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ABSTRACT

This dissertation examines the developing countries participation and usage of the World Trade Organization's dispute settlement system. Although the World Trade Organization provides equal rights and obligation to enter into the dispute settlement process for all member countries, the litigation process is complex and costly for developing countries. There are various limitations for developing country participation when they want to use the dispute settlement mechanism and this dissertation mainly discusses the lack of legal and financial means of developing countries. In this regard, this dissertation examines possible solution which could increase developing country participation in the dispute settlement mechanism. These alternative resolutions may address the problem of the participation of developing countries in the dispute settlement system and it also try to develop a more effective working dispute settlement mechanism for developing countries. Therefore, World Trade Organization system could propose significant reforms in the Dispute Settlement Body which encourage developing country participation.

ACRONYMS AND ABBREVIATIONS

DSU	Dispute Settlement Understanding / Understanding on Rules and Procedures Governing the Settlement of Disputes
DSB	Dispute Settlement Body
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
ITO	International Trade Organization
LDC	Least Developed Countries
WTO	World Trade Organization
UN	United Nations
UK	United Kingdom
US	United States of America

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CHAPTER I INTRODUCTION

1.1 Research Problem and Background

Globalization of the world increases trade volume and impacts on economic and social development. Countries have been trying to develop their economies within this international trend and international trade may be seen as a major factor for development and economic welfare. In this regard, countries have established a global platform to control international economic activities and the General Agreement on Tariffs and Trade (*hereinafter referred to as* 'The GATT') was established in 1947 as an outcome of various trade negotiation rounds. After GATT, countries adopted the World Trade Organization (*hereinafter referred to as* 'The WTO') in 1995 in order to deal with international trade and economic matters. The WTO has been playing a very important role in the field of international trade and international trade law to date.

The world economy suffered as the de-globalization trend evolved between the dates of 1914 and 1945, caused by World War I, the Great Depression and World War II.[1] Countries pulled back to concentrate on nationally focused and state-controlled economies and consequently the international trade declined sharply.

World War II built trade barriers between the countries and caused considerable damage to the post-war generation; it also created unstable economies and devastated economic structure. Countries closed their borders to other countries, they raised trade barriers. The protectionist approach by governments worsened trade and the employment rate worldwide. The world economy was in a state of collapse at the end of the World War II as a foreseeable outcome. In the post-war years however, a new era of international trade and world economy began. Countries started to demolish the barriers which prevented free trade and international relationships by entering into political negotiations and trade agreements. The pace of world trade pace increased through the growth of import and export levels between countries. There was a shift from a protectionist approach to international free trade for many countries. The trend towards free trade in the western world supported world economic liberalization and it is the root of the contemporary world economy today. As international trade increased

[1] The World Trade Organization, World Trade Report 2013: Factors Shaping the Future of World Trade (2013) p 5.

tremendously, there was a realisation of a great need to regulate the trade relationship between countries. Re-globalization gave birth to various international organizations namely the United Nations (*hereinafter referred to as* 'The UN'), the International Monetary Fund (*hereinafter referred to as* 'IMF'), the International Bank for Reconstruction and Development (*hereinafter referred to as* 'The World Bank'), the GATT and the WTO at a later stage. Within the scope of those international organizations, the multilateral trading system started to make a contribution to the world economic stability.

After World War II, 22 countries gathered to sign the GATT in 1947 which was a temporary agreement regulating tariffs and international trade.[2] The GATT was a part of the Havana Charter for the International Trade Organization (*hereinafter referred to as* 'The ITO') during the United Nations Conference on Trade and Employment and as ITO never came into force, the GATT remained a temporary agreement through the Protocol of Provisional Application.[3] It was the principal regulating institution for international trade from 1947 to 1995 and its provisions incorporated into the GATT 1994 which became a component of the WTO Agreement in 1995.[4]

The WTO system has made a huge effort to remove barriers to trade and has improved the export and import level between its contracting states. The WTO adopted a single undertaking approach which incorporates all 29 agreements and understandings.[5] The goal of the single undertaking approach is to integrate the multilateral trading system. One of the most important component of the WTO is the Understanding on Rules and Procedures Governing the Settlement of Disputes (*hereinafter referred to as* 'Dispute Settlement Understanding' or 'DSU'). Dispute settlement became the central pillar of the multilateral trading system and it is one of the most successful contributions of the WTO to the stability of the global economy.[6] It became an integral part of the WTO and it is binding for all contracting states.

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[2] John H. Jackson *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000) p 16.

[3] 'GATT 1947 and GATT 1994: What's the difference?' available at *https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm,* accessed on 24 January 2017.

[4] Ibid.

[5] Ernst-Ulrich Petersmann (ed) *International Trade Law and The GATT/WTO Dispute Settlement System* (1997) p 13.

[6] 'Understanding The WTO: Settling Disputes a Unique Contribution' available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm*, accessed on 10 November 2016.

The WTO dispute settlement system is one of the most effective and binding international instrument. The dispute settlement mechanism ensures the states' rights and the flow of trade by enforcing the WTO rules. After several trade negotiations, states agreed that the WTO's rule-oriented dispute settlement mechanism would be beneficial for all because they ensure that government policies will be more predictability by allowing contracting parties to access foreign markets, they hinder discriminatory trade barriers such as quantitative restrictions, they create a reliable environment for producers, traders and investors and they provide more transparent policy instruments by limiting potential state intervention.[7]

1.2 Research Question

In theory, all contracting states have equal rights to access the dispute settlement mechanism under WTO. However, mainly developed countries take advantage of the rule-based system and participation of developing countries has not been satisfactory since the establishment of WTO in 1995. In fact, many developing countries do not prefer to use the dispute settlement system for various reasons, mainly the significant expenses and unclear benefits of participating. There are number of constraints that limit the participation of developing countries in dispute settlement system such as lack of financial and legal resources and power based enforcement mechanism. In this regard, many developing WTO members such as India[8], African Group[9], Kenya[10] proposed improvements of WTO DSU. This dissertation will demonstrate the statistics that bigger economies are able to participate to the WTO DSU more than smaller economies. Developing countries compromise the majority of all WTO members. Two-thirds of the WTO's approximately 150 members are developing countries.[11] For instance, 38.3 per cent of the total complaints are brought by either USA or the EU.[12]

Developing countries' participation in the WTO dispute settlement is however essential for a multilateral trading system. If developing countries actively engage in the dispute settlement

[7] World Trade Organization op cit note 1 at 11.
[8] Submission of the Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia to the Special Session of the Dispute Settlement Body 'Dispute Settlement Understanding Proposals: Legal Text' TN/DS/W/47, 11 February 2003.
[9] Submission of the African Group to the Special Session of the Dispute Settlement Body TN/DS/W/15, 25 September 2002.
[10] Submission of the Communication from Kenya to the Special Session of the Dispute Settlement Body 'Text for The African Group Proposals on Dispute Settlement Understanding Negotiations' TN/DS/W/42, 24 January 2003.
[11] World Trade Organization, *Understanding The WTO* 5 ed (2015) p 93.
[12] Please see Table 1.

system, it is argued that multilateral trading and economic growth will increase. Therefore, to get more insight and understanding about the difficulties and possible solutions for more active and effective system for all member states.

I have chosen as research questions the following:
Why do most developing countries fail to bring claims before the WTO and why are they hesitant to use of the WTO DSU process?

This dissertation will focus and discuss the following matters:

- The function of the WTO and the dispute settlement system.
- The developing countries' role in the WTO dispute settlement system.
- The constraints of developing countries participation in the WTO dispute settlement system and its underlying reasons.
- Providing possible solutions to promote active participation of developing countries in the WTO dispute settlement system.

My dissertation discusses reasons of the limited participation of developing countries in WTO dispute settlement mechanism. In that sense, I suggest alternative solutions to promote developing countries participation. My research will contribute to the existing discussions about DSU reform and position of developing countries within the system.

1.3 Research Objective

Developing countries' participation in the WTO dispute settlement system has created a large amount of research and academic writing by legal scholars, attorneys, economists. It is a highly debated topic and researchers have been contributing to the existing academic knowledge by conducting various sophisticated analyses such as a legalistic approach, various economy models and empirical case studies.

One of the most important and guiding principles of the DSU is to establish an equal platform for all in which every member state could bring a claim against any kind of violation and have it fully investigated under the WTO. In this regard, the rules and dispute settlement system provides equal rights and obligations as well as right to equal access to the litigation

procedure for developed, developing and least developed countries regardless of their economic growth. However, lack of developing countries' effective participation is the concern. The international trade system and its rules are perceived to have been designed for richer countries and have under-represented developing countries' interests within the WTO dispute settlement system. On the other hand, it is clear that the developing countries' role is becoming significant in the global economy and their concerns may differ compared to developed countries. This dissertation will investigate the underlying reasons of lack of participation in WTO dispute settlement system and possible alternative solutions for improving developing countries participation.

The conclusion of this dissertation will contribute to the knowledge of the status of developing countries within the WTO's dispute settlement mechanism and the possible ways empowering them to be part of the international binding legal mechanism.

1.4 Methodology

A descriptive research method will be conducted in this research through interpretation and argumentation of the relevant sources of law. The research methodology is based on existing literature and documentation and it entails a review of primary and secondary sources such as legislation, conventions, books, legal journals, articles, case studies, research papers as well as WTO legal documentation and official publications. A wide range of electronic sources and online WTO secretariat data will be considered. The information required to unpack why developing countries do not participate the dispute settlement system will be accessed by examining the WTO publications. All the resources can be accessed via the library, internet and various legal online database/sources. International materials regarding this dissertation will be mainly obtained via the WTO official website and publications.

The WTO's relevant legislations, WTO case law and the official publications compromise the major sources. Specifically, General Agreement on Trade and Tariffs 1994, Understanding On Rules and Procedures Governing the Settlement of Disputes 1994 and Marrakesh Agreement Establishing the World Trade Organization will be our main focus to understand the structure of WTO.

A general overview of the secondary sources such as existing literature, articles, legal journals, legal reviews, commentaries and books on the WTO law and the WTO dispute settlement mechanism will be also used.

Explanatory research methodology will be also used to address the law and explain it. In this regard, the dissertation will provide a historical background of the WTO and its relevant legislation. The following chapters will provide explanation and comments on the WTO dispute settlement mechanism and role of the developing countries within the system.

1.5 Limitations

In general, this dissertation will be conducted by assessing existing literature and legal writings as a research methodology. It gives access to the content analysis on the WTO dispute settlement matters and therefore it has a subjective character as the researcher has used discretion in their specific analysis. This is one of the potential limitations on accessing the research. The characteristics of the methodology influence the interpretation of my findings.

I will be conducting an extensive investigation into the existing literature and documentation as using the primary and secondary sources and I will interpret them accordingly. Therefore, the research will cover the scholarly approaches to the research problem and research question however, this dissertation does not provide an economic analysis of the impact of developing country participation on international trade. In this regard, this research does not provide a complete picture of statistical assessments. The correlation between the developing country participation in the WTO dispute settlement system and its economic impact to the global trade is not analysed. Moreover, this research does not provide surveys or empirical case study on the basis of interviews with government officials or WTO officials in Geneva, Switzerland.

It is the aim of this research to follow the guidance of the literature and implement this in the methodology of the research.

1.6 Chapter Outline

This dissertation will be examined under five interrelated chapters.

Chapter 1 provides an overview and general background of the research topic. The objective of the research and the research questions also sets out in this chapter. The general structure and outline of each chapters are also provided. The research methodology and limitations which will be utilised to analyse the research topic is also covered in the introduction.

Chapter 2 compromises the historical background and establishment of the WTO system and its position within the field of international trade law. The reform from the GATT system to the WTO, significant outcomes of the trade negotiations and the development of rule based dispute settlement system will be discussed. I will be questioning the need for entering into such international trade agreements and regulating the dispute resolution mechanism globally.

Chapter 3 focuses on the Uruguay negotiation rounds and the birth of the DSU. It reviews the historical transformation from GATT to WTO and the development of the system after GATT and the Uruguay Round. It examines the whole process to access to the dispute settlement procedures under WTO.

Chapter 4 assesses the position of developing countries and their importance within the WTO dispute settlement system. The definition of developing country and their significant contribution to the international trade will be examined in this section. I will be examining the provisions of WTO Dispute Settlement System in regards to privileges for developing countries. The lack of participation of developing countries and its legal and economic reasons are also covered. Developing countries face major challenges at the time when they want to make use of the WTO Dispute Settlement System against the developed countries. In general, there is a lack of legal competence in the field of WTO law, lack of economic sources to take advantage of the system and economic and politic reasons preventing to take initiatives against the developed countries. The chapter also addresses the current data provided by the WTO and various international research databases regarding the participation of developing countries in the WTO dispute settlement system.

