NEW PERSPECTIVES ON THE WTO DISPUTE SETTLEMENT SYSTEM

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1. INTRODUCTION

World trade is one of the most important features of the stability of today´s world. To promote this stability, countries agreed to establish the trading regime under the **General Agreement on Tariffs and Trade** (GATT) in 1947. In 1995 the GATT was replaced by the **World Trade Organization** (WTO).

Even in the best possible legal/economic systems and even with the best intentions of its members, there are disputes from time to time. The WTO dispute settlement system is considered to be one of the most successful dispute settlement systems in public international law and member states are willing to participate to it. Davey indicates a successful compliance rate of 83 per cent to the WTO rulings, which is higher than any other comparable international tribunal.[1]

However, there exist some concerns with regard to the functioning of the WTO dispute settlement system. While concerns such as **transparency**[2] of the system or problem of the **length of the proceedings**[3] are important, this paper focuses on the **remedies**. The general purpose of remedies is to put pressure on the violating member to bring non-conforming measures into compliance. It must be emphasized that under the current system this purpose is not met.

This research paper will examine the current remedy system as a part of the WTO dispute settlement system and explore ways to make such system more equal and effective.

[1] For more details see William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. Int´l Econ. L. 17, 46-48 (2005).
[2] See Donald McRae, *What is the Future of WTO Dispute Settlement?*, Journal of International Economic Law 7 (1), 17-18 (2004)
[3] For example William J. Davey, *Expediting the Panel Process in WTO Dispute Settlement, in The WTO: Governance, Dispute Settlement & Developing Countries*, 421-430 (Merit E. Janow, Viktoria Donaldson & Alan Yanovich eds., 2008).

1.1 From GATT to WTO

1.1.1 GATT

The General Agreement on Tariffs and Trade was a loosely-structured organization. The GATT dispute settlement procedure was **rather informal**, although it set the basic elements of the following dispute procedure development. Known as the ″panel procedure″, it called for legal disputes to be submitted to panels of three to seven GATT delegates from neutral countries who would issue legal rulings on the merits of the complaint. The procedure was entirely **voluntary**. Every decision from beginning to end had to be made by consensus. Therefore, the defendant had a right to veto every step of the process, from the appointment of a panel to the adoption of the panel´s legal ruling and the authorization of trade sanctions for noncompliance. Although the procedure was not compulsory, defendant governments almost always decided to cooperate with it.[4] The GATT dispute settlement system had become an adjudication procedure built solidly on the authority of legally binding obligations.[5]

1.1.2 WTO

The WTO was established in 1994 and the new WTO procedure was set out in a detailed agreement known as the **″Understanding on Rules and Procedures Governing the Settlement of Disputes″** (DSU). The DSU gave governments an automatic right to bring their legal complaints before a dispute settlement tribunal, it made legal rulings by tribunals automatically binding upon the parties, it introduced appellate review, and it gave complaining parties an automatic right to impose retaliatory trade sanctions in cases where

[4] They did so under the pressure of a strong community consensus that every GATT member should have a right to have its legal claims heard by an impartial third party decision maker.
[5] More in Robert E. Hudec, *New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn. J. Global Trade 1, 2-7 (1999).

the defendant government failed to comply with legal rulings. Much of new procedure is more or less a repetition of practices already established less formally by the GATT procedure.[6]

Panels that remain from the old GATT system are now a part of a WTO dispute settlement procedure. Their function is to hear and decide legal complaints at the first level and their work is of a great importance. The changes made by the new WTO dispute settlement procedure does not change the fact that panels, when issuing the panel reports, must take greater care to produce demonstrably competent, well-reasoned, and well-supported decisions, as these reports are automatically binding. The fact that the new procedure introduced the review by the Appellate Body[7] only intensifies these demands, giving panels the further task of complying with all of the guidelines set down by previous Appellate Body decisions.

