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Vitaliy Pogoretskyy et al., *Is the WTO Losing its Crown Jewel to FTAs and Why Should This Concern Economically Disadvantaged WTO Members?*
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IS THE WTO LOSING ITS CROWN JEWEL TO FTAS AND WHY SHOULD THIS CONCERN ECONOMICALLY DISADVANTAGED WTO MEMBERS?

The ongoing dispute settlement crisis in the World Trade Organization (WTO) has threatened to turn the WTO rules-based system into a power-oriented model of international trade governance. Unless the crisis is resolved, the WTO may start losing its relevance as the first-best forum choice for interstate trade disputes. For many WTO Members, dispute settlement under free trade agreements (FTAs) may seem superficially to be a viable alternative, which has, moreover, been tested in a recent trade dispute between the European Union and Ukraine. The article demonstrates empirically that this shift from multilateral to bilateral or regional forms of settling international trade disputes would likely have many negative consequences for economically disadvantaged WTO Members, whether they are a complainant or respondent, in a 'north-south', or 'south-south' trade dispute

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I. INTRODUCTION

Those who attended a series of talks dedicated to the World Trade Organisation (WTO) at Twenty will recall how the WTO dispute settlement mechanism (DSM), including its appeal instance, the Appellate Body (AB), was widely praised as the 'jewel in the WTO's crown' and 'the most active international court'. At that time, who would have thought that just five years down the road, the WTO DSM would be paralysed, the AB effectively non-functional, and that the WTO itself would be sliding into the most serious crisis since its birth?

The crisis results from the blockage by the United States (US) of the appointment of the AB judges, which requires the consensus of all WTO Members.[1] While, according to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the AB must be composed of seven members,

[1] According to arts. 17.2, 2.4 & footnote 1 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Appellate Body members 'shall' be appointed by the Dispute Settlement Body [hereinafter DSB] — a political body of the WTO entrusted with managing dispute settlement — which must take its decisions by positive consensus (i.e., "if no Member … formally objects to the proposed decision"). *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. For WTO covered agreements, *see WTO Legal Texts*, WORLD TRADE ORGANISATION, https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

three of whom must serve on any appeal,[2] as of November 30, 2020, the AB's bench has been empty.[3] This effectively means that a losing party has now a veto power to block the adoption of WTO panels' decisions, which it could exercise by appealing those decisions 'into the void'.[4] Until the panel (or the AB) report in a given dispute is adopted, the infringing party has no obligation under the DSU to comply with the findings and conclusions in this report.[5]

The chronology of events leading to this crisis and its major causes are well known.[6] Suffice it to say that the Trump administration, as well as the American policymaking community more generally, have accused the AB of overstepping its mandate, including by means of addressing issues it had no authority to address, and interpreting WTO agreements in ways not envisioned by the drafters. In the US' view, through these actions, the AB has constrained its access to trade remedies (i.e., antidumping, countervailing duties (CVDs), and safeguard measures), leaving the US' domestic industries vulnerable to the influx of unfairly subsidised and dumped imports from China.[7] Until the US and its economic allies find a new regulatory model for their trade relations with China, as well as solutions for other pressing trade-related global challenges, such as climate change, the end of this crisis does not appear to be foreseeable, even under the more liberal Biden administration.[8] One can only hope that, amidst the ongoing shift in many WTO members' economic policies from neoliberalism to economic nationalism and bilateralism, reviving the WTO's automatic and binding DSM continues to be the members' common goal.

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[2] DSU, *supra* note 1, art. 17.1.

[3] *Appellate Body Members*, WORLD TRADE ORGANISATION, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

[4] At the time of writing, this option was used on twenty-one occasions. *See* https://www.worldtradelaw.net/static.php?type=dsc&page=currentcases.

[5] DSU, *supra* note 1, arts.16.4, 17.14 & 21.3.

[6] *See* Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 1 (2018).

[7] *See* Chad P. Bown, *Can We Save the WTO Appellate Body?*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Dec. 3, 2019), https://www.piie.com/commentary/testimonies/can-we-save-wto-appellate-body; *Report on the Appellate Body of the World Trade Organization*, UNITED STATES TRADE REPRESENTATIVE, (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[8] *Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization*, UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tais-remarks-prepared-delivery-world-trade-organization.

It is clear, that without a properly functioning DSM, the WTO's rules-based multilateral trade system will gradually be replaced with power politics.[9] The WTO members with the least economic and political power, such as the least developed countries (LDCs) and the majority of developing countries, jointly referred to as the 'economically disadvantaged countries', will lose the most.[10] As potential complainants, these members will be deprived of effective means to enforce WTO panel reports that are appealed to the void. Also, if, as a respondent, one of these countries were to appeal an adverse panel's finding, it would unlikely prevent a unilateral, WTO-inconsistent enforcement through retaliation by a more economically and politically powerful complainant.[11] This power-oriented trade system is very reminiscent of the General Agreement on Tariffs and Trade (GATT), which preceded the WTO DSM, where each contracting party could block the establishment of a panel, or subsequently, the adoption of the GATT panel report.

Since the beginning of the crisis, many proposals have been tabled to revive the WTO's DSM.[12] The most notable idea is a plurilateral temporary appeal mechanism under the arbitration proceedings in Article 25 of the DSU, which was recently embodied in the Multiparty Interim Appeal Arbitration Arrangement (MPIA).[13] Although the MPIA initiative has been accepted by a substantial number of WTO members, many experienced WTO developing country litigants, such as Argentina, India, Indonesia, Thailand, Turkey, and Vietnam, have not joined it.[14]

Another possible logical solution to the crisis would be to resolve trade disputes under free trade agreements (FTAs).[15] This solution was already put into practice

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[9] *WTO Appellate Body Crisis: Peter Van Den Bossche Addresses Public Hearing*, WORLD TRADE INSTITUTE (Dec. 12, 2019), https://www.wti.org/institute/news/673/wto-appellate-body-crisis-peter-van-den-bossche-addresses-public-hearing/ [hereinafter Van Den Bossche].

[10] WTO Members are generally divided into developed countries, developing countries & LDCs. While the group of LDCs is defined clearly by the United Nations, the concept of a 'developing country' is self-judging & may encompass WTO Members with vastly different levels of economic development, such as Bolivia, on the one hand, & Singapore, on the other.

[11] Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22(3) J. INT. ECON. LAW 297, 308 (2019) [hereinafter Pauwelyn].

[12] Just between November 2018 & December 2019, Members tabled eleven such proposals. *See* Van den Bossche, *supra* note 9.

[13] *See* WTO PLURILATERALS, https://wtoplurilaterals.info/.

[14] *Id.* At the time of writing, the MPIA has fifty-two parties.

[15] *See* Pauwelyn, *supra* note 11, at 298; Robert McDougall, *Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution*, RTA EXCHANGE: ICTSD AND THE IDB (Apr. 2018), https://e15initiative.org/wp-content/uploads/2015/09/Regional-Dispute-Settlement-Mechanisms-Robert-McDougall-RTA-Exchange-Final.pdf.

when, on January 16, 2019, the European Union (EU) requested consultations with Ukraine under the European Union-Ukraine Association Agreement (EU–Ukraine FTA) over a matter (i.e., Ukraine's export restrictions on wood products) that could have been challenged and defended in a similar manner under both, the EU-Ukraine FTA, and WTO law.[16] One of the senior EU trade officials involved in the case had referred to the WTO dispute settlement crisis as the main reason for the EU's decision to resolve this dispute regionally, as, at the time when the dispute was initiated, Ukraine had not yet joined the MPIA.[17]

If the WTO crisis were to continue, the shift from multilateralism to bilateralism or regionalism in adjudicating trade disputes might become a trend. However, this article demonstrates empirically that this trend would have mainly negative consequences for economically disadvantaged WTO members (whether they are a complainant or respondent). This article focuses on the following key challenges that these countries typically face in a trade dispute, and which have also been extensively discussed by other commentators: (1) a relative lack of expertise in international trade law; (2) limited financial resources to pay adjudicators' fees and hire legal representatives, and (3) inadequate economic power to enforce trade rules.[18] It has been argued convincingly that many of these challenges have been overcome in the WTO framework.[19] This article, however, demonstrates that the same cannot be said about FTAs.

To arrive at this conclusion, the article reviews the treaty text of ninety-three FTA dispute settlement chapters involving economically disadvantaged countries, which

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[16] *See* Vitaliy Pogoretskyy, *The Arbitration Panel Report in Ukraine – Export Prohibition on Wood Products: Lessons from the 'Pegasus' of International Adjudication*, 22(5-6) J. WORLD INV. TRADE 732 (2021).

[17] Ulrich Trautmann, Directorate-General for Trade, EU Comm'n, Statement during the online seminar 'The EU-Ukraine Trade Dispute on Wood Export Ban', held by Ghent European Institute (Feb. 12, 2021).

[18] For these challenges, *see* GREGORY SHAFFER, EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW (2021); Sharmin J. Tania, *Least Developed Countries in the WTO Dispute Settlement System*, 60(3) NETH. INT'L L. REV. 375, 379 (2013) [hereinafter Tania]; Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4(1) TRADE L. & DEV. 45 (2012) [hereinafter Bohanes & Garza]; Niall Meagher, *Fostering Developing Country Engagement in the WTO Dispute Settlement System: Outstanding Challenges and Governance Implications*, *in* MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES 328 (Carolyn D. Birkbeck ed., 2011) [hereinafter Meagher]; Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5(2) WORLD TRADE REV. 177 (2006) [hereinafter Shaffer]; Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19(2) WORLD BANK ECON. REV. 287, 308 (2005).

[19] Bohanes & Garza, *supra* note 18.

are listed in Appendix 1 below.[20] This sample consists mostly of: (i) recent FTAs that entered into force and were notified to the WTO between January 1, 2013 and September 16, 2020 (the cut-off date of our research); (ii) several older FTAs of a particular significance due to their broad membership or a substantial use in FTA dispute settlement proceedings, such as the Dominican Republic-Central America FTA (CAFTA–DR); and (iii) a few FTAs that were notified to the WTO during our review period, even though they had been concluded earlier. In addition, the article analyses the major prior academic studies on FTA DSMs, involving economically disadvantaged countries. For example, Chase et al. reviewed 226 DSMs in regional trade agreements that had been notified to the WTO and were in force at the end of 2012 (i.e., the period that immediately preceded our review period).[21]

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[20] For the texts of these agreements, *see RTAs in force, including accessions*, REGIONAL TRADE AGREEMENTS DATABASE, http://rtais.wto.org/UI/PublicAllRTAListAccession.aspx. For the sake of brevity, we provide specific references to FTA documents, such as various Free Trade Commission (FTC) decisions, only to the extent that these cannot be found in the WTO database.

[21] *See* Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*16, 48 (WTO Econ. Res. & Stat. Div., Staff Working Paper No. ERSD-2013-07, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279720 [hereinafter Chase et al.]. For other prior studies on various FTA-related topics, *see* Geraldo Vidigal, *Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement*, 20(4) J. INT'L ECON. L. 927 (2017) [hereinafter Vidigal]; THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS (Robert Howse et al. eds., 2018); Todd Allee & Manfred Elsig, *Dispute Settlement Provisions in PTAs: New Data and New Concepts*, *in* TRADE COOPERATION: THE PURPOSE, DESIGN AND EFFECTS OF PREFERENTIAL TRADE AGREEMENTS 319 (Andreas Dür & Manfred Elsig eds., 2015); Meredith Kolsky Lewis & Peter Van den Bossche, *What to Do When Disagreement Strikes? The Complexity of Dispute Settlement under Trade Agreements*, *in* TRADE AGREEMENTS AT THE CROSSROADS (Susy Frankel & Meredith Kolsky Lewis eds., 2014); Amelia Porges, *Dispute Settlement*, *in* PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT 467 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011); Victoria Donaldson & Simon Lester, *Dispute Settlement*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 367 (Simon Lester & Bryan Mercurio eds., 2009); Fernando Piérola & Gary Horlick, *WTO Dispute Settlement and Dispute Settlement in the "North-South" Agreements of the Americas: Considerations for Choice of Forum*, 41(5) J. WORLD TRADE 885 (2007) [hereinafter Piérola & Horlick]; William J. Davey, *Dispute Settlement in the WTO and RTAs: a Comment*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 343 (Lorand Bartels & Federico Ortino eds., 2006) [hereinafter, Davey]; Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 465 (Lorand Bartels & Federico Ortino eds., 2006) [hereinafter Kwak & Marceau].