Chapter 5 explores the alternative solutions to promote developing country participation in WTO's dispute settlement system. Alternative methods of dispute settlement such as consultation and mediation can serve for the improvement of the developing country participation. Possible roles of the advisory centre on the WTO law, private law firms and public-private partnership will be also discussed. Finally, it provides concluding remarks and

some recommendations regarding how can developing countries position themselves within the international trade law and how to benefit from the WTO dispute settlement system. I will discuss my opinion regarding the most effective approach.

CHAPTER II HISTORICAL BACKGROUND OF THE INTERNATIONAL TRADE LAW

2.1 The History of International Trade Law and The International Trade Organization Negotiations

'*The great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally present in all that we do.*'[13]

Evaluating the present and the future of international trade law and the role of international organizations regulating the world trade begins with an undertsanding of the history of international trade. World War I, the Great Depression and World War II resulted in an era of de-globalization between the years of 1914 and 1945.[14] Countries refrained from global economic integration and instead they adopted a protectionist approach to focus on more domestic and state controlled economic models.[15] The countries protected their domestic market by raising trade barriers.[16] As the global economy disintergrated, international trade decreased sharply. After the Great Depression in 1930s and the World War II in 1940s, the world's economy started to transform through the process of re-globalization and the pace of global economic integration was accelerated.[17] The devastating outcome of the wars and economic crises had showed that a protectionist approach needed to come to an end. Thus, the nations[18] attempted to prevent the unstable world economy after the World War II and global trade arose through increasing the volume of imports and exports among countries. The nations attempted to build a free international economic regime by establishing international institutional structures to address the economic and political issues globally.[19] After World War II, the United States of America (*hereinafter referred to as* 'The US'), the United Kingdom (*hereinafter referred to as* 'The UK') and other alliances led to several trade negotiations in order to create global rules for the post war international economy.[20] The policymakers considered structures of international organizations to govern international economic

[13] James Baldwin *The Price of the Ticket: Collected Nonfiction 1948-1985* (1985).
[14] World Trade Organization op cit note 1 at 46.
[15] Ibid at 52.
[16] Ibid at 51.
[17] Ronald Findlay & Kevin H. O'Rourke *Power and Plenty: Trade, War, and the World Economy in the Second Millennium* (2007) ch 9.
[18] Specifically, the US, European Countries and the UK.
[19] Richard E. Mshomba *Africa and The World Trade Organization* (2009) p 5.
[20] 'Milestones: 1937–1945: Bretton Woods-GATT, 1941–1947' available at *https://history.state.gov/milestones/1937-1945/bretton-woods*, accessed on 8 November 2016.

governance and collaboration.[21] In this regard, the main four institutional bodies came to an existence: The UN, the IMF, the World Bank, the ITO (later GATT and the WTO)[22]. The UN was established in 1945 to maintain international peace and security[23]; the IMF was formed in 1944 and it was intended to set up a stable monetary regime to avoid a repetition of the economic fluctuations which had led to the Great Depression in 1930s[24]; the World Bank was established in 1944 to assist Europe rebuild post World War II[25]; and finally the attempts to establish the ITO to govern international trade affairs.[26] This political attempt was handled successfully and all the international organizations were established except the ITO.[27]

The countries' idea of establishing the ITO was derived from a need for rebuilding the world trading system after the devastating period of the war.[28] They intended to establish the ITO as a third international institution alongside the IMF and the World Bank during the UN Conference on Trade and Employment in Havana, Cuba in 1947 (the Bretton Conference) in order to complete international economic cooperation and to address international trade and economic relationships.[29] However, efforts to create the ITO under the Havana Charter[30] in 1948 as a specialized agency of the UN failed because the Congress of the US did not ratify the agreement because its detailed regulations would undermine the national sovereignty in terms of trade policy.[31] The draft of the Havana Charter was very ambitious; it was not only a trade agreement but it was also regulating a wide range of fields including but not limited to employment policies, labour issues, intergovernmental commodity agreements and restrictive business conduct.[32] For all these reasons, the first attempt to create an international organization under an institutional umbrella regarding the free trade failed. The ITO Charter never came into being and it was deemed as dead and ill-fated but following the failure of the

[21] Ivan D. Trofimov 'The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective' (2012) 5:1 *Journal of Politics and Law* p 56.
[22] Ibid at 56.
[23] 'Maintain International Peace and Security' available at *http://www.un.org/en/sections/what-we-do/maintain-international-peace-and-security/index.html*, accessed on 8 November 2016.
[24] 'About the IMF' available at *http://www.imf.org/external/about.htm*, accessed on 8 November 2016.
[25] 'International Bank for Reconstruction and Development' available at *http://www.worldbank.org/en/about/what-we-do/brief/ibrd*, accessed on 8 November 2016.
[26] Ivan D. Trofimov op cit note 21 at 56.
[27] Ibid at 56.
[28] World Trade Organization, *GATT Analytical Index: Guide to GATT Law and Practice* 6 ed (1995).
[29] World Trade Organization op cit note 11 at 15.
[30] The Havana Charter for the ITO was adopted in The United Nations Conference on Trade and Employment. However, the said Charter never came into force.
[31] Bernard M. Hoekman & Philip English & Aaditya Mattoo *Development, Trade and the WTO: A Handbook* (2002) p 41.
[32] World Trade Organization op cit note 11 at 15.

ITO, countries continued separate negotiations in order to reduce customs tariffs and to fix binding tariffs.[33]

2.2 History of the General Agreement on Tariffs and Trade

After the failure to establish the ITO as a new multilateral trading system, the countries conducted separate negotiations on reduction of trade barriers in December 1945 to increase trade liberalization and to correct the ills resulting from the early 1930s.[34] As a result of the trade negotiations, the GATT took the place of the ITO, adopting most of the ITO's Commercial Policy Chapter and rules.[35] Consequently, the roots of the GATT agreement can be found in the ITO Charter. The countries relied on the sole remaining trade agreement, the GATT, to govern and liberalize the global trade while it was operating as a provisional international organization and agreement between the dates of 1948 and 1994.[36] The new trade agreement, the GATT, was negotiated between 23 original founding countries[37] and thirteen of them might be classified as developing countries.[38] The final original treaty establishing GATT was signed on 30 October 1947 at the Palais des Nations in Geneva by those 23 founding members officially called as contracting parties under the GATT and it came into force on 1 January 1948.[39] It was seen as a provisional agreement and organization that integrated into the Havana Charter.[40] The contracting parties had started to apply the provisions of the GATT provisionally. Throughout its 47 years of existence as a provisional agreement, it intended to reduce the trade barriers among its contracting parties. The GATT became the sole multilateral instrument regulating international trade and the tariff concessions and came into effect on 30 June 1948 by implementing the Protocol of Provisional Application.[41] As a result, the GATT has addressed the international trade relations and policy between its contracting states for 47 years. The GATT has been reformed through a set of subsequent multilateral negotiations, namely trade rounds, and there have been eight trade rounds placed during the 47 years of GATT history. These led to

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[33] Craig VanGrasstek *The History and Future of the World Trade Organization* (2013) p 43.
[34] World Trade Organization op cit note 11 at 15.
[35] Robert E. Hudec *Essays on the Nature of International Trade Law* (1999) p 36.
[36] World Trade Organization op cit note 1 at 52.
[37]Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia (Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, United Kingdom, and United States. 'World Trade Organization Press Brief Fiftieth Anniversary of the Multilateral Trading System' available at *https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm*, accessed on 8 October 2016.
[38] Chad P. Bown'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes'(2004) 27:1 *The World Economy* p 59. "These countries included Brazil, Burma, Chile, Czechoslovak Republic, Cuba, India, Lebanon, Myanmar, Pakistan, South Africa, Sri Lanka, Syria, and Zimbabwe. This does not include China, which was also a founding Contracting Party to the GATT."
[39] World Trade Organization op cit note 11 at 15.
[40] Ernst-Ulrich Petersmann op cit note 5 at 10.
[41] Patrick Love & Ralph Lattimore *International Trade: Free, Fair and Open?* (2009) ch 5 p 78.

significant reforms in global trade which reduced tariffs between the contracting states until the establishment of the WTO in 1995.[42] Thus, unlike the detailed rules and the strict nature of the ITO, the contracting states were able to negotiate the rules during the trade rounds under the GATT. It provided more flexibility to its contracting states. There has been Geneva Round in 1947 regarding tariffs, Annecy Rounds in 1949 regarding tariffs, Torquay Round in 1951 regarding tariffs, Geneva Round in 1956 regarding tariffs, Geneva (Dillon) Round in between 1960 and 1961 regarding tariffs and the establishment of the European Economic Community, Geneva (Kennedy) Round in between 1964 and 1967 regarding tariffs and anti-dumping measures, Geneva (Tokyo) Round in between 1973 and 1979 regarding tariffs, non-tariff measures and framework agreements and finally Geneva (Uruguay) Round in between 1986 and 1994 regarding tariffs, non-tariff measures, rules, services, intellectual property rights, dispute settlement mechanism, textiles, agriculture, agricultural subsidies, the creation of the WTO, and so on.[43]

In conclusion, in the course of 47 years, the GATT contributed to the international trade. On the one hand, it can be argued that despite its provisional nature, the contracting states contributed to the free trade, promoted the global trade liberalization and reduced the barriers to trade through series of trade rounds under the GATT. On the other hand, it is considered that the GATT played a very important role as an international institution for the world economic development.

2.3 History of the World Trade Organization

The GATT operated for 47 years and it produced huge numbers of complex trade agreements throughout its existence. The last trade round namely Uruguay Round was concluded between the dates of 1986 and 1994.[44] At the end of eight years of comprehensive Uruguay Round trade negotiations within the context of the GATT, a new international economic organization providing the institutional structure, the WTO, came into effect on 1 January 1995.[45] Therefore, the WTO Agreement resulting from the Uruguay Round is deemed as 'the most important event in recent economic history' and the WTO as the ‘central international economic institution’.[46]

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[42] World Trade Organization op cit note 11 at 16.
[43] Ibid at 16.
[44] Ibid at 18.
[45] John H Jackson ‘Dispute Settlement and the WTO: Emerging Problems’ (1998) 1:3 *Journal of International Economic Law* p 329.
[46] Leonard Bierman & Donald R. Fraser & James W. Kolari ‘The General Agreement on Tariffs and Trade: World Trade from a Market Perspective’ (1996) 17:3 *University of Pennsylvania Journal of International Economic Law* 821 at 845.

Consequently, the GATT gave birth to the WTO as giving its dynamics and finally it was superseded by the WTO in 1995. Unlike the GATT, the WTO had a far stronger institutional structure. Additionally, the WTO is described as the sole worldwide international organization governing the trade rules between the states at a global or near-global level.[47] It is a forum for trade negotiations between its member governments to resolve their trade issues and settling trade disputes and it is an international institution for the purpose of liberalizing the global trade.[48] Moreover, it provides a binding set of trade rules for international trade which are negotiated, signed and ratified by the member governments in order to achieve its aim to provide a secure trade platform to ensure the producers of goods and services, importers and exporters run their business.[49] The WTO agreements provide institutional legally binding set of rules through the rule-based series of documents for the multilateral trading system. With the creation of a new international organization, the multilateral trading system started to function within the scope of an institutional legal framework. One of the reasons that states were determined to establish a new institutional organization was to add new agreements and issues in trade and to widen the scope of the multilateral agreement. In this regard, the WTO broadened the scope of the GATT in many ways, such as covering the services, intellectual property, and domestic policies of states affecting investment and agriculture, whereas the GATT had only dealt with trade in goods.[50]

In Marrakesh, Morocco at the date of 15 April 1994, representatives of 123 participating states signed the final agreement Marrakesh Agreement Establishing the World Trade Organization (*hereinafter referred to as* 'Marrakesh Agreement') which establishes the WTO as a result of Uruguay Round trade negotiations.[51] Although the WTO became an international organization replacing the GATT in 1995, the General Agreement remains as an umbrella agreement for the WTO for trade in goods.[52] The WTO possesses international legal personality and authority in its own right independent from its members.[53] The countries decided to set up a notion of single undertaking at the end of the Uruguay Round which covers

[47] World Trade Organization op cit note 11 at 9.
[48] Ibid at 9.
[49] Ibid at 9.
[50] Naif Nashi Alotaibi *The WTO's Dispute Settlement Body and its impact on Developing Countries: problems and possible solutions* (A thesis submitted for the degree of Doctor of Philosophy in Law, School of Law University of Essex, June 2015) p 44.
[51] World Trade Organization op cit note 11 at 19.
[52] Ibid at 19.
[53] M Rafiqul Islam *International Trade Law* (1999) p 49.