1.1.3 Basic comparison of GATT and WTO dispute settlement procedure

Without a doubt, the new WTO procedure laid down higher standards than its predecessor. These higher quality standards are necessary for a better quality of a dispute settlement procedure that member countries could depend on. In this context, it is necessary to point to the fact that member state countries and its governments tend to submit more and more complex cases which require both factual and legal analysis and the tasks are therefore much more complex than they were in the typical GATT panel ruling.[8] New elements of the

[6] Id.
[7] For more about Appellate Body see Chapter 1.2.
[8] Visible sign of these new demands has been a staggering increase in the length of panel reports under the WTO procedure in comparison to the panel reports of the GATT procedure.

new procedure place the participants under considerably more pressure than was previously the case under the rather relaxed work habits and procedures of GATT panels.[9]

Furthermore, unlike the WTO dispute settlement system, dispute settlement under the GATT must be under today´s standards seen as ineffective mainly because each contracting party had to approve any decision reached by the panel. This, for example, meant that when a country was facing a negative ruling, it could simply block the adoption of a report. When the WTO replaced the GATT, the system was redesigned and dealt with this problem.

A new body, called **Dispute Settlement Body**[10] (DSB), was created under the WTO to deal with dispute settlements. This body has the authority to establish dispute settlement panels, to adopt panel and Appellate Body reports, and to maintain surveillance of the implementation of the rulings and recommendations it adopts. Furthermore, this body is entitled to authorize the suspension of concessions[11] and other obligations under the covered WTO agreements, if its rulings and recommendations are not acted upon by member states in a timely fashion.[12]

There are a number of **stages of the WTO dispute settlement**[13] under the Dispute Settlement Body. The first stage is a stage of **consultations**. The countries in dispute have sixty days for consultations, and during this period a country cannot request a formation of a panel.[14] If the first stage of consultations fails, the next stage is a **formation of a panel** on one of the party´s request.[15] The panel must be formed within forty-five days and has up to

[9] Robert E. Hudec, *New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn. J. Global Trade 1, 15 (1999).
[10] DSU art. 1.2.
[11] For more detailed explanation see Chapter 2.1.
[12] DSU art. 2.
[13] See Dispute Settlement Training Module, source: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm.
[14] DSU art. 4.
[15] DSU art. 6, 7 and 8.

six months to make its final ruling.[16] Any party may then **appeal**[17] the panel´s ruling to the Appellate Body.[18] The appeals process may last no longer than ninety days, and the Dispute Settlement Body must then accept the Appellate Body´s ruling unless it rejects it with a full consensus.[19] Appeals must be based on legal interpretation rather than evidence presented to a panel. After the appeal is heard, three of the seven members of the Appellate body makes a decision about the appeal and issues an ultimate ruling. The Appellate Body affirms, modifies, or overrules the legal findings and conclusions drawn by the panel.[20]

1.2 Importance of the Appellate Body in the new dispute settlement procedure

Member state governments during the Uruguay Round negotiations[21] on dispute settlement had outlined the main elements which made panel rulings automatically binding. Having decided to give this much power to panel rulings, member state governments then felt the need to provide a stronger safeguard against the possibility of erroneous rulings - the Appellate Body has construed a well-functioning institution in a very short period of time.

The Appellate Body was created primarily to provide added assurance of legal correctness. While in the previous GATT panel proceedings, the decisive influence generally rested with the legal analysis performed by the GATT Secretariat´s Office of Legal Affairs, under the present WTO procedure, the Appellate Body now has the final word on all issues of law. The Appellate Body created very detailed rules of procedure right at the outset;[22]

[16] Technically, the panel is a tool that helps the Dispute Settlement Body make its final ruling, however, the panel´s decision can only be rejected by a consensus in the Dispute Settlement Body, so in practice the panel reports are extremly difficult to overturn.
[17] DSU art. 17.
[18] The Appellate Body consists of seven members from a variety of countries. Each member has no significant affiliation with any specific government and is a scholar in international law. DSU art. 17.1.
[19] DSU art. 17.14
[20] DSU art. 17.13
[21] For more details visit http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm .
[22] Appeals are conducted according to the procedures established under the DSU and the Working Procedures for Appellate Review (Working Procedures). The Working Procedures are drawn up by the Appellate Body in

contrary to the informal, ad hoc procedures often followed by GATT. It also made clear that it expected a fairly high standard of practice, as compared with the more easy-going standard of practice common to party-controlled GATT panel proceedings. The most important are the **written submissions**[23] from the parties, as well as representation by counsel before the three-member panel.[24] In addition, Appellate Body opinions are certainly much more detailed and have much more rigorous legal analysis than GATT panels.

consultation with the Director-General of the WTO and the Chairman of DSB. They have been amended six times since 1995. Source: http://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm#fnt1.