Part II of the article outlines the relevant scenarios in which FTA DSMs and the WTO DSM could be compared as potential alternatives. In Part III, the article discusses how the aforementioned challenges experienced by many economically disadvantaged countries in trade disputes have been addressed in the WTO and why many of these challenges still exist under FTAs. In this context, Part III.D explores whether FTA DSMs have any practical advantages over the WTO DSM. Part IV contains the conclusions. The article also includes three appendices that provide further support for some of our arguments.

II. FTA DSMS V. WTO DSM: OVERLAPS AND SUITABILITY

There is a considerable overlap between WTO and FTA legal obligations. From the perspective of substantive obligations, both legal regimes typically prohibit import or export restrictions and impose non-discrimination obligations on the various border and internal measures.[22] Furthermore, WTO law and many FTAs discipline technical barriers to trade (TBT measures), sanitary and phytosanitary (SPS) measures, trade remedies, and trade facilitation measures.[23] Finally, as illustrated in Appendix 3 below, FTA dispute settlement procedures are largely modelled upon the WTO DSU, except that they generally provide for faster dispute settlement timelines. Thus, to the extent that a similar obligation exists under both WTO law and an FTA, the complainant would have a choice of forum.[24]

That said, despite the above potential overlaps between the WTO and FTA DSMs, there are also many scenarios in which one or another of these DSMs would be the most suitable, or even the only available forum for a trade dispute. For example, FTAs may contain so-called 'WTO-plus' commitments, such as deeper tariff concessions than the concessions that WTO members typically undertook in their GATT schedules. In addition, FTAs, such as various 'economic integration agreements (EIAs)', may regulate 'WTO-extra' issues that are not addressed in

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[22] *Compare* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1994], arts. III & XI, on one hand, with, *inter alia*, European Union – Ukraine FTA, EU-Ukr., arts. 34-35, Mar. 21-June 27, 2014, Turkey-Korea FTA, Turk.-Kor., arts. 2.6 & 2.7, Apr. 26, 2010 [hereinafter TKFTA], China – Korea Free Trade Agreement, China-Kor., art. 2.8, June 2, 2015; European Union – Cote d'Ivoire Free Trade Agreement, EU-Cote d'Ivoire, arts. 18-19, Sept. 2016 on the other hand.

[23] *See*, *inter alia*, El Salvador- Ecuador Free Trade Agreement, El. Sal.-Ecuador, Feb. 13, 2017, Chapters III-VIII; EFTA-Georgia [hereinafter EFTAG FTA], Chapter 2, June 27, 2016; TKFTA, *supra* note 22, Chapter 3.

[24] Kwak & Marceau, *supra* note 21.

WTO law at all, such as competition and labour rights.[25] Indeed, the very raison d'être of FTAs is to achieve a higher level of economic liberalisation between their participants than is feasible in a multilateral setting.[26] It is thus clear that the WTO would not be available as a forum for these specific issues.

Furthermore, there may be institutional reasons for WTO members that are participants of various regional economic frameworks to resolve their trade disputes outside the WTO. While we have not identified any such FTAs, this is frequently the case in customs unions, which are generally characterised by a much deeper political integration and a more comprehensive institutionalisation of their participants' trade relations than the WTO and FTAs. In these customs unions, most internal and external aspects of trade are typically managed by customs union-wide executive authorities (a commission), whose responsibilities include the enforcement of trade rules before regional courts.[27] The judicial branch of customs unions typically consists of standing courts, the powers and structure of which resemble national judicial systems, and which are frequently modelled upon the Court of Justice of the European Union (CJEU). The key legal features of these regional economic organisations often include the direct effect of community law in the participants' national legal systems and the ability of private parties to take legal actions against regional or national authorities.[28] As a matter of regional law and practice, the members of customs unions often find it unacceptable to raise a local trade dispute before an external body, such as the WTO.[29]

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[25] On the examples of these obligations, *see* World Trade Organisation, *World Trade Report 2011 – The WTO and Preferential Trade Agreements: From Co-existence to Coherence* 157-159 (2011),
https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.

[26] These agreements are explicitly permitted under art. XXIV of the GATT 1994, art. V of the General Agreement on Trade in Services, & the Enabling Clause, provided that they meet certain conditions.

[27] *See* Miguel A. Villamizar, *The Andean Court of Justice*, *in* THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS 255, 270 (Robert Howse et al. eds., 2018) [hereinafter Villamizar]; James T. Gathii, *The COMESA Court of Justice*, *in* THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS 314, 318-319 (Robert Howse et al. eds., 2018) [hereinafter Gathii].

[28] *See* Villamizar, *supra* note 27, at 259, 261, 269-270 & 275; Gathii, *supra* note 27, at 319-320; Kirill Entin & Benedikt Pirker, *The Early Case Law of the Eurasian Economic Union Court: On the road to Luxembourg?*, 25 MAASTRICHT J. EUR. COMP. LAW 266, 267-269, 274-275 & 280-281 (2018).

[29] *E.g.*, the Andean Community Members have never litigated matters governed by the Andean Community law externally & appear to be legally prevented from doing so. *See* Villamizar, *supra* note 27, at 280; Piérola & Horlick, *supra* note 21, at 903. Furthermore, Kirill Entin (Deputy Registrar & Head of the Legal Research & Analysis Department in the Eurasian Economic Union Court) drew the authors' attention to the fact that art. 112 of

In other instances, even though an FTA may provide for a deeper level of liberalisation in some specific areas other than WTO law, unlike the latter, it may contain only a few or no commitments at all in some other areas. For example, as Appendix 1 below demonstrates, among the ninety-three reviewed FTAs, thirty-six regulate only trade in goods. This means that any concerns relating to trade in services or the protection of intellectual property rights could not be raised under these FTAs, and would have to be referred to WTO DSM. Moreover, some FTAs, such as the so-called 'Partial Scope Agreements' (PSAs), normally exclude products such as agricultural goods, footwear and textiles, and certain labour-intensive manufactured goods from their coverage.[30] Finally, many FTA DSMs do not apply to certain types of measures, such as TBT or SPS measures, or various types of trade remedies.[31] If an FTA party that is also a WTO member had concerns regarding issues that are not adequately regulated by its FTAs or that are not subject to these FTAs' DSMs, its only forum choice would be the WTO.

Next, there may be many procedural reasons for a WTO member to raise its complaint before a WTO panel, as opposed to an FTA DSM. For example, not all FTAs contain a binding DSM, i.e., an automatic right of access for complainants to binding third-party adjudication. As illustrated in Appendix 1, out of the ninety-three reviewed FTAs, fifteen use a political (or diplomatic) model of dispute settlement.[32]

However, the fact that an FTA DSM is, on its face, binding does not mean that it is, in fact, automatic and operational and, therefore, a potential substitute for the WTO DSM. Under some FTA DSMs, a complainant may be *de facto* unable to pursue a trade dispute without the consent or active participation of the

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the EAEU Treaty, when read in its context, suggests that the EAEU Court has exclusive competence to resolve trade disputes between the EAEU Members.

[30] *See, e.g.*, Mexico-Paraguay Free Trade Agreement, Mex.-Para., Nov. 15, 2003; Brazil-Mexico Free Trade Agreement, Braz.-Mex., July 3, 2002, Appendix 1.

[31] SPS measures are excluded from FTA DSMs, such as Canada-Ukraine Free Trade Agreement, Can.-Ukr., art. 17.3, July 11, 2016; Korea-Colombia FTA, art. 20.2, Feb. 21, 2013 [hereinafter KorColomFTA]; Japan-Mongolia Free Trade Agreement, Japan-Mong., art. 5.7., Feb. 15, 2001 [hereinafter JMFTA]. Antidumping measures, CVDs, & global safeguards are excluded from dispute settlement in EU-Moldova Deep and Comprehensive Free Trade Area, EU-Mold., arts. 158 & 161, June 2014; European Union-Cameroon FTA, EU-Cam., arts. 29 & 30, Aug. 4, 2014; Turkey-Malaysia FTA, Turk.-Mal., arts. 8.9.3, 8.16.4 & 8.17.2., Aug. 1, 2015. For TBT measures, *see* JMFTA, art. 6.10 & Canada - Honduras Free Trade Agreement [hereinafter CHFTA] art. 21.6.2, Nov. 5, 2013.

[32] In general, these political DSMs are not rare. Among the 226 regional economic agreements that Chase et al. reviewed, 69 use this model of dispute settlement. *See* Chase et al., *supra* note 21, at 53-58.

respondent at various procedural stages, such as, the nomination of individuals to the roster of arbitrators. A widely cited example of an FTA with this design flaw was the now-obsolete North American Free Trade Agreement (NAFTA).[33] Moreover, among the ninety-three reviewed FTAs, thirty-three FTAs envisage the appointment of arbitrators from a roster of arbitrators that had to be established shortly after the creation of these agreements through nominations by FTA parties. Reportedly, the actual rosters have not been established in thirteen of these agreements.[34] Thus, if a party to one of these agreements were to initiate an FTA dispute, the dispute settlement proceedings would be delayed at the very least.

Another procedural obstacle to raising an effective FTA complaint may be the absence of the necessary implementing legislation in the FTA parties. This reportedly became an issue in the *Ukraine – Export Prohibition on Wood Products* dispute between the EU and Ukraine. When the EU initiated this dispute, Ukraine was still finalising its domestic procedures for nominating its arbitrators to the EU–Ukraine FTA roster. To avoid any delays, Ukraine ultimately decided to nominate the four arbitrators that had already been selected, leaving the fifth slot called for in the agreement unfilled. A further problem arose when it became clear that no basis existed under Ukraine's legislation for its Ministry of Economy to transfer payments to private foreign citizens acting as FTA adjudicators without a proper tendering process.[35] Another complication was that under Annex XXIV (paragraph 8) to the EU–Ukraine FTA, the arbitrators' fees must be based on 'WTO standards', and could not be increased at will by the FTA parties that had implemented this provision into their domestic law, even if these fees were to be considered inadequate by the appointed arbitrators, as reportedly was the case in this FTA dispute. Ukraine ultimately addressed these problems by adopting a regulatory act that stipulated the procedures for the arbitrators' remuneration and made upward adjustments to this remuneration, which unblocked the dispute settlement proceedings in this FTA case.[36]

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[33] *See* Simon Lester et al., *Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process*, 18(1) WORLD TRADE REV. 63, 66-67 (2019) [hereinafter Lester et al].

[34] *See infra* Appendix 2.

[35] Other Ukraine's ministries, which have an extensive experience with investment or other public international law disputes, such as the Ministry of Justice or the Ministry of Foreign Affairs, have developed their own legal frameworks for these procedures.

[36] Anonymous source in the government of one of the disputing parties. The chronology of this dispute itself shows a significant delay (i.e., by almost a year) in the establishment & composition of the arbitration panel. The European Union requested consultations in this dispute on Jan. 15, 2019, which were held on Feb. 7, 2019. The arbitration panel was established only on Jan. 28, 2020, following the completion of the roster of arbitrators through the European Union-Ukraine Association Committee Decision No. 1/2019 of Mar. 25, 2019, L 120/31 *Official Journal of the European Union* (May 8, 2019). For the question of arbitrators' fees, *see* Ukraine's Cabinet of Ministers Decree No. 944 of Nov. 15, 2019,

In sum, to determine whether the WTO or an FTA would be an appropriate forum to resolve a trade dispute, a complainant would have to analyse the substantive coverage and procedural rules of these legal frameworks. This article concerns only the scenarios in which a trade dispute would be 'actionable' under both the WTO and, at least, one FTA DSM. The following parts discuss the practical implications of the choice between these fora for economically disadvantaged WTO Members.

III. THE WTO DSM OR FTA DSMS?: MAJOR CONCERNS FOR ECONOMICALLY DISADVANTAGED WTO MEMBERS

A. The lack of expertise in international trade law

The lack of sufficient expertise in international trade law is a well-known barrier to trade justice for most developing and least-developed WTO members, which prior commentators have studied scrupulously.[37] However, the question of how this problem may affect these members' participation in FTA disputes remains largely unexplored. In Parts III.A.1 and III.A.2, we provide a brief general background to this problem and recapitulate how it has been addressed in the WTO DSM respectively. Thereafter, in Part III.A.3, we examine the relevance of this problem for FTA dispute settlement.

1. General background

WTO panels and scholars have used the expression 'thickening legality' to emphasise the growing complexity of the field of international trade law, consisting of the thousands of pages of treaty law and the hundreds of WTO panel and AB decisions.[38] Moreover, the WTO consists of numerous bodies, including the Dispute Settlement Body (DSB), that operate based on their rich practice and history, starting from the GATT 1947 era. For many newcomers, such as a recently

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https://www.kmu.gov.ua/npas/pro-vregulyuvannya-deyakih-pitan-fin-a944 [hereinafter Ukraine Decree]. For the dispute's procedural history, *see also* Arbitrators' Final Report (Section 1), FTA PANEL REPORTS, https://www.worldtradelaw.net/static.php?type=public&page=ftapanels [hereinafter FTA Panel Reports].