all agreements and rules of the GATT under a single operational body.[54] They decided to give up the *à la carte* approach under the GATT era which allowed countries to adopt some agreements but not others.[55] On the contrary, the countries agreed on a single undertaking approach which provides every item of the negotiation became the part of the whole package and the countries agreed to all the agreements and issues entirely but not separately.[56] As Craig VanGrasstek stated, "In place of the Tokyo Round's cafeteria, the Uruguay Round produced a fixed-price menu for all participants".[57] As a result, the WTO came into force by the relatively short Marrakesh Agreement which covers 16 articles and consists of four annexes.[58]

The WTO has continued to grow and currently there are 164 member states as at 29 July 2016.[59] The WTO forms a general framework for setting and regulating trade policies globally. As with the GATT system, the WTO gives importance to some basic principles, namely non-discrimination, reciprocity, enforceable commitments, transparency, and safety valves.[60]

The preamble of the Marrakesh Agreement resembles the GATT 1947 with some small amendments.[61] The WTO agreement was accepted as an international institution to govern 'an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations'.[62] The objective of the WTO is to raise living standards, ensure the employment, develop trade and production in services and goods and to allow effective use of the sources of the world.[63] As achieving those purposes, it recognizes needs of developing countries within the scope of international trade.[64] The way to achieve these purposes is the same as stated in the GATT namely 'reciprocal and mutually

[54] Richard E. Mshomba op cit note 19 at 8.
[55] Ibid at 8.
[56] Patrick Love & Ralph Lattimore op cit note 41 at 78.
[57] Craig VanGrasstek op cit note 33 at 48.
[58] See Annexes at 'WTO Legal Texts' available at *https://www.wto.org/english/docs_e/legal_e/legal_e.htm*, accessed on 8 November 2016.
[59] 'Understanding The WTO: The Organization Members and Observers' available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm*, accessed on 8 November 2016.
[60] Bernard M. Hoekman et al op cit note 31 at 42.
[61] The GATT Agreement of 1947 Preamble para 1-3.
[62] Marrakesh Agreement of 1994 Preamble para 4.
[63] Ibid Preamble para 1.
[64] Ibid Preamble para 2.

advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.[65]

The functions of the WTO itself were stated under the article 3 of the Marrakesh Agreement.[66] Accordingly, the WTO shall facilitate the implementation of the agreements, it shall create a forum for trade negotiations, it shall govern the Dispute Settlement Understanding, it regulates the trade policy reviews and finally it shall cooperate with the IMF and The World Bank. Consequently, the WTO emerged as a highly significant well-structured and rule-based organization to reinforce the world trading structure.

[65] Ibid Preamble para 3.

[66] Ibid Article 3 'Functions of the WTO:
1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to this Agreement.
4. The WTO shall administer the Trade Policy Review Mechanism provided for in Annex 3 to this Agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.'

CHAPTER III GATT AND WTO DISPUTE SETTLEMENT SYSTEM

3.1 Historical Development of Dispute Settlement System: From GATT to WTO

The GATT dispute settlement system was established to promote free international trade between its members.[67] In this regard, many provisions under the GATT were designed to resolve any trade disputes between the member states.[68] In that way, the contracting parties could have some mechanism to be protected by the laws in case of any other member states violate their obligations under the provisions of the GATT. As a natural outcome, a well-functioning and effective international enforcement mechanism is needed.

The first dispute settlement mechanism under the GATT 1947 had some provisions on settling disputes on trade among its member states. The rules regarding the dispute settlement were stated under the articles of XXII and XXIII of the GATT 1947.[69]

The dispute settlement practice under the GATT evolved on the basis of interpretation and elaboration of these Articles. Consequently, these provisions established the fundamental basis for dispute settlement procedure under the GATT. Article XXII of GATT 1947 provided a consultation opportunity to its contracting parties on the request of any other party to mutually settle regarding any issues affecting the function of the GATT Agreement.[70] It stated that contracting states may consult each other in order to deal with trade disputes between other contracting states. In addition to this, the core provision of the GATT regarding dispute settlement was stated under the article XXIII which states that in case the parties to a dispute are not able to resolve the dispute by consultation, they can use the main dispute settlement mechanism under article XXIII of GATT 1947.[71] The contracting parties may invoke this article on the basis of 'nullification and impairment' in case there is a situation that a member state is concerned that it did not take advantage of the benefits which it was entitled under the GATT.[72] Primarily, as is mentioned above, the GATT Agreement provided a mutually agreed resolution to the disputes by using the method of consultation. However, if the consultation did not work to resolve the matters in dispute, all the contracting parties convened to assess the

[67] William J. Davey 'Dispute Settlement in GATT' (1987) 11:1 *Fordham International Law Journal* 52 at 53.
[68] Ibid at 54.
[69] William J. Davey 'The World Trade Organization's Dispute Settlement System' (2001) 42 *South Texas Law Review* p 1199.
[70] The GATT Agreement of 1947 Article XXII.
[71] Ibid Article XXIII.
[72] World Trade Organization, *Guide to the Uruguay Round Agreements* (1999) p 18.

matter in dispute and as a result of the investigations they issued a ruling or a recommendation and the necessary measures were taken as a sanction if necessary.[73] Thus, the contracting parties aimed to protect the injured party and rights of all other member states by enforcing the rules.

One of the most important key factors existing under GATT system was the positive consensus rule.[74] Accordingly, every stage of the dispute settlement mechanism including a panel establishment, adaptation of a panel report and authorization of the countermeasures required a positive consensus among the contracting parties.[75] It was highly criticised and considered the weakest point of the dispute settlement system under the GATT Agreement 1947.[76] Positive consensus requires all the contracting party's positive vote and there should be no objections from any of the state party to the dispute.[77] It was significant because it means that even the parties to the dispute - both the respondent and claimant - play an active role in the decision making process. Accordingly, the parties to disputes could delay and block the dispute settlement process in different ways because gaining consent of the disputing parties can take time and this can cause considerable delays in the process. In essence, the dispute cannot be solved without a consent.[78] The disputing parties are able to participate in the decision making process when they refer a dispute to a panel. Therefore, the respondent has ability to block the panel's establishment. Furthermore, at the end of the panel proceedings the panel report must also be adopted with a positive consensus, which means that the respondent party shall also give its consent for the adaptation of the panel report.[79] Therefore, the positive consensus requirement can establish blocks to the dispute mechanism and it could seldom work effectively because the losing party had the power to block the unfavourable decision against them.

Another significant element of the GATT dispute settlement system was that the system was neither integrated nor unified and the member states can select a dispute settlement

[73] Ibid at 18.
[74] 'Historic development of the WTO dispute settlement system' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt2.*, accessed on 10 November 2016.
[75] Richard E. Mshomba op cit note 19 at 25.
[76] Ibid at 25.
[77] Ibid at 25.
[78] William J. Davey op cit note 69 at 1200.
[79] Ibid at 1200.

mechanism which suited them best – many called *a la carte* approach under the GATT.[80]

The dispute settlement system under WTO is deemed to be one of the most successful instruments in the international trade law and it is the central pillar of the multilateral trading system which contributes to the stability and predictability of the global economy.[81] Although the WTO is a 'court with no bailiff'[82] and has no jail, it relies on voluntary compliance of its sovereign country members which promotes execution of WTO's trade rules.[83] The effectiveness of the WTO regime derives from its dispute settlement system to enforce its rules either at the consultation stage or at the panel stage to a ruling.[84] Therefore, an effective and binding dispute settlement system is essential for operating of the WTO. As a result, member countries achieved the establishment of that system by introducing the Dispute Settlement Understanding.[85] The WTO dispute settlement system is a central element to ensure the security and predictability of the world trade system.[86]

This successful dispute settlement mechanism under the WTO does not only belongs to the WTO but also the dispute settlement system under the GATT 1947. The WTO has expanded the dispute settlement mechanism of the GATT dispute settlement law and practice.[87] In this regard, the DSU under the WTO has its roots in the GATT because the WTO inherited the main general agreement of the GATT involving dispute settlement provisions.[88] The WTO DSU has made a major amendment within the functioning of the system despite article XXII and article XXIII of the GATT which remains as a fundamental dispute settlement mechanism under the DSU.[89] The contracting states' concern on the positive consensus requirement reflected to the Uruguay Round negotiations. During the GATT years, the contracting states could block the process because of the positive consensus requirement and a panel report might

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[80] David Palmeter & Petros C. Mavroidis *Dispute Settlement in the World Trade Organization: Practice and Procedure* 2 ed (2004) p 27.
[81] World Trade Organization op cit note 11 at 55.
[82] Marc L. Busch & Eric Reinhardt 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) 24:1 *Fordham International Law Journal* 158 at 159.
[83] Judith Hippler Bello 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90:3 *The American Journal of International Law* 416 at 417.
[84] Marc L. Busch & Eric Reinhardt op cit note 82 at 159.
[85] William J. Davey op cit note 69 at 1199.
[86] DSU Article 3(2).
[87] Bruce Wilson & Rufus Yerxa *World Trade Organization Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) p 15.
[88] 'Historic development of the WTO dispute settlement system' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt2.*, accessed on 10 November 2016.
[89] Bernard M. Hoekman et al op cit note 31 at 71.

remain in 'legal limbo'.[90] The radical reform in dispute settlement has been made by removing the positive consensus and instead introducing the negative consensus approach.[91] By doing so, blocking or delaying the process or the adaptation of a panel report was reduced, resulting in a dispute settlement system which became more independent and automatic. The contracting states cannot block the system unless each and every contracting state, including the disputing parties, determine to establish a panel or to adopt the panel report.[92] So, if the losing party wanted to block the panel's establishment or adopting a panel report, it had to persuade all other contracting parties, including the winning party. Therefore, the system suddenly evolved to a more judicial structure by giving its 'teeth' to the GATT.[93] In addition to that reform, the DSU under WTO has established an integrated system and the contracting states could bring their claims on any multiple trade disputes under various agreements annexed to the Marrakesh Agreement.[94] This new rule removed *a la carte* approach, thus eliminating the situation of the existence of multiple disputes on the same subject matter under various agreements.[95]

The contracting parties also agreed on some significant decisions and undertakings prior to Uruguay Round namely:[96]

- The Decision of 5 April 1966 on Procedures under Article XXIII;
- The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979;
- The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982;
- The Decision on Dispute Settlement of 30 November 1984.

At the end of the Uruguay Round, member countries both developed and developing were aware of the problems from the GATT system and it required an effective transformation. The Uruguay Round negotiations was the place for all the contracting parties to sit and discuss

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[90] John H. Jackson 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation' (1997) 91:1 *The American Journal of International Law* 60 at 62.
[91] Richard E. Mshomba op cit note 19 at 26.
[92] Ibid at 26.
[93] Miquel Mora Montana 'A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes' (1993) 31:1 *Columbia Journal of Transnational Law p* 103.
[94] Peter Gallagher *Guide to the WTO and Developing Countries* (2000) p 185.
[95] Richard E. Mshomba op cit note 19 at 27.
[96] 'Historic development of the WTO dispute settlement system' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt2*, accessed on 10 November 2016.

some developments to the provisions and procedures of the GATT dispute settlement.[97] As a result, these negotiations provided a platform to set new WTO rules for dispute settlement system.

3.2 The Uruguay Negotiation Round and Birth of the DSU

In September of 1986, the contracting parties to the GATT launched a new multilateral trade round in Punta del Este, Uruguay to negotiate the policy issues covered under the agenda and to reform the GATT agreements and dispute settlement system in order to provide effective and prompt dispute resolutions for all member states through improving and strengthening the rules. This resulted in a Ministerial Declaration on the Uruguay Round or Ministerial Declaration of Punta del Este.[98] In accordance with this Ministerial Declaration, the main aim of the negotiations on the dispute settlement are as follows:[99]

> 'In order to ensure prompt and effective resolution of disputes to the benefit of all Contracting Parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognising the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.'

The contracting parties to the GATT 1947 including developing and developed countries shared the same vision that the GATT system needed further developmental steps and they gave prominence to the dispute settlement negotiations within the scope of the Uruguay Round's agenda.[100] During the course of the Uruguay Round, the contracting parties came up with a preliminary document called the Decision of 12 April 1989 on Improvements to the

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[97] Naif Nashi Alotaibi *The WTO's Dispute Settlement Body and its impact on Developing Countries: problems and possible solutions* (A thesis submitted for the degree of Doctor of Philosophy in Law, School of Law University of Essex, June 2015) p 65.

[98] Ministerial Declaration on the Uruguay Round, 33 BISD 19 (1987) available at *http://www.sice.oas.org/trade/Punta_e.asp*, accessed on 10 November 2016.

[99] Ibid.

[100] 'Historic development of the WTO dispute settlement system' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm*, accessed on 10 November 2016.

GATT Dispute Settlement Rules and Procedures.[101] Accordingly, the decision covered some rules on the adoption of panel reports, time frames for panel proceedings, technical assistance to developing countries and effective implementation of the rulings, later embodied in the WTO DSU.[102] However, the decision did not include provisions on procedure for adopting the panel report and appellate review.