[23] DSU art. 10.2. and Rule 21(1) of the Working Procedures.

[24] DSU art. 17.1.

2. DISPUTE RESOLUTION REMEDIES

2.1 Current remedies

After the Appellate Body makes its final ruling, the member state against whom the Appellate Body has ruled must comply with the Appellate Body recommendations within a reasonable period of time.[25] The first objective of the dispute settlement mechanism is to secure the withdrawal of the measures concerned if these are found to be inconsistent with WTO obligations. If the immediate withdrawal of such measures is impracticable, **compensation** may be provided. As a last resort, a complaining member may request authorization of retaliation in the form of **suspension of concessions** or other obligations under WTO agreements. Both compensation and retaliation are temporary measures pending the withdrawal of inconsistent measures.[26] In other words, if compliance has not been achieved within a reasonable period of time, the violating member can offer compensation as a temporary measure.[27] If no agreement is reached within twenty days after the reasonable time period has elapsed, the complaining member may then request that the Dispute Settlement Body permits that member to suspend concessions with respect to the violating member.[28]

Compensation is intended to ease the adverse effect of an inconsistent measure that is not fully eliminated. Only failure to comply with the recommendations and rulings can give rise to the remedy of compensation. Compensation normally involves a lifting of trade barriers such as tariff reductions or increases in import quotas by a violating member. However, compensation is hardly ever offered because of its **voluntary nature**. Moreover,

[25] DSU art. 21.3.
[26] DSU art. 3.7.
[27] DSU art. 22.1.
[28] DSU art. 22.2.

since it has to conform to the requirements of the **Most Favored Nation (MFN) clause**,[29] a violating member has to provide compensation to all its trading partners.

Suspension of concessions, sometimes called retaliation,[30] is the WTO remedy that has been set into place to compensate a wronged member. All other possible remedies under the DSU must be exhausted in order to request retaliation. Suspension of concessions generally means that tariffs or other trade barriers will be applied by the wronged member against the violating member. In addition, unlike compensation where a wronged member has to compensate all its trading members, it affects only the members involved in the dispute. The Dispute Settlement Body expects violated members to first seek suspension of concessions or other obligations with respect to the same sector in which the violation occurred.[31] If the complaining party does not find this practical, it may instead seek to suspend concessions in different sectors, but under the same WTO agreement.[32] Finally, if the member does not believe this is practical, and the situation is deemed serious enough by the Dispute Settlement Body, the member may suspend concessions under any other WTO agreement.[33]

2.2 Problems of the current dispute resolution remedies

In many ways, the current WTO Dispute Resolution System is a substantial upgrade from the system under the GATT. Whereas, under the GATT, every step in the dispute resolution process required consensus approval by all members, the current system inverted this procedure by permitting the process to move forward without a consensus of

[29] Under MFN treatment, a member has to treat all its trading partners equally in respect of such matters as tariff levels.
[30] ″Retaliation″ is a generic term for ″suspension of concessions or other obligations″ as used in the DSU.
[31] This is often called ″pararell retaliation″, DSU art. 22.3 (a).
[32] This is often called ″cross-sector retaliation″, DSU art. 22.3 (b).
[33] This is often called ″cross-agreement retaliation″, DSU art. 22.3 (c).

disapproval.[34] This change has allowed more politically sensitive cases to move forward and has helped protect weaker WTO members that may have had trouble or been intimidated by the prospect of attempting to reach a consensus under the former system. While the current WTO dispute resolution system is undoubtedly more effective, it is far from perfect. There are number of problems, mainly with the current remedies.

2.2.1 Compliance

The primary goal of the WTO dispute resolution system is compliance. While the WTO is in part concerned with compensating a country for its monetary losses and rebalancing the economic scales, the overarching purpose of the system is to bring all WTO members into compliance with WTO norms, thus increasing open markets for trade. The current system does not meet this goal. Overall, timely compliance occurred in about 60 per cent of the cases.[35] Countries that failed to comply in a timely manner in the first decade of WTO dispute settlement included the United States, the European Union, Canada, Japan, and Australia.[36] Their on-time implementation rate was only 50 per cent (!).[37] Developing countries achieved a higher on-time implementation rate of over 80 per cent.[38] Under the Dispute Settlement Body, as it applies today, a violating member has a reasonable time to bring itself into compliance, which essentially means changing its laws to conform to a panel

