100-103.
[150] Ibid.
[151] Statements by the United States at the Meeting of the WTO General Council. – 2018. URL: http://geneva.usmission.gov/wp-content/uploads/sites/290/ Dec12.GC_.Stmt_.items_.7.and_.8.as_.delivered.clean_.pdf.
[152] Russia - Measures Concerning Traffic in Transit. WT/DS512/R. – 2019. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.

it did not enter into force. Thus, after an unfavorable finding by the panel in the dispute with India, the United States utilized a "appeal into the void" option, compelling the winning India to begin negotiations on the resolution of the dispute through diplomatic channels.[153]

It seems correct that according to Ispolinov A.S. and Kadysheva O.V. the most undesirable option would be to employ the dispute resolution mechanisms offered by regional trade agreements, particularly free trade agreements.[154] They all operate under their own process for resolving conflicts between states, using primarily *ad hoc* arbitration. This is the least preferred way out of the AB crisis since it may lead to the disintegration of the international system of trade dispute resolution.[155] In author's opinion, if states, both developing and developed, will systematically start to choose regional forums for dispute resolution, WTO DRS will gradually lose its reputation and its Member States will no longer be able to rely on effective enforcement mechanism and general predictability. As a result, outcomes of trade disputes, generally depending on regional aspects, could be chaotic, unpredictable and difficult to enforce, which can significantly disrupt international trade relations.

The fourth option is that the disputing parties agree to use the arbitration procedures provided for in Article 25 of the DSU as a temporary substitute for the AB by agreeing in advance and providing in their agreement for the appointment of arbitrators, the applicable procedure, and the procedure for enforcing the award, as well as the use of the AB's legal positions to maintain a certain continuity and legal certainty. This option will be reviewed in the following paragraph of the thesis. As events have demonstrated, the latter choice appears to be the better alternative for the time being.[156]

[153] United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India., WT/DS436/R. – 2018. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds436_e.htm.
[154] Ispolinov A.S., Kadysheva O.V. Crisis in the WTO dispute settlement system: Looking for Alternatives // Zakon. – 2020. – № 10. – C. 136 - 144.
[155] Shaffer G., Winters L. A. FTA law in WTO dispute settlement: Peru–Additional Duty and the fragmentation of trade law //World Trade Review. – 2017. – T. 16. – №. 2. – C. 303-326.
[156] Baroncini E. Resorting to Article 25 of the DSU to Overcome the WTO Crisis on the Appellate Body: The EU Proposal for an Interim Appeal Arbitration // DPCE Online. – 2020. – T. 41. – №. 4.

Thus, while the situation regarding the status of Appellate Body remains unclear, it is not beyond recovery. WTO member states depending on their interests in the dispute resolution have a few options when it comes to filing the appeal: from practical waiver of the right to appeal to initiation of *ad hoc* proceedings under the DSU.

2.3. Main approaches for the Appellate Body's crisis resolution: Draft Decision on the Functioning of the Appellate Body and Multi-Party Interim Appeal Arbitration Arrangement.

Since 2018 WTO members are trying to find a solution to restore the operation of the DRS. WTO General Council tried to introduce a Draft Decision on the Functioning of the Appellate Body[157] in order to meet US's concerns. However, the US rejected them the very day the Decision was submitted to the General Council. Later on, 16 WTO members reached an agreement on the Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU for the purposes of preserving a functioning two-step dispute settlement mechanism.[158]

Introduction of Draft Decision on the Functioning of the Appellate Body (**the Report 2019**) in 2019 was probably the first substantial attempt to find a compromise between the US and other WTO members. In the Report Dr. David Walker addressed six issues raised by the US representative.

US's concerns	Report's commentary
Judicial activism	AB's rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."[159]
Existence of binding precedent practice	Precedent "is not created through WTO dispute settlement proceedings."[160] However, predictable interpretation of obligations under the covered

[157] General Council, Informal Process on Matters related to the Functioning of the Appellate Body, Report by H.E. Dr. David Walker / JOB/GC/222. – 2019. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689.
[158] Isachenko T., Saveliev O. WTO dispute settlement System: Overcoming the Crisis and Reformation // International Processes. – Vol. 17. – 2019. – № 4 (59). – pp. 22-35.
[159] General Council, Informal Process on Matters related to the Functioning of the Appellate Body, Report by H.E. Dr. David Walker / JOB/GC/222. – 2019. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689.
[160] Ibid.

	agreements "is of significant value to Members."[161] Thus, the AB "should take previous [AB] reports into account to the extent they find them relevant in the dispute."[162]
Advisory opinions	The AB may only resolve concerns brought up by the parties and "to the extent necessary to resolve the dispute."[163]
Municipal law	"The 'meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal."[164]
90-day timeframe for appellate review	The AB is obligated to issue its findings within 90 days after receiving the notice of appeal, and this deadline can only be extended with the agreement of the parties.[165]
Completion of an appeal by the AB member whose term of office has expired	The DSB has the exclusive power to order an outgoing Appellate Body member "to complete the disposition of an appeal after the expiration of her/his term in office," provided that the hearing in the appeal took place prior to the term's expiration.[166]

Table 2.

Thus, The Report 2019 was a carefully composed compromise meeting all main US's objections to the WTO DRS. However, it was not enough. As it was stated above USA rejected the Report quite rapidly, reciting quite vague argumentation that "the fundamental problem was that the Appellate Body was not respecting the current, clear

[161] Ibid.
[162] Ibid.
[163] Van den Bossche P., Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.
[164] General Council, Informal Process on Matters related to the Functioning of the Appellate Body, Report by H.E. Dr. David Walker / JOB/GC/222. – 2019. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689.
[165] Van den Bossche P. Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.
[166] Ibid.

language of the DSU".[167] It seems that the central issue for USA was allegedly expansive power of AB members some of whom viewed their position as "appellate judges" serving on a "World Trade Court".[168] Generally, United States' position amounts to the following: (1) AB's jurisprudence limits the United States' capacity to safeguard its domestic economy from import competition through trade remedy measures, and (2) the US wants to return to a pre-WTO situation where a binding dispute settlement mechanism with quasi-judicial features would not infringe on US sovereignty.[169]

The most significant step to resolve WTO's crisis was taken at the initiative of the European Union. In 2020 in accordance with Article 25 of the DSU which provides for "arbitration within the WTO as an alternative means of dispute settlement" 16 WTO member-states have reached an understanding on the Multi-Party Interim Appeal Arbitration Arrangement (**MPIA**). MPIA has officially entered into force on 30 April 2020 when it was introduced to DSB and signed by more than 20 WTO members.[170]

United States' reaction to introduction of the MPIA was rather controversial. US representative has outlined that such a forum for arbitration proceedings is in line with Article 25 of the DSU and it is acceptable to settle disputes of WTO members.[171] However, the US also asserted that the MPIA "incorporates and exacerbates some of the worst aspects of the Appellate Body's practices."[172] According to the US the main issues of the MPIA are the following: (1) the required deadline for finalizing Appellate Body reports is weakened, (2) appeal arbitrators are allowed to review factual side of panel findings, (3) by identifying 'consistency' as a core principle for decision making, MPIA encourages the recourse to precedent.[173] Finally, the US position is that the

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[167] General Council, Minutes of Meeting / WT/GC/M/180. – 2019. – para. 4.51. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=259444&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[168] Van den Bossche P. Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.

