IS WORLD TRADE ORGANIZATION (WTO) DISPUTE SETTLEMENT SYSTEM UNDERUTILIZED? AN ASSESSMENT FROM THE WTO MEMBERS OF THE SOUTH PACIFIC REGION

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INTRODUCTION

The dispute settlement system of the World Trade Organization (WTO) is widely considered a success story the World Trading System.[1] It is infrequent in public international law that there exist a judicial system that provides binding third-party adjudication of international disputes between sovereign states. In May 2017, the WTO dispute settlement mechanism records a number of cases processed at 580, comprising of 524 regular cases, and 56 Dispute Settlement Understanding Article 21.5 cases (compliance disputes).[2] It is also probably the busiest international dispute settlement system in the world. By way of comparison, the International Criminal Court exists about 15 years, and has dealt with only 23 cases and issued six verdicts.[3] The International Tribunal for the Law of the Sea is in existence as long as the WTO and has to date dealt with 25 cases.[4] The only system that competes with the WTO in number of cases is that of international investment arbitration.[5] Although, on the one hand, the wide use of the WTO dispute settlement system no doubt reflect its success the system is far from perfect, and has drawn criticisms.

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[1]See WTO, 2009 Press Releases, PRESS/578 (6 November 2009) WTO Disputes Reach 400 Mark, available here: https://www.wto.org/english/news_e/pres09_e/pr578_e.htm (Accessed 17 March, 2019).
[2] See: http://worldtradelaw.net/databases/basicfigures.php (Accessed 19 March, 2019).
[3] See: https://www.icc-cpi.int/about (Accessed 20 March, 2019).
[4] See: https://www.itlos.org/en/cases/ (Accessed 20 March, 2019).
[5] See: http://investmentpolicyhub.unctad.org/isds (Accessed 20 March, 2019).

There exists a significantly large body of scholarship on the WTO Dispute Settlement Mechanism (DSM). Such a body of writings poses an enormous task of investigation, one far too large to be perfected without diverting the focus of this paper. However a refined approach is employed in the process to better understand the elements of participation in disputes, and the impact of dispute settlement in the WTO process.

Most trade legal scholars, trade experts and legal trade practitioners agree that the DSM is one of the key elements for handling trade disputes, which in turn facilitates the exchange of goods and services between its member states. Conversely, the WTO itself does not provide an enforcement agency or agencies to ensure that defendants comply with a respective ruling. If the complainant believes that the defendant does not properly implement a ruling, it can use retaliatory measures, i.e. trade sanctions, to self-enforce compliance after an implementation dispute ruling has acknowledged the complainant's right to do so. Thus, ultimately the effectiveness of the WTO's DSM in resolving a trade dispute relies in significant degree on members' capabilities to comply with trade rulings.[6]

The paper attempts to look at the reasoning behind certain WTO members' lack of participation in the dispute settlement process of WTO. A particular focus will be on the South Pacific Island members of WTO and their participation at the Dispute Settlement Mechanism (DSM). At the outset discusses the WTO Legal Framework, then look at the South Pacific Island WTO developing members and the DSM, barriers to participation in the WTO's DSM, and in its conclusion summarises the challenges faced by the South Pacific WTO members.

WTO Legal Framework

This paper is not intended to describe in a particular way the manner the WTO DSM procedure operates; however will attempt to present briefly the WTO procedural

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[6] Lee & Teresa, 'Weak Vs Strong Ties: Explaining Early Settlement in WTO Disputes' (2017) 7 EconStor https://www.econstor.eu/handle/10419/162700 (Accessed 27 February 2019).

dispute settlement approach. When a dispute arises amongst the WTO member states, the initial attempt is to try to resolve the trade dispute through consultations. The second stage is to invoke the panel process if the consultation fails to reach settlement. The third stage is where the losing Party not satisfied with the panel ruling may appeal to the Appellate Body, comprised of seven independent persons. The conclusions and recommendations of the Appellate Body are automatically adopted by the Dispute Settlement Body unless there is a consensus not to adopt, which has never occurred. Parties may comply with the decisions of the panel and Appellate Body, the preferred result, but also can decline to comply.[7]