[34] DSU art. 16.4. If there is no appeal by either party, the DSB is obliged to adopt the report, unless there is a so-called negative (or reverse) consensus, i.e. a consensus in the DSB against the adoption. This (after the establishment of the panel) is the second key instance in which the decision-making rule of reverse consensus applies in the WTO dispute settlement system. The reverse consensus rule has never been applied, and because the 'winning' nation under the panel's ruling would have to join this reverse consensus, it is difficult to conceive of how it ever could. By contrast, under GATT, a rule of positive consensus applied at the stage of adopting panel reports. This gave the losing party the ability to block or veto the adoption of reports.
[35] William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. Int´l Econ. L. 17, 137-138 (2005).
[36] Id. at 113,138
[37] Id.
[38] Id.

or Appellate Body ruling. Should the violating country choose to ignore the ruling, DSU provides two ineffective remedies.

2.2.2 Compensation

The idea of lowering trade barriers by way of removal of tariffs may sound like a great option to help induce compliance. Compensation under the DSU, however, is subject to the agreement of the violating member. If weaker country chooses to seek compensation by requesting the stronger party to reduce the trade barriers with respect to the weaker party, the stronger party can simply decline. In other words, the violating member has to agree to provide compensation.[39] This voluntary nature makes complaining members prefer retaliation to compensation, because with compensation, it is the violating member that retains control in the sense that it can unilaterally end compensation whenever it believes it has complied with WTO rulings. Granting such veto power to the violating party seems very odd – it is basically making this kind of remedy useless.

As mentioned above, compensation must be consistent with MFN treatment in the WTO agreements.[40] This means that in the case of compensation in the form of tariff reductions on products, not only the complaining member but also any other members exporting the products to the violating member will receive the benefits of compensation. Therefore, third members may have the same level of market access as the complaining member. In this regard, the violating member may be reluctant to provide compensation. It would allow a larger degree of market access than if it were to be provided only to the complaining member.

[39] Article 22.1 of the DSU clearly specifies that compensation is voluntary.
[40] DSU Article 22.1 together with GATT art. I:1.

2.2.3 Suspension of concessions (retaliation)

As seeking compensation will rarely if ever induce compliance, prosecuting members are left with the sole remedy of retaliatory suspension of concessions with respect to the violating member. However, several cases have shown that it was not strong enough to achieve compliance, even though a significant amount of retaliation has been imposed.[41] In these cases, the DSB authorized the U.S. to retaliate against the EC, yet even sanctions by an economic powerhouse the size of the U.S. could not force the EC into compliance. How then can a country with small economy ever realistically expect to induce the compliance of a powerful economy? Developing countries and small countries have never taken retaliatory measures, even following WTO authorization.[42]

Sanctions favor countries with larger economies, and such countries have a much greater ability to use this retaliatory scheme. Countries with smaller economies face a bleak reality. When any country is faced with sanctioning a violating member, the prosecuting country´s economy is to some degree harmed. When a country with a smaller economy considers imposing such sanctions against a country with a much larger economy, the implications of such an action may even deter the prosecuting country from acting. This is what happened to Ecuador.

Ecuador was the original complaint in the EC – Bananas case, and as a result it was essentially left without remedy. The arbitrators in EC – Bananas noted that Ecuador, a developing country, may find itself in a situation where ″it is not realistic or possible for it to implement retaliation against the EC, a developed country.″[43] Because imposing retaliation is

[41] The most prominent cases are *EC - Bananas* and *EC - Hormones*.
[42] William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 Cornell Int´l L.J. 119, 3 (2009).
[43] Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, 2237, page 33.

based on a member´s economic power, retaliation by a relatively small country member will not likely have a great impact on a large country member. This fact results from the inevitable economic and political inequality between WTO members. In short, retaliation is highly dependent upon the relative economic power of the disputing members. Developing countries have expressed this concern by noting that ″the tremendous imbalance in the trade relations between developed and developing countries places severe constraints on the ability of developing countries to exercise their rights of retaliation.″[44] A small country member may be clearly limited in its ability to use retaliation against a large country member, whereas it may be a very effective instrument for a large country member to use against a small country member.