[37] *See*, *inter alia*, Bohanes & Garza, *supra* note 18, at 70-72; Meagher, *supra* note 18, at 341; Shaffer, *supra* note 18, at 179-185; Tania, *supra* note 18, at 389-383.

[38] *See* Petina Gappah, *An Evaluation of the Role of Legal Aid in International Dispute Resolution with Emphasis on the Advisory Centre on WTO Law*, *in* AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO 308, 311-313 (Harald Hohmann ed., 2008) [hereinafter Gappah]; Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶5.101, WTO Doc. WT/DS90/R (Sept. 22, 1999).

appointed trade diplomat, the WTO legal framework often seems too complicated and bewildering. The fact that the government officials of developing countries and LDCs would experience difficulties in navigating through complex WTO rules and interpretative sources is recognised explicitly in Article 27.2 of the DSU, which requires the WTO Secretariat to provide these Members with additional legal advice and assistance.[39]

The root cause of this problem appears to be a relatively small economic size and global trade share of many economically disadvantaged WTO members.[40] The less valuable and diverse trade is for a member, the fewer trade frictions will likely arise in its international economic relations, and with fewer trade partners. As a result, international trade institutions, such as the WTO, and the subject of international trade more generally, would logically draw less attention to such members' domestic politics and academia. It is, therefore, to no surprise that the WTO DSM has been used most frequently by developed country members, such as the EU or the US, or by developing countries with larger markets and more diverse trade interests, such as Argentina, Brazil, China, India, Korea, Mexico, and, more recently, the Russian Federation.[41] It is also logical that these repeat players have had a higher incentive to invest into their in-house expertise in international trade law than lower-income developing country members that use the WTO DSM only occasionally.[42]

As international trade law continues to be a very niche subject in many economically disadvantaged members' countries, they generally experience particular difficulties in identifying relevant trade barriers, assessing the consistency of these barriers with applicable international trade rules (WTO law or FTAs), and mobilising their government resources to bring an effective legal claim or negotiate a favourable settlement.[43] These difficulties generally do not exist in more industrialised economies that are active users of the WTO DSM.

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[39] Art. 27.2 of the DSU states: "there may … be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members". This provision further requires the WTO Secretariat to 'make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests'.

[40] Bohanes & Garza, *supra* note 18, at 55-67; Henrik Horn et al., *Is the Use of the WTO Dispute Settlement System Biased?*, CEPR (2009), https://cepr.org/active/publications/discussion_papers/dp.php?dpno=2340; Meagher, *supra* note 18, at 335.

[41] Bohanes & Garza, *supra* note 18, at 55-67.

[42] *Id.* at 71; Meagher, *supra* note 18, at 339.

[43] Shaffer, *supra* note 18, at 179.

2. Is the lack of legal expertise still a serious concern in the WTO?

Much work has been done in the WTO framework to level the playing field between WTO members with different levels of economic development, including in the field of dispute settlement. As noted, Article 27.2 of the DSU has entrusted the WTO Secretariat with the task of providing developing countries and LDCs with legal assistance. Nevertheless, this provision itself recognises the limited scope of this assistance by stipulating that it should not compromise the impartiality of the Secretariat. If, for instance, the Secretariat were to act as both the legal advisor for a member and the assistant to the panel in a dispute involving this member, this would likely be perceived as a conflict of interest.[44] To overcome this limitation, at the 1999 WTO Ministerial Conference in Seattle, the function of legal assistance for developing countries and LDCs on matters of WTO law was delegated to a new external, neutral and impartial intergovernmental organisation — the Advisory Centre on WTO Law (ACWL) — which began operations in 2001. The ACWL provides its developing country members and LDCs with legal advice on WTO law free of charge, helps these members build legal capacity in their governments, and may act as their counsel in trade disputes for a subsidised fee, below-market rates.[45]

As a result of the creation of the ACWL, the governments of its developing country members and LDCs, as a group, have essentially been provided with an external common 'Legal Service' department, similar to that of the EU Commission or the Office of the United States Trade Representative. Thus, the creation of the ACWL has, to a large degree, addressed the problem of insufficient WTO law expertise among these Members.[46] The fact that, since its inception, the ACWL has assisted its developing country members and LDCs in sixty-eight separate WTO dispute settlement proceedings (i.e., in approximately nineteen

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[44] Gappah, *supra* note 38, at 316-318; Hunter Nottage, *Developing Countries in the WTO Dispute Settlement System* 6 (Univ. of Oxford, GEG Working Paper, No. 2009/47, 2009), https://www.econstor.eu/bitstream/10419/196308/1/GEG-WP-047.pdf.

[45] For greater detail on the ACWL's core functions, *see* Niall Meagher & Leah Buencamino, *Advisory Centre on WTO Law (ACWL)*, *in* MAX PLANCK ENCYCLOPAEDIAS OF INTERNATIONAL LAW (2018).

[46] Officials of thirty-seven WTO Members have spoken highly of the ACWL services for developing countries & LDCs at the DSB meeting held on Sept. 27, 2021. *See* WT/DSB/M/456, Minutes of Meeting held in the Centre William Rappard on 27 September 2021, Dec. 2, 2021, ¶¶10.1-10.45. The ACWL's services have also been positively assessed in academia. *See*, *inter alia*, Gregory C. Shaffer, *Assessing the Advisory Centre on WTO Law from a Broader Governance Perspective*, UNIV. MINN. L. SCH. (2011).

percent of all WTO disputes initiated since 2002) confirms that the demand for the ACWL's services among their beneficiaries has been significant.[47]

In addition, the manner in which the WTO judicial system is organised makes the problem of insufficient WTO law expertise in economically disadvantaged WTO Members less acute. First, due to the multilateral nature of the WTO DSM, where many complainants and third parties may join forces to challenge a WTO-inconsistent measure, a developing country complainant with insufficient resources could potentially 'piggyback' on a complaint by another member, simply by incorporating by reference that member's claims and legal arguments in its own complaint.[48] If the dispute concerns fairly straightforward matters, and is not too fact-intensive, this strategy will likely be sufficient to meet the standard of proof. Some developing countries — for instance, Cuba — have used this strategy even in very complex WTO disputes, such as *Australia — Tobacco Plain Packaging*.[49]
Second, despite its increasing legal complexity, the WTO DSM is still generally considered to be less legalistic than many other international economic law regimes. For example, unlike in investor-state dispute settlement (ISDS), the outcome of WTO disputes does not depend on whether one disputing party has managed to exclude key evidence submitted by the other party as, for instance, inadmissible.[50] The fact that the WTO DSM has been managed mainly by public servants,[51] as opposed to private commercial lawyers, may explain this difference between the WTO DSM and other international economic law regimes.

For instance, analysts who have studied the profiles of WTO panellists have described them as 'low-key' diplomats or ex-diplomats in the WTO internal

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[47] Advisory Centre on WTO Law, REPORT ON OPERATIONS 22 (2020), https://www.acwl.ch/download/dd/reports_ops/Final-Report-on-Operations-website.pdf.

[48] Bohanes & Garza, *supra* note 18, at 69.

[49] Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶7.1736, 7.2824, WTO Doc. WT/DS458/R (adopted Aug. 27, 2018).

[50] There are no rules on evidence in WTO law & to our best knowledge, WTO panels have never discarded any evidentiary sources as a priori inadmissible. *See* Panel Report, *European Communities — Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶6.33, WTO Doc. WT/DS141/R (adopted Mar. 12, 2001); Panel Report, *China — Antidumping and Countervailing Duty Measures on Broiler Products from the United States*, ¶7.67, WTO Doc. WT/DS427/RW (adopted Feb. 28, 2018). For detailed procedures for the examination of evidence, including its admissibility, in the ISDS *see* International Centre for Settlement of Investment Disputes Convention Arbitration Rules arts. 36-38, Oct. 14, 1966.

[51] Gabrielle Marceau et al., *Judging from Venus: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 288, 288-290 (2015); Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus*, 109(4) AM. J. INT'L L. 761 (2015), at 15 [hereinafter Pauwelyn (2015)].

network.[52] The greatest advantage of adjudicators with this profile is not their detailed knowledge of complex WTO jurisprudence or their legal drafting skills, but rather their ability to find a practical and well-balanced solution to a trade dispute that would be acceptable to his/her peers representing the disputing parties. Importantly, in the WTO legal framework, panellists cannot be the nationals of the disputing parties or third parties, unless the parties expressly agree.[53] The fact that the panellists are neutral and impartial explains why WTO members have hardly ever questioned the legitimacy of their decisions.

Furthermore, in the discharge of their functions, WTO adjudicators are assisted by the staff members of the WTO Secretariat, who are highly experienced and knowledgeable experts in the field of WTO law, many of whom have served as international civil servants during their entire career, some even from the GATT era.[54] Based on their explicit mandate in Article 27.1 of the DSU, the WTO Secretariat officials may, for instance, advise panels on procedural technicalities of a dispute, such as jurisdictional objections; conduct detailed research on Members' voluminous submissions, facts, and law; and draft panel questions and lengthy final decisions.[55]

While some aspects of this collaborative structure between WTO adjudicators and the WTO Secretariat have been criticised in the academic literature, in particular, the lack of transparency in how the WTO Secretariat and adjudicators have

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[52] There are many prominent academics & private legal practitioners among WTO panellists, although they appear to be the minority. *See* Pauwelyn (2015), *supra* note 51, at 3, 15, 20-21, & 38; Louise Johannesson & Petros C. Mavroidis, *Black Cat, White Cat: The Identity of the WTO Judges* (EUI, RSCAS, Working Paper No. RSCAS 2015/17) [hereinafter Johannesson & Mavroidis]; J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35(2) J. WORLD TRADE 191, at 195, 197 (2001) [hereinafter Weiler].

[53] DSU, *supra* note 1, art. 8.3.

[54] *See* Gabrielle Marceau & Daniel Ari Baker, *A Short History of the Rules Division*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 112, 118-123 (Gabrielle Marceau ed., 2015) (referring to Mark Koulen, Counsellor at the WTO Secretariat). One of the authors of this book chapter, Professor Marceau, who has assisted numerous WTO panels, joined the GATT Secretariat in September 1994. *See People*, WORLD TRADE INSTITUTE, https://www.wti.org/institute/people/251/marceau-gabrielle/. We use the term 'Secretariat' to refer to all WTO divisions involved in WTO dispute settlement, including the Appellate Body Secretariat, which is technically separate from the WTO Secretariat.

[55] Art. 27.1 of the DSU provides as follows: "The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support".

sometimes interacted,[56] it has important advantages for the less-experienced users of this DSM and the WTO Members at large. On one hand, given their public service background, WTO panellists have generally been sympathetic to many practical difficulties that governments experience when adopting trade regulations, and provided them with the appropriate margin of deference. On the other hand, the WTO Secretariat has played a fundamental role in ensuring the consistency and legal sustainability of panel rulings, which is crucial for the security and predictability of the WTO legal framework.[57] In this framework, it is less likely that a disputing party with less experience and fewer resources would be outlitigated, if it has, at least, some basic understanding of WTO law and procedures. Moreover, as elaborated further in Part III.B, this type of DSM is more cost-efficient than FTA DSMs. This is also a significant advantage for the poorer users of the WTO DSM.

3. Insufficient expertise in international trade law still matters under FTAs

The asymmetry of legal expertise between lower-income and higher-income countries is largely left unaddressed under most of the reviewed FTAs. Exceptionally, some FTAs allow special and differential treatment for less economically developed parties at the stage of the implementation of arbitration panel rulings. For instance, under some EU FTAs, mainly with the African, Caribbean, and Pacific (ACP) group of countries, arbitration panels may consider the respondent's capacity constraints and economic development in determining the implementation period.[58] In these FTAs, the EU has also committed to exercising due restraints in seeking compensation or retaliation measures in the case of non-compliance.[59]

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[56] *See* Johannesson & Mavroidis, *supra* note 52, at 695-697; Joost Pauwelyn & Krzysztof Pelc, *Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement*, SSRN 24-36 (Sept. 26, 2019); Weiler, *supra* note 52, at 205.

[57] Frieder Roessler, *The Role of Law in International Trade Law Relations and the Establishment of the Legal Division of the GATT*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 161, 165-166 (Gabrielle Marceau ed., 2015).

[58] *See* Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, art. 84.3, Sep. 16, 2016 [hereinafter European Union- SADC FTA]; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, art. 75.3, Oct. 30, 2008 [hereinafter European Union-CARIFORUM FTA].

[59] European Union-SADC FTA, *supra* note 58, at art. 86.5; European Union-CARIFORUM FTA, *supra* note 58, at art. 77.4.