[169] Ibid.

[170] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum / JOB/DSB/1/Add. 12. – 2020. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504.

[171] Ibid.

[172] Ibid.

[173] Ibid.

MPIA's initial purpose is not to resolve current WTO crisis, but simply to create a substitute for the Appellate Body.[174]

In essence the MPIA is a temporary arrangement existing up until the Appellate Body is no longer paralyzed. The idea is that the MPIA will contribute to preservation of "a functioning and two-step dispute settlement process"[175] within the DSU framework. The mechanism is the following: while "the MPIA applies to all disputes between participating WTO members", they agree to challenge WTO panel reports through appellate arbitration in accordance with Article 25 of the DSU. In this way, WTO members effectively avoid the Appellate Body. The DSU provisions regulate appeal arbitral procedures under the MPIA as well as "other rules and procedures applicable to appellate review under the DSU, such as the Working Procedures for Appellate Review".[176] Simultaneously, the MPIA includes some developments to improve procedural efficiency and simplify proceedings.[177]

It is worth noting that MPIA's arbitrators are at wide discretion when it comes to organizational measures taken for the purposes of speeding up the proceedings, e.g. they decide "on page limits, time limits and deadlines as well as on the length and number of hearings required".[178] Nevertheless, the MPIA still limits the authority of the appeal arbitrators: they must review only legal issues, address the issues which are essential to settle the dispute. In addition, arbitrators are not authorized to add to or undermine the rights and obligations prescribed by WTO agreements, and must maintain uniformity and predictability in their interpretation of these rights and obligations.[179]

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[174] Ibid.

[175] EU Statement, Regular Dispute Settlement Body meeting. – 2020. – Agenda point 13. URL: https://eeas.europa.eu/delegations/world- trade-organization-wto/81752/eu-statement-regular-dsb-meeting.

[176] Van den Bossche P. Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.

[177] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum / JOB/DSB/1/Add. 12. – 2020. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504.

[178] Van den Bossche P. Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.

[179] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum / JOB/DSB/1/Add. 12. – 2020. – paras. 9-10. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504.

Overall, however, the scope of authority of appeal arbitrators under the MPIA does not materially differ from AB members' one prescribed by Article 17 of the DSU. There are still three arbitrators who adjudicate of the appeals. The selection process is random. Moreover, arbitrators involved in the dispute resolution "may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators"[180] similarly to Appellate Body adjudicator's ability to consult with other AB's members. The MPIA's pool of arbitrators is comprised of individuals with recognized authority and validated expertise in law, international trade and the WTO Agreements.[181]

Currently, there are two finalized disputes adjudicated under the MPIA: Colombia - Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands;[182] and Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products.[183] By means of an example, we suggest to take a closer look at procedural history of both disputes in order to illustrate the mechanism of the MPIA.

The first dispute concerns anti-dumping measures adopted by Colombia on imports of potatoes, prepared or preserved, frozen originating in Belgium, Germany, and the Netherlands.[184] Prior the establishment of the Panel at the request of the European Union, both parties have notified the DSB that they had reached an agreement to deal with their appeals in accordance with Procedures for Arbitration under Article 25 of the DSU (**Agreed Arbitration Procedures**). The purpose of the Procedures was "to give effect to communication JOB/DSB/1/Add.12", i.e. the MPIA, and "to decide any appeal from any final panel report as issued to the parties in [this]

[180] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum / JOB/DSB/1/Add. 12. – 2020. – Annex, para. 8. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504.
[181] Van den Bossche P. Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTI Working Paper. – № 01/2022. – 2022.
[182] Colombia - Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands. – 2022. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/591ARB25.pdf&Open=True.
[183] Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products. – 2022. URL: https://www.wto.org/english/tratop_e/dispu_e/583-13_e.pdf.
[184] Colombia - Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands. – 2022. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/591ARB25.pdf&Open=True.

dispute."[185] Subsequently, the Panel has adopted Additional Working Procedures to facilitate arbitration under Article 25 of the DSU,[186] and issued its final report. The Panel found that Colombia acted inconsistently with Articles 2.4, 3.1, 3.2, 3.4, 3.5, 5.3, 6.5, 6.5.1, 6.8 of the Anti-Dumping Agreement.

Following the issuance of the final report, Colombia requested the Panel to suspend its work in accordance with Article 12.12 of the DSU in order to start arbitration under the Agreed Arbitration Procedures.[187] The request was granted, and parties have started the initiation of the appeal proceedings. Colombia submitted a notice of recourse to Article 25 under the Agreed Arbitration Procedures (**Notice of Appeal**). Later on, the Notice of Appeal was transferred to the DSB. It is comprised of "the full text of the final Panel Report transmitted by the Panel to the parties, third parties and the pool of arbitrators."[188] Following the selection of a chairperson and arbitrators, the hearing took place on November 15th, 2022. December 21st the final award was issued and "notified to the DSB, the Council for Trade in Goods, and the Committee on Anti-Dumping Practices and circulated to Members."[189]

The second dispute between Turkey and the EU related to measures concerning the production, importation and marketing of pharmaceutical products. It should be noted that Turkey is not a member of the MPIA. However, disputing parties entered into an appeal-arbitration agreement under Article 25 of the DSU that adhered to the MPIA's principles. Moreover, two of the three arbitrators who heard the appeal proceedings were brought from the MPIA pool of arbitrators.[190]

The EU filed the complaint in 2019 on the basis of alleged violations of WTO agreements: GATT 1994, Agreement on Trade-Related Investment Measures (**TRIMS Agreement**), Agreement on Subsidies and Countervailing Measures (**SCM Agreement**) and Agreement on Trade-Related Aspects of Intellectual Property Rights

[185] Colombia - Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands. – 2022. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] WTO Summary, Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm.

(**TRIPS Agreement**),[191] and requested consultations with Turkey, followed by the establishment of a panel. Overall, panel proceedings – first instance – resulted in rejection of several Turkey's arguments and upholding of the EU's position regarding the inconsistency of measures taken by Turkey with the GATT 1994.[192]

After the issuance of the final report in November 2021, the disputing parties have reached an agreement on procedures for arbitration under Article 25 of the DSU stating that they "abide by the arbitration award, which shall be final".[193] Subsequently, pursuant Article 12.12 of the DSU the panel accepted a joint request submitted by the European Union and Turkey to suspend its work indefinitely.

