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WTO Challenges:

Dispute Settlement System and the reasons of non-compliance of Developing Countries

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ABSTRACT

Developing Countries in WTO system are facing the non – compliance under Dispute Settlement Body (DSB) in cases where respondent mainly developed country is not following the DSB recommendations and proceedings within reasonable period of time. As a remedy for that WTO includes compensation and suspension of concessions or other obligations. By other obligations is meant retaliation. Recently more and more works are underlining the weak sides of retaliation process. Thesis is focused on better understanding the language of law stated in DSB as well as analysing the available options for developing countries to use as retaliatory measures vis-à-vis developed states. Throughout the research they have been pointed out the usage of cross – retaliation under Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement for developing countries to face the economic and political power of developed states. For better understanding there is provided detailed analysis of the working structure of DSB system as well as there are presented relevant cases. Furthermore, there is discussed both positive and negative sides of cross – retaliation implementation. In the end of the thesis, there would be offered possible enhancements and solutions for making DSB to work even in a more efficient way.

Key words: World Trade Organization, Dispute Settlement System, Developing Countries, International Trade Law, Cross – Retaliation, TRIPS, Intellectual Property

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ABBREVIATIONS AND ACRONYMS

AB – Appellate Body

DS – Dispute Settlement

DSB – Dispute Settlement Body

DSU – Dispute Settlement Understanding

EC – European Community

EU – European Union

GATT – General Agreement on Tariffs and Trade

GATS – General Agreement on Trade in Services

ICJ – International Court of Justice

IP – Intellectual Property

IPRs – Intellectual Property Rights

ITO – International Trade Organization

LDC – Least Developed Country

PIL - Public International Law

SCM - Subsidies and Countervailing Measures

TRIMS – Agreement on investment measures related to trade

TRIPS – Trade-Related Aspects of Intellectual Property Rights

UN – United Nations

UNCTAD – United Nations Conference for Trade and Development

US – United States

WTO – World Trade Organization

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1.1 INTRODUCTION

Since WTO has its own structure and process, for the years of experience that WTO went through, countries learned how to negotiate and bargain by using this almost perfect DSU system. The key issue that would be observed in this thesis is to consider the current challenges that developing countries are facing while they have decided to go to WTO as well as to propose ways of negotiating and strategies they can use, to counterpart the power of developed countries. In the beginning, by introduction the way of development from GATT to WTO, there would be emphasized the role of developing and developed countries. Furthermore, there would be mentioned obstacles developing countries are facing by introducing two cases US – Gambling (Antigua)[1] and US – Subsidies on Upland Cotton (Brazil)[2]. Every non – compliance case of WTO is deriving certain economic and social problems.

Research is focused on better understanding the language of law stated in DSB as well as analysing the available options for developing countries to use as retaliatory measures vis-à-vis developed states. The implementation stage of DSB is the most difficult in the whole WTO Settlement process. In cases where respondent is developed country and complainant is developing state, sometimes for respondent it is better to go for non – compliance rather than follow DSB recommendations and rulings. Unfortunately in these circumstances developing countries are the only one who is losing even though they have

[1] US - Gambling (WT/DS285)

[2]US – Upland Cotton (WT/DS267)

won the WTO case, it seems that traditional retaliation will only harm more their vulnerable economic situation. To address the abovementioned situation, this thesis has focused on DSU and provided certain provisions for developing countries to face developed countries from a position of "strength" by using cross – retaliation in IP sector.

There have been reviewed both positive and negative sides of using this techniques. Since the beginning there is always separation of developed and developing countries. Developed countries considered the advanced economic countries according to World Bank ranking, i.e. the United Sates, most of European Countries, Japan, Canada, etc. Developing countries are including other WTO members who are not considered as developed one. Also, it should be taken into consideration, Brazil, China and India are considered as developing countries with special economic characteristics.

This research has been based on certain scholars and their previous works. Especially were considered authors contributed to WTO DSB system, i.e. Bernard M. Hoekman, Michael M. Kostecki, Hunter Nottage, Bernard O'Connor, Margareta Djordjevic, Marco Bronckers, Naboth van den Broek, Jason E. Kearnes, Steve Charnovitz and Marco Wuorinen, their argumentation have been used as a primary source of writing this thesis. Furthermore, Shamnad Brasheer, Lucas Eduardo F.A. Spadano, Subramanian Arvind, Watal Jayashree, Erich Vranes and Joost Pauwelyn are the experts in cross – retaliation under TRIPS Agreement and their views have been also taken into consideration by implying certain proposals for developing countries.

1.2 LITRATURE REVIEW

1.2.1 Significance of the Research

WTO is performing for a bit less than 20 years. It is well acknowledged that system itself proved the high standards and throughout history of both GATT (1947) and WTO (1995) systems, their outstanding performance approved and strengthened the existence of it. However as every system has, there are some weak sides of WTO system that has been recently discussed. Trade retaliation is one of the most discussed debates that brought up to discussion numerous times. Although there are number of articles and research that contributes to retaliation, where there were discussed certain advantages as well as disadvantages and some general solution, there was not paid proper attention to the topic of cross- retaliation as a solution for developing countries to face the power of developed countries in WTO disputes. Moreover, the cross – retaliation itself was not investigated properly, and it still remains as one of the options for member state to retaliate stated in Article 22.3 DSU.

One of the reasons of not much research on cross – retaliation could be referred to a reason that cross – retaliation has taken place recently and was granted only in three cases throughout the whole history of WTO. And none of them were actually implemented. So, basically only in three cases cross – retaliation was granted, but none of them have actually used it. It is important to investigate the nature of appearance of request for authorization of cross – retaliation as well as reasons of non – implementing till the end this function. Also, considering the increasing number of cases brought up by developing

countries against developed countries, it is important to provide solid understanding of this option for increasing the available solutions for developing countries to use against developed one's.

Despite the positive sides of cross – retaliation, there are some undermining issues that should be considered by developing members in considering or choosing this option. Apart from receiving more bargaining power of having the authorisation to use cross – retaliation, developing countries should also take into consideration the adverse effects on their internal economies in case if they will in fact decide to implement cross –retaliation. Moreover, as a side effect of using cross – retaliation option, there could be harmed third parties as well. To know both sides of cross – retaliation option is bringing the significance for this research.

Also, there would be discussed other option available for developing countries to deal with developed countries in cases where they do not have enough power to influence on developed states for them to comply with DSB recommendations and proceedings.

To sum up, purpose of this research is to bring up the problem that developing countries are facing in cases where they are complaining against violations of major developed states and the non – compliance of latter one. It is important to review the possible techniques that developing countries can use to reduce the power of developed members.

1.2.2. Research Questions

There are numerous questions that are stated in this research. One of the most important is how can developing countries best achieve compliance vis-à-vis developed countries when WTO rulings are in the favour of latter one?

Another important question that included is evaluating cross – retaliation starting from figuring out the fundamental purpose of it and going for discussion both positive and negative sides of this option. From this there is arisen another questions as the role of arbitrators in their decision of the level of cross – retaliation as well as their actions in determining the term "equivalence" according to Article 22.4 DSU.

Finally, there would be discussed major differences between "traditional" retaliation and cross – retaliation. There were three cases where cross – retaliation has been granted. Hence, there are appeared questions as why complainant states decide to go for cross – retaliation instead of using the traditional one? Why in the end none of them in fact implemented it? Are there certain problems in cross – retaliation option? And there are reviewed major questions as how developing countries are behaving in WTO system? How are they dealing with DSB recommendations and rulings? Are there available solutions for developing states to actually face developed countries on equal rights?

1.3 RESEARCH METHODOLOGY

3.1 Theoretical Framework

In this research would be applied mainly hermeneutic approach. This approach basically implies on interpretation and argumentation. It will involve the interpretation of Articles DSU as well as provide the arguments for support of interpretation. Also according to this approach there would be conducted analyse of theories and cases.

Articles that would be used in research are under DSU, WTO (1995) and GATT (1947) Agreements. Mainly, the research begins with stating the main problem and explaining the fundamental of systems. After that there would be mentioned statistics as well as case study to support the main statement made in the first part. Case study is essential in interpretation of unclear WTO law language.

Furthermore this research will also include comparative analysis of introducing the differences and similarities of both GATT (1947) and WTO (1995) systems which is necessary for understanding the existed problems. Also, it would be helpful in a deeper understanding of WTO (1995) system considering the fact, that it was established as a improved version of GATT (1947).

1.4 STRUCTURE OF THE PAPER

In this paper are presented six chapters.

First Chapter is representing introduction as well as methods of how this thesis has been conducted.

Second chapter is presenting the history of GATT (1947) and WTO (1995) systems. Also it is explaining the deep understanding of DSU with emphasis on compensation and suspension of concessions as well as retaliation. Finally it provided the overview of developing countries in WTO system.

Third chapter, will emphasise more on role of Developing Countries activities in current WTO system.

Chapter Four, will perform detailed analysis of WTO Case "US – Gambling"

Chapter Five, will provide in-depth analyse of cross – retaliation techniques as well as would present areas of reform of DSU to protect Developing countries.

Chapter Six will focus on promoting major suggestions and recommendations for DSU reforms.

OVERVIEW OF WTO STRUCTURE, MEMBERSHIP AND DECISION – MAKING PROCESS

WORLD TRADE ORGANIZATION (WTO) is international economic organization that regulates international trade rules according to the "principles of liberalism".

WTO started their activities from January,1 1995. Initially, the creation of WTO involved numerous years of negotiations in the Uruguay Round of GATT, which has been finished in December, 1993. Official WTO was formed on Conference in Marrakesh (April 1994), therefore Agreement of Establishment of WTO also well known as Marrakesh Agreement.

Since GATT was only involved in regulations only trade of goods, the new version of it in the face of WTO has broaden their scope of influence much further. WTO is responsible not only for regulations of good trade but also for trade of services and trade – related aspects of Intellectual Property. WTO has judicial status of specialized agency of the United Nations (UN) system.

Initially only 77 countries entered into WTO Agreement, however by 2003 there were already 146 countries which involved both developed and developing countries. 10 years after the number increased to 159 countries. One of the most memorable moments of WTO could be noted the entrance of one of the most promising player in the global trade – China (December, 2001). Members WTO are taken almost 95% of the whole international trade. The influence of WTO is increasing and currently there are number of countries that have expressed their willingness to become members of WTO.

2.1. Goals of WTO

The main goal of WTO is the promotion of free international trade. Developed countries who were in fact initiators of WTO truly believed that exactly economic freedom in international trade contributes to economic growth and increased level of economic well – being of people.