However, among the reviewed FTAs, we have not identified any FTA that would provide for legal aid to the parties that cannot afford legal representation similar to the ACWL's services in the field of WTO law.[60] The most comparable legal assistance option is the Financial Assistance Fund of the Permanent Court of Arbitration (PCA), available under several FTAs that have incorporated by reference the PCA 1992 Optional Rules for Arbitrating Disputes between Two States (PCA Optional Rules) in their DSMs.[61] It is also extremely rare for an FTA to allow arbitration panels to apportion dispute settlement costs, in particular, the costs of legal counsel, based on the disputing parties' level of economic development, as these costs must typically be borne by the parties in equal shares.[62] Again, a notable exception here are those few FTAs that incorporate by reference the PCA Optional Rules, Article 40.1 of which leaves it to the discretion of the arbitration tribunal to apportion the costs.[63] In sum, under FTA DSMs, it is generally the responsibility of each party to acquire the legal expertise necessary for the effective participation in these legal frameworks, including their DSMs.

The problem, however, does not end here. The lack of sufficient legal expertise in some economically disadvantaged countries may affect not only their ability to defend their trade interests under FTA DSMs as a complainant or respondent, but also to be properly represented on the judicial bench. Under FTAs, the selection of arbitrators and the arbitrators' discharge of their functions resemble commercial or investment arbitration more than the WTO system. Two out of the three members of a typical FTA arbitration panel are nationals of the disputing parties, who, in many instances, must be selected from the roster of arbitrators composed by the FTA parties. The third arbitrator, the Chair, is normally a third-country national,

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[60] Note that, pursuant to its mandate, the ACWL may provide legal assistance only on matters of WTO law & not FTAs. *See* Agreement Establishing the Advisory Centre on WTO Law, art. 2, https://www.acwl.ch/download/basic_documents/agreement_establishing_the_ACWL/Agreement_estab_ACWL.pdf.

[61] *See* Free Trade Agreement between the EFTA States and Philippines, art. 13.6.1, Apr. 28, 2016; EFTAG, *supra* note 23, art. 12.5.1; Free Trade Agreement between the Government of Montenegro and the Government of Ukraine, art. 49.1. *See also the Financial Assistance Fund*, PCA, https://pca-cpa.org/en/about/faf/.

[62] This general rule is stipulated explicitly in fifty-five out of the ninety-three reviewed FTAs, while the other FTAs do not address this issue at all. *See*, *e.g.*, Rules of Procedures under the CPTPP ¶91 (Annex to the Decision CPTPP/COM/2019/D003), https://www.dfat.gov.au/sites/default/files/annex-rop-to-cptpp-com-2019-d003.pdf [hereinafter CPTPP Rules of Procedures]; CHFTA *supra* note 31, annex 21.3.

[63] Arbitration Rules 2012, PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/documents/pca-conventions-and-rules/.

who is typically selected jointly by the disputing parties, or, less frequently, by the two party-appointed arbitrators.[64]

Like many other arbitration tribunals, but in stark contrast with the WTO, FTA arbitrators are not provided with any substantive institutional support from an FTA Secretariat as, unlike the WTO, FTAs normally lack any robust institutional structure. In those few instances where FTA Secretariats are established, their role in dispute settlement is limited to administrative and logistical support.[65] Under many FTAs, if an arbitrator requires some limited substantive help (for instance, in legal research), this help may be provided by arbitrators' personal assistants.[66] However, the assistants' level of engagement in a trade dispute cannot be compared to that of the WTO Secretariat for two reasons. First, under many FTAs, arbitrators' assistants are explicitly prohibited from drafting arbitration panel rulings and decisions.[67] Second, in general, the scale of the assistants'

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[64] This is how the arbitration panel composition process is described in almost all of the reviewed FTAs with binding DSMs. The only exception is the ASEAN DSM, which mimics closely the WTO two-instance DSM, & where the ASEAN Secretariat should propose panellists to the disputing parties. *See ASEAN Protocol on Enhanced Dispute Settlement Mechanism,* Association of Southeast Asian Nations, https://asean.org/asean-protocol-on-enhanced-dispute-settlement-mechanism/#:~:text=All%20persons%20serving%20on%20the,or%20indirect%20conflict%20of%20interest. (ASEAN), ¶I.6 of Appendix II. This DSM has never been used in practice.

[65] Apart from the ASEAN DSM, we have not identified any FTA Secretariat with legal responsibilities. *Compare*, for instance, *supra* note 64, art. 19, on the one hand, with CHFTA, *supra* note 31, art. 21.3, United States-Mexico-Canada Agreement art. 31(12), Dec. 10, 2019, or EFTA-Central America Free Trade Agreement art. 12.4.3, June 24, 2013, on the other hand.

[66] *See*, *inter alia*, TKFTA, *supra* note 22, annex 6-A ¶1; CPTPP Rules of Procedures, *supra* note 62, at ¶¶ 3, 94; International Trade Administration, Procedures and Rules for Article 10.12 of the United States-Mexico-Canada Agreement, art. 2, https://www.govinfo.gov/content/pkg/FR-2021-12-09/pdf/2021-26551.pdf (USMCA FTC Decision).

[67] We counted fourteen such FTAs. *See*, *e.g.*, Turkey-Malaysia FTA, Turk.-Malay., ¶3, Annex 12.2 (Operation of Arbitration Panels), July 16, 2019; European Union-Ukraine FTA, EU-Ukr., Mar. 24-June 27, 2014, ¶13, Annex XXIV; Korea, Republic of - Viet Nam FTA (2015), Kor.-Viet., May 5, 2015, ¶11, Annex 15-A; MERCOSUR-Israel FTA, ORGANISATION OF AMERICAN STATES, http://www.sice.oas.org/tpd/MER_Isr/MER_ISR_e.asp#:~:text=On%2018%20December%202007%2C%20MERCOSUR,signed%20a%20free%20trade%20agreement.&text=The%20MERCOSUR%2DIsrael%20FTA%20will,for%20the%20Israel%2DMERCOSUR%20FTA, ¶13, Annex II; Gulf Cooperation Council-Singapore Free Trade Agreement, ENTERPRISE SINGAPORE, https://www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/singapore-ftas/gsfta#:~:text=Gulf%20Cooperation%20Council%20%2D%20Singapore,Free%20Tra

remuneration presupposes that they would be relatively junior compared to the arbitrators themselves, or even to senior lawyers in the WTO Secretariat (e.g., up to € 225 per day for the maximum period of 44.5 days of work under EU-Ukraine FTA).[68]

These essential differences between the WTO DSM and FTA DSMs suggest that the general profile of an FTA adjudicator cannot be the same as that of most WTO panellists (i.e., a diplomat or ex-diplomat, frequently with no law degree). To ensure that the dispute settlement process is fair, well organised, and would not lead to surprising or legally unsustainable results, all three FTA arbitrators would have to possess sufficient knowledge of international trade law and WTO jurisprudence, which, under some FTAs, the FTA arbitrators are required to follow;[69] have practical experience with international trade disputes; and be well versed in drafting judicial decisions.[70] The short timeline for most FTA dispute settlement proceedings, coupled with the arbitrators' limited remuneration, as explained further in Parts III.B and III.D, would make it difficult for a newcomer to acquire all the knowledge and practical skills during their first, and possibly the only, appointment. In other words, the profile of an FTA arbitrator is more likely to resemble the profile of an investment arbitrator, capable of managing the dispute on his/her own, with minimal legal support from junior assistants, than

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de%20Agreement%20(GSFTA)&text=GSFTA%20eliminates%20tariffs%20for%2099,operating%20environment%20for%20service%20suppliers, ¶4, Rule 5.

[68] *See* Ukraine Decree, *supra* note 36. Similar modest levels of remuneration of arbitrators' assistants are set under many other FTAs. *See*, *e.g.*, Annex 1 to the 2012 FTC Decision under the Dominican Republic-Central America FTA (CAFTA-DR) to Establish the Remuneration of Panellists, Assistants, and Experts, and the Payment of Expenses in Dispute Settlement Proceedings under Chapter 20 (Dispute Settlement), http://www.sice.oas.org/tpd/usa_cafta/CAFTAfinal/Chap20_e.pdf (Annex 1 to the Decision of the CAFTA-DR FTC); Annex 1 to the Decision of the Peru-Honduras FTC No. 4 to Establish the Expenditures and Payments of Panellists, Assistants, and Experts for Dispute Settlement Procedures under Chapter 15 of this FTA, http://www.acuerdoscomerciales.gob.pe/En_Vigencia/Honduras/Textos_Acuerdo.html (Annex 1 to the Decision of the Peru-Honduras FTC).

[69] We counted 19 FTAs with this explicit requirement. *See*, for instance, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), AUSTRALIAN GOVERNMENT, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf art. 28.12.3; European Union-Vietnam FTA, EU-Viet., art. 15.21, 30 June 2019; New Zealand-Chinese Taipei FTA, N.Z.-China, art. 4(a), Oct. 1, 2008; Australia-Hong Kong Free Trade Agreement (A-HKFTA), Austl.-H.K., art. 18.3.1, Mar. 26, 2019.

[70] This is, at least, what standard qualification requirements under FTA DSMs, which generally resemble Art. 8.1 of the DSU, suggest. *See*, *e.g.*, Office of the United States Trade Representative, CAFTA-DR (Dominican Republic-Central America FTA) art. 20.7.2; KorColomFTA, *supra* note 31, art. 20.7.

that of a typical WTO panellist.[71] Our assessment of the profiles of arbitrators nominated under the reviewed FTAs in which the roster of arbitrators has been established, however, paints a different picture. Moreover, the level of relevant legal expertise between arbitrators nominated by developing and developed-country FTA parties appears to be strikingly different.

In particular, we reviewed the profiles of arbitrators in eighteen FTAs involving developing countries, which appear to be the only FTAs with established and non-confidential rosters of national arbitrators within our sample – i.e., forty-two nationals of developed countries (such as Canada, the EU, and the US) and 122 nationals of developing countries.[72] To avoid any subjective judgments, we limited our inquiry only to the following basic questions: (1) legal background; (2) considerable practical or academic experience in international trade law and policy;[73] and (3) prior participation in WTO or FTA dispute settlement. We took the following steps to answer these questions: (1) we analysed information that these individuals have themselves reported in their biographies on LinkedIn or in other public sources; (2) we verified whether these individuals have adjudicated WTO or FTA disputes on worldtradelaw.net as well as in all publicly available FTA decisions; and (3) in a few instances in which some aspects of the arbitrators' biographies were unclear, we sought to clarify this information through our personal connections in the governments of relevant WTO members, to the extent that this was practically feasible. We present below only general statistical results without naming individual arbitrators.

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[71] The individuals that render decisions in the ISDS have been described as mostly full-time legal practitioners, ambitious, & widely praised; Pauwelyn (2015), *supra* note 51, at 15, 22 (citing Puig).

[72] Among the ninety-three reviewed FTA DSMs, thirty-three FTAs, which are listed in Appendix 2 below, require the establishment of the rosters of arbitrators to compose arbitration panels in specific disputes, of which thirteen FTAs have no established rosters, one FTA (ASEAN) reportedly has a confidential roster, & one FTA (CPTPP) has only the roster of panel chairs. The eighteen FTA rosters that we reviewed contain 150 developing-country nationals. However, among these individuals, we could collect sufficient information about only 122 arbitrators. Finally, when one individual was nominated to the rosters of several FTAs, which was, for example, the case of many EU arbitrators, we counted & assessed this person's profile only once.

[73] We counted as 'considerable experience' in international trade law & policy any tenures in governmental, international or academic institutions & law firms specialised in these areas, which exceeded two years, as well as any prior experience in international trade disputes in the capacity of an adjudicator. We chose the two-year threshold to exclude cases where an arbitrator's only exposure to the relevant subject matters was a WTO internship, or a few minor trade-related projects during the entire career in a different field of law, such as civil law. We defined the subject of international trade law & policy broadly as including both WTO & FTA trade disciplines, domestic trade remedies, & customs matters.

In general, the FTA rosters that we analysed can be divided into the following groups in Table 1:

Table 1: Reviewed FTA rosters by region (see the entire list in Appendix 2)

FTAs involving developing countries categorised by region	Number of reviewed FTA rosters	Number of reviewed profiles of developing-country arbitrators by region	Number of reviewed profiles of developed-country arbitrators by country
FTAs involving Latin American countries (LA)	9	81	9 Canadian nationals
EU FTAs with ACP countries (ACP)	4	17	16 EU nationals
EU FTAs with Eastern European developing countries (EE)	4	19	17 U.S. nationals
EU – Korea FTA	1	5	

Among these FTAs, we analysed both 'north-south' FTAs, such as CAFTA-DR or EU-Cameroon FTA, and 'south-south' FTAs, such as Chile-Central America or Costa Rica-Colombia.