As it was indicated above, in the present case appeal arbitration was not initiated pursuant the MPIA since one of the disputing states is not a party to it. Procedures for the appeal arbitration were instituted due to parties' request for arbitration under Article 25 of the DSU when Turkey and the EU agreed "to enter into arbitration under Article 25 of the DSU to decide any appeal from any final report as issued to the parties in dispute DS583"[194] pursuant Article 25.2 of the DSU. In July 2022, the arbitrators' award was issued and later on communicated to the DSB, the Council for Trade in Goods, the Committee on Subsidies and Countervailing Measures, and the Committee on Trade-Related Investment Measures.[195] Consequently, Turkey indicated to the DSB that "it intended to implement the recommendations and rulings of the arbitrators and the panel in this dispute […] and that it would need a reasonable period of time to do so."[196]

Thus, in the context of MPIA proceedings, the mechanism of dispute resolution within the WTO currently is the following:

[191] Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products. – 2022. URL: https://www.wto.org/english/tratop_e/dispu_e/583-13_e.pdf.
[192] Ibid.
[193] WTO Summary, Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm.
[194] WTO Summary, Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm.
[195] Ibid.
[196] Ibid.

1. Prior to the establishment of a panel for first instance proceedings, parties agree to recourse their appeals in accordance with Procedures for Arbitration under Article 25 of the DSU which gives effect to the MPIA.
2. Following the issuance of the panel report parties make a request for the panel to suspend its work under Article 12.12 of the DSU in order to start arbitration under the agreed Procedures.
3. Defending party submits a notice of appeal to the DSB.
4. The selection of chairperson and arbitrators out of the MPIA pool takes place.
5. Appeal arbitrators issues a final award and communicate it to the DSB, the Council for Trade in Goods and relevant international committees (whenever necessary).
6. There is an option for states which are not parties to the MPIA to request an arbitration under Article 25 of the DSU and engage MPIA's arbitrators in dispute settlement proceedings.

Currently, there are seven ongoing disputes where disputing parties resort to the MPIA in appeal proceedings. In five of those cases the respondent state is China while in other two disputes - Australia and European Union.[197]

In 2022 the MPIA was adopted by 26 WTO Members, including Brazil, Canada, China, the European Union, and Mexico - five out of ten prevalent users of the WTO system.[198] The total amount of MPIA members is projected to grow substantially. However, the MPIA remains a temporary and partial solution to the present WTO crisis.

Overall, the AB's paralysis in the WTO DRS may not completely damage the multilateral framework of international trade and economic relations, instead indicating that the WTO may return to the GATT period.[199] MPIA is only starting to function properly and it is unknown for how long this solution for appeal proceedings will stay viable. In author's opinion, even though the US's role in the institution is

[197] Geneva Trade Platform, Multi-Party Interim Appeal Arbitration Arrangement (MPIA). URL: https://wtoplurilaterals.info/plural_initiative/the-mpia/.
[198] Ibid.
[199] Van den Bossche P. Henri P. L. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? // WTO Working Paper. – № 01/2022. – 2022.

uncertain, the prospects of MPIA's operation are quite promising since it may very well become a valid alternative substituting WTO's Appellate Body.

3. THE PROSPECTS OF DEVELOPING STATES PARTICIPATION IN THE WTO DISPUTE SETTLEMENT SYSTEM

3.1. Overview of developing states' participation in WTO dispute resolution system.

Currently, one of the most discussed problems regarding dispute settlement is the issue of developing states' participation in the WTO DRS. Some studies[200] have shown that the level of developing countries participation in WTO dispute settlement process has increased comparing to states' prior recourse to the GATT system. However, according to statistical analysis conducted by other scholars the percentage of such participation is high "due to an increase in the number of disputes initiated against [developing states] rather than by them".[201]

According to Arie Reich's survey[202] of WTO dispute settlement cases, developing and least developed countries' participation in the dispute settlement process is significantly less than of developed countries. From the perspective of the research which was based on applying the World Bank's 4-tier classification of countries – "Atlas Method", to the existing WTO statistics from 1995 to 2016, it follows that high-income economies are prevailing both as initiators and respondents in the dispute settlement. Reich suggests four main reasons for an infrequent participation of states with lower middle- and low-income economies in the WTO disputes: (1) developing countries with lower income economies are unable to afford high legal and administrative costs of the dispute settlement procedure; (2) "weak" states are not willing to harm or in any way upset their international relations with more powerful countries; (3) in case the respondent of the developing state does not comply with panel's report, it may be quite difficult for a small economy to impose retaliation measures; and (4) governmental representatives and legal counsels of developing states are not sufficiently informed about perspectives of dispute resolution under WTO's

[200] Azofeifa A., Hernandez N. The World Trade Organization's Dispute Settlement System and Some Cases Related to Agricultural Goods // Inter-American Institute for Cooperation on Agriculture. – № 4. – 2018; see also Leitner K., Lester S. WTO Dispute Settlement 1995-2004: A statistical Analysis // J. Int'l Econ. L. – № 8(1). – 2005. – pp. 231, 234.
[201] Al Shraideh S. Reflections on Developing Countries' Initiation of Disputes in the WTO Dispute Settlement System //Global Trade and Customs Journal. – 2021. – T. 16. – №. 3. – at p. 105.
[202] Reich A. The effectiveness of the WTO dispute settlement system: A statistical analysis //Transnational Commercial and Consumer Law. – Springer, Singapore, 2018. – C. 10-11.

proceedings. Not to mention that sometimes they cannot recognize the mere existence of violations of WTO agreements. For these reasons, it almost seems natural that developing countries with low-income economies are often unable to initiate dispute settlement proceedings.

In addition, developing and least-developed states share a common misconception that due to insufficient trade activities their trade interests and rights will not be violated by other States' trade policies. This perception results in the lack of interest to develop human capital or expertise in WTO law and affects states' capacity to cover litigation costs. This is due to the fact that developing states frequently struggle finding appropriately trained domestic counsel that is capable of looking into and pursuing complaints.[203] Additionally, lack of due financing also has a negative impact on the availability of legal resources and consultation. Thus, developing states have no choice but to use legal services of highly specialized firms from developed states that charge quite a substantial fee.