Moreover, some authors[45] suggest that should a smaller country impose such sanctions, the larger economy may in turn respond with counter-retaliation outside of WTO system in fields such as development aid. In addition, political ramifications may arise in response to such economic sanctions. An import-dependent country cannot realistically cut off its market from a major world economy because it would be more likely to harm its own economy than to induce compliance by the larger economy. Charnovitz explains this phenomenon briefly, stating that; ″The biggest problem with WTO sanctions is that the teeth bite the country imposing the sanction.″[46] As such, the import dependency of a country has a direct effect on the ability of that country to impose sanctions.[47]

[44] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Special and Differential Treatment for Developing Countries, Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, 1, TN/DS/W/19 (Oct. 9, 2002).
[45] For example Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 Am. J. Int´l L., 338 (2000).
[46] Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 Am. J. Int´l L. 792, 814 (2001)
[47] Id. at 816-817.

Retaliation was never formally used under GATT rules, and retaliatory measures have been applied to date in only four cases under WTO rules: *EC – Bananas,*[48] *EC – Hormones,*[49] *U.S. – Foreign Sales Corporation (FSC)*[50] and *U.S. Byrd Amendment*.[51]

[48] For more details see Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, upheld by Appellate Body Report WT/DS27/AB/RW/USA.
[49] For more details see Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507.
[50] For more details see Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517.
[51] For more details see Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Canada – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS234/ARB/CAN, 31 August 2004, DSR 2004:IX, 4425.

3. POTENTIAL SOLUTIONS FOR A MORE EFFECTIVE WTO DISPUTE RESOLUTION SYSTEM [52]

There exist a number of possible changes the WTO dispute resolution system could undergo to address the inequality under the current dispute resolution system.

3.1 Collective sanctions

One option is to permit collective sanctions. There are currently no collective remedies or sanctions by the WTO membership as a whole.[53] Therefore a country is essentially left to fend for itself, including bearing all of the costs associated with pursuing a claim and other costs, both economic and political, of imposing sanctions.[54] Collective sanctioning could possible take one of the following forms: (a) the DSU could permit any affected member to enforce a decision already reached, (b) the DSU could require all affected members to pursue a claim and enforce sanctions together, or (c) the DSU could issue sanctions directly on behalf of the entire WTO. Pros and cons of these options are stated below.

3.1.1 Permission of any affected member to enforce a decision already reached

It looks like developing or small country would be in a much better position if any affected member could enforce a decision already reached. In that way the developing country would not have to litigate for its own claims and therefore would be able to decrease the litigation costs. Another country (probably one of the major players or generally developed country) would do the litigation for the affected developing country. If the

[52] The potential solutions are based on: Jeremy B. Darling, *Gambling with our future: A Call for needed WTO Dispute Resolution Reform as Illustrated by the U.S.-Antigua Conflict over Online Gambling*, 42 Geo. Wash. Int´l L. Rev. 381 (2010).
[53] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 Am. J. Int´l L., 338 (2000).
[54] Id. at 345.

outcome of the case was positive, the developing country could then only enforce the decision for its own claim.

However, as much as this appears to be a help for the developing countries, it only creates (just another type of) dependency on the countries with larger economies. While this proposal may help reduce costs, it does not actually change anything. First, this proposal assumes another country is willing and able to bear the costs of litigation. Second, even if another country is willing, sometimes the smaller country cannot afford to wait for another country to do all of the work.[55] Under this proposed system, the situation would be no different than it currently stands.

3.1.2 Permission to all affected members to pursue and enforce a claim and resulting sanctions together

The other proposal, which would give permission to all affected members to pursue and enforce a claim and sanctions together, fails similarly. As it would help the weaker countries to bear the costs of the proceedings, it would not change the inequality of the system. This proposed system would again create an economic dependency of a developing country on the developed one and cannot reach an ″equal playing field″ for every country no matter what their economic or political situation. And again, this raises a number of problems. First, it may not be feasible to require a country to impose sanctions. Some countries are so dependent on another country as a trading partner that such a system may actually deter WTO membership. Dependency on larger countries is undesirable because a country will only invest its resources in a worthy cause. While many countries in the world are affected by the larger country, each country is not affected equally. Thus, those countries that have a lot at

[55] For example in case of collapsing economy.

stake, regardless of size, will still bear the majority of the costs. In conclusion, this proposed system seems to create more problems than it solves.