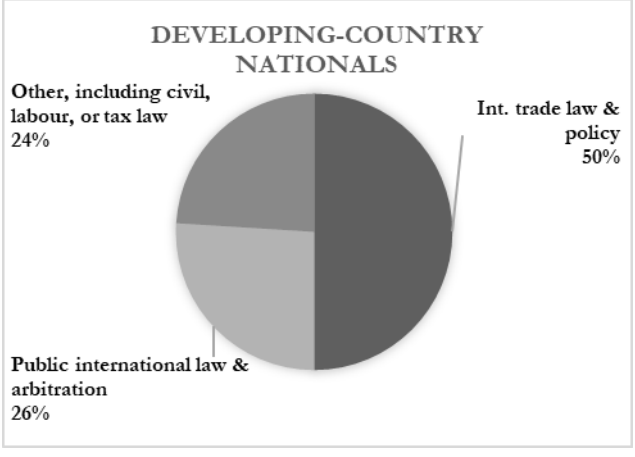
Turning to our results, the overwhelming majority of individuals nominated to the FTA rosters have a legal background: ninety percent of developing-country nationals, and 100 percent of developed-country nationals. Thus, in contrast with WTO panellists, among whom forty-five percent reportedly have no legal background,[74] there appears to be a general trend under FTAs to nominate lawyers to the rosters of arbitrators.

That said, as illustrated in Figure 1 and Table 2 below, only a fraction of these individuals can be said to have a considerable practical or academic experience in international trade law and policy. In addition, the percentage figures vary significantly between developing-country and developed-country arbitrators, as well as among the arbitrators nominated by different countries. The difference between the arbitrators' professional backgrounds within these two groups is particularly significant when one compares, for example, EU arbitrators (ninety-four percent of whom are well-known international trade lawyers) and the

[74] Pauwelyn (2015), *supra* note 51, at 6 (citing Costa).

arbitrators nominated to FTA rosters by some Latin American or Eastern European countries (among whom only from fifteen percent to twenty-nine percent of individuals fit this description). Note that within the group of the EU FTAs with Eastern European developing countries (the 'EE' group), we presented statistics both with and without the EU-Georgia FTA, which is a peculiar case. Perhaps appreciating the lack of sufficient experience among its own nationals in the field of international trade law, Georgia decided to nominate non-Georgian renowned experts in this field, such as Christian Häberli, Donald McRae, John Adank, Ronald Saborío, and Thomas Cottier, to the EU-Georgia FTA roster of arbitrators.

Figure 1: FTA arbitrators' main areas of expertise



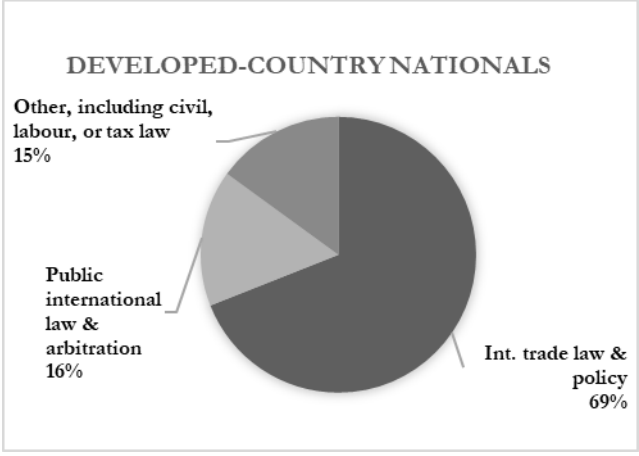


Table 2: FTA arbitrators with a considerable experience in international trade law and policy by region or developed country

Developing-country arbitrators		Developed-country arbitrators	
LA FTAs	49% of arbitrators in this region have expertise in international trade law and policy. Note, however, that, in some countries in this region, such as Costa Rica or Mexico, approximately 80% of arbitrators are experts in this field, whereas, in some other countries, only less than 15% of arbitrators have this expertise.	67%	Canada
ACP FTAs	41%	94%	European Union
EE FTAs	29% (excluding EU-Georgia FTA) and 47% (including this FTA)	47%	United States
European Union – Korea FTA	80%		

The difference between developing-country and developed-country arbitrators nominated to the rosters of the reviewed FTAs is even more striking when one compares their relative experiences in international trade disputes (either WTO or FTA proceedings) as a country's representative or adjudicator, as illustrated in Table 3 below.

Table 3: FTA arbitrators' prior participation in international trade disputes

Developing-country arbitrators: 20% across all regions		Developed-country arbitrators: 43%	
Developing-country arbitrators' prior participation in trade disputes by region		Developed-country arbitrators' prior participation in trade disputes by country	
LA FTAs	18.5% of arbitrators in this region have served as counsel or adjudicators in international trade disputes. However, if Mexican arbitrators 75% of whom have extensive experience in WTO and NAFTA cases were excluded from this count, the percentage figures would drop to just 9%.	67%	Canada
ACP FTAs	6%	37.5%	European Union
EE FTAs	14.3% (excluding EU-Georgia FTA) and 36.8% (including this FTA)	35%	United States
EU – Korea FTA	40%		

Overall, when one excludes from these statistics several particular cases, such as Georgia, Korea, and Mexico — because Georgia nominated non-Georgian legal experts to its FTA roster, and both Korea and Mexico are the active users of the WTO DSM — the level of expertise in international trade law between the arbitrators nominated by developed and developing countries to their FTA rosters is hardly comparable. This raises the question of whether in a DSM where one of the party-appointed arbitrators is likely to have significantly less practical experience and knowledge about how this DSM works than the other two arbitrators, the outcome will be affected by the qualifications of the arbitrators. Supposedly, one advantage of the FTA approach to refer trade disputes to a tribunal in which two of the three arbitrators are the nationals of the disputing parties is that these adjudicators would be very familiar with the practical realities of trade between the complainant and respondent, including various institutional challenges faced by these parties. Nevertheless, if one of these individuals was in fact not a trade expert, this potential advantage would be negated. Put simply, the fact that the level of legal expertise of the adjudicators from FTA parties with different levels of economic development is unequal, and there are no institutions, such as the WTO Secretariat, to balance this inequality, appears to exacerbate the

problem of access to trade justice for economically disadvantaged countries under FTA DSMs.

B. Costs of Dispute Settlement

It has long been recognised that access to justice should not be impeded by financial inequalities.[75] This principle is of particular importance in the field of international trade law, where the potential financial benefits from bringing a complaint — e.g., potential improvements in the conditions of competition in a foreign market — are prospective in nature and cannot always be accurately measured in monetary terms. Moreover, as illustrated in Appendix 3 below, these benefits can be achieved only after, on overage, 554 days of litigation at the panel stage alone, not counting any subsequent phases of WTO disputes, such as a possible appeal, an implementation period, or compliance and retaliation proceedings.[76] Thus, unlike in some other legal regimes where the goal of dispute settlement is to obtain adequate monetary compensation, including, in some instances, interest accrued during the litigation period, in the WTO or FTA DSMs, there is rarely any immediate financial justification for a complainant, such as an economically disadvantaged country, to make a significant investment in high legal fees for dispute settlement proceedings. If anything, these high costs may serve as a deterrent, especially if this complainant has little or no prior experience with international trade disputes and has no in-house resources to manage them.[77]

In the WTO DSM, these economic considerations appear to be well accommodated, as the fees of adjudicators are covered from the WTO's general budget.[78] Moreover, as explained in Part III.A.2 above, WTO adjudicators receive both administrative and legal support from the staff members of the WTO Secretariat, whose salaries are also paid from the WTO's budget. The same applies to various administrative and technical expenses pertaining to WTO disputes.[79] Thus, when faced with a WTO dispute, complainants, respondents and third-party members need not worry about these expenses either in financial terms or in terms

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[75] *See* Gilbert Guillaume, President, Int'l Ct. Just., Speech to the General Assembly of the United Nations (Oct. 30, 2001), https://www.icj-cij.org/public/files/press-releases/3/2993.pdf; Karl P. Sauvant & Federico Ortino, *Extending International Legal Aid from Trade to Investment: An Advisory Centre on International Investment Law*, 16 GLOB. TRADE & CUST. J. 548 (2021).

[76] *See infra* note 123.

[77] Shaffer, *supra* note 18, at 185-186; Tania, *supra* note 18, at 382-383.

[78] *See, e.g.*, WT/BFA/W/427/Rev.1, 2018-2019 Budget Proposals by the Director-General: Revision, Committee on Budget, Finance and Administration, Oct. 27, 2017, 31-32.

[79] These include travel & daily subsistence allowances for panellists, costs of venues for consultations & hearings, & IT support, as well as the costs of interpretation & translation of hearings & reports in the three WTO official languages.

of having to go through complex domestic bureaucratic procedures to get approval for them.

By contrast, under FTA DSMs, adjudicators' fees and all of the administrative expenses for a dispute must normally be borne by the parties in equal shares. As explained in Part III.A.3 above, only under a few FTAs do the disputing parties appear to be eligible for financial assistance, in particular from the PCA Financial Assistance Fund, or may request the arbitration panel to apportion the costs, considering their different levels of economic development. However, whether and to what extent this assistance would be provided in each given case cannot be ascertained. And, of course, the possibility of apportioning the costs would be of little help if both disputing parties were at approximately the same development level.

Table 4 below illustrates the adjudicators' fees that the disputing parties would have to bear in FTA dispute settlement. These fees do not include various organisational, traveling, and administrative expenses, which may vary, depending on how the proceedings are organised, and whether government or international institutions, such as the PCA, will administer the dispute and host hearings.[80]

Table 4: FTA arbitrators' fees under selected FTAs[81]

CAFTA-DR	EFTA-Georgia	EU-Ukraine	Peru-Honduras	USMCA
US$ 600 per full day (8 hours) /	Fees are regulated by the PCA	According to Annex XXIV, Rule 8 of this FTA, the	US$ 560 per full day (8 hours) /	Unless the disputing parties agree

[80] Under European Union - Ukraine FTA, for example, each arbitrator, in addition to his/her fees, is also entitled to receive remuneration for one assistant (€ 225 per day for a maximum period of 44.5 days of work), per diems during hearings (€ 335 per day), & reimbursement of traveling expenses. *See* Ukraine Decree *supra* note 36. When the PCA administers a dispute, the parties are required to pay a non-refundable processing fee of € 3000, its registry services are subject to hourly rates (e.g., Secretary-General-€ 275/hour, Legal Staff-€ 195/hour, & Secretarial/Clerical-€ 60/hour), & all other services, such as verbatim transcription, interpretation, translation, document reproduction, & sound & audiovisual equipment, are quoted separately. *See* Schedule of Fees &Costs, PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/fees-and-costs/.

[81] *See* Annex 1 to the Decision of the CAFTA-DR FTC, *supra* note 68; EFTAG, *supra* note 23, arts.12.4.3 & 12.5.1; Optional Rules for Arbitrating Disputes between Two States, PERMANENT COURT OF ARBITRATION, art. 38, https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States_1992.pdf; Ukraine Decree, *supra* note 36; Annex 1 to the Decision of the Peru-Honduras FTC, *supra* note 68; USMCA FTC Decision, *supra* note 66, art. 12 in Annex III.

US$ 75 per hour. Unless the parties agree otherwise, the cap for each arbitrator is set at US$ 19,000.	Optional Rules and shall be determined by arbitration tribunals in each case. For example, in one interstate PCA arbitration, the rate of each arbitrator was set at € 600 (US$ 633) per hour for all time devoted to the arbitration (max. 8 hours per day) and € 300 (US$ 316) per hour for travel time, not counting per diems and other expenses.[82]	arbitrators' remuneration and expenses must be in accordance with WTO standards. This rule was further elaborated in the FTA parties' domestic law. Ukraine's Cabinet of Ministers Decree No. 944, for instance, sets the arbitrators' fees at the level of € 810 (US$ 854) per day for non-government arbitrators, and € 270 (US$ 284)per day for government-employed arbitrators or international civil servants, for the maximum period of 44.5 days of work (i.e., in total € 36,045 (US$ 38044) per non-government arbitrator).	US$ 70 per hour.	otherwise, panellists' fees must be paid at the rate for non-governmental panellists used by the WTO on the date of the panel request. These are CHF 900 (US$ 905) per working day for the expected 34.5 days of work (i.e., CHF 31,050 (US$ 3167) in total).[83]

[82] For the terms of appointment of the arbitration tribunal, *see* Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukr. v. Russ. Fed.), (Perm. Ct. Arb.), https://pcacases.com/web/sendAttach/5786.