The wholly new body WTO DSU was placed to enforce multilateral disciplines and it was deemed as a very significant and positive result of the Uruguay Round which took one step further towards to an automatic and rule-oriented dispute settlement mechanism.[103] As a result, the member states agreed to adopt the Dispute Settlement Understanding as an Annex 2 of the WTO Agreement and they have been applying the DSU rules since the its creation 1 January 1995[104], referring to the GATT 1947 DSU rules[105] and replacing them with the new WTO DSU mechanism. Consequently, creation of the WTO dispute settlement system based on the GATT dispute settlement system is deemed as one of the most important innovations resulting from the Uruguay Round.[106]

The WTO DSU introduced more detailed dispute settlement procedures such as strict time frames and specific deadlines in order to create a more predictable timeline for settling disputes.[107] The new dispute settlement system provides a framework which applies to any of the covered agreements with some minor differences.

As the member states agreed on the single undertaking principle, the WTO DSU provides a single set of rules for each and every dispute arising out of the Uruguay Package including the WTO itself, the GATT and its annexes such as Multilateral Agreement on Trade in Goods, General Agreement on Trade in Services (*herein after referred as* 'The GATS') and the Agreement on Trade Related Aspects of Intellectual Property Rights (*herein after referred as* 'The TRIPS').[108] It means that the scope of WTO's international trade rules has been broadened

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[101] Ibid.
[102] 'Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a3s1p1_e.htm*, accessed on 10 November 2016.
[103] John H Jackson op cit note 45 at 341.
[104] Ernst-Ulrich Petersmann op cit note 5 at 35.
[105] DSU Article 3(1).
[106] 'Historic development of the WTO dispute settlement system' available at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm*, accessed on 10 November 2016.
[107] Ibid.
[108] World Trade Organization op cit note 72 at 17.

to the extent of the same dispute settlement mechanism will be applied and the member countries can invoke the same dispute settlement rules for any kinds of disputes on WTO issues. It ensures that the new issues and multilateral agreements under the WTO are subjected to an effective dispute settlement system.

3.3 The Dispute Settlement Process of the WTO

The dispute settlement system of the WTO is designed to deal with international trade disputes and to resolve disputes between member governments within the scope of their WTO obligations.[109] The WTO DSU introduced specific time frames to be followed and flexible deadlines in different stages for settling disputes to operate effectively and promptly.[110] The DSU explicitly states that the WTO dispute settlement system is the key factor for ensuring predictability and security to the trading system and it protects the rights and obligations of member states under the covered agreements namely Agreement Establishing the World Trade Organization, Multilateral Agreements on Trade in Goods, GATS, TRIPS and Plurilateral Trade Agreements.[111]

The WTO dispute settlement functioning is supervised by the institutional body called the Dispute Settlement Body (*hereinafter referred to as* 'The DSB').[112] The DSB is simply the General Council of the WTO and there are representatives of all member states in the DSB.[113] It is the authorized body 'to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements'.[114]

The WTO dispute settlement function provides five phases: consultations, the panel process, the appellate review process, surveillance of implementation of recommendation and rulings and lastly the compensation and the suspension of concessions.[115]

First phase is the consultation phase. The WTO initially encourages the member states to

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[109] Patrick Love & Ralph Lattimore op cit note 41 at 86.
[110] 'Understanding The WTO: Settling Disputes a Unique Contribution' available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm*, accessed on 10 November 2016.
[111] DSU Article 3(2).
[112] World Trade Organization op cit note 72 at 20.
[113] Marrakesh Agreement Article 4(3).
[114] DSU Article 2(1).
[115] Richard E. Mshomba op cit note 19 at 27.

settle disputes cooperatively through direct consultations.[116] The dispute settlement mechanism aims a positive resolution to a dispute and it is preferable to agree on a mutually acceptable solution between the disputing parties, which should be consistent with the WTO agreements.[117] By this way, the consultation phase provides disputing parties to understand reason of the dispute, the parties' legal basis for their claims, and preferably to resolve the dispute before going to panel proceedings.[118]

> 'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. …'.[119]

This provision gives opportunity to the parties to a dispute to settle their dispute at any phase in the dispute settlement procedure through negotiating a settlement.[120] Member states may submit a request to consult with another WTO member state if the complainant party has concerns that another member state has breached its obligation under the WTO agreement or the infringement has caused an adverse effect on the complainant party and the action constitutes a case of nullification or impairment.[121] The nullification or impairment is presumed to reduces the WTO benefits to the complainant party.[122] On the request of the complainant party requesting consultation, the other member state could start consultations within 30 days and if the latter party refuses to enter into consultation then the complainant party may request the panel's establishment.[123] Similarly, if the consultation phase did take place but has broken down and cannot produce a mutually agreed settlement within the period of 60 days following the receipt of the request for consultation, the complainant party may request the establishment of a panel.[124] The statistics shows that approximately one-half of the disputes are negotiated between the member governments in the consultation phase and they are either resolved, settled or abandoned which means that some of the cases have been concluded by the consultation

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[116] 'Understanding The WTO: Settling Disputes a Unique Contribution' available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm*, accessed on 10 November 2016.
[117] DSU Article 3(6)(7).
[118] William J. Davey op cit note 69 at 1200.
[119] DSU Article 3(7).
[120] Thomas J. Dillon, Jr. 'World Trade Organization: A New Legal Order for World Trade?' (1994) 16 *Michigan Journal of International Law* 349 at 381.
[121] William J. Davey op cit note 69 at 1200.
[122] DSU Article 3(8).
[123] DSU Article 4(3).
[124] DSU Article 4(7).

requirement.[125]

Secondly, as it is stated above, the panel stage came into existence to assess the particular dispute subject matter in case the parties to a dispute fails to settle in the consultation phase.[126] Upon the written request of the complainant party, the DSB shall establish a panel unless it determines by consensus not to establish a panel.[127] The DSU specifies a standard terms of reference for a panel if the parties otherwise agreed:

> 'To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)'.[128]

In this regard, the DSB needs to examine and assess the facts of the given claims cited by the disputing parties which fall in the scope of the related covered agreement(s).

The panel's composition under the DSU is specified that it shall include three or, if the parties mutually agree, five well-qualified individual panellists.[129] The panellists shall be selected from diverse backgrounds by ensuring the independence of the panel.[130] The detailed set of processes to be followed by the panel is explained under the Working Procedures of the DSU.[131] A feature of these provisions is that the deliberations of the panel is confidential.[132] The appointed panel shall submit its examination and the final report to the disputing parties within 6 months following the date of composition of the panel and issuance of the terms of reference.[133] The provision also provides an accelerated time frame for emergency cases, in which case the panel shall issue its final report within 3 months.[134] Once the panel issues its final report, it is to be adopted as a ruling or recommendation within 60 days unless the DSB reaches a consensus to reject it or the parties decides to appeal the decision of the panel.[135]

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[125] William J. Davey op cit note 69 at 1200.
[126] World Trade Organization op cit note 72 at 21.
[127] DSU Article 6(1).
[128] DSU Article 7(1).
[129] DSU Article 8(1)(5).
[130] DSU Article 8(2).
[131] DSU Appendix 3.
[132] DSU Article 3 of Appendix 3.
[133] DSU Article 12(8).
[134] DSU Article 12(8).
[135] Peter Gallagher op cit note 94 at 186.

The third institutional element under the WTO's dispute settlement system is the appellate review phase which is completely a new feature of the system.[136] The DSB establishes the Appellate Body composed of permanent seven members, three of them work on the case to examine/compare the appeal requests from the panel cases.[137] An appeal review has limitation on the issues of law stated in the panel report and the panel's legal interpretations.[138] Therefore, the Appellate Body is not able to investigate and assess new evidences or facts. Appellate Body must conduct its examinations within 60 days or in absolute maximum of 90 days from the date of a party making a notification of its appeal request till the Appellate Body circulates its report.[139] The appeal reports shall be adopted or rejected by the DSB within the period of 30 days and the DSB can only reject the appeal report if there is a consensus against the ruling which is very unlikely.[140]

The fourth element under the WTO's dispute settlement system is the surveillance of the implementation of the recommendation and rulings – this is the compliance stage. Once a panel report and/or an Appellate Body report is adopted, the effective compliance of the recommendation and rulings of the DSB is of obvious significance in securing the rights and benefits of the member states in the dispute settlement system.[141] The implementation of the decision during the compliance stage is subjected to a reasonable period of time which cannot exceed 15 months from the adoption of a panel or Appellate Body report[142]. The DSB is the authorized body to monitor the surveillance of implementation of recommendation and rulings[143].

The last element of the dispute settlement system's legal framework is the compensation and the suspension of concessions. It gives 'teeth' to the dispute settlement mechanism in case of the non-implementation within a reasonable period of time[144]. In case the respondent party does not bring the recommendations and rulings into a complaint with the covered agreement, it may decide to negotiate with the complainant party in order to reach a mutually acceptable

[136] World Trade Organization op cit note 72 at 22.
[137] DSU Article 17(1).
[138] DSU Article 17(6).
[139] DSU Article 17(5).
[140] Richard E. Mshomba op cit note 19 at 28.
[141] DSU Article 21(1).
[142] DSU Article 21(3)*(c)*.
[143] Peter Gallagher op cit note 94 at 186.
[144] Richard E. Mshomba op cit note 19 at 28.

compensation[145]. Where the parties cannot reach a mutually agreed solution about the compensation during the negotiations within 20 days, a complainant party may request the DSB to suspend concessions or other obligations to the violating member state under the covered agreements[146]. It means that in principle, the complainant party is able to request retaliation by issuing barriers to trade or raising tariffs on the goods in the same sector to the non-compliant party and if this retaliation does not sufficiently compensate then the suspension can be imposed across the sectors and agreements[147].

In conclusion, these phases within the WTO DSU are designed to resolve the disputes on trade between the contracting members and there have been very important reforms to make the system more effective. GATT's diplomacy approach to the disputes evolved in the more judicial nature under the WTO system[148]. The members can always agree mutually to settle their disputes at any phase of the dispute settlement. The rules on international trade constitute the backbone of the global economy and people all over the world can take advantage of the benefits of well-structured international law by conducting business in an international arena[149].

[145] DSU Article 22(2).
[146] DSU Article 22(2).
[147] Richard E. Mshomba op cit note 19 at 29.
[148] John H Jackson op cit note 45 at 333.
[149] Press Release Director General Mike Moore 'Changes in the multilateral trading system: Challenges for the WTO' Winconference 2001 Interlaken Switzerland available at *https://www.wto.org/english/news_e/spmm_e/spmm66_e.htm,* accessed on 10 November 2016.

CHAPTER IV PARTICIPATION OF THE DEVELOPING COUNTRY IN THE WTO DISPUTE SETTLEMENT SYSTEM

4.1 What is a Developing Country?

The WTO explicitly states that there is no specific classification of developing country by the WTO and so the meaning of a developing country under the WTO is not defined.[150] The WTO is a member-driven international organization[151] and contracting parties can announce their own status on the basis of self-designation whether they want to be classified as a developed or a developing country.[152] Where a country classifies itself as a developing country in order to take advantage of the specific provisions available to developing countries, other contracting states can challenge the decision.[153] Thus, there is a lack of a clear harmonized definition of development status under the scope of the WTO legal system. The meaning of the developing country is defined neither under the general international law nor the WTO system.[154] In this regard, the criteria or standard of being a developing country needs a clear definition within the scope of the functions of an international trade organization such as the WTO and the GATT.

The WTO also does not provide a clear definition for the 'least developed countries' (*herein after referred as* 'The LDC'), however, article XI(2) of the Marrakesh Agreement explicitly acknowledges the category of the LDC granted by the UN.[155] In this way, even though it does not set out criteria, or a test of the standard for the LDC category, at least it provides a general framework and addresses a certain international organization for the definition of LDC by referring the UN's LDC category.[156] Likewise, developing countries are defined by some significant organizations such as the World Bank,[157] United Nations and United Nations

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[150] 'Who are the developing countries in the WTO?' available at *https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm*, accessed on 21 November 2016.
[151] Peter Gallagher op cit note 94 at 21.
[152] Ibid at 21.
[153] Ibid at 21.
[154] Sonia E. Rolland *Development at the World Trade Organization* (2012) p 78.
[155] Marrakesh Agreement Article XI (2).
[156] 'LDC criteria' available at *http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml*, accessed on 21 November 2016.
[157] 'World Bank Country and Lending Groups' available at *https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups*, accessed on 6 December 2016.