It stands to reason that "cost" issues are also connected to political and economic costs arising directly from state's participation in the WTO DRS. In this sense, developing states, especially the smaller ones that may be dependent on certain trading partners in the absence of alternative export markets, must pay special attention to preserving their international relations with these partners. Evidently, the beginning of dispute resolution proceedings may adversely affect state's market access and lead to retaliatory actions which can be vital for a developing economy since the likelihood of bringing a further claim against a complainant who started dispute resolution proceedings increases by up to fifty-five times.[204] For instance, China's active participation in WTO dispute settlement has led to complaints from Western nations.[205]

Small developing countries are significantly discouraged from starting proceedings due to the possibility of retaliatory disputes because they are uncertain

[203] Guzman A., Simmons B. International Dispute Resolution: Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes // J. Legal Stud. – 2005. – at 566.
[204] Guzman A., Simmons B. International Dispute Resolution: Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes // J. Legal Stud. – 2005. – at 570.
[205] Liya H., Gao H. China's Experience in Utilizing the WTO Dispute Settlement Mechanism / Dispute Settlement at the WTO: The Developing Country Experience // Edited by Gregory Shaffer & Ricardo Melendiz-Ortiz. – 2013.

whether their own trade practices do violate WTO law and whether they can effectively address any subsequent complaints made against them.[206] Thus, initiating disputes could have a detrimental impact on crucial trade relations for developing states, e.g. reduced funding or preferential treatment. Therefore, developing countries lack motivation to participate in proceedings against stronger respondents considering the long-term effect of preserving trade relations, vitally required bilateral funding, or advantageous preferential arrangement.[207]

It is worth mentioning, however, that the WTO has made certain attempts in order to address issues concerning developing countries' involvement in the dispute settlement system. For instance, in 1966 GATT has published its recommendations regarding the issue - Basic Instruments and Selected Documents (BISD).[208]

The DSU stipulates the notion of differentiated and more beneficial dispute resolution where one of the parties is a developing or least developed nation. This technique stems from the fact that, during the Uruguay Round, industrialized nations required the cooperation of developing countries in order to ratify a comprehensive package of agreements.[209] Furthermore, it was critical to establish that the WTO will be an institution that takes into account the needs and priorities of developing nations.

When an developing state files a complaint against a developed country, it may, at its discretion, apply the provisions of the 1966 BISD[210] to conflicts between developed and developing countries rather than Art. 4, 5, 6, and 12 of the DSU, which govern normal dispute resolution procedure. Thus, in the case of a conflict between Art. 4, 5, 6, and 12 of the DSU and the 1966 BISD the latter should be applied.

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[206] Sandhu N., Member Participation in the WTO Dispute Settlement System: Can Developing Countries Afford Not to Participate // UCL J. L. & Juris. – №5(1). – 2016. – at p. 162.
[207] Eleso A., WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries // The Berkeley Electronic Press. – № 1378. – 2006.
[208] World Trade Organization. Secretariat, World Trade Organization. Legal Affairs Division, World Trade Organization. Appellate Body. A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication // Cambridge University Press. – 2004.
[209] Smbatyan A.S. International Trade Disputes in GATT/WTO: Selected Decisions (1952 - 2005) // Moscow: Wolters Kluwer. – 2006.
[210] World Trade Organization. Secretariat, World Trade Organization. Legal Affairs Division, World Trade Organization. Appellate Body. A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication // Cambridge University Press. – 2004.

In general, the predicament of the least developed nations is to be taken into account at all stages of dispute resolution processes under the 1966 BISD. Developed nations should likewise refrain from launching actions against such states, as well as from suspending concessions and other WTO-mandated obligations.

Furthermore, the 1966 BISD includes the following assistance initiatives for disputes in which at least one of the disputing sides is a developing country. When a dispute falls under the provisions of Article XXIII of the GATT: "any benefit accruing to it [disputing party] directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded",[211] and consultations between a less-developed and a developed state fail to achieve beneficial outcomes, the less-developed country may approach the Director-General, who, "acting in an *ex officio* capacity",[212] may use his good offices to facilitate a reasonable solution.

To foster a favorable settlement, the Director-General shall consult with the involved countries, as well as other WTO members or inter-governmental organizations as he believes necessary. If a mutually acceptable solution cannot be reached, the Director-General will bring the issue to the attention of WTO members or the Council, who will assemble a team of specialists to evaluate the problem and suggest an appropriate strategy.[213]

The panel has to deliver its findings and recommendations within 60 days of being referred to it, and the party to whom a recommendation is addressed has to provide information on the actions taken in response to the decision within 90 days. If the situation is sufficiently critical, WTO members may allow the affected party to postpone the execution of any concession or other GATT commitments.[214] If a developed nation fails to execute a proposal within the timescale indicated, they may

[211] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, // Marrakesh Agreement Establishing the World Trade Organization. – Annex 1A. – 1867 U.N.T.S. 187. – 33 I.L.M. 1153. – 1994.
[212] Dispute settlement system training module, Decision of 5 April 1966 on procedures under Article XXIII. – 1966. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm.
[213] Ibid.
[214] Ibid.

consider what extra steps, in addition to those previously taken, should be taken to resolve the issue.[215]

Thus, the level of participation of developing countries stems from two main features attributed to such states: (1) "individually, they are relatively small value, volume, and variety exporters," and (2) there is a "lack of institutional, human, and financial resources in such states."[216] Naturally, there are a few exceptions, e.g. large developing countries, such as Brazil and India.

3.2. Main issues of developing states' participation in WTO dispute resolution system.

For developing countries, the WTO dispute settlement mechanism is extremely challenging and expensive, resulting in overwhelming human capital and financial repercussions. The substantial expenses of WTO litigation, according to India's Ambassador Bhatia, are a "major barrier" to benefiting from the institution.[217] Concerns from developing countries originate from shortcomings in WTO legal expertise, and the cost of employing private legal representation to litigate WTO issues has risen significantly in recent years.[218]

These increasing expenses might be linked to the various levels of WTO dispute resolution, as well as the system's compulsory essence, which results in more thorough and costly submissions.[219] The WTO agreements, which entered into force in 1995, incorporate legal requirements based on comprehensive scientific or economic assessments, which were not as important under the GATT. This has contributed to a rise in the complexity and technicality of applications, as well as a shortage of technical experience.[220] As a result of their lower trade shares and government budgets, developing nations experience cost and resource challenges in WTO dispute settlement

[215] Ibid.
[216] Al Shraideh S. Reflections on Developing Countries' Initiation of Disputes in the WTO Dispute Settlement System //Global Trade and Customs Journal. – 2021. – T. 16. – №. 3. – at p. 105.
[217] H.E. Mr. Ujal Singh Bhatia Ambassador and Permanent Representative of India to the WTO, "Settling Disputes Among Members", Presentation at the WTO Public Forum 2008. – Session 6. – 2008. URL: http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm.
[218] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.
[219] Busch M., Reinhardt E. Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement // University of Minnesota Law School Conference on the Political Economy of International Trade Law. – 2000.
[220] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.

proceedings.[221] Furthermore, private firms frequently fund WTO litigation, putting developing states at a disadvantage due to a lack of backing from well-funded private industries.[222]