Nowadays, there are defined five principles that world trade system should follow:

1) Non – discrimination in trade

No State has power to infringe any other country by imposing limitations on export or import of goods. Ideally, there should not be any differences between local and foreign products in terms of sales on domestic market of any country.

2) Reduction trade barriers (for Protection measures)

Trade barriers could be referred to factors, that reduce the possibility of any foreign goods to enter local market of any country. These includes, custom duties and import quotas (quantitative restrictions on import). Moreover, international trade is also affected by administrative obstacles and policy determining exchange rates.

3) Stability and predictability of trade conditions

Foreign companies, investors and other states should be confident that trade conditions (tariffs and non-tariffs barriers) would not been changed suddenly and arbitrarily.

4) Stimulation of competitiveness in international trade

For equal competition of companies from various countries there should be eliminated "unfair" methods of rivalry such as export subsidy (help of government to local export companies) and usage of dumping (intentionally undervalued) prices to capture new markets.

5) Benefits for less developed countries in international trade

This principle is partly contradicts to the before mentioned principles, but it is necessary technique to help developing countries to be involved in international trade. Since it is obvious that they cannot compete with developed countries on equal footing, this principle could be referred as "fair" for providing less developed countries with special privileges.

Overall, WTO is promoting the idea of free trade by fighting for removal of protectionist barriers.

2.2. Practical principles of WTO

WTO mainly based on three international agreements, signed by majority of governments who are actively participating in global economic relationship. General Agreement on Trade in Goods (GATT), as amended by 1994, General Agreement on Trade and Services (GATS) and the Agreement on Trade – Related Aspects of Intellectual Property Rights

(TRIPS). The main purpose of these agreements is to help companies of all countries that are involved in export-import operations.

Implementation of the WTO Agreements however not only brings long – term benefits, but also short – term difficulties. For instance, the reduction of protectionist tariffs make foreign goods cheaper for local customers and as a result more affordable, but as a side effect it could lead to bankruptcy of local producers, in case if they produce good with high costs. Therefore, according to WTO rules, Member countries are allowed to conduct prescribed changes not immediately but rather step by step, according to the principle of "progressing liberalization". Furthermore usually, developing countries are receiving more time for implementation of all these obligations.

Commitments to follow the rules of free trade, that were signed by all members of WTO constitute the system of "multilateral trade". Most of the countries of the planet including all major export – oriented countries as well as import – oriented countries are Members of WTO system. However, since not "ALL" countries are signed the WTO Agreement, but rather "MAJORITY", thus the system mainly named "multilateral" but not "world". In the future, by expansion of number of countries that would become members of WTO, system finally should be transformed from "multilateral trade" into a truly "world trade".

2.3. Main functions of WTO

- Monitoring of compliance with the basic agreements of the WTO;

- Creating conditions for negotiations between WTO member countries about the external economic relations;

- The settlement of disputes between member states on issues related to foreign economic policy

- Control over the policies of WTO member states in the field of international trade;

- Assistance to developing countries;

- Cooperation with other international organizations.

Since, in fact all created agreements are based on negotiations and signing up by majority of Member countries that are participating in international trade relations, they are often cause «hot debates» and controversies. Most of the times, each party that entered into negotiations is pursuing different goals. Moreover, agreements and treaties (including those that were concluded after long negotiations and with the help of WTO) are often required further interpretation. Therefore, one of the main purposes of WTO is to serve as a third party in trade negotiations as well as to promote the settlement of disputes.

The practice of international economic disputes clearly shows that conflicts are resolved the best, by following the WTO rules, which are based on a mutually agreed legal framework and on providing the parties with equal rights and opportunities. That's why in the texts of agreements signed in scope of WTO, it is certainly included the clause about rules of dispute settlement. According to the agreement on the rules and procedures

for the settlement of disputes – "dispute settlement system of the WTO is a key element in providing security and predictability of the world trading system"

Finally, WTO members are committing that they will not take any unilateral action against possible violations of trade rules. Moreover, they undertake to resolve disputes within the multilateral dispute settlement system and follow by its rules and decisions. Decisions on controversial issues are made by all participating parties on the base of usual consensus, which plays an additional incentive for greater harmony in WTO system.

2.4. DISPUTE SETTLEMENT SYSTEM

2.4.1. The Dispute Settlement System of GATT 1947

The Uruguay Round that was held in 1986 has transformed the international trade system, involving major outputs well known as forming of World Trade Organization and serious improvements of dispute settlement procedures.

The Dispute Settlement System is considered as the main regulatory authority in any international trade disputes. The history of the development of this System went through two main stages: under GATT(1947) and under WTO (1995).

Dispute Settlement Understanding (DSU) was based on two Articles (XXII and XXIII) of the General Agreement on Tariff and Trade (GATT) 1947. The main reason that led to creation of GATT was attempt of creation regulatory mechanism of world trade process after World War II. In the beginning, GATT was viewed as an experimental approach of

solving world trade issues, however as times went by, the system turned out to be one of the main authority in dealing with any world trade disputes and successfully existed for nearly half of the century from 1948 – 1994. Despite the inevitable success of GATT, the problems occurred because GATT was in fact just an agreement and interpretation as well as application of which could have been done differently by Parties. This led to further development of GATT and provided certain procedure for settling the disputes.

Article XXIII of GATT was designed for dispute settlement proceedings. It included that dispute settlement procedure could have been started as soon as Contracting Party established that any benefits that they are supposed to have under GATT 1947 were "nullified or impaired" by the actions of another Party. Firstly, in the case if dispute has occurred, GATT implied that countries should have tried to solve the issues by themselves without involving any other parties. And only in the cases, where countries could not have reached mutual solution, GATT interfered into communication between two parties by setting the panel and providing report. According to Article XXIII:2 which stated that a complaining party could possibly suspend concessions/obligations to the other country under the GATT by proving two conditions:

a) The circumstances are serious enough

b) The proposed suspension is appropriate

In the beginning of its existence, GATT was used mainly in diplomatic procedures, however later after 1955 it was admitted as in fact "working regulatory authority", which

was supported by increased cases of occurred disputes. The major arguable development of that time could be fairly named the system of 3 – 5 experts who would be assigned to the case and which role would be to investigate on a behalf of their own abilities and capacities, rather than as representative of any country. This change could be seen as transforming point of multilateral negotiations to more judicial procedure, which would not only focus on the facts, but also consider the correct interpretation of the law.

Despite the tremendous success and rapid development of GATT, it still had weak sides. One of the main disadvantages was hidden in the main idea of the creation of GATT. Since it was based on positive consensus, multilateral negotiation and diplomacy, any party involved in dispute could have blocked the process at any stage. Moreover, there were not set any time frame as well majority of rulings were considered as unqualified.

2.3.2 The Dispute Settlement System of WTO (1995)

Later, by considering all weak sides of GATT, new DSB system has evolved. Since, DSU was well acknowledged of being the most powerful authority in international trade world, there have been made four major improvements in succeeding World Trade Organization (WTO). Nowadays, WTO is resolving more than 93% of all international trade disputes which provides stability and security to countries to conduct international trade more. In cases of non-compliance according to WTO agreement, DSU has the power to impose trade sanctions which would be discussed later.

The DSU of WTO is different of the previous one, by reversing the decision-making process into "negative consensus" whereas before, GATT was based on "positive consensus". "Negative" consensus is working at all three stages of dispute settlement process as establishment of Panel, Adoption of Panel's report and Retaliation of Panel's Proceedings, which basically prevents of investigation of any case that was reviewed by DSB of WTO. In the case if one member would intend to block the decision of Panel's report, it had to convince all Members of WTO to vote "FOR" it or stay "passive", however since one member would be always "against" it (the complaint party), this situation never occurred in the life of WTO. This "negative consensus" is fully used only in DSB and was recognized as the major improvement of DSB of WTO compare to the previous positive consensus of GATT.

Secondly, the DSU system became more clarified and detailed in WTO compare to more "vague" explanation of GATT, where DSU could have been established only in the case "if circumstances are serious enough" and "if they would determine it appropriate". The DSU of WTO provided more specific conditions as "granting authorization to suspend concessions or other obligations". Moreover, there have been made some changes in terms of "parallel retaliation" as in the case if Member Party fails to implement Panel's recommendations within reasonable period of time, according to Article XXII:2 the complaint Member may retaliate in the same sector where violations have been made, after negotiating with DSB. This changes led to introduction of "cross-retaliation" mechanism, which offers more options for injured Party to deal with non-compliance situations.

Finally, there was organized a unified Dispute Settlement System under WTO which also included Trade – related Aspects of Intellectual Property Rights Agreement (TRIPS) and General Agreement on Trade in Service". Also, there were made improvements in setting stricter time limits on the working process of Panel.

2.4.2.1. The Consultations

Consultations are the first stage in case if international trade dispute has been occurred. Article IV of DSU is consisting of all details in how to conduct "consultations stage". The complaint should follow all the steps described in Article IV within the certain period of time before the establishment of Panel, which is considered as the second step.

2.4.2.2. Time Frame, Location and Compensation

According to Article IV of DSU, the respondent party should respond to consultation request of complaint party within 10 days, after request has been made and within 30 days it should enter into consultation with requesting party. Also, it should be noted that the above mentioned time frame has the possibility to be less, in case if the consultations occurred because of perishable goods. Article XXII:1 and XXIII:1 of GATT 1994 described the basis where parties can request for consultations. In case if the complainant party decide to refer to Article XXII:1, than respondent has the right of choosing involvement of third parties, whereas by referring to Article XXIII:1, the complainant party has the right to exclude the participation of third parties in the "consultation stage".

Usually, complainant uses the latter Article in case if complainant member is willing to pursue mutually agreed solution without any third party interference.

Location

The headquarters of WTO is based in Geneva, Switzerland. However, there have been conducted numerous informal back and forth discussions and meetings before the formal WTO consultations will take place.

Compensation

Dispute Settlement Mechanism is not providing any compensation to complainant party during the dispute process, i.e. from the beginning of request of consultations till its withdrawal. Hoekman and Kostecki (2008) were suggesting that it is harmful for small economies countries even though the period of time is estimated as relatively short, their vulnerable small economies are too sensitive to any minor changes in market.

2.4.3. Compliance in the dispute settlement system

Compliance in the Dispute Settlement System is occurred when respondent party is not following the recommendations and rulings of Panel's report. Every party can request to WTO under Article 21.5 of the DSU to proceed the non – compliance measures. The Panel have the authority to upheld or reject the request within 90 days. Furthermore, the Appellate Body report is designed for reviewing and considering new facts of the dispute including the consistency with an agreement rather than just reviewing whether implemented measures are consistent to Panel's rulings.