Statistics Division,[158] IMF and the Advisory Centre on WTO Law (*herein after referred as* 'The ACWL').[159] The World Bank classifies countries based on their income and there are four income groups within this special classification system: low-income economies are defined as those with a gross national income per capita of $1,025 or less in 2015, lower middle-income economies are those with a gross national income per capita between $1,026 and $4,035; upper middle-income economies are those with a gross national income per capita between $4,036 and $12,475; high-income economies are those with a gross national income per capita of $12,476 or more.[160] Under the classification system of the United Nations and United Nations Statistics Division, there is not a specific designation for developed and developing countries and it rather provides a classification based on regions or areas such as Canada in the north of America, Japan in Asia deemed as developed countries.[161]

The IMF's publication, World Economic Outlook, provides country classification based on export diversification, income rate and integration level into the global economic system.[162] Lastly, the ACWL acts as an independent organization from the WTO and it separated developing countries into three categories namely Category A, Category B and Category C based on their share of world trade reflecting their per capita income:[163]

Members entitled to the services of the ACWL		
CATEGORY A	CATEGORY B	CATEGORY C
• Hong Kong, China • Chinese Taipei • United Arab Emirates	• Bolivarian Republic of Venezuela • Colombia • Egypt	• Bolivia • Côte d'Ivoire • Dominican Republic • Ecuador

[158] 'Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings' available at *http://unstats.un.org/unsd/methods/m49/m49regin.htm#developed*, accessed on 6 December 2016.
[159] 'Members' available at *http://www.acwl.ch/members-introduction/#*, accessed on 6 December 2016.
[160] 'World Bank Country and Lending Groups' available at *https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups*, accessed on 6 December 2016.
[161] 'Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings' available at *http://unstats.un.org/unsd/methods/m49/m49regin.htm#developed*, accessed on 6 December 2016.
[162] Lynge Nielsen 'Classifications of Countries Based on Their Level of Development: How it is done and how it could be done' (2011) IMF Working Paper WP/11/31 p 17.
[163] 'Members' available at *http://www.acwl.ch/members-introduction/*, accessed on 6 December 2016.

	• India • Pakistan • Philippines • Thailand • Uruguay • Oman • Mauritius • Turkey • Indonesia • Viet Nam • Seychelles	• Guatemala • Honduras • Kenya • Nicaragua • Panama • Paraguay • Peru • Tunisia • Jordan • El Salvador • Sri Lanka • Costa Rica • Cuba

In the light of designated definitions for developing countries made by several organizations, these may influence the WTO to consider a method to classify developing countries. This dissertation will use the income classification method prepared by the World Bank due to its clear division.[164]

4.2 Privileges for Developing Countries in the WTO

The WTO's approximate 150 members are developing countries which compromise two-thirds of the member states.[165] As mentioned above, since the WTO does not give a definition of developed or developing country, the country has to designate its own status. Every WTO developing country member can take advantage of the provisions under WTO Agreements called 'provisions of differential and special treatment'.[166] Developing countries have a significant role within global trade as they play an active role with their huge volume of trade

[164] 'The income classification method' available at *http://data.worldbank.org/about/country-and-lending-groups*, accessed on 6 December 2016.
[165] World Trade Organization op cit note 11 at 93.
[166] 'Special and differential treatment provisions' available at *https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm*, accessed on 21 November 2016.

transactions and they see the trade as an important key factor in their development agenda.[167] For that reason, the concerns and needs of developing countries are crucial and it shall be taken into consideration for a well-functioning WTO and global trade.

Countries which designate themselves as a developing country in the WTO system can receive certain rights and benefits defined under the WTO provisions.[168] There are some provisions under WTO agreements which provide more favourable rights to developing countries. The Marrakesh Agreement which established the WTO recognizes the interests of the developing countries under its preamble. It is explicitly stated that:

> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.[169]

It was therefore recognised and agreed that the developing countries needs and their shares within the growth of international trade should be secured and recognized in compatibility with their economic development needs.[170]

There are some provisions that give certain privileges in the DSU which provide more favourable time frames and procedure for developing countries. The profile of developing countries is highly diverse so their needs and interests may vary in line with their economic developments.[171] In this regard, the WTO created three ways to deal with these special and different needs of developing countries:[172]

- There are special provisions under some of the WTOAgreements.
- The Committee on Trade and Development is authorized to provide guidelines for the technical assistance, technology transfer and trade on topics of development in the WTO and the trade of developing countries.

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[167] World Trade Organization op cit note 11 at 93.
[168] 'Who are the developing countries in the WTO?' available at *https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm*, accessed on 21 November 2016.
[169] Marrakesh Agreement of 1994 Preamble para 2.
[170] Peter Gallagher op cit note 94 at 130.
[171] World Trade Organization op cit note 11 at 93.
[172] Ibid at 93.

- The WTO technical assistance and training programme is regulated by the Committee on Trade and Development for developing countries. In this regard, WTO's trade-related technical assistance is governed by the WTO Secretariat in order to maintain sustainable trade capacity-building for the member states including developing countries.

In addition to these mechanism, 32 WTO member states established the ACWL in order to contribute voluntary funding and provide legal advice and expertise on cases at the DSB for developing countries and LDCs.[173]

The WTO provisions allow developing countries to receive preferential treatment which can be found in various WTO Agreements - such as agreements on trade in goods, GATT, GATS, TRIPS, DSU, trade policy review mechanism and ministrial decisions and declarations.[174]

This disserttion focuses on the special provisions that allow developing countries to be treated more favourably under the WTO dispute settlement system. The DSU specifically makes special provision on the consultation phase, composition of panels, panel procedures, surveillance of implementation of recommendations and rulings and technical assistance for developing countries.[175] In general, these provisions enable developing countries to receive longer time-frames for the purpose of implementing the relavent agreement and developing countries can also use benefits of technical assistance.

The first special provision sets out that if a developing country brings a claim against a developed country, the panel may extend the time frame if it considers that the normal time frame is insufficient for the developing country.[176] The second special provision deals with the consultations phase and accordingly, it focuses on the particular interests and problems of developing countries and all member states should take into account that needs of developing countries during the consultation phase.[177] The developing countries also have more favourable rights in case the dispute takes place between the developing and developed countries in terms of composition of the panel. Accordingly, upon a request of the developing country member

[173] World Trade Organization op cit note 11 at 94.
[174] Peter Gallagher op cit note 94 at 127.
[175] Ibid at 187.
[176] DSU Article 3(12).
[177] DSU Article 4(10).

state, one of the panellists in the establishment of the panel should come from a developing country member state.[178]

Thirdly, if a developing country has taken a measure, it may request a longer period of time for consultations.[179] For instance, if there is a case filed against a developing state, the panel shall consider an appropriate period of time for preparation and presentation of a developing country's arguments.[180] Fourthly, in case there are one or more developing country member states participating in the DSU process, the panel shall explain in its report the way how they take into consideration of any special differential provision and more-favourable treatment raised by the developing country member state.[181] Another provision is that the surveillance of implementation of recommendations and rulings should pay attention to the matters interlinked with the interests of the developing countries.[182] In addition to this, if a developing country brings a dispute, the DSB shall take into account what appropriate further action can be possible apart from normal surveillance and the DSB must also consider the coverage of measures complained and their impact on the economic features of the developing country member state.[183] The last special provision is the technical assistance to the developing countries. On the request from a developing country, the WTO Secretariat provides an expert in law for providing further legal advice on the matters of dispute settlement to developing country member state.[184]

4.3 The Low Participation by Developing Countries

The WTO evolved from being a diplomatic process during the GATT years to a judicial process and, as has been noted above, it has served as one of the most regulated dispute settlement systems in international trade from its establishment in 1995.

The developing countries participation in the WTO dispute settlement process has been discussed by a large number of scholars in the international trade field and it has been argued that the WTO DSU system favours richer and developed member states over developing and LDCs, this is as a result of developed countries using more qualified lawyers, and the ability

[178] DSU Article 8(10).
[179] DSU Article 12(10).
[180] DSU Article 12(10).
[181] DSU Article 12(11).
[182] DSU Article 21(2).
[183] DSU Article 21(7)(8).
[184] DSU Article 27(2).

to pursue trade disputes - which is normally a lengthy process and money-consuming.[185] Powerful and wealthier member states are better positioned in the nature of WTO's complex jurisprudence and demanding legal system.[186]

In general, developing countries are in less advantageous position against a developed country for various reasons - they rely on trade volume, financial aid, technological transfer from bigger economies. There is also the fact that the impact of developing countries on developed countries' economies stays at a minimal level.[187] Therefore, a balance between developed and developing countries in international trade needs to be achieved to enable developing countries to contribute to global trade through using the dispute settlement system to improve their trade interests and to strengthen their existence in the international arena as active players. From another perspective, each and every member state is equal before the WTO law, developed and developing countries alike, and the WTO was built to create an equal and fair platform for all its member states to bring claims, have them fully investigated, obtain recommendations and rulings, as well as effective measures compatible with the WTO rules.[188]

The WTO DSU has been actively operating from 1995 and there are still some limitations for developing countries using the WTO DSU. Some of key factors affecting the developing countries' participation in the WTO DSU will be examined in terms of legal and financial sources, ability or inability to enforce rulings, decisions and sanctions. Developing countries still have some concern and problems in participating the WTO DSU. Developing countries may face disadvantages once they want to participate in the WTO dispute settlement system due to their lack of legal capacity if they face developed country. For example, according to African countries the dispute settlement system is complex and costly, they cannot present effectively in the system because it does not provide a platform to embrace a development agenda and the enforcement and compensation system does not work for the developing countries.[189] Also, the African Group under the WTO expressed their concerns during the

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[185] Roderick Abbott 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995- 2005' (2007) ECIPE Working Paper No: 01/2007.

[186] Gregory Shaffer 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining' (2005) based on paper prepared for WTO at 10: A Look at the Appellate Body p 3.

[187] Hansel T. Pham 'Developing Countries and The WTO: The Need for More Mediation in The DSU' *(*2004) *Harvard Negotiation Law Review.*

[188] Ibid.

[189] Richard E. Mshomba op cit note 19 at 47.

Special Session of the Dispute Settlement Body that 'the dispute settlement system is complicated and overly expensive'.[190] In addition to this, Indian Ambassador and Permanent Representative stated their concern about the high costs of the WTO dispute settlement system and its deterrent effect for developing countries as an outcome.[191]

Developing countries, particularly small economies, participate less actively in the WTO DSU mainly because of unequal benefits as well as costs of using the system.[192] In general, the benefit of using the system is interlinked with the stake of developing country in the WTO complaint and their exports are in lower value comparing to their claim.[193] Therefore, the overall benefit from a successful claim does not have a significant impact on developing country's economy. On the cost side, developing countries lack local legal expertise and it is expensive to work with foreign legal counsel and/or a renowned law firm.[194] For these reasons, the possible benefits of using the WTO dispute settlement system and initiating a legal claim before the DSB are less likely to exceed the costs of procedure. Therefore, developing countries may hold back from using the DSU.

4.4 Participation Constraints of Developing Country to the WTO Dispute Settlement System

4.4.1 Introduction

There are several reasons for low participation in WTO dispute settlement system among developing counties. Scholars have shown that the participation of a developing country is much lower than developed countries with bigger economies.[195] This section will assess the elements which limit the developing countries participation in the WTO dispute settlement system and the consequences of this lack of participation. Existing literature provides three possible challenges for developing countries to participate in WTO dispute settlement

[190] Submission of the African Group to the Special Session of the Dispute Settlement Body TN/DS/W/15, 25 September 2002.
[191] 'Presentation at the WTO Public Forum 2008 by Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO' available at *http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm*, accessed on 5 December 2016.
[192] Gregory Shaffer op cit note 186 at 20.
[193] Ibid at 20.
[194] Ibid at 20.
[195] Kristina M.W. Mitchell 'Developing Country Success in WTO Disputes' (2013) 47:1 *Journal of World Trade*, 77 at 80.

system.[196] First, developing countries might lack legal expertise in the WTO dispute settlement matters when identifying trade barrier or monitor the dispute settlement process.[197] Secondly, developing countries might lack financial resources to initiate a claim before the WTO, to hire a legal expertise to be represented before the WTO dispute.[198] Lastly, developing countries may hold back from participating in the WTO dispute settlement system due to its ineffective enforcement rules, such as the retaliatory system and also developing countries may be unwilling to claim against more powerful member states.[199] Lack of financial resources and legal capacity are the most frequently cited participation constraints. In this regard, the legal and financial resources and also enforcement concerns will be examined.