[83] WTO panellists' remuneration conditions are set out in special service agreements between the WTO Secretariat & each panellist & are elaborated in an information note, as well as the attached sample claim form, prepared by the WTO Secretariat. These documents are not public but may be obtained by WTO Members upon request.

Under several FTAs, the parties have tried to introduce a cap on panellists' fees. For example, as illustrated in Table 4 above, under the CAFTA-DR, this cap is US$ 19000 per arbitrator. However, in reality, these caps have not always been practical. For instance, in *Guatemala – Labour*, as the arbitration panel explained to the parties in a letter, which was referred to in the panel report, the cap established under this FTA for each arbitrator translated into approximately 253.3 hours of his time, while the arbitration panel Chair alone exceeded his cap by more than 650 hours of work. Thus, in the arbitration panel's view, if the cap was observed, the arbitrators would be undercompensated.[84]

However, the most significant expenses that a disputing party would have to bear in a trade dispute are arguably those related to hiring legal counsel and experts, unless the party has sufficient in-house capacity. For the reasons of confidentiality, information on legal fees charged by law firms in various international trade disputes is scarce and mostly anecdotal. It is, moreover, hard to generalise about these fees, as they would normally depend on many factors, such as the legal and factual complexity of a given case, as well as the law firm's location and status on the legal market. Only a few WTO members, including Ukraine, make this information public, when a law firm is hired by the Government (as opposed to by the domestic industries). For example, according to public information on Ukraine's government procurement platform 'Prozorro', in its two disputes with the Russian Federation, *Russia — Railway Equipment* and *Russia — Traffic in Transit*, Ukraine was represented by a Brussels-based law firm, which charged Ukraine approximately € 283,000 (US$ 298695) and € 447,422, (US$ 472236) respectively, for the consultations and panel phases in these two disputes.[85] One of the authors was told informally that some other top law firms in this field could charge for an equivalent work US$ 1,000,000, or even more.

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[84] *See* FTA Panel Reports, *supra* note 36, ¶56; MR. FRANCISCO VÀSQUEZ COLLADO & MS. BEATRIZ BORRAYO, IN THE MATTER OF GUATEMALA – ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF THE CAFTA-DR, PRESENTATION OF THE FINAL REPORT (2017), https://www.mineco.gob.gt/sites/default/files/Integracion%20y%20comercio%20exterior/transmittal_letter_-_final_report_of_the_panel_june_14_2017.pdf. While this dispute concerned labour rights, it was governed by the same dispute settlement rules as a normal trade dispute under CAFTA-DR.

[85] These figures are the results of our calculation of the legal fees under different procurement contracts pertaining to each dispute, including, when applicable, currency conversion. For the raw data, *see* https://prozorro.gov.ua/en/tender/UA-2016-10-19-000171-b, https://prozorro.gov.ua/en/tender/UA-2017-04-26-001325-b, https://prozorro.gov.ua/en/tender/UA-2016-10-18-001409-b, https://prozorro.gov.ua/en/tender/UA-2018-11-23-002871-c.

In the context of WTO dispute settlement proceedings, the problem of high legal costs for economically disadvantaged WTO members has been addressed by establishing the ACWL, which, as explained in Part III.A.2, advises its developing-country members and LDCs on WTO-related matters. The ACWL's fees for representing these countries in a WTO dispute depend on a country's level of economic development, measured in terms of its income per capita and share in world trade.[86] For example, for consultations and panel phase, the ACWL's fees may vary from CHF 23,640 (23,772 US$) for an LDC to CHF 191,484 (US$ 192554) for an ACWL category 'A' Member, such as Chinese Taipei.[87] In addition, the ACWL has a Technical Expertise Trust Fund on which it can draw to finance a portion of any experts' fees incurred in fact-intensive dispute settlement proceedings.[88] Considering that these fees have been established by the ACWL members themselves, they likely reflect the average fees that each of the ACWL categories of members would find affordable.

Given that under FTA DSMs, legal aid options are limited, FTA parties would likely have to pay normal market rates for their legal representation, regardless of their level of economic development, in addition to the arbitrators' fees and administrative expenses. The closer the overall dispute settlement costs approach the value of a complainant's lost exports, the less attractive the option of bringing an FTA complaint will look for a government and its industries, from the economic perspective. One prior study has estimated that, during the 2001-2008 period, the average value of lost exports for developing countries benefitting from the assistance of the ACWL in WTO disputes was approximately US$ 1.9 million.[89] It is questionable whether any of these disputes would be initiated, if the complainants in these disputes had to rely only on their own budget, and had no legal aid options, such as the ACWL's legal services.

Any economically disadvantaged respondent may find itself even in a more delicate position. It may have no choice other than to engage in FTA dispute settlement

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[86] For the list of the ACWL Members divided by their categories, *see* Members, ACWL, https://www.acwl.ch/members-introduction/.

[87] A category 'B' Member, such as Colombia, India, Kazakhstan, Thailand, or Ukraine, would be charged a maximum fee of CHF 143,613 (US$ 14416) for the same legal services, whereas a category 'C' Member, such as the Dominican Republic, Guatemala, Kenya, or Sri Lanka, would be charged CHF 95,742 (US$ 96277). *See* Decision 2007/7, adopted by the ACWL Management Board on Nov. 19, 2007: Billing Policy and Time Budget, https://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-MB-D-2007-7.pdf.

[88] *See* Technical Expertise Fund, ACWL, https://www.acwl.ch/technical-expertise-fund/.

[89] Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, 21 (World Bank, Pol'y Res. Working Paper No. 5168, 2010), https://openknowledge.worldbank.org/handle/10986/19938.

proceedings to defend a challenged trade measure, and to bear the legal costs, rather than risking the anger of its domestic constituency and policy makers by not defending the measure.

C. The Asymmetry of Power to Enforce Trade Rules

Many commentators that have studied the participation of economically disadvantaged WTO members in WTO disputes have commented on these members' inherent disadvantage vis-à-vis industrialised economies with respect to their inability to enforce WTO decisions. According to this argument, "an exporting country is less likely to participate in WTO litigation if it has inadequate power for trade retaliation", which refers to many lower-income developing countries and LDCs.[90] Most trade retaliatory measures taken by these members, such as the suspension of tariff concessions equivalent to the level of illegality, would be unlikely to create sufficient economic pressure to induce compliance by the developed-country respondent.[91] Moreover, these retaliatory measures frequently involve significant economic costs for the retaliating member itself, as they affect its domestic industries and consumers that rely on the targeted products or services. Thus, economists have often described the way these trade sanctions work as the retaliating country 'shooting itself in the foot' to harm the infringing country.[92]

This argument on the asymmetry of enforcement power between developed and developing-countries is understandable. By way of background, as illustrated in Appendix 3 below, the authorisation to retaliate is the last step in WTO dispute settlement proceedings, which is preceded by: (1) the attempt of the disputing parties to settle their dispute through political means (consultations); (2) the establishment of a panel to review the allegedly WTO-inconsistent measures; (3) panel proceedings, which end with the adoption of the panel report, or an appeal; (4) appellate review, if an appeal is filed, which for some members has temporarily been replaced with the MPIA;[93] (5) a lengthy implementation period, which may

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[90] Bown (2005), *supra* note 18, at 308; *see also* Tania, *supra* note 18, at 384; Hudec called this argument 'a conventional wisdom'. Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, in DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 81 (Bernard Hoekman et al., 2002).

[91] Inducing compliance is one of the objectives of the WTO trade retaliation remedy. *See* 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, Apr. 9, 1999, ¶6.3.

[92] Maarten Smeets, *Can Economic Sanctions Be Effective?*, 15 (World Trade Organisation Econ. Res. & Stat. Div., Staff Working Paper No. ERSD-2018-03, 2018), https://www.wto.org/english/res_e/reser_e/ersd201803_e.pdf.

[93] *See supra* Part I.

involve the determination of this period through arbitration; and (6) proceedings to review the respondent's compliance measures. Thus, to obtain the right to retaliate and in this way to press the respondent for compliance, a complainant would have to take many preliminary procedural steps, which could, in real practice, take sixty-four months or longer.[94] If all these steps were to lead to an empty right, taking them may seem pointless, or, at least, this is what the argument on the asymmetry of enforcement power suggests.

There are, however, certain important nuances of WTO dispute settlement that this argument does not fully capture, and which also affect our comparison between WTO and FTA disputes. First, the asymmetry of power to enforce trade rules does not exist, or is, at least, less pronounced, when a dispute arises between two countries at approximately the same level of economic development.[95] For instance, in the past two decades, the number of WTO disputes between developing countries has increased, which suggests that trade disputes can no longer be viewed as exclusively a 'north-south' issue.[96] To the extent that there is a substantial trade between the disputing parties developing countries, trade retaliation could, in principle, be used as an effective remedy in their dispute.

Second, even in the context of a 'north-south' dispute, the argument downplays somewhat the complex political considerations that would typically influence a respondent's decision on whether and when to comply with an adverse WTO ruling, among which a complainant's enforcement power in fact does not appear to play the major role. As explained by one of the founders of the discipline of international trade law, Professor Robert Hudec, government compliance with WTO legal rulings often depends on factors such as: (1) the influence of those decision-makers within the responding member's government that see their country's compliance with WTO law as a matter of good policy, which is reinforced even by an adverse WTO ruling; (2) the extent to which WTO members' governments appreciate the WTO as an institution and care for its long-term relevance; and (3) in the case of non-compliance, the extent of pressure by other governments – the respondent's trade and negotiating partners.[97] Furthermore, the WTO system itself stimulates a compliance-inducing dynamic within the members' governments, by, *inter alia*, requiring the infringing members to report periodically to the DSB on the subject of their implementation of

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[94] *See infra* note 128.

[95] Bohanes & Garza, *supra* note 18, at 99.

[96] Meagher, *supra* note 18, at 336-337. Based on our calculation, among the most recent WTO disputes starting with the number DS500 & ending with DS606 (covering the period between 9.11.2015 & 17.08.2021), 29 cases (27.3%) have been filed by a developing country against another developing country. *See Chronological list of disputes*, WORLD TRADE ORGANISATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[97] Hudec, *supra* note 90, at 82-83.

adopted WTO panel decisions.[98] Based on his interviews with current and former trade officials, Vidigal has observed that this dynamic creates a reputational cost for the trade officials responsible for this reporting, and encourages them to press their capitals for compliance.[99]

Third, the history of the operation of the WTO dispute settlement system, starting from its predecessor, the GATT, further confirms that the availability of retaliatory remedies has not had the main influence on a developing country's decision to initiate a trade dispute, and the success of this dispute. For instance, according to Hudec, over the entire GATT history, developing country complainants succeeded in eighteen out of the twenty-two cases that were known to be based on a valid legal claim, even though, during that period, a respondent could block the dispute settlement proceeding, or the adoption of an unfavourable ruling.[100] In the WTO, the relatively high rate of the respondents' compliance with adverse rulings, which, according to one study, was estimated at eighty-three percent,[101] was achieved despite the infrequent use of retaliatory measures. As Vidigal has observed, out of the 162 disputes with adopted panel reports that he reviewed, only thirteen (eight percent) have reached the stage of arbitration on the quantum of retaliation, and in eight out of these thirteen disputes, retaliation was authorised, but never actually applied.[102] What is more, in the overwhelming majority of these 162 cases (eighty-four percent), respondents decided to comply with an adverse ruling long before the dispute would reach the retaliation proceeding.[103]

All this suggests that, in the GATT/WTO system, a complainant's strong retaliation power has not been the only, or even the major, factor influencing the respondent's decision to comply with an adverse ruling. This power would likely matter most in politically sensitive disputes, in which the respondent's domestic interests would overweigh the interest in preserving its reputation vis-à-vis its trade partners or the WTO membership at large.[104] This means that, in all other, indeed the majority of, trade disputes, even the member with a limited or no ability to enforce panel rulings through economic retaliation could still benefit from a successful WTO complaint. The important role that the GATT and the WTO have played for their members as a multilateral platform for international trade governance and negotiations appears to have, to a large degree, offset any imbalances between these members' economic might.

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[98] DSU, *supra* note 1, art. 21.6.
[99] Vidigal, *supra* note 21, at 941.
[100] Hudec, *supra* note 90, at 82.
[101] Davey, *supra* note 21, at 348.
[102] Vidigal, *supra* note 21, at 945-949.
[103] *Id.*
[104] *See also* Bohanes & Garza, *supra* note 18, at 100-101.