The WTO agreements specify an advantageous series of provisions for developing countries, and the difficulties encountered by the South Pacific WTO members appear more sharply in the sphere of the DSM. Indeed, in the framework of the WTO negotiations, the South Pacific WTO developing members can act in concert when they consider their interests sufficiently common, but the situation is usually very different in the DSM procedure since the litigation is specific and concerns a limited number of countries (focused on a trade measure which triggered the dispute). The WTO establishes some legal provisions specifically intended for developing countries, including the South Pacific members, but there are difficulties encountered by these developing countries: although assistance can be requested of the WTO secretariat, or through the Advisory Centre on WTO Law (ACWL), the Secretariat is limited in the scope of its advisory capacity since specific advice would then call into question the impartiality of the institution. On the other hand, the ACWL can provide extensive legal counsel in proceedings, as their purpose is to provide WTO training, and assistance with regard to pursuing specific cases.

A frequent allegation in the policy debate over the workings of the DSM is that participation is biased to the disadvantage of poorer or smaller countries.[8] These claims

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[7] Besson & Mehdi, 'Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis', (2004) 13 *Journal of Economic Literature,* see https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf (Accessed 1st March 2019).

[8] Gregory Shaffer, 'Developing Country Use of the Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining' (2005), see

take various forms: for instance, it is argued that developing countries do not launch complaints as frequently as other WTO members, or that they are targeted more frequently by richer WTO members.[9] Research examining these claims and focusing on the determinants of participation in the South Pacific WTO member states in the DSM is developing. Horn and Mavroidis based on their investigation of the other developing countries participation argue that in order for a claim such as "developing countries do not complain as often as they should" to be meaningful, there must be a way of counting participation, and the manner in which this is done may have an important effect on the outcome of the investigation.[10] They posit the simplest solution is to count whenever a consultation request is registered by the WTO Secretariat (as indicated by a new Dispute Settlement number being assigned) as a dispute. This, in their view, has been the path followed in much of the descriptive and quantitative legal literature. Such an approach is based on a number of implicit assumptions; for example, in *Bananas DS* DS27—which involved five countries as complainants and four additional countries who requested to join consultations—would count as a single dispute. Horn and Mavroidis also suggest an alternate approach: to consider this case as involving five (or nine) *bilateral* disputes.[11]

The above arguments do not really touch the core issues with regard to developing and least-developed members participating less fully in the WTO DSM's consultation, panel and appellant body processes. The gist of the argument by Horn and Mavroidis is that in order to know whether developing member countries are participating at all at the WTO DSM, there should be a counting of member participants at the consultation stage and this might determine whether or not there is less participation by these members. Quantitatively, this approach may provide valuable data, but practically, it does not reveal the qualitative decisions that motivate participation by the developing and least-developed members. My view is the singular number of complaints (if any) by developing and least-developed WTO members

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https://www.ictsd.org/sites/default/files/event/2013/02/developing-country-use-of-the-wto-dispute-settlement-system_shaffer.pdf (Accessed 1st March 2019)

[9] Gregory Shaffer, above n 8, 19-25.

[10] Horn, Johannesson, and Mavroidis, 'The WTO Dispute Settlement System 1995-2010: Some Descriptive Statistics', (2011) 891 *Research Institute of Industrial Economics, see* http://www.ifn.se/wfiles/wp/wp891.pdf (Accessed 27 March 2019).

[11] Horn, Johannesson, and Mavroidis, above n 10, 4-6.

already registered with the WTO DSM cannot provide comparative data for addressing the reasons developing and least-developed members participate as they do in the WTO DSM process. However, Christina L. Davis presents the issue in another context.[12] In debating the lack of participation by developing countries, Davis addresses the issue by looking at it from the perspective of the effectiveness of the WTO DSM. She compares the effectiveness of WTO DSM relative to negotiation in a different forum.[13]

Developing countries and the DSM

The six (6) WTO South Pacific Island members, Papua New Guinea, Fiji, Solomon Islands, Tonga, Samoa and Vanuatu face daunting challenges in accessing the WTO's DSM. In the twenty four years (1995–2018) of the WTO's DSM operation, the WTO's Dispute Settlement Body has played the principal role in dealing with trade disputes. Although the legal provisions stipulated in the Dispute Settlement Understanding Articles bestow the power for the DSM to be a potent mechanism, the WTO South Pacific Island members are not situated to the same extent or degree to access and effectively harness the use of the WTO's DSM. Identification of possible causes, key factors or barriers as to how the South Pacific members' use the DSM, however, is not straightforward.