2.4.3.1. Compensation and Suspension of Concessions

Compensation and Suspension of Concession are described in Article 22, which stated that in case if respondent party was not able to implement all rulings of Panel's report within a given reasonable period of time, than both parties involving respondent and complainant should mutually agree upon suitable compensation that would have been provided to complaining member. The term "compensation" is not involving monetary or financial compensation, rather than the complaining party should receive beneficial treatment from respondent member, e.g. import/export tariff reduction, which in total would be equal to damages that complaining party had.

However, the "compensation" is fully described in the Article 22, it had its own limitations and was not fully practiced. Firstly, it should be consistent with all agreements that were involved in dispute. Secondly, it has to be consistent with MFN obligation, which basically means that other Members of WTO will also receive tariff reduction, which is absolutely not attractive to both parties complainant, who will not receive an exclusive beneficial treatment and respondent who will be pushed to raise prices even more.

"Suspension of Concessions or other obligations under the covered agreements" occurred when both parties did not reach mutual solution within 20 days after the expiration of reasonable period of time. However, there is mentioned strict time frame for suspension of concession, the real case practice showed that mostly countries are requiring more time. In this case, complainant party is suffering from damages, but are not able to do anything

except waiting. In some cases, Appellate Body report was released after 15 months. Moreover, after that it could have been postponed further for requesting the arbitration for the amount of retaliation. Whereas, developed countries economies can handle the "waiting time", most of developing countries are suffering major damages in their not developed economies, especially if there are involved their major trading commodities.

2.4.3.2. Retaliation in the dispute settlement system

Article 22 of the Dispute Settlement Understanding includes procedure in cases, if the respondent party is not complying with the rulings of WTO and thereby allows complainant party to retaliate. According to Article 22 of DSU there should be met certain requirements as it should be imposed in the same sector of trade where the violations has taken place.

Retaliation in the dispute settlement system are not common practice, rather it could be considered as less than 7% of total cases has led for request of retaliation. Moreover, it also should be taken into consideration that retaliation measures were implemented solely by developed countries and never have taken place by developing countries. Hoekman and Kostecki (2008) are suggesting that this situation occurred because of mistrust of developing countries in WTO system, in their own power, that they in fact cannot opposed developed countries and finally, developing countries believe that the cost of it would be undeservedly too high for the local citizens.

Joost Pauwelyn (2000) has written about challenges of enforcement and countermeasures in the DSB system. According to him, non – compliance cases were noted to occur more in "political disputes", when "weaker member" i.e. developing country would have faced "stronger member" i.e. developed country. Although, "weaker member" would be in a position of winner, there are hardly could be find countermeasures that could pursue "stronger member" to follow the compliance. Moreover, there should be also noted that there are high chances of implementing "counter retaliation", which could be outrageously harmful for developing countries, e.g. it would have been affecting in aid or imposition of tariff barriers that would harmed the local consumers of developing countries even more than not following of compliance procedure.

2.5. Controversies between member countries of WTO

Although, WTO declares equality between member countries, however there are strong objective contradictions between developed and developing countries.

Developing countries have cheap but not well qualified labour forces. Therefore "third world countries" are able to import usually traditional goods, i.e. fabrics and clothes and agricultural products. Developed countries, to protect their textile industry and agricultural sector, are limiting import from developing countries by imposing high custom duties on imported goods. Their protectionist actions, they are usually explaining by accusing developing countries to use dumping. In comparison, developed countries are leading on high technology markets, where developing countries are in return using the same protectionist barriers.

Thus, at some level almost all countries are using protectionist methods. Therefore mutual reduction of protectionist barriers is becoming quite difficult process.

Furthermore, since developed and developing countries differ in their economic situation, the liberalization of world trade become even more complicated. As a result there is occurred great mistrust between “poor South” and “rich North”, developing countries are suspecting that the latter one wants to impose the system that would be more beneficial for them rather than for developing countries. In turn, developed countries are fairly complaining that other countries are speculating on its underdevelopment, by seeking instead of implementation of economic modernization, the concessions and privileges in international trade relations.

The most clearly asymmetry of the relationship between developed and developing countries could be seen in the sector of protection of intellectual property rights. I.e. Anti - Counterfeiting - mainly in the countries of the "Third World" – usually there is observed illegal production of brands of developed countries. Therefore naturally, in this struggle, the countries of the “rich North” are much more interested than the states of "poor South."

Despite all these facts, liberalization of world trade is still objectively beneficial for both: developed and developing countries. For instance, the accession of developing countries in the WTO increases the inflow of foreign investments in them. Therefore, WTO members seek and find compromise solutions to solve difficult problems.

The main development strategy of the WTO is the gradual involvement in it more and more countries, but the less developed the country's economy, the longer period it would have been provided to fully implement all principles of free trade.

Benefits for the new Member States are clearly visible, especially at the level of tariffs on imported goods. If we compare the average tariffs of WTO member countries with the conditions on which the WTO included some of the country, than there could be clearly seen the privileged position of new members. They are often allowed to apply higher import tariffs than the average in the WTO; besides, these rates are introduced after a long transition period. Thus, the new WTO members can immediately benefit from the reduction of duties on export of goods abroad, and the difficulties of reducing protectionist is diminishing.

Struggling against the restrictions imposed by developed countries on imports from the "third world", developing countries are going to arbitration of WTO and seek to cancel "anti-dumping" measures. Thus, in the beginning of 2000, India requested to WTO the protest against the United States and the EU, who introduced restrictions on imports of textiles and clothing manufactured in India; after protracted litigations, WTO has ordered the respondents to cancel protectionist measures. However, this kind of conflicts often arises not only between developed and developing, but also between different developing countries. For example, in the second half of 2001, India initiated the WTO anti-dumping investigation 51 times, 9 of them against China, 7 - Singapore, 3 - Thailand.

2.6. Preferential Treatment to Developing Countries

Article IV of WTO is specified the conditions that have to be followed to conduct consultations. Also, there is mentioned that Developing Countries should have been paid special attention according to their problems and interests, however there is not given any clarification about procedure of how it could have been achieved. It could be clearly stated that these provisions stated in Article IV are determined more of the "soft nature of law" rather than actually being used in practice.

"10. During consultations Members should give special attention to the particular problems and interests of developing country Members."

2.7. Experience of Developing Countries in WTO System

2.7.1. Statistics of WTO cases involving Developing Countries

Figure 1. Number of disputes requested for consultation per year

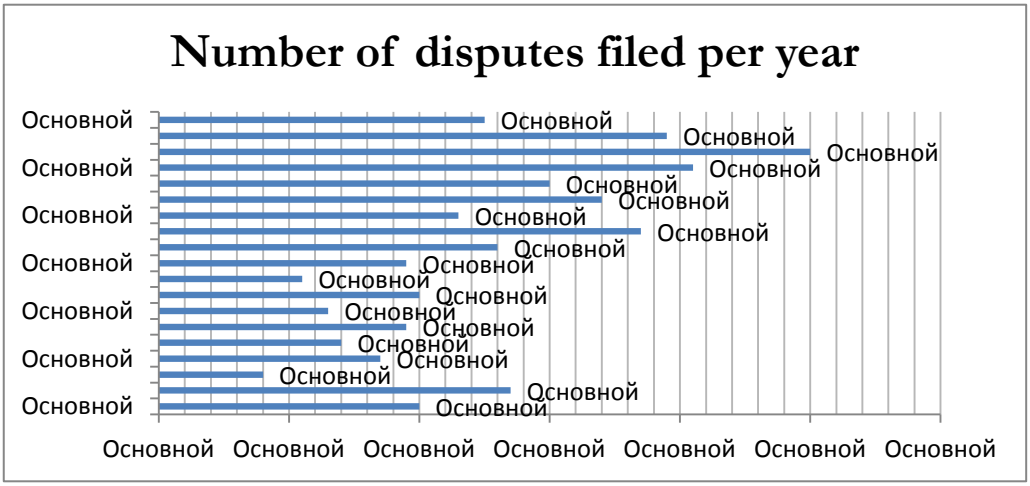


Figure 1 presents data for the period 1995 – 2013, there were conducted 473 disputes through request of consultations to WTO.[3] Moreover it should be included, that in some cases a few countries requested consultations to WTO against the same violations imposed by the same country, than in WTO it would be recorded as one case, e.g. in the US – Shrimp (DS58) case consultations were requested by India, Malaysia, Pakistan and Thailand, however in WTO it was listed as one request, in reality it could be seen as four separate dispute cases.[4] Therefore the number of 473 is nominal and real number is in fact increased to more than 500.

In figure 1, is presented the analysis of WTO dispute cases for 1995-2013 period. From the graph it could be clearly seen decrease of cases brought to WTO after millennium, in comparison to the first years after establishment of WTO. It could be explained according to various factors. Firstly, since WTO was just newly established, there were some issues that stayed unclear, which motivated countries to request consultations more often by addressing their cases to the "undefined spots" of the system. Furthermore, most of the countries wanted to "try" the WTO system to see how it actually works, since it is just started to operate and members were not familiar with new modifications that were evolved from the previous system GATT. Finally, one of the main factors could be defined as stable export growth that happened after 2000s. Therefore, it consequently has reduced the country's chances to prove their loss of expected market access which would lead to higher chances of losing the case.

[3] www.wto.org
[4] See US – Shrimp (WT/DS58)

Table 1, figure 2 and 3 are representing the number of frequency of each WTO member in a role of complainants, respondents and third parties during the period of existence of the system. United States of America as well as European Communities were the most active users of WTO system. Canada, Japan and Korea were the second group of developed countries who also actively participated in WTO. Some developing countries as Brazil, Thailand, Argentina, Chile, Mexico and India were also using WTO more than 10 times.

Table 1.

Complaints by Developed Country Members	
Respondents - Developed	171
Respondents - Developing	112
Complaints by Developing Country Members	
Respondents - Developed	140
Respondents - Developing	67

Table 1 shows that in 112 cases where the developed countries were complainants, developing countries were respondents. There are 140 complainants made by developing countries in which the developed countries were respondents. It is only in 67 cases where developing countries complained against their fellow developing countries. These statistics indicate that developing countries are also actively participating in the WTO dispute settlement system. What is worrying is that there are many cases where developing countries are complaining against developed countries. The problem is that in the event that the DSB has ruled in favour of developing countries and there is no

compliance with such a ruling, there is a very little which developing countries could do to ensure compliance by developed countries.