3.1.3 Sanctions issuance on behalf the entire WTO membership

A final collective sanctioning remedy would be for the DSU to issue sanctions on behalf of the entire WTO membership. For example, the DSU could suspend a WTO agreement[56] with respect to a country that refuses to come into compliance. This proposal, however, seems to be a violation of basic WTO values, essentially forcing a given country to change its laws at the expense of every member country in the WTO. Forcing every country in the WTO to cut off at least part of its trading is very drastic and unreasonable, and it would negatively affect the legitimacy of the WTO as a whole. It is unlikely that many countries would support such a system. The only undisputable positive of this concept is that it would definitely give more power to the dispute resolution system. However, as the legitimacy of the WTO is at the heart of this discussion, this proposal is the most dangerous thus far.

From analyzing the above mentioned collective sanctions, it becomes evident that the proper solution does not appear to be an improved sanctioning remedy. As such, the best way to fundamentally correct the WTO dispute resolution system seems to lie in the change of the compensation remedy.

3.2 Mandatory compensation

3.2.1 Advantages of mandatory compensation

As discussed above, the effective change of the WTO dispute resolution system can hardly come from a new sanctioning system. The only option left (besides creating brand new

[56] Suspension could be in full or only in part of the WTO agreement.

kinds of remedies) is to change the compensation remedy, the other form of remedy currently provided by the DSU. Specifically, compensation is subject to the consent of the violating country. J. B. Darling[57] inspired by other authors[58] suggests that the ineffective remedy of optional compensation should be eliminated and replaced with a remedy of so called mandatory compensation.

Mandatory compensation would function much like the current compensation scheme, i.e., it would continue to take the form of decreased trade barriers[59] – but with two substantial changes. The first change to the compensation procedures would be to permit reparations.[60] Under the proposed mandatory compensation system, compensation in the form of reduced tariffs would equal the total estimated damage that a country has suffered to date and will likely suffer in the future due to the defending country´s actions, as determined by a panel. This differs from the current compensation system, which limits recovery to the damage the prosecuting country has suffered subsequent to the date of expiration of the reasonable time period the panel provides the violating country to come into compliance.[61] This would actually help a country to recover an amount equal to the total fiscal harm the country has suffered.

No less important is the problem of the voluntary nature of the compensation remedy. Therefore, a second change would be to make the compensation mandatory, i.e. to remove the veto power countries currently have over compensation requests. In doing so, the inequality in the system would almost entirely be removed. After the panel and, if applicable, the Appellate Body would determine the required amount of compensation, the violating

[57] In Jeremy B. Darling, *Gambling with our future: A Call for needed WTO Dispute Resolution Reform as Illustrated by the U.S.-Antigua Conflict over Online Gambling*, 42 Geo. Wash. Int´l L. Rev. 381, 11 (2010).
[58] Mainly by Dirk De Bievre and Joost Pauwelyn.
[59] Essentially reduced tariffs on foreign goods.
[60] Currently, the system allows only prospective relief.
[61] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 Am. J. Int´l L., 338 (2000).

member would then be required to reduce its tariffs in accordance with their determination (as to the sectors and goods that would most likely help compensate the prosecuting member).[62]

3.2.2 Mandatory compensation counterarguments

While Darling claims that mandatory compensation is the most effective method for correcting the WTO´s dispute resolution system, some authors[63] argue otherwise. One argument is that, because the decreased tariffs apply to all countries, the prosecuting country would need some additional access to truly be compensated.[64] Another argument is that the political leadership in the violating country would suffer as a result of losing the protective barriers it put in place to protect its own industries.[65] A third argument, favored by those who are not in favor of changing the current, weak system of remedies (most likely countries with strong economies) would be that this is a bit too powerful of a remedy.

It must be agreed with Darling[66] that these arguments fail. The fact that all the member countries gain benefits of compensation through an open market with respect to the violating country does not reduce the compensation of the prosecuting country. Furthermore, the WTO is a voluntary trade organization that has the power to issue binding rulings and permit countries to sanction one another. It is the very purpose and true nature of this global trade organization to influence the political leadership and people of all member countries to be in compliance with its rules. As the system currently stands, it allows only large countries to force other countries into compliance through the imposition of sanctions.