The statistics of the WTO dispute settlement shows that member states have filed 522 WTO complaints as of February 2017[200] The number of complaints and the average number of complaints filed per year from the date of 1995 has been as follows:[201]

Table 1: The number of complaints between the dates of 1995 and 2017

	1995–1999	2000–2004	2005–2009	2010–2014	2015	2016[202]	2017[203]
Complaints	185	139	78	86	13	17	4

[196] Gregory Shaffer 'How to Make The WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' (2003) ICTSD Resource Paper No. 5 p 26.
[197] Kristina M.W. Mitchell op cit note 195 at 81.
[198] Ibid at 81.
[199] Ibid at 81.
[200] 'Chronological list of disputes cases' available at *https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 25 February 2017.
[201] Kara Leitner & Simon Lester 'WTO Dispute Settlement 1995–2015— A Statistical Analysis' (2016) 19 *Journal of International Economic Law* 289 at 290.
[202] *For 2016 statistics see, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 22 January 2017. *(Current status of the disputes brought before the WTO DSU is that 12 of the disputes are in consultations, the panel composed for 2 of them and lastly the panel established, but not yet composed for 3 of them.)*
[203] *For 2017 statistics see, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 25 February 2017. *(Current status of the disputes brought before the WTO DSU is that the dispute is in consultation stage.)*

Complaints per year (Average)	37	27.8	15.6	17.2	13	17	4

The following Table 2 and Table 3 clearly show that larger economies such as the USA and the EU are the most active members using the WTO dispute settlement system. In this sense, the USA or the EU have been involved in 211 complaints as a complaining party, which is 38.3 per cent of the total complaints. Likewise, the USA or the EU have been involved in 214 complaints as the responding party, comprising 40.9 per cent of the total complaints. Moreover, the complaints filed by the US and the EU have diminished in recent years and other WTO members has become more active.

Table 2: Complaining parties in WTO disputes[204]

	1995–1999	2000–2004	2005–2009	2010–2014	2015	2016[205]	2017[206]	Total[207]
Brazil	6	16	2	3	0	3	1	31
Canada	15	11	7	1	0	1	0	35
Chile	2	7	1	0	0	0	0	10
China	0	1	5	6	1	2	0	15
EU	47	21	13	14	0	2	0	97
India	9	7	2	3	0	2	0	23
Japan	8	4	1	6	2	2	0	23

[204] Kara Leitner & Simon Lester op cit note 201 at 291. *"Note that because some complaints were brought by multiple members, the total number of complaining parties exceeds the total number of responding parties for some periods."*

[205] *For 2016 statistics see, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 22 January 2017.

[206] *For 2017 statistics see, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 25 February 2017.

[207] The total number of related disputes were updated in line with the dispute numbers filed in 2017.

Korea	3	9	2	3	0	0	0	17
Mexico	8	5	8	2	0	0	0	23
USA	60	20	13	14	2	3	2	114
Other-developed	12	6	4	6	4	0	1	33
Other-developing	34	40	20	28	4	2	0	126
Other-least developed	0	1	0	0	0	0	0	1
Total	204	148	78	86	13	17	4	550

Table 3: Responding parties in WTO disputes[208]

	1995–1999	2000–2004	2005–2009	2010–2014	2015	2016[209]	2017[210]	Total[211]
Brazil	9	3	2	1	1	0	0	16
Canada	10	3	2	3	0	0	2	20
Chile	3	7	3	0	0	0	0	13
China	0	1	16	15	2	4	1	39
EU	28	23	16	13	2	1	1	84
India	13	4	3	2	1	1	0	24

[208] Kara Leitner & Simon Lester op cit note 201 at 291.

[209] *For 2016 statistics see, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 22 January 2017.

[210] *For 2017 statistics see, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm*, accessed on 25 February 2017.

[211] The total number of related disputes were updated in line with the dispute numbers filed in 2017.

Japan	12	2	1	0	0	0	0	15
Korea	11	2	1	0	1	1	0	16
Mexico	3	9	2	0	0	0	0	14
USA	39	49	20	16	1	5	0	130
Other-developed	20	4	1	9	1	0	0	35
Other-developing	37	32	11	27	4	5	0	116
Other-least developed	0	0	0	0	0	0	0	0
Total	185	139	78	86	13	17	4	522

The following Table 4 and Table 5 also show the statistics of the complaints filed by the member states based on their income classifications.[212] Accordingly, the larger economies are more active than developing and least developed countries in entering into the WTO dispute settlement system. The US and the EU are regular users of the dispute settlement system. On the other hand, developing economies with upper middle income and lower middle income also use the dispute settlement system and it has been increasing.

Table 4: Number of complainants by income classification between the dates of 1995 and February 2017[213]

[212] The income classification method reflects the World Bank's classification method. 'World Bank Country and Lending Groups' available at http://data.worldbank.org/about/country-and-lending-groups, accessed on 5 December 2016.

[213] Kara Leitner & Simon Lester op cit note 201 at 292. *For 2017 statistics see also, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm,* accessed on 25 February 2017. *"A number of complaints have been filed by multiple Members acting jointly. In some of these complaints, the Members filing the complaint fall into different income categories. Where this is the case, we have counted the complaint once in each income category in which at least one complainant falls. Therefore, the number of the complaints in this table will add up to more than the total number of complaints under the DSU and also more than the number in the table on respondents."*

High Income	Upper Middle Income	Lower Middle Income	Low Income
314	116	82	26

Table 5: Number of respondents by income classification between the dates of 1995 and February 2017[214]

High Income	Upper Middle Income	Lower Middle Income	Low Income
297	105	96	24

All in all, developing countries with lower income face several constraints to access to the process of the WTO dispute settlement. The market size and the economic flow in terms of import and export also effect the WTO DSU participation level.[215] Developed countries are more active in initiating the WTO claims because of their huge level of trade flow of export.[216] In parallel, developing countries prefer to initiate claims that have more economic importance and economic benefit.[217]

4.4.2 Lack of Financial Resources

The first difficulty for developing countries' participation in the WTO dispute settlement system is financial and cost issues. Cost is defined as the price for usage of the WTO DSU system calculated by members in monetary terms.[218] Developing countries hold back from using the WTO DSU system because the whole dispute settlement procedure is expensive. As

[214] Kara Leitner & Simon Lester op cit note 201 at 292. *For 2017 statistics see also, 'Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm,* accessed on 25 February 2017.
[215] Manfred Elsig & Philipp Stucki 'Low-income Developing Countries and WTO Litigation: Why Wake Up the Sleeping Dog?' (2012) 19:2 *Review of International Political Economy* 292 at 295.
[216] Thomas Sattler & Thomas Bernauer 'Gravitation or Discrimination? Determinants of Litigation in the World Trade Organization' (2011) 50:2 *European Journal of Political Research*.
[217] Andrew T. Guzman & Beth A. Simmons 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes' (2005) 34:2 *The Journal of Legal Studies.*
[218] Navneet Sandhu 'Member Participation in The WTO Dispute Settlement System: Can Developing Countries Afford not to Participate?' (2016) *UCL Journal of Law and Jurisprudence* 146 at 153.

the WTO dispute settlement system and jurisprudence is getting more complex from the consultation to the appeal stage, the burden of legal expenses is also rising for all member states, especially for developing countries.[219] The complexity of the dispute settlement system makes it too expensive and it holds back African countries to use the system effectively.[220]

The new appellate review system adopted by the WTO DSU[221] has created more complex legal requirements. All of those changes and the greater legalization of international trade dispute settlement within the system requires more structural need and this resulted in an increase of the costs of using the WTO dispute settlement system.[222] The developing countries faced relatively higher costs for using the WTO DSU in proportion to their national wealth. On the other side, the relation between the trading stake and the cost factors have a greater impact in terms of participation.[223] Developing countries' benefits in bringing a claim before the WTO DSU is relatively low when comparing the cost of the WTO litigation, even if they succeed their claim.[224] In this sense, if a developing country initiates a dispute under WTO proceedings, the outcome of successful settlement of the dispute would be less beneficial. The expected benefits out of the WTO litigation sharply declines. Therefore, the absolute trading stake of developing countries are a significant factor in determining their participation in the WTO's dispute settlement system.[225] The result is that low income countries in the WTO may face difficulties in pursuing their legitimate claims arising from the WTO DSU.

Other concerns exist with regard to other additional costs - such as travel and accommodation expenses for developing country officials. A significant budget is required to travel overseas and most developing country have very few officials in Geneva handling WTO matters and disputes.[226] This also causes underrepresentation of developing countries diplomatically and technically in Geneva whereas developed countries can afford more trade experts in particular areas of WTO.[227]

The trend in international litigation and consequently in WTO litigation is to obtain legal

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[219] Gregory Shaffer op cit note 186 at 22.
[220] Richard E. Mshomba op cit note 19 at 47.
[221] DSU Article 17.
[222] Navneet Sandhu op cit note 218 at 153.
[223] Gregory Shaffer op cit note 186 at 23.
[224] Ibid at 23.
[225] Henrik Horn & Håkan Nordstrom & Petros Mavroidis 'Is the Use of the WTO Dispute Settlement System Biased?' (1999) CEPR Discussion Paper numbered 2340 p 26.
[226] Richard E. Mshomba op cit note 19 at 48.
[227] Ibid at 50.

advice from the trade legal experts, which becomes more US and Euro-centric as well as highly specialized, and costly.[228] If developing countries want to work with a private law firm to be represented in the WTO cases, parties to disputes can face expensive hourly fees for legal advice ranging from $300-$600 or more depending on the volume of the case because the jurisprudence of the WTO Appellate Body increases the demand on lawyer time, which automatically increases the hourly workload and the fees.[229] The average cost of WTO litigation is approximately $100,000.[230] As an outcome, the budget for legal expenses for developing countries to initiate litigation, to obtain expertise legal advice and to be represented by the lawyers cannot be underestimated. There is some significant case law which shows the high costs of WTO litigation in practice and one of them is *US-Upland Cotton* case.[231] Thiscase involved Brazil against the US, resulting in very high legal costs for Brazil's cotton trade association of over US $2,000,000.[232] Another case law, the *US-EC Boeing-Airbus* dispute[233] was initiated between two developed countries, the US and the European Communities. The developed countries and multinational companies were willing to pay much for expertise legal advice and the estimated fee in this particular dispute was around $1,000,000 per month and if they could not settle the case the total cost could have reached $20,000,000 for each company.[234] They also hired the biggest US-based law firm to be represented effectively and to defend their commercial interest in the global trade arena.[235] The European Union trade commissioner, Peter Mandelson, pointed out the high cost and concerns on the US-EC Boeing-Airbus case law that: "America's decision will, I fear, spark probably the biggest, most difficult and costly legal dispute in the WTO's history."[236] Even though one can think that every WTO member states have equal right to access the WTO dispute settlement procedure, as it is shown from the case law examples it is very unlikely for developing countries to initiate a WTO case, taking into account these greater legal costs. These examples also demonstrate that the WTO dispute settlement system does not distinguish between claims - whether they amount to one

[228] Gregory Shaffer op cit note 186 at 22.
[229] Ibid at 22.
[230] Manfred Elsig op cit note 215 at 295. *"Costs for bringing a case are estimated at roughly $100,000, interview with WTO ambassador from a large developing country, 14 July 2009."*
[231] *United States — Subsidies on Upland Cotton Brazil v United States* (2005) DS267 WTO Dispute Settlement available at *https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm*, accessed on 21 November 2016.
[232] Gregory Shaffer op cit note 186 at 21. *See also* Elizabeth Becker, 'Lawmakers Voice Doom and Gloom on WTO Ruling' *New York Times* 28 April 2004 ("the litigation has already cost $1 million").
[233] *EC and Certain Member States – Large Civil Aircraft US v The European Communities* (2005) DS316 WTO Dispute Settlement available at *https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm*, accessed on 21 November 2016.
[234] Gregory Shaffer op cit note 186 at 21.
[235] Ibid at 21.
[236] David Gow, 'Snubbed Mandelson takes Boeing fight to WTO' *The Guardian* 01 June 2005.

million dollars or a claim of one billion dollars. When it comes to practice, enforcing a claim of one million dollars and employing government officials requires a huge resource commitment for a long period of time. According to the current WTO dispute settlement different stages, this time schedule is generally up to three years to litigate a dispute.[237]

4.4.3 Lack of Legal Resources

One of the most significant factors of the impediments limiting developing countries usage of the WTO dispute settlement system is that developing countries lack of legal capacity, legal resources to bring a claim to the WTO.[238] It can also regarded as a lack of human capital resource in order to pursue WTO dispute settlement process.

Following the legalization of the WTO dispute settlement system and more detailed litigation structure with different phases, a greater level of legal expertise is needed for all member states to participate in WTO litigation.[239] Developing countries' need for having the necessary legal capacity enables them to use these complex and demanding disputes settlement requirements, to pursue their commercial interest and bring a claim against other member states. Therefore, the need for better legal understanding and technical aspects of international trade law and professional approach to represent the governments has become highly significant. However, many developing countries do not possess this legal capacity in the field of international trade law and the WTO law.