Figure 2 showed the data of WTO dispute system by representing the category of "complainant party". The number of cases initiated by US, EC and other developed Countries were noticeable decreased from mid-90 to today, whereas despite the fact that developing countries have also experienced a slight decrease compare to the beginning of the time that WTO has started to work, however in contrast to the decline of developed countries, developing countries relatively increase their usage of WTO system.

Table 2.

Complainant	Respondent							
	1995-2000				2001-2008			
	US/EC	Other Ind.	Developing	Total	US/EC	Other Ind.	Developing	Total
US/EC	48	30	45	123	15	7	24	46
Other Ind.	24	7	14	45	31	3	3	37
Developing	45	2	31	78	42	4	40	86
Total	117	39	90	**246**	88	14	67	**169**

Table 2 presents complainants and respondents parties throughout the existence of WTO system. In the beginning, it could be clearly seen that US and EC were the one who used WTO dispute settlement system the most and in majority of cases they were standing against each other. However with the growth of export market, the number of cases between two giants decreased. Developing countries mainly were involved in disputes against US, EC or other developing countries. More than half of all cases that have been

involved developing countries as complainants were against US or EC, and only roughly 43% were addressed against other developing country. The cases where developing countries would request consultations against any other developed country than US and EC are rare and unusual. Furthermore, not surprisingly that in case where developing countries were in a role of respondents, around half of the cases were initiated by US or EC, and only around 30% by other developing countries. Finally, it also should be noted, that majority of cases US/EC against developing countries were mostly against two most prominent states as China and India.

As we can see through numerous tables and graphs, number of dispute cases, where developing countries are in the role of complaints, is steadily growing, however the concerns that in particular cases where developing countries are facing developed countries in a position of winner party, when DSB rulings were absolutely ruled in favour of them, unfortunately there is not much anybody could do to ensure that developed country would comply with the decision of DSB.

Table 3.

	Active Compliance Panels	Adopted Appellate Body and Panel Compliance Reports	Arbitrations on Level of Suspension of Concessions	WTO Authorizations of Suspension of Concessions
Reporting period/date	On reporting date	From 01.01.1995	From 01.01.1995	From 01.01.1995
Number	4	19	16	15

Table 3 is representing that since mid – 90s, the DSB has issued 19 Appellate body and Panel Compliance Reports and there were 16 arbitrations that reached the level of suspensions of concessions. Moreover, from the table it could be seen that 15 out of 16 has in fact granted suspension of concessions. Hence, it could be concluded that "retaliation" is not widely used in WTO. In most cases, developing countries decided not to request authorization of suspension of concession due to their weak economic situation and as a result inability to retaliate. E.g. EC- Banana (DS27)[5], Guatemala and Honduras decided not to request for imposition of countermeasures against the EC for their failure to implement the rulings of Panel's as well as AB reports. These examples can actually explains the reason of low rate of cases that involved retaliation stage. Therefore, this table shows the necessity of introducing and promotion more practical and effective remedies, so that developing countries would also benefit from using WTO system.

[5] EC - Bananas III (WT/DS27)

RETALIATION TECHNIQUES AS A SAVIOUR MECHANISM FOR DEVELOPING COUNTRIES

3.1. The Main Purpose of retaliation

Article 22.1 DSU is explaining the core principle of retaliation:

"Compensation and Suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements"

Moreover in Article 22.8 DSU it is also explained the goal of the nature of suspension:

"The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the

recommendations to bring a measure into conformity with the covered agreements have not been implemented"

Finally Article 3.7 DSU describes the core principle of conduction of retaliation:

"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. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure which is inconsistent with a covered agreement. The last resort which is Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis–á–vis the other Member, subject to authorization by the DSB of such measures"

3.2. The Arbitration decision in terms of trade

After respondent party did not comply with Panel's recommendations within a given reasonable period of time, the complaining party has the right to request the authorization of retaliation. In response to that, respond party can also request for arbitration according to Article 22.6 DSU, which is including the arbitrators and that they are in charge of

controlling the “equivalence” of proposed suspension, whereas Article 22.4 is in fact explaining that the proposed suspension should be in equivalent to the level of the nullification or impairment.

The decision made by arbitrators actually costs a tremendous amount of dollars in terms of trade. Since arbitration decision is the very final one, there could not be done any appellation after. Article 22.7 DSU describes the jurisdiction of arbitrators that should be considered by parties before they are deciding actually to involve in arbitration. Generally, there should be matched two main qualifications as:

1. Whether the suspension of concessions or other obligations are equal to the level of nullification or impairment

2. Whether procedures and principles were conducted in accordance with the Article 22.3 DSU

Tariff – retaliation, also known as “traditional” is applied in cases where, respondent country does not comply with proceeding of DSB. If country has failed to implement all recommendations within a given reasonable period of time, than they considered as “guilty” and as a “punishment” that country is asked to grant to complaint parties. Certain tariff concessions in other goods than those where violations has been made. Furthermore, if complaint member would still be not reasonably compensated, WTO allows them to impose retaliatory tariffs.

Rulings of WTO are working quite effectively, and 60% of all cases recommendations were implemented by countries, other 20% of cases has experienced delay in implementation, but overall also has been peacefully solved. And only remaining 20% went through non – implementation under Article 21.5. Arguably to the belief that DSB rulings are successful because of well performed system could be stated assumption that small developing states in fact are not able to retaliate, hence they are not even going till the end, but rather agree to make a deal.

However, despite the negative sides, tariff retaliation serves at least for two factors. Firstly, the threat of retaliation is providing somehow stability, when fear of foreign retaliation can stop some countries from not complying with WTO rulings. Moreover, each institution has to have a certain "punishment" for those, who are violating the rules. Tariff – retaliation is playing this role in WTO system. Also, raise of tariffs by injured members is providing compensation at some level in two ways:

1) Improving the trade terms (only in cases if it contains significant amount to actually affect the world's prices)
2) Receive benefits from certain import privileges that could be granted due to rather political than economical factors

"Traditional trade – retaliation" has its both positive and negative sides, however the development of new measures considering situation of developing countries could lead to improvement of the system.

Ineffectiveness of trade retaliation has been discussed recently, by implying on their harmful effect on economies of small developing countries. It seems that trade retaliation can actually perform properly only in cases where sanctions are imposed against developed country in a favour of developing country, which one is considered as important trade partner. Strong imbalance of economy size between countries weakens the trade retaliation because developing country's market is simply too small to affect at any level non – complied developed country. There are number of cases that in fact can prove it, EC – Bananas, US – Gambling, US – Upland Cotton, etc. They would be discussed later.

Furthermore, another weak side of retaliation could be seen in situations, where complaining party's economy is too dependent on their trade relationships with respondent party than by seeking suspension of concessions or other trade related obligations, complaining member's market can be more harmed by these actions than the other party. In US – Gambling case, Antigua's market was too dependent on import from US, whereas for US the export to Antigua was evaluated as less than 1% of their total trade. Therefore although Antigua won WTO case, they were not be able in fact to use retaliatory measures as it would have harmed their market situation even worse. Finally, trade retaliation itself is leading to unpredictability of trade between countries, political tensions and also the mechanism of imposing retaliation contradicts the core principle of WTO – trade liberalization.

3.3. The role of Article 21.5 – the compliance panel/The Article 22.4, 22.6

Kearns and Charnovitz (2002) have discussed the role of cross – retaliation in DSB system. Cross – Retaliation is actually mentioned in Article 22.3 of DSU where there is provided the hierarchy of retaliation measures. There were described three retaliation techniques:

1. Parallel Retaliation – mainly, it describes the common rule of retaliation as that plaintiff is looking for suspension of concessions within the trade sector where violations have been found.

2. Cross – Sector Retaliation could be performed in cases, where complaining party is deciding that retaliation would not be effective within the same trade sector, than they could search for suspension of concession in other trade sectors.

3. Cross – Agreement Retaliation is performed as a last stage, where neither parallel retaliation nor cross – sector retaliation has been found effective enough, than complaining Member can request for suspension of concession under another Agreement of WTO.

Cross – Sector and Cross – Agreement Retaliation are basically generalized to "Cross – Retaliation".

Historically, exactly US and the whole developed countries block were the one who actually upheld and strongly insisted on including cross – retaliation in DSU. They believed that in case of non – compliance by developing countries, the use of cross –

retaliation under TRIPS would be more effective rather than the "traditional trade retaliation". However so far only developing countries in fact used cross – retaliation against developed countries, mainly US and EC.

Cross – Retaliation was granted to three cases in WTO System, one would be discussed more detailed later.

- In 1995, EC – Bananas III (under Article 22.6 DSU Arbitration) case was the very first case where cross – retaliation has been asked to suspend the concessions under TRIPS agreement. Plaintiff was Ecuador and they have requested for suspension of concessions according to Article 22.2 of the DSU under TRIPS Agreement due to EC non – compliance with Panel's proceedings. Later, in response the EU has requested the arbitration according to Article 22.6 of the DSU. Arbitrators has reviewed the case and granted permission to Ecuador for their request to DSB to suspend the concessions under the TRIPS. After receiving the request from Ecuador, DSB authorized it. However this suspension has never been implemented because in the end Ecuador and EC after years of negotiation has finally successfully settled their dispute.

- In 2003 US – Gambling (under Article 22.6 DSU Arbitration) as it was mentioned before it would be discussed more detailed later. The plaintiff was Antigua and Barbuda and they claimed about US violations according to their commitments under the GATS Agreement in cross – border gambling services. Moreover, since US failed to implement Panel's proceedings than Antigua and Barbuda requested to DSB suspension of concessions according to Article 21.5 under GATS and TRIPS Agreements. After

reviewing the request, arbitrators granted permission to Antigua to request suspension of concessions only under TRIPS Agreement. In this case Antigua and Barbuda also did not request for the suspension yet, since they are still negotiating with US.

- In 2002, US – Upland Cotton (under Article 22.6 DSU). The complaining party was Brazil, who found violations made by US in their provision of subsidies to local cotton producers, which are inconsistent with regulations and obligations of WTO system. Brazil was granted the suspension of concessions under TRIPS, which they are successfully implemented.

3.4. Cross Retaliation

Cross Retaliation has been designed as one of the options of retaliation by focusing mainly on developing countries. Usually cross retaliation is used under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). In the research was stated that usage of cross retaliation particularly under TRIPS is incomparably more effective for developing countries rather than "traditional trade retaliation". Moreover, he claimed that in fact exactly in cases where cross retaliation would be used under TRIPS agreement, developed countries would willing more to comply (Brasheer, 2009). Other Scholars are also highly supporting the usage of cross retaliation, and especially under TRIPS (Spadano (2008), Subramanian and Watal, 2000). However, there were performed some doubts about the effectiveness of cross retaliation under any agreement due to insignificance of small developing countries against too large sized market developed countries (Vranes, 2003).