The problems facing the South Pacific countries in using the DSM are similar to those of many other developing and least-developed countries found in Africa, Asia, the Caribbean and elsewhere, however the South Pacific members' relatively lower level of development and integration in international trade may translate to issues that are more difficult to identify and overcome. Although the importance of an adequate trade policy infrastructure is difficult to underestimate, some of the more specific problems facing South Pacific countries seem to be rooted in the nature of the DSM itself.

At the initial stage of the WTO DSM much interest was shown by the South Pacific WTO members but as time passed seemed to become less enthusiastic about the

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[12] Christina L. Davis, 'Do WTO Rules Create a Level Playing Field for Developing Countries?' (2006), see http://ruig-gian.org/ressources/dupont-davis.pdf (Accessed 5 March 2019).
[13] Christina L. Davis, above n 12, 1-6.

DSM. It is undoubtedly true that the DSM has shortcomings. These include sometimes conflicting deadlines, weak and inefficient enforcement mechanism, questionable quality of some of its rulings, and the possibility of prolonging disputes. The absence of the South Pacific members, raises concern for not seeking inclusiveness in the world trading system. Further Concerns are raised in relation to South Pacific members' levels of engagement in the DSM, their shares and patterns of trade, and the retaliation opportunities that these provide. Bown and Hoekman cited member countries' shares of world trade, numbers of traded products and numbers of trading partners as determinants of their participation.[14] Bown and Hoekman's supposition or possible explanation is that the probability of encountering disputable trade measures is proportional to the diversity of a country's exports over products and partners, which means that larger and more diversified exporters would be expected to bring more complaints than smaller and less diversified exporters. Their theory "goes quite far toward predicting the actual pattern of complaints across countries" especially when the cost of litigation is a controlled variable. However, Raul A Torress comments that the G4 countries namely, Canada, EU, Japan, and the U.S. are represented in a much higher proportion than the average in the DSM, relative to their positions with regard to these traits.[15] By far, the U.S. and the EU have utilized the DSM more than most countries (US = 97 complainant, 113 respondent, 86 as third party; EU = 84 complainant, 70 respondent, 114 as third party; Canada = 33 complainant, 16 respondent, 71 as third party; followed by Brazil, Mexico, India, Argentina, Korea and finally Japan). Canada, the EU, the U.S. and others have the resources to litigate at will and enjoy a larger volume of world trade, thus it is not surprising they initiate a proportionally greater number of trade disputes with the WTO DSM than the South Pacific member nations.

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[14] Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector.' (2005) 13 *Journal of Economic Literature,* see https://www.brookings.edu/wp-content/uploads/2016/06/200505bown.pdf (Accessed 12 December 2018).

[15] Raul A. Torres 'Use of the WTO Trade Dispute Mechanism by the Latin American Countries-Dispelling Myths and Breaking Down Barriers.' (2012) 3 *World Trade Organisation Economic Research and Statistics Division,* see https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf (Accessed 12 December 2018).

A second, related set of observations supports the issue of negative consequences as being a cause for why the South Pacific members are not active in the DSM. Examples are provided include a model that is used to examine certain aspects of disputes dealing with matters related to market access. He discovered that lost market access and economic losses determine countries' decisions to initiate cases. However, he added that;

> *"[S]everal other political economy factors affect the decision not to litigate. Other things being equal, adversely affected exporters are less likely to participate when they are involved in a preferential trade agreement with the respondent, when they lack the capacity to retaliate against the respondent by withdrawing trade concessions, when they are poor or small, and when they are particularly reliant on the respondent for bilateral assistance."*[16]

The above arguments expose what the South Pacific members face, additionally they reiterate those of Hoekman and Mavroidis views, observing reasons for not initiating trade dispute related cases before the WTO DSM.

A final set of observations from this discussion focuses on biases and inequalities within and between institutions managing trade, including the WTO in general and the DSM in particular. Here, the main problem these authors identified is that the DSM has become too technically complex and demanding, therefore is a challenge for the South Pacific members to use effectively in the absence of adequate expert assistance, which typically carries a steep cost. Underlying this is the observation that there is too much law and too little politics in the system for the members of WTO in the south pacific region.