Furthermore, poor and least-developed countries may be cautious to initiate WTO dispute settlement processes due to their vulnerability to retaliation.[223] Small developing countries may be unable to battle the removal of preferential tariff benefits or foreign funding if they oppose a trade policy.[224] As a result, developing nations' occasional involvement in dispute settlement activities may indicate a fair decision not to dedicate resources to a matter that is already being adjudicated and involves other WTO members. The most crucial aspect determining the choice to file an action is the willingness to engage foreign judicial systems.[225] Therefore, there is some logic in weaker WTO Members not actively participating in disputes initiated by stronger WTO Members and purposely "free-riding" on the execution of favorable judgments.[226]

One of the most significant issues is the impact of retaliation measures for developing states within the WTO dispute settlement system which is quite a controversial issue. Retaliatory measures are not usually an effective option for developing countries, i.e. most developing countries are incapable of retaliating effectively. In general, political and economic power play an important role in the dispute resolution process. Developed countries wield significant power, they can easily achieve compliance when dealing with developing states. On the contrary, whenever a weaker developing country faces a stronger developed country, the balance of power between them is unequal. In these cases, it is unavoidable that the developed country is reluctant to comply with WTO rules most of the time.[227] Thus, due to the

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[221] Ibid.
[222] Bown C., Hoekman B. WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector. // JIEL. – 2005. – 8(4). – at p. 859.
[223] Shaffer G., The Challenges of WTO law, Strategies for Developing Country Adaptation // World Trade Review. – 5(2). –at 185.
[224] Ibid.
[225] Romano C. International Justice and Developing Countries: A Qualitative Analysis // The Law and Practice of International Courts and Tribunals. – Vol. 1. – № 2. – 2002. – at 551-552.
[226] Ibid.
[227] Zhang W. The Hierarchy of Remedies Under the WTO Dispute Settlement System and Its Impact // 3rd International Conference on Judicial, Administrative and Humanitarian Problems of State Structures and Economic Subjects (JAHP 2018). – Atlantis Press, 2018. – at p. 724.

disproportionality in the markets of developing and non-complying countries, the WTO's retaliation rules have been criticized as practically worthless.[228]

The DSU empowers non-compliant countries to be retaliated against by canceling trade concessions or obligations.[229] Developing countries with small domestic markets are unable to inflict significant economic or political harm on industrialized countries in order to build the required leverage for compliance promotion.[230] These restrictions essentially result in a waste of time and resources for developing nations. Thus, developing states' lack of involvement in WTO DRS is attributed to the shortcomings of the remedies accessible to them.[231]

According to WTO law, retaliation amounts to suspension of concessions or other obligations either within sector in which the violation was found, or within other sectors under the relevant agreement.[232] Due to particularly critical circumstances the suspension may take place in relation to both different sector and agreement.[233] De facto trade retaliation has traditionally included the revocation of tariff concessions, resulting in higher duties on certain imports from the non-complying state.[234] However, the idea depends on the size of the retaliating Member's domestic market in comparison to that of the other state.[235] For instance, the retaliation claims of Antigua and Barbuda, one of the smallest WTO Members, against the US highlights retaliation challenges where market size disparity exists.[236]

Developing states with limited markets are probably not in a position to compel compliance from developed countries since retaliation through the suspension of tariff concessions is not a viable alternative for enforcing WTO obligations. The WTO's

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[228] Footer M., Developing Country Practice in the Matter of WTO Dispute Settlement // Journal of World Trade – 35(1). – 2001. – at 94.
[229] See Article 22 of the DSU; see also Agreement on Subsidies and Countervailing Measures // Marrakesh Agreement Establishing the World Trade Organization. – Annex 1A. – 1994. – Articles 4.10, 7.9.
[230] Hudec R.E. The adequacy of WTO dispute settlement remedies: a developing country perspective // Development, Trade and the WTO: The World Bank. – 2002.
[231] Ibid.
[232] DSU, Article 22.
[233] Ibid.
[234] Ibid.
[235] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.
[236] United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22. – 2007. – para. 3. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

World Trade Report of 2007[237] outlines the idea that major economies can bring economic loss to a party deemed to be in breach of its obligations, whereas developing states are not in a position to put significant pressure on developed WTO members to change their behavior.[238]

Additionally, retaliatory measures are inherently destructive, particularly for developing countries.[239] Their economies are small-scale, i.e. retaliatory measures are not an efficient option. This is demonstrated in the *Bananas* case. Ecuador was given the authority to levy retaliatory tariffs on European imports totaling US$ 201.6 million per year. However, Ecuador did not find any practicable way to apply retaliation measures and discovered that using such measures would inevitably harm its own economy.[240] These cases question the effectiveness of the WTO's retaliation remedy under the WTO DRS.

In their requests for retaliation against the US and European Communities, Antigua and Barbuda and Ecuador expressed deep concerns that the revocation of tariff concessions would be more disruptive to the developing economies.[241] Antigua voiced an opinion that retaliation through import bans would have a disproportionately negative impact on developing countries, while Ecuador noted that the termination of certain concessions may be more detrimental to the party requesting concessions than to the developed one.[242] These views have resulted in the opinion that countermeasures are an ineffectual tool in the hands of "weaker" players, and that there is a challenge for developing states trying to execute successful retaliation within the WTO framework.[243]

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[237] World Trade Report, WTO Publications. – 2007. URL: https://www.wto.org/english/res_e/publications_e/wtr07_e.htm.
[238] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.
[239] Bronckers M., Broek N. V. D. Financial compensation in the WTO: improving the remedies of WTO dispute settlement // Journal of International Economic Law. – Vol. 8. – 2005. – at p. 104.
[240] Diego-Fernández M. Compensation and Retaliation: a developing country's perspective // WTO law and Developing Countries. – Cambridge University Press. – 2007. – at p. 233.
[241] United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22. – 2007. – para. 3. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.
[242] Ibid.
[243] Mavroidis P. C., Remedies in the WTO legal system - between a rock and a hard place // European Journal of International Law. – Vol. 11. – 2000.

Retaliation is also time-consuming and expensive for the developing countries. Costs of imposing retaliatory measures are prohibitively expensive for developing states, so that they cannot afford them. Most of the time, benefits of retaliation cannot outweigh the costs, which is why most developing countries are hesitant to seek remedies through the WTO dispute settlement system.

Thus, cost issues and practical irrelevance of one of the most efficient enforcement incentives – retaliation, are the main constraints limiting developing states' participation in the WTO DRS. In perspective these limitations are not likely to be overcome by developing states without an outside assistance. That is why it is crucial that international community provides aid to developing states in order to overcome the imbalance between states' ability to resort to the WTO DRS.