3.4.1. The stages of Using Cross - Retaliation

As it was mentioned before, Article 22 of DSU is explaining the whole retaliation. The cross – retaliation also included there. After non – compliance of respondent party with WTO rulings within a given reasonable period of time, two parties have the right to negotiate the compensation without involving WTO again. However in cases, where successful negotiation has not been agreed, plaintiff have the right to request authorization for retaliation which includes parallel and cross retaliation. In response, respondent member can object the level of requested concessions and/or claim certain procedures were violated according to Article 22.3 of DSU.

CASE STUDY: US – GAMBLING (ANTIGUA AND BARBADOS)

4.1. Summary of the Case

US – Gambling case was already introduced before and now it would be finally reviewed more detailed. Antigua has given the right according to Article 22.6 DSU to use cross – retaliation under the TRIPS Agreement. However they have never used this right against US. For the five year period of continuous negotiations between two countries in finding the solution did not went that easy for Antigua. As one of the solution, Antigua has decided to launch the website where their citizens would have had the right to download US Hollywood movies, songs and TV – shows without paying the fee to copyright holders. But US absolutely disagreed with this approach by claiming it "government – authorized piracy". In fact this decision caused huge critics and some copyright holders even claimed that in the case if Antigua's government will launch this website, they are going to counter – retaliate against them for their unsanctioned piracy activities.

US – Antigua case was closely followed by mainly WTO members, because the whole case is actually representing the debate that was circulating in public, that WTO created by developed countries and serve for developed countries benefits only. Moreover case represents, the actual nature of cross – retaliation as Antigua's economy is too tiny compare to US and any sanctions would in fact have more adverse impact on complaining party economy rather than vice versa.

4.2. Procedural History

On March 13, 2003, Antigua and Barbuda have send request to the Panel of WTO challenged three U.S. anti-racketeering statutes (the Wire Act, the Travel Act and the Illegal Gambling Business Act) and four state laws as "barriers to trade" in "cross – border gambling services" under the World Trade Organization's service – sector agreement called the General Agreement on Trade in Services (GATS). They were considering that such actions are inconsistent with Articles II, VI, VIII, XI, XVI and XVII and the US Schedule Specific Commitments annexed to GATS. On June 12, 2003, was established a panel. Canada, Chinese Taipei, European Communities, Japan, Mexico and China were chosen as third parties.

In August, 2003 Panel was composed. They were provided with the time till the end of April, 2004 to investigate the case. After negotiation between two parties, they have requested for a numerous times to postpone the panel's proceedings. On November 8, 2004 Panel finally continue their proceedings.

On November 10, 2004 Panel has presented its report. They have stated that USA was in violation of Article XVI:1 and Article XVI:2 (Market Access), since its measures were in the nature of prohibition, which amounted to a "quota" of zero. Antigua could not provide enough evidences that USA has violated Articles VI:1 and VI:3 of the GATS (domestic regulation). Panel found out that these Articles were obligations of a procedural nature, and they would be applicable if USA had made requirements as authorization to their products. Moreover, USA also failed in demonstrating that Wire Act, Travel Act and

Illegal Gambling Business Act are necessary under the Articles XIV(a) and XIV(c) of the GATS (exceptions provisions, incl. public morals). Finally, Panel proposed to implement judicial economy according to Articles XI (payments and transfers) and XVII (national treatment) of the GATS.

In January, 2005 both parties were not satisfied with Panel's decision and therefore they appealed. On April 7, 2005 Appellate Body presented report. They support Panel's decision that USA violated Article VXI:1 as well as sub – paragraphs a and c of Article XVI:2 by setting limitations to the market access which were not specified in its Schedule. However, Appellate Body disagreed that three federal statutes are not necessary to protect public morals and promote public order according to Article XIV(a).

Finally, in April 2005 both reports were adopted by both parties. USA requested for a reasonable time to implement proceedings. They were provided with the time till April 3, 2006. However during the period of implementation both parties have argued according Article 21.5. In March, 2007 Panel performed its report, which stated that USA has failed in performing its obligations. In June, 2007 Antigua and Barbuda again complained to WTO according to Article 22.2 (suspend application to USA of related obligations of Antigua and Barbuda under GATS and TRIPS Agreement). In January, 2013 Panel agreed to grant authorization to suspend the application of United States.

4.3. Explanation of Article 22.6 DSU

Since US did not implement any WTO rulings, and did not participate in active discussion for compensation afterwards, Antigua was in desperate situation. Hence, as a

solution they decided to request for cross – retaliation under both TRIPS and GATS Agreements. The proposed suspension for concessions was evaluated in the amount of $3.443 billion annually. In response to their request, US claimed that Antigua has failed in their request for cross – retaliation because they did not follow with all principles and procedures set in Article 22.3 DSU. In the end, case was submitted for Arbitration according to Article 22.6 DSU.

Arbitrators responded to the US request that Antigua has rights in determining clarifications in Article 22.3 DSU and arbitrators need to review whether principals of Article 22.3 DSU has been followed or not.

Firstly, at initial stage, Arbitrators had to state whether parallel retaliation was not practical or effective. Thus, in US – Gambling case, arbitrators looked whether traditional retaliation under GATS was practical or effective. Since Antigua only made commitments on sub – trade under GATS (Entertainment sector), the suspension negatively affect their local citizens, whereas there would not be any impact on US market.

Secondly, on a later stage, Antigua claimed that their market including major products and services is too much relied on US export. Furthermore they have pointed the fact that Antigua is a very small island with limited natural resources and their tremendous dependence on US imported products and services make for them impossible to raise tariffs as a way of retaliation. The growth of tariffs will lead to rise in prices of all major products and services which in the end would lead to sufferings of local citizens. In

contrast to Antigua sufferings, US economy would not even notice any difference, since their trade with Antigua is evaluated less than 1% of their total trade. Also, Antigua has proposed cross – sector retaliation in some service as "travel and transport service" or sort of "communication service", which were declined by arbitration panel, since the volume of those sectors were extremely small and "switching cost" between providers were too high. Considering these factors, Arbitrators decided that for Antigua it was not practicable of effective to use cross – sector retaliation.

Finally, at the last stage of reviewing cross – agreement retaliation, arbitrators had to evaluate "seriousness" of given conditions and to state whether it is better for Antigua authorize cross – agreement retaliation under TRIPS agreement. Since, there are no given specifications; arbitrators had to interpret it in quite ambiguous way. Considering all the graphs and tables provided by Antigua such as GDP, import/export volume with US, population, territorial size, etc., arbitrators concluded that economic relationships between two countries are extremely unbalanced, which make neither practicable nor effective for Antigua to have their suspension under the same agreement.

As it was mentioned before, arbitration decision was circulated on December, 2007 where it was stated that Antigua followed all principles and procedures of Article 22.3 DSU.

4.4. Comments and Remarks

The decision of granting to Antigua right to cross – retaliate was so obvious, that nobody had any doubts including US. Unfortunately, too tremendously huge imbalance of two economies, Antigua and US, made retaliation under GATS impossible, since it is clearly

obvious that it will bring much more harm to complaining party rather any benefits. Hunter Nottage has mentioned in his work that Antigua has presented quite reasonable facts that their economic costs from retaliation would be rather harmful, therefore they have requested for cross retaliation under another agreement as TRIPS which could be ultimate solution. Particularly in this case, cross retaliation under TRIPS Agreement does sound like a best alternative for the small economy as Antigua's one. In fact their economy would not be harmed at any level, but also citizens could somehow receive moral satisfaction which would lead to so called "welfare retaliation", when Antigua's people can download and watch on the Internet all entertainment videos that US Hollywood industry can offer them.

However despite the reasonable arguments of benefits of cross – retaliation, it seems that both parties were unsatisfied with rulings. US were not happy with the granted permission of cross – retaliation under TRIPS Agreement to Antigua, although the amount of sanction was not that significant, whereas Antigua were also not quite satisfied by switching from multi – billion dollar industry to $21 million. But despite the dissatisfaction of both sides, US – Gambling case and EC – Banana case are currently precedents in WTO system where developing countries actually managed cross – retaliation within the system.

As it was mentioned before, Appellate Body's report was performed in the end of 2007, but Antigua remains quite during the later five years where they conducted negotiations with US in finding reasonable solution. In 2013, Antigua finally request to DSB the

authorization for cross – retaliation, because during the years of negotiation, US did not show any will for cooperation and in fact was not active in finding the solution, hence Antigua has no choice but to request cross – retaliation and thereby force US to make actual movements for concessions.

AREAS OF REFORMS OF DSU TO PROTECT DEVELOPING COUNTRIES

5.1. Non – compliance: different perspectives at the end of the WTO process

Implementation stage is well – knowingly considered as the most difficult and ambiguous one in the whole WTO process, starting from request for consultation and ending up with regulations of implemented recommendations and proceedings. Although WTO has considered as one of the most prominent International System, there are cases of non – compliance by some of Member countries, especially when there are involved quite serious interests that are affecting their internal economies. As it was discussed before, DSB includes request for retaliation, but the list of non – compliance case where Member state did not implement, delayed or is still disputing is increasing.

Non – compliance generally is lying outside of WTO obligations, but instead in so named "internal front", when State need to face local industries that were ruled for compliance. Domestic groups are not willing to give up easy and follow the international rules for their own disadvantage. Therefore, in most cases, it is easier to follow DSB recommendations and proceedings when it could be achieved through "administrative action under the control of the executiveas opposed to legislative action"[6]("i.e. opposed to political interests insuperpower States)"[7]. Furthermore, according to number of cases, that involved problems with its implementation it is surprisingly to observe, that majority of them were closed because of expiration of the time when Member can request for further sanctions. Considering these factors, the "horizontal enforcement"(i.e.

[6] Wilson; see note 13; p 399
[7] Choi; see note 1; p 1050

enforcement through trade sanctions imposed by one member state against the other)[8] is the only way for proper operation of WTO compliance system.

"Verticalization" of the WTO system seems ineffective, since the granting of suspension in order to pursue the common interests is not reasonable as one of the Member state would be in the end harmed which is also contradicts to the core principal of WTO - the promotion of free trade.

There is also appeared the fact that WTO principles are not providing any effective solutions for applicable methods of implementation that Member states should follow. Also, WTO system is also not stating any direct solution for effective implementation. Currently, there are on-going debates of promoting the solution of this ambiguous situation.