Barriers to the South Pacific Island WTO Members' Participation in the DSM

The lack of participation and engagement by the South Pacific members in the WTO in general, and in their use of the DSU in particular, has been a continuing

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[16] Raul Torres, above n 15, 1-10.

problem facing the WTO, tainting not only the organization as a whole but also the DSU, its crown jewel. This section of the article considers—from a trade viewpoint—the many issues and barriers preventing the South Pacific WTO members from using the DSU, including entry barriers, weak retaliation, bias, risk to development assistance and trade partnerships, lack of resources, legal capacity and training, costs, government-industry coordination, and questions of compliance and equity.

1) Entry barriers

Following the discussion by Hoekman and Mavroidis[17], two sets of entry barriers to the DSM by the South Pacific members can be identified: those faced before a case is officially initiated and those confronted when using the system after a case has been initiated. An obvious problem of most developed-country proposals with respect to DSM reform is that they do not address the first type of barrier, even though the inadequate nature of the trade-policy infrastructures of developing countries is now widely acknowledged.[18] The increased volume and complexity of WTO agreements intensifies the attendant quandaries that the lack of such infrastructures propagate, compounded by the increased demand for, and cost of, in-depth, expert legal knowledge of how to use the system and how to proceed with a case.[19] The rising cost of initiating litigation, which the South Pacific WTO members are not able to afford, effectively denies access to the system.

The process under the WTO DSM is such that cases usually commence after complainants have assessed the merits and prepared their initial arguments and submissions. The South Pacific WTO members are not capable of performing these tasks; thus the lack of pre-case assistance is a major impediment. At the same time, the existing Special and Differential Treatment (SDT) provisions are applicable only once a case is officially initiated. In other words, the current system does not assist even to

[17] Bernard M. Hoekman and Petros C. Mavroidis, 'The Dark Side of the Moon: Completing the WTO Contract through Adjudication,' (2012) *World Bank and CEPR and European University Institute.*
[18] Gary N. Horlick and Hanna Boekmann, 'Where do WTO Cases Come From? The pre-litigation assessment of trade barriers', (2012) 3 *ICTSD Background Paper*
[19] Horlick and Boekmann, above n 18, 27-30

the extent of acknowledging the existence of an 'upstream' process. It is of interesting note that literature on the DSM, particularly such generated from developed WTO member countries, have not expounded on this issue. It is possible that developed countries may have an interest in obscuring this omission, since discussing and making recommendations to address it may impede their advantage or equalize the playing field.[20]

However, a more beneficial approach could be to identify and even provide assistance in the form of a pool of experts and lawyers for use by South Pacific WTO members in preparing and conducting their cases, providing expert guidance and consultation, and even to present and argue cases on the South Pacific members' behalf. Rules pertaining to the SDT provisions exist under the DSM to address this issue. However, not all of them are mandatory or automatically applicable, which means that education and awareness must be extended where such assistance is potentially and practically needed—especially notice of the availability of such expertise—to promote more active pursuit of DSM resources.[21] This statement is particularly relevant so far as the WTO South Pacific members are concerned as there is a strong need to foster progressive awareness of the benefits and strengths of the WTO process in the South Pacific region.

2) Weak Retaliation

A significant obstacle to participation that the South Pacific members face relates to the DSM's retaliatory system. The problem is that most South Pacific Island Nation' WTO members cannot meaningfully retaliate against their bigger trading partners such as Australia or New Zealand due to their share of international trade as it is such that their losses would exceed any possible gains. This line of argument is supported by a string of cost-benefit analyses of the retaliation provisions of the DSM

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[20] Horlick and Boekmann, above n 18, 27-28.
[21] Uche U. Ewelukwa, 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System, Politics, Process, Outcomes and Propsects', (2005), see https://www.carnegiecouncil.org/publications/articles_papers_reports/5213/_res/id=Attachments/index=0/5213_fellowPaper_ewelukwa.pdf (Accessed 15 January, 2019).

as observed by Robert E Hudec.[22] This issue was raised in Vanuatu, a small pacific island state that recently joined WTO. One of its trade officials described their concern that retaliating against a trading partner, such as Australia, may result in Australia's aid and other donor funding to be reduced or sabotaged.