3.3. Advisory Centre on WTO Law: legal assistance to developing states within the WTO dispute settlement system

To start with, it should be highlighted that the DSU incorporates strategies to deal with cost and resource constraints. Article 27.2 of the DSU, for example, specifies that the WTO Secretariat should provide experts to help developing countries with additional legal support and guidance. However, the efficiency of this function is debatable.[244] Experts can only assist with dispute resolution and cannot give legal advice prior to filing a claim. Additionally, they only can help the developing countries in a way that ensures the Secretariat's ongoing neutrality, leaving no way for them to engage as a counsel in further proceedings.[245]

Whereas efficiency of Article 27.2 of the DSU in overcoming limitations for developing states may be debated, several measures outside of the DSU seem to be more efficient. When it comes to providing assistance to developing states, one particular institution comes to mind first: the Advisory Centre on WTO Law (ACWL) - an independent inter-governmental organization with the mandate to assist developing nations in WTO dispute resolution, as well as provide "legal advice and WTO law training."[246] The ACWL offers free or significantly funded legal assistance

[244] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.
[245] Ibid.
[246] Ibid.

to developing nations.[247] Some experts define the ACWL as the world's first international legal assistance center,[248] indicating that ACWL's establishment has led to reinforcement of the perception that the WTO dispute resolution mechanism is open to the economically challenged "as much as it is available to the economically strong."[249]

In most cases, ACWL provides developing countries with sponsored legal support, including as free or low-cost legal consultations on WTO issues, as well as training programs for state officials. Furthermore, it offers low-cost legal assistance to developing countries when they participate as complainants, respondents, or third parties in WTO DRS.[250] ACWL provides assistance to any developing nation that is a member of the Centre, including any WTO member identified by the UN as a least developed country. (LDC).[251]

The center was engaged in over 65 WTO disputes and approximately delivers 200 expert opinions to its developing and LDC members each year. The ACWL offers reduced charges for its aid in dispute resolution.[252] It also regularly holds WTO legal training classes. Its assistance is accessible to all 39 developing states of the WTO who have joined the ACWL, as well as all 43 LDC members of the WTO, totaling 50% of the WTO's membership.[253] 12 developed states – members of the ACWL, form the core of center's financial support: Australia, Canada, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, and the UK. ACWL's personnel consists of 12 lawyers, three office managers, and four lawyers recruited from developing and LDC members.[254]

The ACWL, according to Bown C. P. and McCulloch R., has not been successful in motivating new developing states to become involved in WTO dispute settlement,

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[247] Ibid.
[248] WTO news, Speeches: Former Director-General Mike Moore (1999-2002). – 2001. URL: https://www.wto.org/english/news_e/spmm_e/spmm_e.htm.
[249] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.
[250] Van der Borght K. The Advisory Center on the WTO Law: Advancing Fairness and Equality // Journal of International Economic Law. – 2(4). – 1999. – pp. 723-728.
[251] Ibid.
[252] WTO news, WTO members mark 20th anniversary of the Advisory Centre on WTO Law. – 2021. URL: https://www.wto.org/english/news_e/news21_e/acwl_27sep21_e.htm.
[253] Ibid.
[254] Ibid.

however, it has provided developing countries with services that let them pursue cases differently than they would have done without ACWL.[255] In their paper, Bown C. P. and McCulloch R. provide statistical analysis of ACWL' engagement with WTO dispute resolution from 2001 to 2008.Their research has shown that eight of the thirteen states participating in the ACWL had never previously brought to WTO a case all by themselves – separately.[256] Developing states' background in dispute settlement was primarily in cases where they supported a more influential WTO member in a dispute or grouped with other developing countries effected by the same agenda.[257] Thus, due to ACWL services, developing nations' reliance on the DSU to pursue their market-access rights has increased.

In general, Bown and McCulloch's study implies that the ACWL will be unable to eliminate remaining barriers to developing nations. This is because of the lack of data needed to identify prospective WTO dispute settlement cases. More research resources are required to assist developing states in identifying less apparent issues.[258] Arrangements that fund the expense of WTO litigation, on the other hand, may deter private legal firms from providing additional data for attracting new developing-country members. This may raise the demand for public release of information on possible WTO disputes.[259]

It has been stated that the ACWL has essentially solved many of the resource issues experienced by developing nations in dispute resolution since its introduction.[260] The ACWL has produced several legal opinions on WTO law issues, including aspects of potential dispute resolution proceedings, to date. It also runs comprehensive training programs in Geneva for developing and least developed country delegates.[261]

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[255] Bown C. P., McCulloch R. Developing countries, dispute settlement, and the Advisory Centre on WTO Law // The Journal of International Trade & Economic Development. – 2010. – T. 19. – №. 1. – P. 33-63.
[256] Ibid.
[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] Abbott R., Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005 // ECIPE Working Paper. – № 01/2007. – at 4.
[261] ACWL Document, How to Use the Services of the ACWL: A Guide for Developing Countries and LDCs. – 2007. URL: http://www.acwl.ch.

At the time of the ACWL's inception, one particular worry was repeatedly expressed: the ACWL's inability to give non-legal technical counsel to developing countries, despite the fact that such assistance is critical in WTO disputes.[262] However, the problem appears to be resolved for the time being. Recognizing that the level of technical knowledge is essential to the success of WTO proceedings, the ACWL has created a technical expertise trust fund to cover the costs of hiring such experts.[263] To be more exact, the fund has been used to assist poor countries in improving scientific, economic, and domestic legal competence in dispute resolution. The United Nations Conference on Trade and Development (**UNCTAD**) regarded it as a significant turning point because of the fund's increasing accessibility in supporting countries with scientific and technical information required to participate in WTO dispute settlement.[264]

While the ACWL does not eliminate all of the obstacles that developing countries have when engaging in the WTO dispute settlement system, it does greatly lessen the extent to which a lack of knowledge of WTO law and associated technical matters limits their participation.[265] While the often-highlighted cost and resource limitations were formerly important, they seem to have been mostly resolved.

ACWL has a very specific mandate.[266] Its goal is to give poor countries who qualify for these services both legal advice and instructing on WTO law, as well as assistance in WTO dispute settlement.