5.2. Proposals for the improvement of special and differential provisions in the WTO dispute settlement system

The proposal was presented in fact by two groups as LDC and African one, where they proposed to include for panel the requirement to evaluate the development aftermaths of the reviewed case and also to take into consideration how their recommendations and rulings will actually affect the economy as well as welfare of complainant party. By considering these factors, DSB should make their final recommendations.

Davey (2004) mentioned in his work, that such reform would be as a great benefit for the vulnerable economics of developing countries. The idea, of considering the consequences

[8] Assessing the Effectiveness of International Courts, by Yuval Shany, p 209, Oxford Unviersity Press, 30 Jan, 2014

of DSB ruled recommendations, would positively affect particularly developing countries. Since, as it was mentioned before, developing countries are winning the case, they are not able to actually implement DSB recommendations and proceedings due to harmful consequences for their own small economies. However, proposal seems reasonable for consideration, in real practice DSB is making decisions according to reverse consensus which contradicts to the proposed solution.

The consideration of consequences which implemented recommendations would do to developing member's economics is highly beneficial for them, thus now LDC and African groups are trying to introduce it as reform for DSB.

5.3. Cross – Retaliation as a countermeasure for Developing Countries

In this Chapter it would be finally reviewed more closely cross retaliation and there would be provided comparison it to traditional trade retaliation. Moreover there would be given emphasize of cross retaliation under TRIPS Agreement and its beneficial sides for developing countries. As well here would be mentioned alternative retaliation techniques as financial compensation.

The actual requirements of using Cross – Retaliation

As it was mentioned before the authorizing of cross – retaliation is going under Article 22.3 DSU. Firstly, usually parallel retaliation would be reviewed at first, and in case if it would be considered not effective or practicable enough, than cross – sector retaliation is requested and finally if conditions and circumstances of the particular case is "serious enough" the last stage of retaliation could be requested.

“Practicable or not effective enough” basically could be explained separately. The term “practicability” could be described on the example of China. Since Chinese financial market is still closed, in the case if their external financial activities would be somehow violated by actions of another country, e. g. US, than it is not practicable to use retaliation in financial sector, since China lack of any financial import. Furthermore, the term “effectiveness” underlines the idea that impact of proposed suspension of concession must be strong and actually lead to results in compliance. If one of requirements is fulfilled, than parallel retaliation would be used.

Article 22.3 DSU also provides with explanation that to move between cross – sector and cross – agreement retaliation is enough to present that proposed suspension for concession either not practicable or not effective.

The other term “serious enough” unfortunately does not have clarification in DSU interpretation, as a result it creates the ambiguous atmosphere for WTO members. In both cases, where cross – retaliation was granted, EC – Banana and US – Gambling, arbitrators decided to follow the contextual guidance by referring to Article 22.3 (d). They have looked through the trade itself and the importance of it to complaining country and they have evaluated wide range of possible economic consequences applicable to both member countries. Generally speaking, to prove the term “serious enough”, complaining party should provide to arbitrators as much as they could find information to make them look as more pitiful “victim” as possible.

All requirements stated in Article 22.3, practicability, effectiveness and serious enough, unfortunately are not that easy to be proven, however luckily it is not stopping developing countries from trying to use it. In July, 2006 Cuba, India and Malaysia proposed new provision in Article 22.3 DSU where there would be stated that in cases where developing countries would be against developed countries, they would automatically have the right to request the authorization to seek for suspension of concession in any sector and under any agreement.

5.3.1. Cross – Retaliation Current Practice

Cross – retaliation is a powerful mechanism in WTO system, however its underestimation represents in a very small number of cases that used this tool. Due to rare number of usage this technique, cross – retaliation was mostly considered as a part of an Article rather than viewed as a powerful tool for developing countries to face the power of developed states.

It is not surprisingly that cross – retaliation started to be used recently together with the increase of power of developing countries as Brazil, China, India, etc. It is obvious that unfair trade could not be reduced and imbalance between markets would exist in nearest future. Developed countries are not easily giving up their positions, therefore they are trying to protect their domestic markets as much as they could by imposing trade barriers. Currently it is a sad fact that developing countries do not have power to countervail developed countries due to their trade insignificance and any of their traditional trade retaliation are not affecting developed countries economies, consequently they are not

active in persuading implementation of DSB recommendations and rulings. Developing countries in this case have no other choice to influence for trade injustice. Three cases that have used cross – retaliation in fact served as a quite influential tool for bargaining with developed states. Hence, for now according to facts, cross – retaliation is useful mechanism for developing countries to pursue in their trade war with developed states.

5.3.2. Cross – Retaliation under the TRIPS Agreement and Consideration of Transferable remedies

First of all it should be clarified why there is mentioned TRIPS agreement and not GATS. Marko Wuorinen has explained in his article that cross – retaliation performed by TRIPS or GATS in the end would have absolutely different effects. Also, it is doubtful that retaliation in service is very different than retaliation in goods.

Cross – retaliation under GATS in the end would work the same as suspension of concessions, e.g. in economic terms, suspension under GATS Agreement will eventually lead to higher costs or lower quality of services which as a result will give less variability to domestic customers.

Secondly, since core basement for all developing countries is liberalization of trade, under GATS Agreement their options are limited due to the fact that developing countries should impose any measures only in trade service and modes of supply. Hence, the variety of trade sectors that could be reviewed is shortened.

In comparison to so many limitations of using cross – retaliation under GATS Agreement, it is seemed that TRIPS Agreement is a better solution.

TRIPS agreement is very attractive to developing countries, because of Intellectual Property Patent rights which imply high technology. One Intellectual Property Patent can transform the entire industry. Also, the value of Intellectual Property Patent rights is tremendously high and could affect the price, volume and quality of products and service. Developing countries are weak in new technologies and that's the key factor for them to use TRIPS, where they can receive the right to use certain Intellectual Property Patents. There are two main benefits that could be highlighted in using TRIPS agreement in suspension for concessions by developing countries.

Firstly, suspension in TRIPS obligations can lead to economic development of a country in such industries as supplement of pharmaceuticals, development of entertainment products and access to technical information of industrial equipment. Intangible Property Development under TRIPS Agreement can lead developing country to a next level in important industries that will influence on improvements of welfare inside the country. Innovation in pharmaceutical industry as well as in technological aspects will boost overall development of a country.

The records of cases where cross – retaliation has been granted can clearly provide evidences, that it actually helped for developing countries to set up compliance. In the US – Upland Cotton case, as soon as Brazil has published the list for proposed measures under TRIPS agreement according to given cross – retaliation rights, US started to be more active engaged in dialogue. Even though Brazil has announced their upcoming activities of their intentions according to implementation of cross – retaliation under TRIPS, month later they notified DSB that they are willing to postpone their

implementation of cross – retaliation. Just a few months later, Brazil and US has signed mutually beneficial agreement and the case was solved. The dispute was actually solved in a bit more than four months, which is relatively fast. And it is was actually fastened after Brazil's release of Intellectual Property industries that they were going to suspend under TRIPS agreement. Those industries included pharmaceutical, agricultural, etc. could be also described as politically sensitive. Hence, the published list of proposed industries made US to reconsider their positions. In EC – Banana case, the same situation could be observed. Their proposed list of goods included suspension of Intellectual Property rights in industries as industrial design, music one and also they have put geographic indications for alcoholic beverages. These actions led EC to reconsider their settlement terms they have proposed before. As a result, they have reconsidered their actions and offer better settlement in Banana market terms. The cases are approving the fact, that developed countries are starting to revise their settlement offers right after developing country received authorization for cross – retaliation.

Recently cross – retaliation performed under TRIPS agreement was involved in hot debates, which generally could be summarized into the idea that this technique is pursued particularly by developing countries against developed countries. There could not be done a lot of research on this topic, since throughout the whole history of existence of GATT and WTO, there have been only three cases who actually granted the right to use cross – retaliation and in the end till now nobody actually has implemented it yet. All three cases were settled without using cross – retaliation, and also they are approving the statement

that cross – retaliation under TRIPS is used by developing countries against developed one:

- EC – Banana case, Ecuador against EC;
- US – Gambling case, Antigua against US;
- US – Upland Cotton case, Brazil against US.

5.3.3. Limitations of Developing Countries in fact to implement Cross – Retaliation

Cross – Retaliation is seemed as an optimistic approach for developing countries to use vis-à-vis developed countries, however because of political pressure, cross – retaliation seems unlikely to be implemented by many WTO member countries. Moreover, the track record with all cases supports the idea, that cross – retaliation is not in a favor by any countries. Mostly, the political pressure could be described as a fear of developing countries to experience retaliation against retaliation performed by developed country and since economy of developing country is too dependable on trade with the latter one, they prefer not to use cross – retaliation.

In the case US – Upland Cotton, when Brazil has issued the list of goods for retaliation, they were afraid of US counter – retaliation. US could have withdrew their offer of $2.5 billion in trade privileges that they have agreed earlier according to their generalized system for preferences. Before the publication of that list, US warned Brazil according to their suspension of concessions under TRIPS agreement. However in the end, US did not pursue aggressive strategy and the whole case was solved.

Cross – retaliation has all benefits for developing countries to use it, but the fear of getting into trade war by using this tool is prevailing the benefits of this technique. This belief was hold before, however recently according to US – Gambling case, where Antigua in fact used cross – retaliation, the trade war did not started. The counter – retaliation actually is not allowed in WTO and in case if this retaliation vs. retaliation has taken place, WTO have authority to deal with it. Also, aggressive tactics performed by any WTO member country will ruin their image and prestige in international trade world.

Also it should be taken into consideration, that one of the benefits of cross – retaliation is that even in receiving the permission to use cross – retaliation, complainant party has still the right to actually implement it or not. Mostly, the granting right to use cross – retaliation could be seen as an additional bargaining factor for developing countries to trade better deal and receiving more beneficial compensation from developed country. It should be highly underlined, that for developing countries sometimes it's a way more beneficial to have the right to cross – retaliate rather than actually to implement cross – retaliation decision.

Till today, there are no cases with actual implemented cross – retaliation. But it does not mean that it will not occur in the nearest future. The cases of using cross – retaliation has been raised already to three, therefore there is no doubt that sooner or later some WTO member would actually use cross – retaliation granted rights till the end.

5.4. Alternative Retaliation: Financial or Monetary Compensation in the WTO system

Currently in cases where respondent member failed to comply with DSB rulings and recommendations, WTO system is providing two choice of further development of the case as trade compensation or retaliation. According to Article 22.2 DSU trade compensation can be achieved through the agreement between two members, which in real cases is hard to reach. Unfortunately such compensation can lead to harmful impact for industries that were not involved in dispute. Moreover, there is possibility that it would negatively affect both countries respondent and complaint. The other choice that WTO is proposing as retaliation is trade restrictive. It is too harmful for developing countries to use it against developed countries. As it was mentioned before, for developing countries it is basically impossible to stand against the developed countries. Their economies are suffering a way more than the developed one's even though they won the case.