A related issue is the capacity demands for initiating retaliation. The extent to which 'access without fear' to the DSM's retaliation mechanism as a significant gain for the South Pacific members states is questionable. The experience so far with those cases that have reached the retaliation stage show that, unless other rules are changed, countries can avoid being subjected to retaliation for a very long time. Furthermore, it is not clear whether retaliation, when it has occurred—as there is very little data, particularly with regard to the South Pacific member countries, makes it more likely that the losing parties comply with the rulings.

The issue related to retaliation may be viewed from another perspective. In most cases—especially those involving the South Pacific WTO members—the retaliation stage is never reached. This is less because retaliation mechanisms are weak and/or there is restricted access to them; rather, it is mainly because it takes an average of three years for a case to reach this stage. Given that most developing countries—especially South Pacific members—do not have enough resources to pursue a case as far as the retaliation stage, and that by the time this stage is reached, the losses caused by the disputed measure would be vastly detrimental, or at least greater than any relevant gains.

3) Bias

An indirect obstacle identified by a number of authors as limiting developing and least-developed countries' participation in the DSM are the implicit biases in systems of trade rules, including the DSM, in favor of powerful countries—reinforced

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[22] Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minn J Global Trade*, see https://pdfs.semanticscholar.org/02d3/c9f4be4819d3c3bec41172ef422d4e633a41.pdf (Accessed 15 January, 2019).

through the dominance of judicial forms of rule-making.[23] The DSM's lack of development orientation is seen on two fronts: first, the alleged trend of the DSM towards law-making, and secondly, the system's lack of flexibility. Because the DSM is bound by the covered agreements and has relatively little discretion in how it interprets the agreements, it cannot take into consideration how the rules may impact the LDCs and developing countries, which the South Pacific WTO members are part of, differently than those who are more developed. Thus, decisions appear to favor the more developed countries. These views appeal to two quite different conceptions of the role of the DSM. One pertains to the level of legal formalism applied by the panels and the Appellant Body in their proceedings, and the other pertains to outcomes of cases.[24]

4) Risk to Development Assistance and Trade Partnerships

It has also been suggested that developing and LDC members do not have incentive to initiate dispute proceedings at the WTO given the fact that most of their exports receive preferential treatment in their major export markets of Australia, New Zealand, Japan, China, European Union and the United States. These preferences are nonreciprocal and could be revoked at any time by the preference-giving country without providing any reasons. Some states fear that initiating actions at the WTO could irritate their major trading partners and put at risk the preferences which they so much depend on. Associated with this risk is the fact that most of the the South Pacific WTO members depend on their major trading partners, predominantly Australia and New Zealand, for budgetary support. With the value of their trade so small and sometimes far less than the Official Development Assistance (ODA) they receive from donor countries, it would make economic sense to continue receiving support from donor governments rather than to initiate actions at the WTO which might not result in increased export earnings. It has been further suggested that traditional South Pacific WTO members' culture has always resorted to settling disputes through alternative dispute settlement processes as opposed to litigation which these countries perceive as

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[23] Antoine Bouet and Jeanne Metivier, 'Is the WTO Dispute Settlement Procedure Fair to Developing Countries?' (2017) 01652 *IFPRI Discussion Paper*, see http://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/131321/filename/131532.pdf (Accessed 26 January 2019).

[24] Bouet and Metivier, above n 23, 14.

antagonistic and likely to damage relations between them and their major trading partners.

5) Lack of Resources

As mentioned earlier, there is a pronounced lack of in-country knowledge or expertise in WTO DSM processes in the south pacific region—as well as weak budgetary resources to engage international law firms to represent countries in dispute settlement proceedings. The Trade Ministries of most South Pacific WTO members are inadequately staffed and do not have trained international trade lawyers. While the WTO has tried to address this problem by providing training to developing and least-developed members' trade officials in line with Article 27.2 of the DSU, the impact has not been very significant. If such training is to be conducted for the members in the region, the duration of the dispute settlement courses should not be too short. Because the WTO is a rule-based organization coupled with a growing complexity of its rules and the case law, and the growing jurisprudence therein, more time is necessary to build the capacity of the trade officials in these countries, especially where such officials have not had any prior exposure to international trade law. Also, there needs to be follow-up courses, or continuing legal education, to maintain the expertise of the officials and keep them abreast of developments in WTO law.