According to Article 6 of the Agreement Establishing the ACWL,[267] each developing Member and qualified LDC is eligible for assistance from the ACWL. As a result, ACWL must make its resources equally available to all of its Members and LDCs. Essentially, this means that the ACWL can only respond to advice requests from

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[262] Bown C. P., McCulloch R. Developing countries, dispute settlement, and the Advisory Centre on WTO Law // The Journal of International Trade & Economic Development. – 2010. – Т. 19. – №. 1. – P. 33-63.
[263] Ibid.
[264] UNCTAD Report of the Commission on Trade in Goods and Services, and Commodities, at its Seventh Session. – 2003. – p. 33. – paras. 107-108. URL: https://digitallibrary.un.org/record/1493324?ln=ru.
[265] Nottage H. Developing countries in the WTO dispute settlement system. // GEG Working Paper. – 2009. – № 2009/47.
[266] Meagher N. Representing developing countries before the WTO: the role of the Advisory Centre on WTO Law (ACWL) // Robert Schuman Centre for Advanced Studies Research Paper. – № RSCAS. – 2015.
[267] ACWL documents, Agreement Establishing the Advisory Center on WTO Law. – 2001. URL: https://www.acwl.ch/download/basic_documents/agreement_establishing_the_ACWL/Agreement_estab_ACWL.pdf.

developing countries and cannot advise them on particular legal matters. Otherwise, developing states would be deprived of their equal chance to use the ACWL's assistance.[268]

In terms of any possible bias, ACWL' services never concern politics or strategic advices. It only gives legal counsel. Thus, it is guaranteed that ACWL is independent and objective when it deals with its Members and LDCs. As a result, the ACWL doesn't really render legal opinions – it just informs states on the actual status of the law: "what the law is, not what it should be."[269]

Ultimately, legal counsel provided by the ACWL is completely confidential. The ACWL does not identify (1) any specific states that seek its assistance; (2) the substance of the matter on which each country requests counsel; or (3) information regarding how the inquiring state implemented the advice.[270] Meagher[271] illustrates the necessity of confidentiality by the following example. Assume that developing state A is planning to implement an import embargo on products manufactured in developing state B and seeks guidance from the ACWL to determine whether the policy follows the WTO law. State A is unwilling to allow State B to discover that it is thinking about banning its imports.[272] Evidently, these issues are significant in the WTO context, which involves interactions between sovereign states. These issues are even more heightened when the country seeking guidance is concerned about policies adopted by stronger, more powerful developed states.[273]

Generally, ACWL gives around 200 advisory documents for free to its developing states and LDCs eligible for its assistance annually. The ACWL offers states the same "in-house" aid as developed countries. For instance, European

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[268] Meagher N. Representing developing countries before the WTO: the role of the Advisory Centre on WTO Law (ACWL) // Robert Schuman Centre for Advanced Studies Research Paper. – № RSCAS. – 2015.
[269] Ibid.
[270] Horlick G., Boekmann H. Managing WTO Dispute Settlement at Home: A Guide for Developing Countries // ICTSD Background Paper. – No. 3. – 2012. URL: http://www.ictsd.org/downloads/2012/04/horlick-boeckmann-trade-barrier-assessment-ictsd- background-study-no-3.pdf.
[271] Meagher N. Representing developing countries before the WTO: the role of the Advisory Centre on WTO Law (ACWL) // Robert Schuman Centre for Advanced Studies Research Paper. – № RSCAS. – 2015.
[272] Ibid.
[273] Ibid. See also: Meagher N. Fostering Developing Country Engagement in the WTO Dispute Settlement System: Outstanding Challenges and Governance Implications // Cambridge University Press. – 2011.

Commission officials can obtain free legal counsel from their personnel.[274] The ACWL offers its clients the same ability. Thus, once again, the equity principle governs ACWL's operations.

In contrast to its legal counsel services, the ACWL takes payment for providing aid in dispute resolution. The payments for assistance, like the "membership fees" paid by developing states when they join the ACWL, range depending on a state's GDP rate and economic relations at international market.[275] The highest charges that each type of countries would be obligated to reimburse for the ACWL's help in the three major stages of dispute settlement (consultations, panel, and Appellate Body) are: (1) CHF 276,696 for Category A; (2) CHF 207,522 for Category B; (3) CHF 138,348 for Category C; and (4) CHF 34,160 for LDC.[276] It should be mentioned though that under certain circumstances LDCs may be provided with services in the area free of charge.[277]

These costs are considerably less than those billed by private consulting, which charges in average from CHF 400,000 to CHF 600,000 for a standard WTO case. The initial objective (apart from generating income) of these charges was to discourage "frivolous litigation".[278] Due to ACWL's unbiased character, it provides an accurate estimate of the prospects of winning in every future WTO dispute, avoiding "frivolous" conflicts.[279]

It is a common misperception that ACWL does not participate in the dispute's preparation. That is not the case: whenever a country seeks help from the ACWL in this area, the ACWL engages in all phases of developing a potential WTO case.[280] Furthermore, the ACWL maintains a Technical Expertise Fund to cover the costs of any technical expert assistance required to prepare and prosecute a dispute.[281]

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[274] Gappah Petina, An Evaluation of the Role of Legal Aid in International Dispute Resolution, with Special Emphasis on the Advisory Centre on WTO Law // Oxford University Press. – 2006.
[275] Ibid.
[276] ACWL, Report on Operations. – 2021. URL: https://www.acwl.ch/download/dd/reports_ops/Final-Report-on-Operations-2021-FOR-WEBSITE.pdf.
[277] Ibid.
[278] Meagher N. Representing developing countries before the WTO: the role of the Advisory Centre on WTO Law (ACWL) // Robert Schuman Centre for Advanced Studies Research Paper. – № RSCAS. – 2015.
[279] Ibid.
[280] Ibid.
[281] Ibid.

Whenever two states request ACWL's assistance for the same dispute, the "first-come-first-served" principle applies. In order to provide all requesting countries with legal aid ACWL has introduced an External Counsel which is presented by well-known law firms such as: Hogan Lovells, White & Case, Mayer Brown, King & Spalding and etc.[282] These companies have made a commitment to help any ACWL Member who cannot receive initial support from the ACWL due to potential contradictions.[283] The negatively impacted state chooses its lawyer from the pool of external counsel, with no referral or influence from the ACWL. Under these circumstances, the ACWL bills both states using the price schedule outlined above. The ACWL then reimburses the lawyer assisting the second country for the sum paid to the ACWL with additional fee.[284]

The ACWL's educational and training operations also greatly contribute to its legal consulting and conflict resolution activities.[285] The ACWL runs training classes in WTO law at its headquarters for representatives of developing states, relying on its expertise in dispute settlement and other legal matters.[286] Generally, training includes a moot court practice and an optional test, ad hoc lectures on practical issues.[287] For budgetary considerations, and in accordance with equity principle mentioned above, ACWL is not able to provide training courses by relocating to particular states. At the same time, it engages in educational initiatives supported by other organizations.[288] Additionally, ACWL is now more frequently organizing courses through the internet via webinars.[289] It should be mentioned that in 2005 ACWL has also introduced a program for trade lawyers – representatives from developing states.[290] Basically, they join the ACWL's staff as compensated trainees for a certain period of time. The program allows government representatives in the area of trade law to engage with and