This conclusion would, however, be unlikely to hold under FTAs, where the decision to comply with an adverse ruling cannot be influenced by institutional values, due to the absence of any robust institutional structure under these agreements. Moreover, under FTAs, any reputational costs of non-compliance would naturally be more limited than in the WTO, given that FTAs have a significantly smaller membership than the WTO's 164 Members. The only remaining factors influencing this decision would appear to be the interests of certain domestic stakeholders within the responding country, and the complainant's enforcement power. Hence, the question of the asymmetry of power to enforce trade rules between countries with different levels of economic development appears to come to the forefront under FTA DSMs.

The participation of Mexico in the NAFTA Chapter twenty trade disputes sheds some light on the relative weaknesses of FTA DSMs, as compared to the WTO DSM, in terms of their enforcement procedures. Mexico has prevailed in the two disputes that it has brought against its major trade partner, the US. However, in *United States – Cross-border Trucking Services*, the US has apparently never complied, and in the *United States – Safeguard on Broom Corn*, the challenged safeguard measure was terminated ostensibly under the US' domestic law, rather than as a result of the NAFTA dispute.[105] Moreover, in a third NAFTA Chapter twenty proceeding initiated by Mexico over the US' market access restrictions on Mexican sugar, the US has apparently blocked the appointment of the arbitration panel Chair, which has effectively prevented the dispute from advancing to the arbitration panel stage.[106] It is, therefore, not surprising that one Mexican former trade official has described the WTO (and not NAFTA) as Mexico's preferred forum for adjudicating inter-State trade disputes, as, irrespective of its bargaining power vis-à-vis the other NAFTA parties, "Mexico can inflict [reputation damages] more efficiently in the WTO".[107]

Finally, in circumstances where retaliation could, in principle, be effective, such as in a 'south-south' FTA dispute, the key question is whether litigation would always offer a more attractive solution than political dialogue, or, in the event of the failure to reach a political settlement, unilateral retaliation. A basic cost-benefit analysis of these options suggests that the litigation option has more disadvantages in terms of the lost time and resources than advantages, assuming that, in the absence of a community pressure and reputation costs under the relevant FTA, retaliatory rights are, in any event, the ultimate goal of the dispute. According to

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[105] Davey, *supra* note 21, at 351.
[106] Lester et al., *supra* note 33, at 68.
[107] Jorge A. Huerta-Goldman, *Mexico in the WTO and NAFTA in a Nutshell: Litigating International Trade Disputes*, 44 J. WORLD TRADE 173, 201 (2010).

Vidigal, the relatively weak benefits of FTA litigation over unilateral remedies, may explain why trade disputes have very rarely been brought to these regional or bilateral fora, even though, on many occasions, have FTA parties applied unilateral economic sanctions against each other.[108]

D. Are there Advantages of FTA DSMs over the WTO DSM?

We have thus far compared the range of practical challenges that an economically disadvantaged country would face in participating in FTA and WTO DSMs. In this part, we discuss briefly whether FTA DSMs have practical advantages over the WTO DSM.

One of these advantages, which is frequently mentioned in the literature, is the comparably shorter timeframes under many FTA DSMs.[109] As Appendix 3 below illustrates, the 'statutory' period between panel establishment and the adoption of panel report in the WTO DSM (approximately 330 days) is about twice the length of the typical such period under FTA DSMs, which ranges from one hundred days under the Association of Southeast Asian Nations (ASEAN) to 210 days under the United States-Mexico-Canada Agreement (USMCA). Similarly, the overall statutory period of trade disputes up to the authorisation to retaliate phase is considerably longer in the WTO (1335 days) than under FTA DSMs (340 days under the Mexico-Central America FTA, or 950 days under the CPTPP). This substantial difference can be explained by the fact that FTAs generally do not have an appeal phase, the only exception being the ASEAN. Moreover, under most FTAs, the successful complainant is not required to wait for a lengthy implementation period until the illegality is removed. The default rule under many FTAs is that, unless the disputing parties agree on this period within a short timeframe (e.g., forty-five days under the USMCA), the complainant can proceed to the next phases of dispute settlement. In contrast, in the WTO, this implementation period could take 450 days as a guideline,[110] or even longer, when the challenged measure is a parliamentary act.

In reality, however, it is unclear whether a given trade dispute would be resolved faster under an FTA DSM than in the WTO. This would depend on many factors. For instance, in each of the three NAFTA Chapter twenty disputes, as well as in *Guatemala – Labour* (CAFTA-DR), and *Ukraine – Export Prohibition on Wood Products* (EU-Ukraine FTA), the dispute settlement proceedings exceeded by far the statutory timeframes. The official reasons for these delays have varied from difficulties in composing arbitration panels, the complexity of the cases, to the

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[108] Vidigal, *supra* note 21, at 944.
[109] *See*, *inter alia*, Chase et al., *supra* note 21, at 52.
[110] DSU, *supra* note 1, art. 21.3(c).

COVID-19 pandemic.[111] In fact, to our knowledge, the only FTA arbitration report that was issued in compliance with the statutory deadlines was the report in *El Salvador — Tariff Treatment for Goods Originating from Costa Rica*. Even in this case, however, the arbitration panel composition process took longer than it is envisaged under the CAFTA-DR.[112] These examples demonstrate that the statutory deadlines under the WTO DSM or the relevant FTA DSMs do not guarantee the time efficiency of dispute settlement proceedings.

Moreover, even if FTA DSMs are, on average, faster than the WTO DSM, this advantage comes with a cost. For instance, the lack of any appellate review under FTA DSMs creates the risk of inconsistent rulings on similar legal questions by different arbitration panels composed under the same FTA, which may, in turn, weaken the security and predictability of each of these DSMs. The tight timeframes under FTA DSMs may also arguably create a disincentive for the arbitrators to devote sufficient time and effort to the preparation of a high-quality decision, if one also considers: (1) the relatively symbolic remuneration that the arbitrators typically receive under these DSMs, at least, compared to other economic fora, such as the ISDS; and (2) the lack of adequate legal support for arbitrators under FTA DSMs, compared to WTO panellists.[113] Finally, the ability to resolve a trade dispute in an expedited manner has a questionable value if an economically disadvantaged party cannot properly defend its interests in this dispute or would be unlikely to derive any substantial economic benefits from its outcome, as discussed in the preceding parts of the article.

The FTA DSMs could have provided an interesting alternative to the WTO DSM, had they offered a wider range of remedies than the standard WTO remedies, such as voluntary compensation and trade retaliation.[114] For example, the inclusion of a compulsory monetary compensation among the remedies under these DSMs could have arguably offset the asymmetry of power to enforce arbitration decisions under some 'north-south' FTAs. However, it appears to be unrealistic to expect these far-reaching improvements in an FTA DSM, and we have not identified any such measures in our reviewed sample. Both in the GATT and the WTO, there have been many proposals by developing country members to introduce a compulsory monetary compensation as a remedy, but most governments have

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[111] *See infra* notes 127, 129 & 130.

[112] *See infra* note 127.

[113] Pauwelyn has, for instance, observed that, besides expenses, "ICSID arbitrators get a compensation of 3000 US$ per day worked on the case", & that "[o]ther arbitration venues … pay an even higher rate or fees as a proportion of the amount in dispute"; Pauwelyn (2015), *supra* note 51, at 33. In this respect, also compare the fees of PCA & other FTA arbitrators in Table 4 above.

[114] *See* DSU, *supra* note 1, art. 22.1.

been reluctant to transfer that much sovereign power to these institutions.[115] It is unclear why this attitude would change under an FTA framework.

IV. CONCLUSION

The ongoing WTO dispute settlement crisis threatens to turn the WTO rules-based system into a power-oriented model of international trade governance, reminiscent of the GATT. If that course is not changed by reviving the WTO DSM as binding and automatic -— whether this would involve fixing its perceived deficiencies or completely redesigning it -— the normative value of the WTO covered agreements may be significantly diminished. The old history of the GATT, which includes many blocked panel decisions, unilateral trade measures, and bilateral 'voluntary' export restraint agreements, may repeat itself. What the latest generations of trade lawyers and diplomats have learnt from the brief historical remarks in the first introductory chapters of major treatises on WTO law would become a new reality.

Unless the crisis is resolved, the WTO may start losing its relevance as the first-best forum choice for inter-state trade disputes, especially among Members that for various political reasons have decided not to join the MPIA.[116] For those Members, FTA DSMs may seem superficially to be a viable alternative to the WTO DSM. Indeed, most of these DSMs replicate the major features of the WTO DSM and are operational.

As the article has, however, demonstrated, compared to the WTO, FTA DSMs present many important practical disadvantages, especially for economically disadvantaged WTO members in the context of a 'north-south' dispute. FTA DSMs appear generally to be based on the assumption that all parties to an FTA dispute, regardless of their level of economic development, have the same: (1) level of access to legal expertise; (2) ability to cover dispute settlement costs; and (3) power to enforce the decisions of arbitration panels. The fact that, like in any domestic legal system, a party with financial needs or that belongs to a disadvantaged or vulnerable group should have the right to some form of legal aid[117] thus remains largely neglected under this system. It is also significant that, under most FTAs, the value of the final decisions favouring an economically disadvantaged party appears to be illusory, as those parties are unlikely to have sufficiently effective means to enforce these decisions against a more politically or economically powerful respondent.

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[115] Bohanes & Garza, *supra* note 18, at 94-95.

[116] Under the MPIA, the appeal of an unfavourable WTO panel ruling to the void is no longer possible.

[117] Sauvant & Ortino, *supra* note 75, at 548-549.

FTA DSMs do not appear to fare better in the context of a 'south-south' dispute. In these disputes, the problem of enforceability of trade rules appears to be less acute, as both of the disputing parties could, in principle, enforce these rules against each other by using a trade retaliation remedy. However, the other problems, such as the access to legal expertise and the lack of adequate financial resources to cover dispute settlement costs, remain constant. As a result, one can question the practical benefits for these parties of going through costly and lengthy dispute settlement proceedings, if exactly the same outcomes (i.e., settlement or retaliation) could be achieved through political negotiations, or their unilateral actions.

In sum, if, as a result of the WTO dispute settlement crisis, the WTO multilateral dispute settlement system were to disintegrate into many bilateral and regional FTA proceedings, this would likely have a negative impact on the ability of economically disadvantaged WTO members to defend their trade interests against each other, or, more importantly, against more advanced economies, as well as on the rule of law generally in the international trade community.

V. APPENDICES

Appendix 1: Reviewed FTA DSMs

No.	FTA Name	Coverage	Type	Date of Notification to the WTO	Date of Entry into Force	Non-binding DSM
1.	United States-Mexico-Canada Agreement (USMCA)	Goods & Services	FTA & EIA	16-Sep-20	01-Jul-20	
2.	European Union-Viet Nam	Goods & Services	FTA & EIA	13-Jul-20	01-Aug-20	
3.	Peru-Australia	Goods & Services	FTA & EIA	24-Jun-20	11-Feb-20	
4.	European Union-Singapore	Goods & Services	FTA & EIA	01-Apr-20	21-Nov-19	
5.	Chile-Indonesia	Goods	FTA	01-Apr-20	10-Aug-19	
6.	Eurasian Economic Union (EAEU)-Iran	Goods	FTA	31-Jan-20	27-Oct-19	
7.	Hong Kong, China-Australia	Goods & Services	FTA & EIA	17-Jan-20	17-Jan-20	
8.	Indonesia-Pakistan	Goods	PSA	12-Nov-19	01-Sep-13	Non-binding
9.	European Union-Armenia	Goods & Services	FTA & EIA	23-Aug-19	01-Jun-18	
10.	Mexico-Bolivia	Goods	PSA	23-Jul-19	07-Jun-10	Non-binding[118]
11.	Ecuador-Mexico	Goods	PSA	23-Jul-19	01-May-83	Non-binding
12.	Mexico-Paraguay	Goods	PSA	23-Jul-19	01-Jan-84	Non-binding
13.	Brazil-Mexico	Goods	PSA	23-Jul-19	02-May-03	
14.	Mexico-Cuba	Goods	PSA	23-Jul-19	28-Feb-	

[118] The FTA refers to an Additional Protocol for Dispute Settlement, which has apparently not been signed. For documents relating to this FTA, *see* Bolivia-Mexico Free Trade Agreement, Bol.-Mex., Sept. 10, 1994, http://www.sice.oas.org/TPD/BOL_MEX/BOL_MEX_e.ASP#Implementation.