The concept of legal capacity can be defined as usage of the resources in order to identify, analyse, pursue and litigate a WTO dispute.[240] The developing countries and/or smaller economies may face those legal capacity constraints which limits their ability to pursue number of cases.[241] The connection between the legal capacity to participate the WTO litigation and the WTO dispute settlement procedure is significant. As it is stated above, the WTO DSU created a more legalized system and the effective usage of the dispute settlement system by the member states is relatively affected by this greater legalism.[242] As the system is getting more

[237] Håkan Nordstrom & Gregory Shaffer 'Access to justice in the World Trade Organization: A case for a Small Claims Procedure?' (2008) 7:4 *World Trade Review*.
[238] Horn et al op cit note 225 at 1.
[239] Navneet Sandhu op cit note 218 at 153.
[240] Andrew T. Guzman op cit note 217 at 559.
[241] Ibid at 559.
[242] Marc L. Busch & Eric Reinhardt & Gregory Shaffer 'Does legal capacity matter? A survey of WTO Members' (2009) 8:4 *World Trade Review* 559 at 559.

complex, the greater legal capacity to invoke, monitor and pursue rights and obligations and the more human resources is needed. The creation of the appellate review system resulted in a more complex legal system and the decision of the Appellate Body on the previous panel decisions requires more sophisticated legal analysis on WTO law and also public international law.[243] In this regard, the disputing countries need to possess sufficient human capital resources and qualified trade experts. However, it is not always the case. Since developing countries do not have many qualified people with the right training and experience level, they are less equipped to participate in the WTO dispute settlement procedure.[244] Practically, in the situation where a less equipped developing country files a claim against a developed country with well-trained and experienced experts 'the lack of experience frequently cannot be overcome'.[245] Therefore, although the WTO dispute settlement system is established based on an adjudicatory system while supporting the notion of impartiality within the system, the gap in resources between developed and developing country is inevitable which results in a perception that the 'fight' is not fair.[246]

Developing countries with less legal capacity face a higher opportunity cost when it files a complaint.[247] Even if developing countries have well trained and experienced experts, once those officials focus on one claim, they are not available for other work.[248] The lower the capacity of the developing country, the lower the possibility to find a trained person to pursue the trade cases. Therefore, developing countries might need to hire foreign legal counsel and/or private law firm in order to initiate a claim and defend their commercial interests whereas a developed country may have in-house government legal counsel who has expertise in WTO law and/or international trade matters.[249] Again, working with experienced law firms and/or foreign legal counsels is very costly for the small economies.

All in all, a lack of legal capacity of developing countries impacts the participation rate in WTO dispute settlement process.

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[243] Gregory Shaffer op cit note 186 at 2.
[244] Bernard M. Hoekman et al op cit note 31 at 79.
[245] C. Christopher Parlin 'WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively' (1998) 32 *The International Lawyer* 863 at 868.
[246] Ibid at 868.
[247] Christina R. Sevilla 'Explaining Patterns of GATT/WTO Trade Complaints' (1998) Working Paper No. 98-01 Weatherhead Center for International Affairs.
[248] Andrew T. Guzman op cit note 217 at 566.
[249] Ibid at 566.

4.4.4 Enforcement Concerns

One of the most important factors that makes the WTO dispute settlement procedure the central pillar is its ability to enforce the rulings internationally. However, there are some significant reasons that developing countries cannot use the enforcement system effectively. Another compelling argument by developing countries is the enforcement mechanism of the WTO DSU system. Once the panel or appellate body renders its recommendation and ruling, the winning member state can rely on compensation and the suspension of concessions at the final stage of the process.[250] However, the compensation and retaliation is a not very commonly used mechanism by developing countries and small economies because the system is not effective and it causes additional economic loss.[251] The use of the retaliation mechanism is a costly trade sanction both for the respondent and claimant party and the developing countries' fragile and small economies are most adversely affected where a retaliation is self-defeating.[252] Additionally, if the respondent party is a developed party, the impact of the retaliation is less than the economic loss it caused to developing country.[253] For the reason that the retaliation mechanism does not work effectively for the developing countries, they are unwilling to initiate a dispute settlement mechanism under the WTO DSU against developed countries.[254] Additionally, it can be also seen as a power-based factor because developing countries are reluctant to take an action against powerful and strong economies and this causes them not to participate in the dispute settlement system as much as the developed countries. Even though there are measures of a successful dispute, they do presently work for developing countries.

The retaliation provides a system in which the trade relations between member states is an 'eye for an eye or a tooth for a tooth' which does not rebalance the trade loss and it does not give incentive to parties in dispute to be in compliance with the WTO rules but rather creates

[250] DSU Article 22.
[251] Richard E. Mshomba op cit note 19 at 57.
[252] Submission of the Communication from the European Communities to the Special Session of the Dispute Settlement Body 'Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding' TN/DS/W/1, 13 March 2002 p 4. *('Therefore, the use of suspension of trade concessions involves a cost not only for the defending party, but also for the economy of the complaining Member. As shown by past experience, this is especially the case when that complaining Member is a developing country.')*
[253] Richard E. Mshomba op cit note 19 at 57.
[254] Kristina M.W. Mitchell op cit note 195 at 81.

a greater economic damage on the complainant party.[255] To sum up, developing countries may face difficulties in enforcing the recommendations and rulings due to their limited retaliatory power and this causes a lack of participation in the WTO's dispute settlement system. Developing countries hold back from initiating claims against the developed countries because they depend on those developed countries both economically and politically such in development aid.

[255] Submission of the Communication from Ecuador to the Special Session of the Dispute Settlement Body 'Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO' TN/DS/W/9, 8 July 2002 p 3.

CHAPTER V POSSIBLE SOLUTIONS TO FACILITATE THE PARTICIPATION OF DEVELOPING COUNTRY IN THE WTO DISPUTE SETTLEMENT SYSTEM AND CONCLUDING REMARKS

Developing countries may have difficulties in entering into the WTO's dispute settlement proceedings due to number of significant constraints which have been highlighted in this research. Despite certain constraints for developing countries in participating in the DSU, usage of the dispute settlement mechanism has been increased as it is seen from the growing number of disputes in recent years.[256] To the date 522 trade disputes have been submitted to the WTO for settlement.[257] The growing number demonstrates that the WTO members have a strong confidence in the system thereby the governments shall work in coordination to address challenges and improve the overall efficiency of the dispute settlement system. In recent years, many developing countries have been playing an active role using the dispute settlement system. Moreover, there has been a potential and opportunities for developing countries to be more active in international trade by performing their WTO rights and obligations against the bigger economies. The question needs to be asked how the dispute settlement mechanism could be modified to facilitate the participation of developing countries. In the other words, what are the optimal ways to enhance the effectiveness of the dispute settlement system for developing countries? In my opinion the dispute settlement mechanism could be more inclusive for developing countries and this would build the legitimacy of the DSU.

This dissertation has touched on the reasons for low participation, possible solutions and concluding remarks will be mentioned in this chapter.

5.1 Financial and Legal Resources

In the previous chapter of this dissertation it was argued that developing countries face high costs in order to initiate a dispute within the WTO mechanism. More than that, most developing countries have a lower trade stake to initiate a costly WTO litigation process and governments of developing countries have a limited budget and human resources to pursue their legitimate claims under the WTO DSU. The point was made above that developing countries need to

[256] Annual Report 2016, World Trade Organization p 102.
[257] 'Current status of disputes' available at *https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm,* accessed on 25 February 2017.

receive funds and legal assistance. For instance, developing countries must pay lawyer's fees to challenge a developed country trade barrier.[258] If developing countries are given an opportunity to reclaim their legal fees which is 'easily affordable payments from large developed countries who fail to settle a case or comply with a panel decision'[259], then developing countries may participate more actively to the DSU. Some developing countries offered if a trade dispute involves a developing and a developed country and in case developing country wins the dispute, the developed country is required to bear the developing country's litigation cost involving lawyers' fees, costs for preparation of necessary documents and participation in the consultations, panel and the Appellate Body proceedings.[260]

To sum up, the considerable cost of initiate and pursue a WTO case before the panel and Appellate Body has a strong impact on developing countries' participation. Lack of financial sources draw back governments of developing countries from enforcing their WTO rights against a violating party. Possible solutions could facilitate developing countries' participation in the dispute settlement system as well as supporting developing countries' rights and obligations under the DSU. Once the dispute costs will be reduced, the volume of cases taken by the developing countries will be higher.

5.2 The Role of the Advisory Centre on WTO Law in Dispute Settlement

A major constraint for developing countries is the lack of legal assistance. The 'Agreement Establishing the ACWL' established the ACWL in 2001 as a separate and independent organisation from the WTO to provide legal services on WTO law and the WTO dispute settlement process to eligible developing countries and LDCs.[261] Developing countries still cannot bear the high litigation fees of initiating disputes and therefore, they need more efficient legal assistance on WTO law and litigation procedure. In this regard, the ACWL provides low-cost legal services to developing countries and LDCs during the WTO litigation proceedings as well as assistance in the preparation of legal documents and the representation in WTO disputes.[262] Also, more legal training opportunities for developing country officials is essential

[258] Gregory Shaffer op cit note 196 at 44.
[259] Ibid at 44.
[260] Submission of the Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia to the Special Session of the Dispute Settlement Body 'Dispute Settlement Understanding Proposals: Legal Text' TN/DS/W/47, 11 February 2003 p 1.
[261] 'The ACWL's Mission' available at *http://www.acwl.ch/acwl-mission/*, accessed on 6 December 2016.
[262] Chad P. Bown & Rachel McCulloch 'Developing countries, dispute settlement, and the Advisory Centre on WTO Law' (2010) 19:1 *The Journal of International Trade & Economic Development* 33 at 48.

for WTO members to be aware of their WTO rights under the DSU, and this is supported by the ACWL. In this sense, the ACWL performs to address the participation constraints in the form of legal capacity and cost of litigation constraints of developing countries and LDCs in the WTO dispute settlement system.

Member states can take advantage of their rights and obligations under the WTO if they are able to understand how the WTO operates and how the disputes are settled. The WTO law has a complex structure with its over 20 agreements, with more than 20,000 pages of schedules of concessions and commitments, and the jurisprudence of the dispute settlement body.[263] In this regard, the ACWL provides necessary knowledge to the eligible WTO members which lack legal and financial resources.[264] The ACWL gives legal advice free of charge through its own staff or external legal counsel on all WTO issues such as procedural and substantive law and it also provides legal opinions on different stages of dispute settlement procedure, negotiations and trade measures taken by and/or against developing countries and/or LDCs.[265] As well as providing legal advice by ACWL's staff, the ACWL also offers a network of external legal counsels who are expert in international trade law and WTO law. The ACWL statistics shows that the ACWL provided support to developing country members and LDCs in 51 separate WTO dispute proceedings by its own staff and in seven disputes through external legal counsel between 2001 and 2017 and it consist of approximately 20 per cent of all WTO disputes within the same period.[266] As of February 2017, 31 private law firms and four individuals had agreed to offer legal services through the ACWL.[267] The ACWL also provides training programmes specialized in the WTO law by offering trainee programme, annual courses, seminars and the Secondment Programme for Trade Lawyers and up to date 16

[263] 'The ACWL's Mission' available at *http://www.acwl.ch/acwl-mission/*, accessed on 6 December 2016.
[264] Ibid.
[265] 'Legal Advice' available at *http://www.acwl.ch/legal-advice/*, accessed on 6 December 2016.
[266] Advisory Centre on WTO Law 'Report On Operations 2015' (2015) p 20. 'Disputes which involves multiple complainants are counted as a single dispute.' *See also*, 'Assistance in WTO dispute settlement proceedings since July 2001' available at *http://www.acwl.ch/wto-disputes/*, accessed on 6 December 2016.

[267] 'External Counsel' available at *http://www.acwl.ch/external-counsel/*, accessed on 25 February 2017. The law firms are: Akin Gump Strauss Hauer & Feld LLP, Arent Fox, Berwin Leighton Paisner LLP, Borden Ladner Gervais, Crowell & Moring, Economic Laws Practice, FratiniVergano, Gide Loyrette Nouel, Hogen Lovells, Jochum Shore & Trossevin, JWK Law Office, Jones Day, K&L Gates, King&Spalding, Lakshmikumaran&Sridharan, Amelia Porges PLLC, Lewin&Wills, Luthra&Luthra Law Offices, Mayer Brown, Minter Ellison, NCTM Studio Legale Associato, Nishimura&Asahi, Shin&Kim, Sidley Austin LLP, Gary N. Horlick, Thompson Hine, Tilpa International Trade & Investment Law, Van Bael & Bellis, VVGB Advocaten / Avocats, White & Case, Winston & Strawn LLP.

developing countries and seven LDCs have benefited from the Secondment Programme for Trade Lawyers.[268]

The ACWL is funded on a voluntary basis, mainly by high income WTO members and also developing countries make contributions to the Endowment Fund based on their economic share within the international trade and income per capita.[269] However, richer economies can refrain from funding the ACWL due to some political reasons that may challenge their own actions under the WTO.[270] The ACWL therefore needs reform in terms of its funding sources. In this regard, WTO and ACWL can work together to create an awareness of the importance of Endowment Fund for developing and LDCs. Alternatively, the ACWL could obtain funding from non-governmental sources.[271] The more funders and supporters will also show that the legal assistance to developing countries and their participation to the WTO dispute settlement system is essential for global trade and it will also encourage the richer economies to contribute the Endowment Fund.