[282] ACWL, External Counsel. URL: https://www.acwl.ch/external-counsel/.
[283] Ibid.
[284] Meagher N. Representing developing countries before the WTO: the role of the Advisory Centre on WTO Law (ACWL) // Robert Schuman Centre for Advanced Studies Research Paper. – № RSCAS. – 2015.
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[289] Ibid.
[290] Ibid.

acquire knowledge from a team that has been actively participating in WTO dispute resolution.[291]

The perception of ACWL's activities is generally rather positive. It assists the developing states by allowing them to safeguard their economic interests at cheaper rates. Professor Richard Mshomba observed in a review of Africa's WTO membership that "the ACWL is a shining example of how technical assistance can and should be delivered."[292] Notwithstanding good reviews, ACWL has several noticeable shortcomings as well. First of all, it fails to deal with or solve all of the internal resource restrictions that impact developing states.[293] These limits restrict countries' capacity to cooperate with their private-sector partners in order to detect and solve possible trade issues.[294] Secondly, ACWL lacks funding to expand its activities outside Geneva. It has been proposed, however, ACWL may establish regional divisions in that respect.[295]

To conclude, the long-term viability of the ACWL relies on its clients trust in the performance, neutrality, and autonomy of its services, productive interaction between developed and developing states, and openness of developed countries to contribute to the ACWL financially.

Overall, ACWL's fate also is greatly influenced by the progress existing within of the WTO legal framework. If WTO continues to handle its members' trade disputes properly, there ought to be an ongoing need for the ACWL's assistance. It is anticipated that the more developing states concentrate on trade issues, the faster more of them will recognize the need of having an in-depth knowledge of the WTO legal system, and thus they will be able to protect their rights by frequently seeking assistance from the ACWL.[296]

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[291] Ibid.
[292] Ibid.
[293] Bohanes Jan, Fernanda Garza, Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement // Trade, Law and Development. – 4(1). – 2012.
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CONCLUSION

WTO members are required to follow the Dispute Settlement Body's decisions based on the findings of the Panel and Appellate Body. WTO dispute settlement mechanism is an independent system which uniquely provides effective enforceability. It has proved to be the most effective institution preventing states from trade wars. The system is comprised of several stages providing WTO member-states with opportunity to resolve their disputes in any possible way, e.g. by providing a platform and legal framework for consultations, dispute settlement and possibility of review which is currently blocked. As to the enforcement, not only does the DSU provides for a coherent mechanism employed to oversee the implementation of DSB rulings, but it also offers several legal tools for member-states to protect their economic interests, i.e. trade compensation or withdrawal of inconsistent measures.

In the context of WTO' dispute resolution a regional integration aspect should be taken into account. Even though regional forums and WTO' DRS *de jure* exist as separate entities, still their functioning is quite intertwined. The most problematic issue in that regard is the conflict of jurisdictions since legal framework of regional integration is tied closely to WTO regulations. The AB crisis greatly contributed to the issue. Prior to the existing constraints states usually chose the WTO system due to its well-known advantages, e.g. sufficient time restrictions, predictability, high percentage of implemented decisions and etc. State's ability to file an appeal was a critical factor for disputing parties. Currently, since such an option is blocked, regional forums in some cases (whenever the issue's review requires deep evaluation in the regional context) may become a much more preferable choice. Thus, in order to avoid possible ambiguity in the future it is proposed that a forum exclusion clause should be added to international treaties stating that once a dispute has been submitted to the WTO or a regional justice body, the same issue cannot be reexamined by a different judicial body.

In any case the issue of Appellate Body's crisis seems to be the main stumbling rock preventing WTO dispute settlement system from efficient operation and development. The US have been limiting AB's functions for quite some time. In 2016-2019 their actions have finally led to AB's practical blockage. Overall, the US

objections concerned the time frame for dispute adjudication by the AB, wrong interpretation of WTO provisions, giving previous AB's reports a binding precedential status and reviewing factual findings of the panels outside of the Article 17.6 of the DSU scope. The issues raised by the United States were controversial which resulted in numerous debates among WTO member states. General reaction, however, appeared to be negative. WTO members have been actively trying to settle the existing problems for the US suggesting different approaches to resolve these issues. These attempts remained fruitless. To date the prospects of AB's renewal are unclear.

WTO member states have employed a temporary solution to fill the existing vacuum in appeal proceedings. Article 25 of the DSU has provided for an institutional substitute needed to address the AB's crisis. Pursuant to this DSU provision, a great number of WTO member-states have entered into the Multi-Party Interim Appeal Arbitration Arrangement under which states agreed to appeal WTO panel reports resorting to appellate arbitration pursuant to Article 25 of the DSU established within the MPIA forum. Notwithstanding, that to this date, only a few disputes have been appealed under the MPIA, it presents a promising alternative to Appellate Body's proceedings within the WTO system and essentially resolves the issue of AB's paralysis for now.

In the context of WTO dispute settlement system, the issue of developing states' participation is quite significant. Even though the number of developing countries in WTO is relatively higher than of developed states, rates of actual participation show a completely different picture. That is due to the fact that developing states face serious limitations when it comes to dispute resolution within the WTO, e.g. they cannot afford high legal and administrative costs of the dispute settlement procedure; in some instances these states are not willing to harm or in any way upset their international relations with more powerful countries; in case the respondent of the developing state does not comply with panel's report, it may be quite difficult for a small economy to impose retaliation measures; governmental representatives and legal counsels of developing states are not sufficiently informed about perspectives of dispute resolution under WTO's proceedings. In order to address these limitations, the Advisory Centre

on WTO Law was created. It is an organization which is mostly funded by developed states to assist developing nations in WTO dispute resolution and provide legal assistance and WTO law training. ACWL is a unique centralized institution operating within discretion and relying on certain principles. It has positively influenced developing states' level of participation in dispute settlement by strengthening their position and bringing balance into the whole dispute resolution system.

Thus, general results of the conducted research have indicated the current state of the WTO dispute resolution system and prospects of its transformation and improvement. Master thesis has addressed the main objectives outlined in the introductory part of the paper, i.e. (1) examination of the structure and functional division within the dispute resolution system, (2) assessment of the statistical analysis of the WTO dispute resolution mechanism operation, (3) evaluation of the development of the WTO dispute resolution system, (4) assessment of recommendations rendered by academic scholars regarding the reformation of the system, (5) research and evaluation of the development prospects of the WTO dispute resolution system, (6) evaluation of the main issues which WTO Member states face during participation in the resolution of trade disputes.

Overall, the review of the WTO DRS, its issues and perspectives has indicated that even though the system is imperfect and it is constantly facing obstacles, it is still one of the most powerful institutions in international trade relations. The DRS continues to operate and adjust to emerging constraints providing WTO members with a unique forum to resolve their trade disputes. In perspective, the system's future is greatly dependent on states' positive cooperation within international community and their willingness to give the law precedence over the power.

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