6) Legal Capacity and Training

The South Pacific members experience issues of capacity, find training and strengthening the capacity of their trade officials to be valuable, particularly where turnover of government staff is very high. Legal professionals who gain knowledge about the WTO and its dispute settlement system are likely to be lured away by the private sector where incentives are superior to those offered by state governments. It would be more cost-efficient for the South Pacific WTO members to engage international law firms or the Advisory Centre on WTO Law for attorneys experienced in international trade issues, rather than to invest state resources in repeatedly training their full-time lawyers who may never actually have the opportunity to practice international trade law. It would appear that in most South Pacific members, the Trade and Foreign Affairs Ministries have many economists and foreign-trained officials but

no trade lawyers, a practice that appears to reinforce the need for a more-focused aim of resources and training.

7) Cost

A further problem is the rates chargeable by international law firms. The African example reflected in Kessie and Addo's paper outlines[25] a scenario that is similar to the South Pacific region's situation. Kessie and Addo note that very few African countries are members of the Advisory Centre on WTO Law. Those which are not may have no option other than to seek the services of international law firms, most of whom are based in Brussels or Washington. This may also happen to the South Pacific members in the event they are required to challenge trade disputes before the WTO Appellate body through the DSM.

A major constraint is that the South Pacific members lack expertise in WTO law as well as sufficient resources to fund external WTO lawyers. WTO DSM is overly expensive, thereby making it extremely difficult for developing countries to overcome financial resources that are expended in the process. The legal fees incurred in the Japan and United States case dealing with the issue of Measures Affecting Consumer Photographic Film and Paper was recorded by the Panel Report to be in excess of 10 Million US dollars.[26] These amounts are particularly burdensome for the relatively third world member countries, let alone the South Pacific WTO members. Legal luminaries and world trade experts observe that the problem of high costs faced by developing countries is exacerbated by their small trade shares and government budgets, and they tend to have smaller aggregate trading stakes than their developed country counterparts. Although the DSU contains in Article 27.2 certain provisions that address the cost and resource constraints, it is submitted that the experts can only assist in respect of the dispute settlement and cannot provide legal advice before a dispute is initiated.

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[25] E Kessie and K Addo (2008); see also http://www.ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf (Accessed 8 July 2018).

[26] World Trade Organization: Dispute Settlement DS44 'Japan – Measures Affecting Consumer Photographic Film and Paper' see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm (Accessed 8 July 2018).

For the South Pacific members, it would simply not make economic sense to spend such huge sums when the total value of their export of a particular product may not be significantly more than the legal fees they would be charged.

Many developed members who constantly engage in the DSM either as litigants or as third parties over time their counsels gain invaluable exposure to the process and are able to test litigation strategies. They become more familiar with the nuances of the system. There is a marked disadvantage for the South Pacific members as they do not have such lawyers with equal exposure; in addition, there is no active practice environment in the area of international trade law to allow Pacific Nations' trade delegations opportunity to gain similar or more extended experiences before DSM panels or appellant body to become equally well-acquainted with the DSM process. Such exposure for these countries' lawyers and trade officials is lacking.

8) Government-Industry Coordination

Kessie and Addo's discussions regarding the qualitative partnerships developed or advanced developing countries enjoy between government and industry also reflects the position of the South Pacific WTO members, where such a partnership is lacking. Brazil and India are two countries that use DSM actively, but it is their private sectors who routinely pay the legal fees of international law firms to represent their interests in WTO dispute settlement proceedings. This is not happening in the South Pacific members. There is also the complicating factor that there is no proper institutional structure or mechanism in place detailing the procedures to follow if exporters should encounter trade or access problems in foreign markets.

9) Questions of Compliance and Equity

A further reason, as echoed by Kessie and Addo, may be the uncertainty whether a responding Member would faithfully implement the dispute settlement body's recommendations and rulings. In addition, there is concern whether the

implementation would occur within a reasonable period of time when fixed by an arbitrator pursuant to Article 21.3(c) of the DSU, or through an approved mutual agreement. It is argued as a guideline, a reasonable period of time shall normally not exceed fifteen months from the date of adoption of the report by the Dispute Settlement Body. For the South Pacific members which rely on few export products and markets, 15 months could prove excessive considering the state of their industries, and if unable to find new markets during the implementation period, it is possible that a business could cease to exist.