The ACWL does not provide legal advice prior to a WTO case. However, developing countries need to identify the violation and prepare pre-litigation documents in order to initiate and pursue a successful case. In this regard, the ACWL mechanism only offers low-cost legal services to governments of developing countries but not necessarily the exporters or trade industry associations who are the significant players of the public-private partnership to enforce their rights against the violators.[272] Another problem is that the ACWL does not have any staff who are expert economists and consequently it cannot provide technical economic advice. However, a strong WTO case about international trade issues requires an economic and legal partnership and professional economists are able to provide assistance in using technical economic tools and economic evidence.[273] For this reason, the ACWL could broaden its legal services for developing countries in terms of pre-litigation assistance. Besides, the ACWL could strengthen its legal services to provide quality legal assistance to developing countries in order to encourage them to be active in the WTO dispute settlement system.

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[268] 'Training' available at *http://www.acwl.ch/training-introduction/*, accessed on 6 December 2016.
[269] Chad P. Bown & Bernard M. Hoekman 'WTO Dispute Settlement and The Missing Developing Country Cases: Engaging The Private Sector' (2005) 8:4 *Journal of International Economic Law* 861 at 874.
[270] Most powerful WTO members such as Japan, Germany, France, US do not contribute the ACWL's Endowment Fund (as of 2 January 2017).
[271] Chad P. Bown & Bernard M. Hoekman op cit note 269 at 875.
[272] Chad P. Bown op cit note 269 at 875.
[273] Chad P. Bown op cit note 269 at 876.

The ACWL's impact in terms of participation has had mixed results. Its subsidized services to developing countries have extended their participation in the WTO dispute settlement system to some extent. On the other hand, this has not been a sufficient and remarkable solution and the ACWL has not addressed all dispute settlement participation concerns in terms of a lack of legal and financial capacity that developing countries face. Therefore, the ACWL has a supportive effect for developing country participation in the WTO dispute settlement system but it has not reached its full performance yet. Although the ACWL decreased the high litigation cost of WTO, developing countries still need to pay fees for being represented in the WTO dispute settlement proceedings and it still creates difficulty for developing countries. Additionally, one may expect that a decrease in the cost of litigation would affect the new WTO members' participation in the dispute settlement system which had no prior WTO dispute history. However, the only WTO member which has not prior history in participating WTO dispute settlement is Chad which is in the category of low income country.[274] All other countries using the ACWL services have already had WTO DSU experience. It shows that the ACWL assists the WTO member states to pursue additional cases which are already aware of their rights and obligations under the WTO and have the capacity to identify potential WTO violations to initiate a case.

All in all, the ACWL's contribution to the WTO law encourages developing countries to be more active in the dispute settlement process. However, it still needs to be improved in order to achieve more concrete results.

5.3 Private Law Firms

Most governments do not have sufficient legal expertise and the legal capacity to pursue a case before an international court, so experts in international law and lawyers as advocates and advisors act on behalf of governments.[275] The need for representation before the WTO panel and Appellate Body by lawyers is even more specific involving WTO law and dispute settlement. Therefore, governments need highly specialized lawyers in the WTO law and dispute settlement process. Many private law firms offer legal services in WTO litigation to clients; private law firms could be a part of solution for assisting governments of developing

[274] The ACWL provided legal assistance to Chad acting as a third party in the case of United States — Subsidies on Upland Cotton Brazil v United States (2005) DS267 WTO Dispute Settlement.
[275] Bruce Wilson & Rufus Yerxa op cit note 87 at 125.

countries.

Private law firms could provide legal assistance to developing countries on *pro bono* or at reduced fees in return law firms improve their reputation worldwide as being a contributor to the public benefit.[276] Big international law firms can take the advantage of pro bono service in terms of representing a significant precedent and the value of pro bono service generates more reputation and income in the long run for the law firm's efforts.

Private law firms can also coordinate with the ACWL.[277] There are already 30 private law firms and four individuals registered in the ACWL's roster of external legal counsel system in order to provide legal services to developing countries in WTO dispute settlement at reduced rates.[278] This is an example for other private law firms to offer similar services on *pro bono* basis or at reduced rates to developing countries either through ACWL or on their own initiative. Also, acquiring legal advice from private international law firms could be a faster solution than funding from the WTO or ACWL because legal experts can monitor possible WTO violations in order to assist developing countries to initiate proceedings. Since the ACWL is not entitled to investigate any possible WTO violation, it cannot provide legal services to developing country exporters prior to a viable WTO case[279]. Moreover, developing countries do not have to depend on solely ACWL or WTO funding. For that reason, working jointly with private law firms could create a long-term solution for developing countries to access to legal services and pre-litigation investigation.

5.4 Public-Private Partnership

A strong public-private partnership is helpful in initiating a viable case over trade issues at the WTO. Developing countries face difficulty in identifying possible WTO violations against their exporters which may cause financial damages to the domestic economy. Developing country governments are the only authorized bodies which may seek subsidized legal assistance under the current WTO system.[280] Exporters and trade industry associations are the key players which are directly affected by the detrimental effects of WTO violations made by the member countries. However, they cannot approach the WTO or ACWL directly to get their

[276] Chad P. Bown & Bernard M. Hoekman op cit note 269 at 877.
[277] Navneet Sandhu op cit note 218 at 160.
[278] 'External Counsel' available at *http://www.acwl.ch/external-counsel/*, accessed on 6 December 2016.
[279] Chad P. Bown & Bernard M. Hoekman op cit note 269 at 875.
[280] Chad P. Bown & Bernard M. Hoekman op cit note 269 at 876.

legal claim investigated and present their challenge before the WTO; rather they must persuade their government to take a necessary step at the WTO or ACWL. Therefore, private sector need to create an active collaboration with the government to raise WTO claims. Prior to a viable case, the private sector could come up with the necessary economic and legal research to convince the government of the benefits to initiate a case before the WTO. Exporters and trade industry associations could be involved in the WTO process as being a key part of the public-private partnership.[281] Thus, the private sector in developing countries could assist and influence their government officials to prepare legal claims for the WTO dispute settlement process. The private sector could support developing countries' usage of the WTO dispute settlement mechanism by engaging government officials to address the need for legal assistance in WTO litigation.

Importers and consumers in developed countries could constitute a separate group with private interests in supporting developing country exporters due to their interest in accessing the developing country market.[282]

To sum up, a public-private partnership framework could function through the active collaboration of exporters, trade industry associations, importers and consumer groups by raising WTO claims, getting them investigated, getting support from private law firms and finally in convincing the developing country governments to negotiate in the shadow of the law by using consultation or mediation method for their WTO disputes.

5.5 Consultation and Mediation

A consultation stage has been offered by the DSU as an alternative solution during the course of the dispute by any disputing party to solve the dispute between the WTO members.[283] The WTO members must engage in a consultation stage before bringing a case in order to attempt to ensure a positive mutually acceptable decision to a dispute.[284] The DSU supports the countries to enter into consultation in order to settle their disputes amicably.[285] The DSU also provides special provision for developing countries in terms of consultation which states that developing members shall be given special attention to their problems and interests during

[281] Ibid at 876.
[282] Ibid at 886.
[283] DSU Article 4.
[284] DSU Article 3(7).
[285] Håkan Nordstrom op cit note 237 at 12.

consultations.[286] The DSU provides extended timeframes in favour of developing countries in terms of consultations.[287] The consultation stage can be used as an alternative solution to facilitate developing country participation in the dispute settlement because it avoids developing countries using their financial sources to initiate a whole WTO dispute settlement process; it also avoids the enforcement procedure for the panel or Appellate Body rulings against developed countries. For instance, Jamaica proposed to strengthen the consultation stage for developing countries to use the dispute settlement mechanism more often instead of using a costly and lengthy panel process.[288]

The consultation process has been used effectively by the WTO members because a common settlement was found or the complainant party decided it did not want to pursue the case for specific reasons. 157 disputes have been solved by using consultation which approximately equals 30 per cent of all WTO disputes since 1995.[289] This shows that consultation is an effective alternative means of dispute settlement and WTO members can settle their trade disputes without initiating a litigation process.

Members also can use other alternative dispute instruments by using good offices, conciliation and mediation. If the consultation stage fails, disputing parties could use mediation as an intervening option in which a third party assist in resolving the dispute.[290] Again, the parties can avoid using costly and time-consuming litigation proceeding.

Developing countries can benefit from mediation by using the third party assistance in resolving their disputes. Article 5 of the DSU provides that countries may choose the Director-General of the WTO as the mediator due to his/her knowledge and expertise on the WTO law; this considered to provide a 'mediator with muscle'.[291] Mediation as an alternative dispute resolution mechanism can be undertaken voluntarily upon the parties' consent.[292] There are those who have proposed changing the voluntarism to something more compulsory; Haiti

[286] DSU Article 4(10).
[287] DSU Article 12(10).
[288] Submission of the Communication from Jamaica to the Special Session of the Dispute Settlement Body 'Contribution by Jamaica to The Doha Mandated Review of the Dispute Settlement Understanding (DSU)' TN/DS/W/21, 10 October 2002 p 1.
[289] 'Current Status of Disputes' available at *https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm,* accessed on 19 January 2017.
[290] 'Thailand: Conciliating a Dispute on Tuna Exports to the EC' available at *https://www.wto.org/english/res_e/booksp_e/casestudies_e/case40_e.htm,* accessed on 30 December 2016.
[291] Hansel T. Pham op cit note 187.
[292] DSU Article 5.

proposed that the good offices, conciliation and mediation shall be mandatory for members before initiating a case.[293]

Mediation can address the problems that developing countries face under the DSU process. First, mediation does not create a hostile or political opposition environment and it provides countries with a way to solve their dispute mutually. Secondly, once the parties agree on mediation, they can also enforce the mutually agreed solution voluntarily. Therefore, developing countries do not face any difficulty arising from the enforcement process, such as using retaliatory counter-measures.

The first example of the mediation under the WTO is the Thailand/Philippines/EU tuna dispute.[294] The lesson of this is that developing countries can use their right to mediation under the WTO in order to secure more equal treatment from a developed country.[295] However, this is the only case that countries employed the mediation as a form of dispute settlement. Moreover, there has not been much academic research on mediation as an alternative solution for developing countries in the DSU.

Developing countries could use mediation against developed countries more frequently because of its benefits in terms of financial resources. It has been argued that mediation could solve the problems faced by developing countries in participating in the DSU mechanism. Mediation could encourage countries to settle during the negotiation phase. It would also give an opportunity to developing countries to seek their WTO rights in a less legalistic and more equitable platform. To improve the participation in the DSU process, developing countries shall focus on to settle their disputes by means of mediation together with consultations. Developing countries are able to clarify the facts of the dispute by consultation and mediation which are diplomatic features.

5.6 Concluding Remarks

To sum up, many of the WTO members think that the DSU system is working well while some of the members think that there is room for improvement.[296] In this research, I tried to address

[293] Submission of the Communication from Haiti to the Special Session of the Dispute Settlement Body 'Text for LDC Proposal on Dispute Settlement Understanding Negotiations' TN/DS/W/37, 22 January 2003 p 4.
[294] 'Thailand: Conciliating a Dispute on Tuna Exports to the EC' available at *https://www.wto.org/english/res_e/booksp_e/casestudies_e/case40_e.htm,* accessed on 30 December 2016.
[295] Ibid.
[296] Bruce Wilson & Rufus Yerxa op cit note 87 at 253.

the capacity constraints of developing countries and how to mitigate them to increase the participation in the WTO DSU. In the light of abovementioned issues, first, one should address specific problems and needs that developing countries face while implementing WTO law and then differential and special treatment articles within the agreements of the WTO about the DSU shall be strengthened in order to better collaborate and provide trade related legal support and capacity building.[297] In my opinion, WTO shall reform its agreements particularly the DSU in terms of differential and special treatment articles in favour of the developing countries as well as improving its institutional mechanism. My results point out that the capacity building is important for developing countries and consultation and mediation shall be used more often by developing countries for settling disputes in order to increase the participation in the WTO DSU. Considering that developing countries face many challenges and their limited sources to participate the DSU, their situation need to be carefully taken into account by the WTO and developed countries. Ultimately, WTO legal framework influence the political dynamics among the WTO members. A more balanced international platform for settling disputes could be created. Therefore, institutional hurdles shall be addressed within the WTO in order to strengthen the DSU and solve the participation issues of developing countries.

[297] Peter Van den Bossche *The Law and The Policy of the World Trade Organization* (2005) p 694.

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