Considering the weakness of current techniques that WTO system contains, there could be introduced Financial Compensation. According to Public International Law the wrong act done by government could be covered financially. In fact, this proposal has history of nearly 50 years, since it was firstly introduced even in 1966 when GATT was existed. Bronckers and Broek (2005) provided the positive feedbacks of introducing financial compensations:

- The most important factor that was pointed out is that it is not trade restrictive.

The other factors contain such information as:

- Financial compensation is helping to reimburse the injury,
- It might work better than forced compliance,
- Financial compensation would not affect other industries,
- Protective factor in delaying the implementation of DSB recommendations and rulings process
- It is in compliance with Public International Law

Finally, they also stated the fact that financial compensation can bring justice between countries.

However despite the great advantages of financial compensation proposal, there are as well discussed various shortcomings.

For promoting financial compensation to actually work, there should be some elements to be followed:

1. Financial Compensation should be evaluated according to damages that were caused
2. The complaint member should have the right to choose between financial compensation in terms of monetary retaliation and traditional trade retaliation
3. Financial compensation should be available for developing countries or small economic developing countries
4. Financial compensation should be available for violations of all agreements of WTO
5. Financial compensation should be provided in terms of monetary retaliation which should be calculated referring to the time when violations initially took the place

Finally, it is important to note that financial compensation promotion should not replace other remedies, but cohabitate with them and provide more option for WTO members in dealing with cases where non – compliance appeared.

Financial Compensation was reviewed for years, and considering the fact that it does not provide new system, but rather adding variety for WTO remedy procedure, it is reasonable to revise it for actual reform of DSU. Also, for developing countries this approach seems more favourable, since they are more likely to receive monetary compensation rather than any other trade connected remedies, which in any case at some level has reversed effect on their economies.

As a good example for supporting the introduction of Financial Compensation could be taken US – Copyright case. Although there are two developed countries opposing each other, the agreement they have concluded reflects the usage of financial compensation in real life. US and EC have signed temporary agreement during the time of implementation under Article 22 DSU that US provide special payment to a certain EC body. O'Connor and Djordjevic (2005) stated that financial compensation theoretically could be processed. Moreover, they also have suggested that in case of including the financial compensation, there should be done reforms on all levels in WTO system rather than only in judicial part as it were done in US – Copyright case. Finally, there should be also followed main rules of WTO as transparency and predictability.

As it was mentioned earlier, the actual including of financial compensation has various difficulties. A lot of WTO Members has to authorize it according to their legislature, which is leading to a great delay. Also, there is controversial situation with financial

compensation in a sense, that it in small cases, it could be the fastest and easiest solution for resolving the dispute whereas in big cases, it would not be neither effective nor practical to use it. Furthermore, in some cases financial compensation is not reasonable to use, e. g. in the cases of providing subsidy to complainant member for the purpose of stabilizing the non – compliance.

Financial Compensation has its weak and strong sides, however it is highly recommended to review it for further reform of WTO system. Despite its weak sides, financial compensation can be seen as a tremendous help for developing countries to use it in cases where they can't stand to developed countries. Developing countries can use financial compensation instead of trade retaliation which sometimes could be too harmful for their economies, or in cases where non – compliance existed and developed countries are not willing to set satisfactory compensation and case is postponed for years, which in the end turned to harm developing country's economic situation much more even though they have won in WTO and proved to be "the right". But due to their lack of economic power, they are the one who are suffering. Considering these facts, financial compensation should be reviewed more detailed and it will serve as a great help for developing countries and possibly could encourage some of them to actually claim their rights and stand against developed countries.

MAJOR SUGGESTIONS AND RECOMMENDATIONS FOR DSU REFORMS

6.1. Major proposals for DSU

In this chapter would be discussed issues concerning DSU reform. Mostly it would be focused on exactly those DSU reforms which are anyhow connected to developing countries and will serve for their benefit and enhancing their chances to use the WTO system more frequently. Moreover in this chapter there would be paid more attention to the proposal for improvement of retaliation procedure as well as compensation for suspension of concessions.

6.1.1. Possible general enhancement of the WTO – DSU system

6.1.1.1. Strengthening the Compliance Monitoring System of DSB

Panel's report issued by Dispute Settlement Body is supervised under Article 21.6 DSU where stated that DSB has the right to monitor the implementation of WTO rulings and recommendations. Therefore, DSB should be strengthened. It is necessary because exactly DSB under Article 21.6 DSU is pressuring WTO members to comply with the final recommendations and rulings. Furthermore, during DSB meetings, non – compliance can be raised which will show to other WTO members that WTO system is reliable and working properly and countries do in fact follow the rules, so that there would not be doubts in WTO system. Also, developing countries could support each other in raising their concerns and be able to speak up.

Another factor that supports modifications of Article 21.6 DSU is the Chairman's Text. According to the mentioned Article 21.6 DSU, member has time period of 30 days for informing the adoption of DSB recommendations and rulings, however there is proposal to shorten it to 10 days. As a result it will lead to shorten the overall time for implementation of WTO rulings. As it was discussed before, for developing countries it is crucial to wait, since their economies are small and in a stage of developing, any trade issues between countries are vulnerable for their economies and negatively affect their markets. The reduction in a given period of time for a country to revise DSB recommendations and rulings from 30 days to 10 days will help not only to fastened the process of compliance but also will have a positive impact on developing countries economics.

6.1.2. Proposals to enhance the value of compensation

6.1.2.1. Request for Compensation

The rules and procedures for compensation is stated in Article 22.2 DSU. Chairman Text's proposed also some modifications in the requests for compensation. Proposal contains that as soon as request for compensation has been sent to DSB, the compensation proposal should be performed within 20~30 days period of time. Also, the most important modification could be considered the mentioning of possible acceptance of non – trade compensation. The main purpose of this proposal is to increase the choice

of compensation over suspension of concessions. Compensation is standing for liberating the trade, whereas suspension of concessions and other obligations are for the restriction. Furthermore, as it was mentioned before retaliation is contradicting the very first principle of WTO as promotion for free trade. Therefore creation of prosperous environment for the promotion of compensation over retaliation would be useful modification in DSB. Also for developing countries, the usage of compensation is more beneficial rather than trade restrictions, which is negatively affect their small economies.

6.2 Sanctions exceeding nullification or impairment

There is proposal to actually review the impact on economies rather than only take into consideration the level of nullification and impairment. Bronckers and van den Broek (2006) has stated:

"Whatever instrument one uses, as long as the level of retaliation, compensation or monetary compensation is calculated the way it currently (e.g. based on the level of trade concerned in the case of GATT violations), a small (developing) economy is at a disadvantage compared to a large (developed) country in terms of the pressure it can exercise on a non – complying Member."

Basically, there should be review reforms in Articles concerning special and differential treatment of developing countries. One of the proposals could be clarification in cases where developing country is against developed country, it would be more effective to take into consideration in evaluation the suspension of concessions not only the level of nullification but also to review the whole impact of those sanctions.

Another proposal that could be reviewed for the reform of DSU is that the level of nullification or impairment that have been defined by arbitral decision should be multiplied considering the fact that it is at least twice more than the amount that DSB has proposed for their suspension of concession or other obligations.

Finally there is proposal of raising sanctions over impairment as times goes by, which includes psychological effects.

These proposals actually refers mostly to cases involving developing countries against developed countries, where great imbalance between economies lead to controversial effects for both sides. Therefore with following proposals for reform it would balance costs and benefits for both complainant and respondent.

6.3. Relief for legal costs

The legal costs for each WTO cases are extremely high, which not all developing countries can afford. Due to their lack of "legal expertise" they have to hire expensive legal advisors and consultants from US and Europe. Therefore there could be provided proposal of providing the reimbursement of legal costs by developed country to developing country in a cases where they have been found in violations of WTO commitments. It could be based on the provision of special and differential treatment of developing countries. Hence, in cases where developed country has been found in their inconsistence with WTO provisions or in cases where developed countries have failed to prove their claim that they brought to WTO against developing countries, Panel or AB of DSU should evaluate and set up a reasonable amount of legal costs and other related expenses that were spent by developing country, and developed country should redress it.

Moreover, this proposal will help to fasten the compliance process by developed countries and will stop them to request for the AB just in order to delay the implementation where it is obviously that they have violated WTO provisions.

Currently, there have been established Advisory Centre on World Trade Law (ACWL) which somehow supports the proposal of high legal costs. The main purpose of this Centre is to provide legal trainings, support and consultations on WTO Law and dispute settlement procedures to developing countries, mainly to small economies countries. They charged according to the share of the world trade and per capita GNP of user governments.

In some cases developing countries are not using WTO system because of its high legal costs and it is easier for them to negotiate directly with developed country and close the deal, even though they would not fairly benefit from that deal. This situation is absolutely contradicts to WTO goals which stands for free fair trade and supports the belief that WTO has designed by developed countries and it serves only for their benefits. Therefore the reduction of legal costs will encourage developing countries to use WTO system more frequently and it will make them to trust in system more.

CONCLUSION

Throughout the research there have been reviewed detailed aspects of WTO as well as DSU. WTO is international organization and is operating under International Public Law. There have been discussed various reasons for non – compliance of Member states. And according to that there were pointed various weak sides of almost perfect negative consensus based WTO DSB system. For their almost 20 years of existence, the number of resolved disputes makes quite clear the provement of successful working system.

Despite their successful performance, there are still some parts that needed to be improved. Especially, there should be paid attention to the last part of DSB Settlement process as implementation of given recommendations and rulings. Furthermore, focus should be directed to procedure of suspension of concessions.

Developing Countries are becoming relatively active in using WTO system, however there are still belief that WTO was created by developed countries and it is mainly used for the benefit of developed countries. Therefore, Member with developing economies did not trust the WTO system.

In cases where Developed Countries were brought to WTO against Developing States, non – compliance of the first one led to realization of latter ones of not having much power to induce developed countries to follow the DSB recommendations and rulings. Even considering the fact that it is mandatory for all members to follow the DSB recommendations, developed countries are skilled enough to make the disputes last for ages, whereas it is too harmful for developing countries to wait. Therefore retaliation

process was discussed very detailed with a great emphasize on cross – retaliation technique by switching to TRIPS Agreement. By reviewing the precedent cases, it showed quite interesting situation with usage of cross – retaliation by developing countries against developed ones. Although it brought positive influence and actually helped to solve the dispute, but still there were discovered some shortcomings of this mechanism.