It is clear that one of the main disadvantages for the WTO South Pacific Members is the inability to enforce positive rulings against larger WTO members. Footer argues that when there is an asymmetry in the market size of the developing country and the non-complying WTO member, the WTO's enforcement measures are essentially meaningless. Article 22 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes and Articles 4.10 and 7.9 of the Agreement on Subsidies and Countervailing Measures provide for a right of retaliation through the suspension of trade concessions or obligations as well as countermeasures. If the WTO members of the South Pacific region attempt to suspend any trade concessions, such suspensions may run contrary to their interest as opposed to the non-complying member who happens to be a developed economy.

Hence there is a common view that the drawbacks in the WTO Article 22 of the DSU undermine the usage of WTO dispute settlement for developing countries. The retaliation request of Antigua and Barbuda (*Antigua*)—one of the smallest WTO members—against the United States provides an illustration of retaliation difficulties where there is an asymmetry in market size.[27] For Antigua to cease all trade whatsoever with the United States would have virtually no impact on the economy of the United States, which in Antigua's view could easily shift such a relatively small volume of trade elsewhere.

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[27] Recourse by Antigue and Barbuda to article 22.2 of the DSU, *United States- Measures affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)*, WT/DS285/22, 22 June 2007, para.3.

A similar observation was made by the Arbitrators examining the ability of Ecuador to effectively retaliate against the European Union by withdrawing tariff concessions. Ecuador imports less than 0.1 per cent of total EU exports, figures prompting the Arbitrator to note that given the fact that Ecuador, as a developing country, only accounts for a negligible proportion of the EU's export of the products under contention, the suspension of concessions would be unlikely to have any significant effect on EU exports.[28] The Arbitrator further questioned whether the objective of including compliance may ever be achieved where a great imbalance in the terms of trade volume and economic power exists between the complaining parties. Based on these observations, the WTO South Pacific members with small markets are unlikely to be able to induce compliance by larger trading members.

The WTO is a rules-based organisation. Its rules are embodied within a wide-ranging set of legally binding WTO agreements, all of which are both technically complex and lengthy. The DSU provides the mechanism whereby these trade rules can be enforced. The process is characterized by complex, highly specialised legal and procedural arguments that often require analysis of highly technical scientific and economic data. The disputes that have already been resolved have resulted in an extensive and continually expanding body of case law, coupled with a complex set of procedural rules within the DSU itself. As a result, pursuing a dispute requires specialised legal advocates as well as the involvement of specialised experts to present and explain such economic, technical, and scientific data as may be required.

CONCLUSION

Most developing and least-developed countries face a great many challenges in the WTO legal system as discussed above. The South Pacific WTO members are not alone in this strife. Shaffer cautions that with trade disciplines ranging from textiles and agriculture to health and safety standards becoming more established under the WTO

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[28] Decision by the Arbitrators, *European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* WT/DS27/ARB/ECU, 24 March 2000, (herein *EC-Bananas III (Ecuador) (Article 22.6-EC)* para. 95.

system, questions regarding how the WTO legal system functions in practice and how it can be adapted for developing countries' benefit require further investigation. There are questions concerning the developing countries including the South Pacific members as to how to mobilize legal resources to defend their rights through WTO dispute settlement. If they participate, will they find the system efficacious? How could the DSU be modified to enhance the system's effectiveness for developing countries? Shaffer raises valid questions; however, to-date no satisfactory response has been forthcoming from either proponents who argue that DSM functions effectively for all members, or from commentators who disagree.

There is no clear answer as to whether the WTO Dispute system has been effective in resolving the trade disputes of developing countries. To some trade law scholars, the DSM has failed the developing countries, whereas others say that some developing countries have reaped benefits from their participation in WTO DSM. While in comparison with other similar international organizations, a few trade law commentators view that dispute settlement in the WTO can be considered to be successful. However, the largest bloc of members of the WTO, the African Group, the Caribbean group, the South Pacific group, the least developing Asian and East European groups' participation in dispute settlement has been negligible. Bangladesh is the only LDC in the South East Asian region that has initiated a dispute at the DSU. Until the South Pacific members, including most Africa and Caribbean countries, increasingly participate in the dispute settlement, the WTO DSM should not be considered as being successful. It is still underutilized.