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[62] Jeremy B. Darling, *Gambling with our future: A Call for needed WTO Dispute Resolution Reform as Illustrated by the U.S.-Antigua Conflict over Online Gambling*, 42 Geo. Wash. Int´l L. Rev. 381, 11 (2010).
[63] Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, 1 World Trade Rev. 123, 129 (2002).
[64] Id.
[65] Id.
[66] Jeremy B. Darling, *Gambling with our future: A Call for needed WTO Dispute Resolution Reform as Illustrated by the U.S.-Antigua Conflict over Online Gambling*, 42 Geo. Wash. Int´ L. Rev. 381, 12 (2010).

The system of mandatory compensation would make this unfair, ineffective system into one that actually accomplishes the goal of a just dispute settlement system. The proposed system would even the scales and would force all violators of WTO agreements to face the same consequences, no matter the size of their economies. All member countries have to have a right to expect and receive adequate relief and cannot be left without a proper remedy as we see today.

4. CONCLUSION

In the dispute settlement system under GATT, guidance on the rules and procedures of remedies was very minimal. The WTO provides much more detailed rules and procedures of remedies. A clear set of rules and procedures on remedies made members more willing to have recourse to the WTO dispute settlement system.

However, as mentioned above, an examination of the current system of WTO remedies revealed a number of problems. Compensation with its voluntary nature (compensation might be simply declined by a larger country, which make it useless option for small countries) and the application of MFN treatment makes the use of this type of remedy infrequent. The biggest problem of retaliation is a fact that it increases restrictions on trade which may undermine the free trade principle, which is essential for the WTO. In other words, retaliation causes self-inflicted harm in the sense that the consumers and industries of the complaining member, who prefer cheaper imports, have to suffer. Further, since retaliation is based on a member´s economic power, it may be ineffective when a small country member attempts to impose it against a large country member.

For all these reasons, the WTO dispute resolution system is both ineffective and unfair. It is in need of reinforcement through thoughtful improvements, especially with respect to the system of remedies. Implementing a mandatory compensation scheme in place of these two current remedies seems to be a reasonable option that would accomplish the primary goal of the dispute resolution system – to bring WTO member countries into compliance with the WTO agreements.

Such a dispute resolution system would have an overall beneficial effect for all countries, even for those with large economies, i.e. for the major players of the world trade. It

is clearly visible[67] that the current dispute resolution system does not work effectively even when the disputes are between two (or more) large economies. None of the current remedies had the power to put the EC into compliance with the WTO rulings.

I agree with the view of Darling that the proposed mandatory compensation system would correct this problem. Just as the proposed collective remedy of mandatory compensation in the form of reduced trade barriers would help smaller countries, mandatory compensation would aid larger countries as well. The size of a country´s economy would be irrelevant under a mandatory compensation system. No matter the size of a violating member, mandatory reduced trade barriers would internalize the problem and force the violating member´s own business and citizens to demand change. Thus, the benefits of the system would extend even to those large economies that one would expect to resist implementing such a system.[68]

Such a new remedy system would equally increase the power of all WTO member countries to the same level, no matter their size. Any member country would then have the most important ability – to force the country, which is not in accordance with the WTO rules and rulings, into compliance with the WTO rules and decisions. This option of enhancing the WTO dispute resolution system is definitely one that has a potential to create an effective way how to deal with international trade disputes in a way that is fair and that will promote stronger world economy and trust in the global world trade economy.

Bringing any type of change into multi-state organization such is the WTO is never easy. There are different pressures and interests from different sides. It is especially unlikely, that the world´s more powerful economies would be willing to empower the WTO in such a

[67] Primarily *EC-Bananas* and *EC-Hormones* case.
[68] Jeremy B. Darling, *Gambling with our future: A Call for needed WTO Dipute Resolution Reform as Illustrated by the U.S.-Antigua Conflict over Online Gambling*, 42 Geo. Wash. Int´l L. Rev. 381, 13 (2010).

way that it would create what seems to be a very powerful tool against non-compliance (for big players non-compliance is sometimes more economically advantageous than compliance). However, as explained above, a proposed mandatory compensation system would benefit all WTO members. If we all want a strong, equal and fair global trade organization all the nations should be willing to make such a change that would remove inequality and, in doing so, would give the WTO legitimacy. This may in turn increase membership in the WTO and promote more international trade.

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