Unfortunately, even though WTO was designed for trade liberalization, the great imbalance between Member's economies is involved in willingness of states to follow the DSB recommendations and rulings. Traditional retaliatory measures require developing countries to raise tariffs however in some cases it is negatively affected to the complainant party. Therefore using cross – retaliation in TRIPS Agreement will give an advantageous position for developing countries to bargain their rights.

Throughout research it was concluded that receiving rights in IP area will in fact give great benefits for developing countries to develop both economics and welfare. Cases that were reviewed supported the idea of successful usage of cross – retaliation under TRIPS Agreement. Although among three cases, that were granted authorization to use cross – retaliation, for today none of them have actually implemented it, but it gave developing countries the power to bargain better settlement with developed states.

Overall it could be concluded that there is high potential for cross – retaliation under TRIPS Agreement to be used as a successful retaliatory measure for developing countries vis-à-vis developed ones. Although it will include high political pressure between states,

in some cases developing countries do not have any other choice but this. Unfortunately, suspension of concessions under TRIPS Agreement could not be applicable to every case, rather to developing countries with suitable market size and certain level developed technological basement.

APPENDIX

Figure 2. Developed and Developing Countries as Complainants

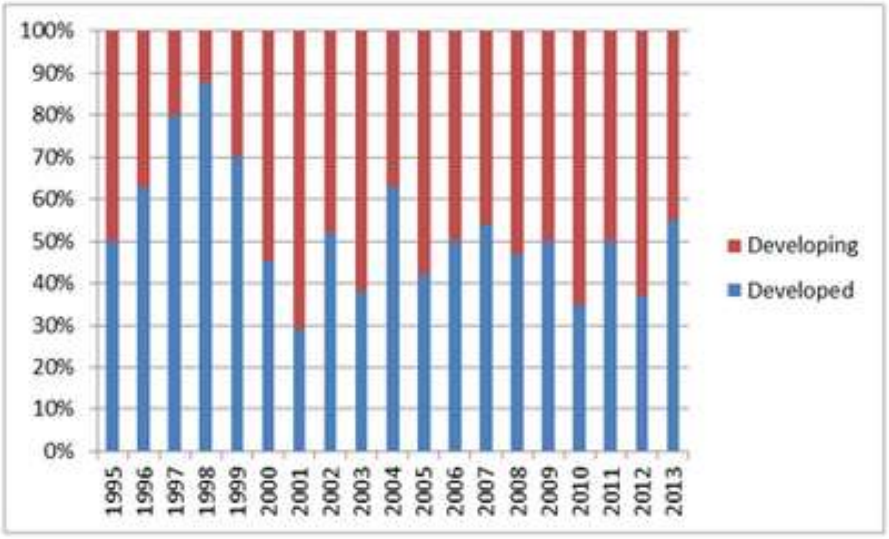
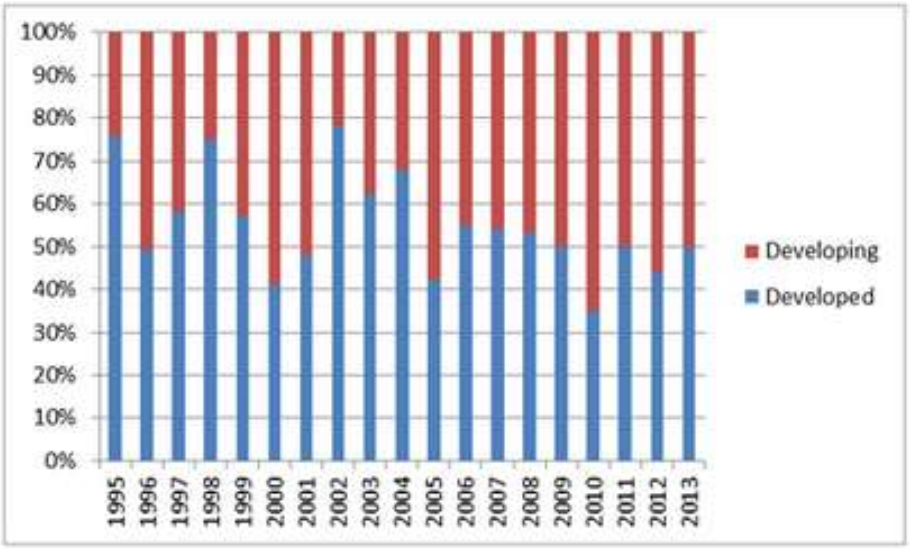


Figure 3 Developed and Developing Countries as Respondents



REFERENCES

WTO Cases:

EC - Bananas III (WT/DS27)

US – Upland Cotton (WT/DS267)

US - Gambling (WT/DS285)

US – Shrimp (WT/DS58)

WTO Agreements:

- General Agreement on Tariff and Trade 1947

- General Agreement on Tariff and Trade 1994

- Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement Establishing the World Trade Organisation, 1995

- Agreement Establishing the World Trade Organisation, 1995

Books/Articles/ Related Documents

- *Award of the Arbitrator, United States – Subsidies on Upland Cotton – Recourse to Arbitration by Brazil under Article 21.5 of the DSU,* WTO DOC WT/DS267/AB/RW 2 June 2008, DSR 2008:V
- *Award of the Arbitrator, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under* Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000 DSR 2000:V, 2243
- Jackson, J. H. (2006). *Sovereignty, the WTO and changing Fundamentals of*

International Law. New York, USA: Cambridge University Press.

- Thomas, Ch. and Trachtman, J. P. (2009). *Developing countries in the WTO Legal System.* New York, USA: Oxford University Press, Inc.
- A Handbook on the WTO Dispute Settlement System. (2005) *World Trade Organization*. Cambridge, UK: Cambridge University Press
- Rosendorff, B. P. (2005). "Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure". *American Political Science Review. 99 (3).* August, 389-400
- Bown, Ch. P. (2004). On the Economic Success of GATT/WTO Dispute Settlement. *Review of Economics and Statistics. 86 (3).* August 811-23
- Bush M. L. and Reinhardt E. (2003). Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement. *Journal of World Trade. 37 (4).* 719 – 35
- Guzman A. T. and Simmons B. A. (2005). Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes. *Journal of Legal Studies. 34 (2).* June, 557-98
- Smith, J. M. (2003). WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings. *World Trade Review. 2 (1).* 65-100.
- Narlikar, A. (2005). *The World Trade Organization.* New York, US: Oxford University Press, Inc.
- Hoekman, B. M. and Mavroidis P. C. (2007). *The World Trade Organization: Law, Economics and Politics*. New York, US: Routledge

- Managing the Challenges of WTO Participation. (2005) *World Trade Organization*. New York, US: Cambridge University Press
- Khor, Martin. The Proposed New Issues in The WTO and the Interests of Developing Countries. *Third World Network*. Retrieved April 6, 2014, from http://www.twnside.org.sg/title/mk10.htm
- Ra once against the South (Trade and Development Series No. 9). *Third World Network.* Retrieved April 6, 2014ghavan, Chakravarthi. The World Trade Organization and its Dispute Settlement System: Tilting the bala, from http://www.twnside.org.sg/title/mk10.htm
- Kawase, Tsuyoshi. Challenges and Prospects for WTO Dispute Settlement Process: What Developed Countries Must Do to Maintain the Multilateral Trading System. *Research Institute of Economy, Trade and Industry, IAA.* Retrieved April 6, 2014, http://www.rieti.go.jp/en/special/policy-update/018_5.html
- United States – Anti-Dumping Act of 1916, (2004) *Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB
- Bronckers, Marco, and Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Resolution*, 8 J. OF INT'L ECON. L. 101, 103.
- Charnovitz, Steve (2001)*Rethinking WTO Trade Sanctions*, 95 AM. J. OF INT'L L. 792, 803

- Abbott, F. M. (2009) *Cross-Retaliation in TRIPS*: Options for Developing Countries. ICTSD Programme on Dispute Settlement and Legal Aspects of International Trade, Issue paper No. 8. Geneva: International Centre for Trade and Sustainable Development.
- Assessing the Effectiveness of International Courts, by Yuval Shany, p 209, Oxford Unviersity Press, 30 Jan, 2014
- Basheer, S. (2009) Turning TRIPS on its Head: An "IP Cross Retaliation" Model for Developing Countries. In: *Law and Development Review*, Vol. 2, No. 1. Published online at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093284>.
- (2003) *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlemen*t. In: Journal of World Trade 37(4), p. 500–754.
- (2010) *Research Handbook on the Interpretation and Enforcement of Intellectual Property under WTO Rules*. UK: Edward Elgar Publishing Ltd.
- Held, D.; McGrew, A. (2003) The Great Globalization Debate. In Held and McGrew. *The Global Transformations Reader*: An Introduction to the Globalization Debate. 2 ed. Cambridge: Polity Press.
- Hoekman, B. (2002) The WTO: functions and basic principles. In: English, P.; Hoekman, B.; Matoo, A. *Development, Trade and the WTO*. Washington, DC: The World Bank.
- Hoekman, B. M.**;** Kostecki, M. M. (2002) *The political Economy of the World*

Trade System: The WTO and Beyond. 2 ed. Oxford: Oxford University Press.

- Laurie, G.; MacQueen, H.; Waelde, C. (2008) *Contemporary Intellectual Property*: Law and Policy. Oxford: Oxford University Press.
- O'Connor, B and Djordevic, M, " Practical aspects of monetary compensation, the US-Copyright case" (2005) 8 *Journal of International Economic Law* 127
- Palmeter, D and Mavroidis, P (2004) *Dispute Settlement in the World Trade Organisation*: *Practice and Procedure* (2nd Ed) Cambridge.
- Charnovitz, S "Rethinking WTO trade sanctions"(2001) 95 *American Journal of International Law* 792
- Basheer, Shamnad. (2009). ―Turning TRIPS on It's Head: An IP ‗Cross Retaliation' Model For Developing Countries‖. *Law and Development Review,* Vol. 2, No. 1, 2009
- Bown, Chad P. (2004b). ―Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes.‖ *The World Economy*, Blackwell Publishing, p 40-75.
- Davey, William J. (2005). ―The WTO Dispute Settlement System: The First Ten Years‖. *Journal of International Economic Law*, 10 – 46.
- Evans, David and Gregory C. Schaffer (2010). ―Introduction‖. in Shaffer, Gregory C. and Ricardo Mélendez-Ortiz: *Dispute Settlement at the WTO. The developing country experience*. Cambridge: Cambridge University Press.