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15.	Argentina-Mexico	Goods	PSA	23-Jul-19	01-Jan-87	
16.	Morocco-United Arab Emirates	Goods	FTA	19-Jun-19	09-Jul-03	Non-binding
17.	Southern Common Market (MERCOSUR)-Israel	Goods	FTA	29-Mar-19	23-Dec-09	
18.	Hong Kong, China-Georgia	Goods & Services	FTA & EIA	12-Feb-19	13-Feb-19	
19.	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	Goods & Services	FTA & EIA	20-Dec-18	30-Dec-18	
20.	European Free Trade Association (EFTA)-Philippines	Goods & Services	FTA & EIA	26-Oct-18	01-Jun-18	
21.	Peru-Honduras	Goods & Services	FTA & EIA	17-Oct-18	01-Jan-17	
22.	Turkey-Singapore	Goods & Services	FTA & EIA	14-Sep-18	01-Oct-17	
23.	China-Georgia	Goods & Services	FTA & EIA	05-Apr-18	01-Jan-18	
24.	El Salvador-Ecuador	Goods	PSA	22-Mar-18	16-Nov-17	
25.	MERCOSUR-Egypt	Goods	FTA	19-Feb-18	01-Sep-17	
26.	Hong Kong, China-Macao, China	Goods & Services	FTA & EIA	18-Dec-17	27-Oct-17	Non-binding
27.	Canada-Ukraine	Goods	FTA	13-Sep-17	01-Aug-17	
28.	Chile-Thailand	Goods & Services	FTA & EIA	12-Sep-17	05-Nov-15	
29.	EFTA-Georgia	Goods & Services	FTA & EIA	29-Aug-17	01-Sep-17	
30.	MERCOSUR-Southern African Customs Union (SACU)	Goods	PSA	19-Jul-17	01-Apr-16	

31.	India-Thailand	Goods	PSA	18-Jun-17	01-Sep-04	Non-binding
32.	EAEU-Viet Nam	Goods & Services	FTA & EIA	04-May-17	05-Oct-16	
33.	European Union-Southern African Development Community (SADC)	Goods	FTA	03-Apr-17	10-Oct-16	
34.	GUAM Organization for Democracy and Economic Development	Goods & Services	FTA & EIA	03-Apr-17	10-Dec-03	Non-binding
35.	European Union-Ghana	Goods	FTA	03-Apr-17	15-Dec-16	
36.	Turkey-Malaysia	Goods	FTA	20-Feb-17	01-Aug-15	
37.	Turkey-Moldova	Goods	FTA	13-Dec-16	01-Nov-16	Non-binding
38.	Pacific Alliance	Goods & Services	FTA & EIA	03-Nov-16	01-May-16	
39.	Costa Rica-Colombia	Goods & Services	FTA & EIA	31-Oct-16	01-Aug-16	
40.	Korea-Colombia	Goods & Services	FTA & EIA	05-Oct-16	15-Jul-16	
41.	Mexico-Panama	Goods & Services	FTA & EIA	06-Jun-16	01-Jul-15	
42.	Japan-Mongolia	Goods & Services	FTA & EIA	01-Jun-16	07-Jun-16	
43.	Panama-Dominican Republic	Goods	PSA	21-Mar-16	08-Jun-87	Non-binding
44.	Korea-Viet Nam	Goods & Services	FTA & EIA	02-Mar-16	20-Dec-15	
45.	China-Korea	Goods & Services	FTA & EIA	01-Mar-16	20-Dec-15	
46.	Agadir Agreement	Goods	FTA	22-Feb-16	27-Mar-07	Non-binding
47.	Australia-China	Goods & Services	FTA & EIA	26-Jan-16	20-Dec-15	
48.	Korea-New Zealand	Goods & Services	FTA & EIA	21-Dec-15	20-Dec-15	

49.	Mauritius-Pakistan	Goods	PSA	02-Oct-15	30-Nov-07	Non-binding
50.	Gulf Cooperation Council (GCC)-Singapore	Goods & Services	FTA & EIA	30-Jun-15	01-Sep-13	
51.	Chile-Viet Nam	Goods	FTA	12-May-15	01-Jan-14	
52.	Canada-Honduras	Goods & Services	FTA & EIA	05-Feb-15	01-Oct-14	
53.	Canada-Korea	Goods & Services	FTA & EIA	20-Jan-15	01-Jan-15	
54.	EFTA-Bosnia and Herzegovina	Goods	FTA	06-Jan-15	01-Jan-15	
55.	Korea-Australia	Goods & Services	FTA & EIA	22-Dec-14	12-Dec-14	
56.	EFTA-Central America (Costa Rica and Panama)	Goods & Services	FTA & EIA	19-Nov-14	19-Aug-14	
57.	Hong Kong, China-Chile	Goods & Services	FTA & EIA	15-Oct-14	09-Oct-14	
58.	Iceland-China	Goods & Services	FTA & EIA	10-Oct-14	01-Jul-14	
59.	European Union-Georgia	Goods & Services	FTA & EIA	02-Jul-14	01-Sep-14	
60.	EU- Ukraine	Goods & Services	FTA & EIA	01-Jul-14	23-Apr-14	
61.	European Union-Moldova	Goods & Services	FTA & EIA	30-Jun-14	01-Sep-14	
62.	Switzerland- China	Goods & Services	FTA & EIA	30-Jun-14	01-Jul-14	
63.	Singapore- Chinese Taipei	Goods & Services	FTA & EIA	22-Apr-14	19-Apr-14	
64.	Mexico-Central America	Goods & Services	FTA & EIA	20-Jan-14	01-Sep-12	
65.	El Salvador-Cuba	Goods	PSA	27-Nov-13	01-Aug-12	
66.	New Zealand-Chinese Taipei	Goods & Services	FTA & EIA	25-Nov-13	01-Dec-13	
67.	Costa Rica-Singapore	Goods & Services	FTA & EIA	16-Sep-13	01-Jul-13	
68.	Mexico-Uruguay	Goods & Services	FTA & EIA	28-Jun-13	15-Jul-04	

69.	Chile-Nicaragua (Chile-Central America)	Goods & Services	FTA & EIA	14-Jun-13	19-Oct-12	
70.	Treaty on a Free Trade Area between members of the Commonwealth of Independent States (CIS)	Goods	FTA	06-Jun-13	20-Sep-12	
71.	Costa Rica-Peru	Goods & Services	FTA & EIA	05-Jun-13	01-Jun-13	
72.	Turkey-Mauritius	Goods	FTA	30-May-13	01-Jun-13	Non-binding
73.	Malaysia-Australia	Goods & Services	FTA & EIA	13-May-13	01-Jan-13	
74.	Korea-Turkey	Goods	FTA	30-Apr-13	01-May-13	
75.	Ukraine-Montenegro	Goods & Services	FTA & EIA	25-Apr-13	01-Jan-13	
76.	Panama-Guatemala (Panama - Central America)	Goods & Services	FTA & EIA	22-Apr-13	20-Jun-09	
77.	Canada-Panama	Goods & Services	FTA & EIA	10-Apr-13	01-Apr-13	
78.	Canada-Jordan	Goods	FTA	10-Apr-13	01-Oct-12	
79.	European Union-Central America	Goods & Services	FTA & EIA	26-Feb-13	01-Aug-13	
80.	European Union-Colombia and Peru	Goods & Services	FTA & EIA	26-Feb-13	01-Mar-13	
81.	Panama- Nicaragua (Panama-Central America)	Goods & Services	FTA & EIA	25-Feb-13	21-Nov-09	
82.	Chile-Malaysia	Goods	FTA	12-Feb-13	25-Feb-12	
83.	Russian Federation-Uzbekistan	Goods	FTA	18-Jan-13	25-Mar-93	Non-binding
84.	Russian Federation-Turkmenistan	Goods	FTA	18-Jan-13	06-Apr-93	Non-binding
85.	European Union-Korea	Goods & Services	FTA & EIA	07-Jul-11	01-Jul-11	

86.	Association of Southeast Asian Nations (ASEAN)-India	Goods & Services	FTA & EIA	19-Aug-2010(G) 20-Aug-2015(S)	01-Jan-2010(G) 01-Jul-2015(S)	
87.	United State-Colombia	Goods & Services	FTA & EIA	08-May-12	15-May-12	
88.	European Union-Cameroon	Goods	FTA	24-Sep-09	04-Aug-14	
89.	European Union-Côte d'Ivoire	Goods	FTA	11-Dec-08	03-Sep-16	
90.	European Union-The Caribbean Forum (CARIFORUM)	Goods & Services	FTA & EIA	16-Oct-08	29-Dec-08	
91.	European Union-Chile	Goods & Services	FTA & EIA	03-Feb-2004(G) 28-Oct-2005(S)	01-Feb-2003(G) 01-Mar-2005(S)	
92.	Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)	Goods & Services	FTA & EIA	17-Mar-06	01-Mar-06	
93.	ASEAN	Goods	FTA	30-Oct-92 (initial notification), 31-Aug-2021 (latest notification)	01-Jan-93	

Appendix 2: FTAs Requiring the Establishment of the Rosters of Arbitrators[119]

FTA name	Argentina-Mexico	Association of Southeast Asian Nations	Chile-Central America
Provision under which the roster of arbitrators is required	Article 11	Paragraph I(4) of Appendix II to the Protocol on Enhanced Dispute Settlement	Article 19.09
Number of arbitrators for trade disputes in the roster[120]	N/A	N/A	30 nationals & 25 non-nationals (Chairs)
Roster status	Has not been established	Reportedly established, but confidential (the DSM is modelled closely upon the WTO DSM; the roster is thus of no significance)	Established
Reference to the roster	N/A	N/A	http://www.sice.oas.org/TPD/CACM_CHL/Implementation/Dec32_s.pdf

[119] This table is based on our own research, inquiries to the official focal points under the relevant FTAs, & the information obtained through our personal connections.

[120] The number of arbitrators in this column excludes those nominated for specialised disputes, such as financial services, labour, environment, & domestic trade remedies.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	**Costa Rica-Colombia**	**Costa Rica-Singapore**	**Dominican Republic-Central America FTA (CAFTA-DR)**	**El Salvador-Ecuador**	**European Union-Armenia**
Article 28.11	Article 18.7	Article 17.7	Article 20.7	Article XI.8	Article 339
15 Chairs	10 nationals & 10 non-nationals (Chairs)	N/A	27 nationals & 11 non-nationals (Chairs)	N/A	10 nationals & 5 Chairs
The list of Chairs has been established, which may be used to compose the entire arbitration panel / some parties have not nominated their national arbitrators	Established	Has not been established	Established	Has not been established	Established
https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Roster-of-Panel-Chairs-Final-Decision.pdf	http://www.tlc.gov.co/TLC/media/media-TLC/Documentos/Listas-de-panelistas-nacionales-y-no-	N/A	https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/cafta/Decision%20on%20Appointment	N/A	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D17

European Union-Cameroon	**European Union-Caribbean Forum (CARIFORUM)**	**European Union-Central America**	**European Union- Chile**	**European Union-Colombia and Peru**	**European Union- Côte d'Ivore**	**European Union-Georgia**
Article 85	Article 221	Article 325, Decision No 3/2014 (Annex)	Article 185.2	Article 304	Article 64	Article 268
10 nationals & 5 Chairs	10 nationals & 5 Chairs	24 nationals & 12 Chairs	10 nationals & 4 Chairs	21 nationals & 13 Chairs	10 nationals & 5 Chairs	10 nationals & 5 Chairs
Established	Established	Established	Established	Established	Established	Established
https://eur-lex.europa.eu/resource.html?uri=cellar:334e7dd4-acbb-11e9-9d01-01aa75ed71a1.0002.02/DOC_2&for	https://eur-lex.europa.eu/resource.html?uri=cellar:c071cdbf-72b5-11e7-b2f2-01aa75ed71a1.0009.02/DOC_2&for	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D03	https://data.consilium.europa.eu/doc/document/ST-8893-2007-INIT/en/pdf	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0277&fr	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7986_2020_ADD_1&qid	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22018D00

European Union-Ghana	**European Union-Korea**	**European Union-Moldova**	**European Union-Singapore**	**European Union-SADC**	**EU-Ukraine**	**European Union-Viet Nam**
Article 64	Article 14.18	Article 404	Article 14.20	Article 94	Article 323	Article 15.23
N/A	10 nationals & 5 Chairs	10 nationals & 5 Chairs	N/A	16 nationals & 4 Chairs	9 nationals & 5 Chairs	N/A
Has not been established	Established	Established	Has not been established	Established	Established	Has not been established
N/A	https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1598666149625&uri=CELEX:2	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D23	N/A	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019D03	https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019D07	N/A

Mexico-Central America	**Mexico-Cuba**	**Mexico-Panama**	**Singapore-Chinese Taipei**	**Southern Common Market (MERCOSUR -Egypt**	**MERCOSUR-Israel**
Article 17.9	Article 7 of DS Chapter	Article 18.9	Article 15.8	Article 13, Section V, Chapter IV	Article 8, Chapter XI
36 nationals & 6 non-nationals (Chairs)	N/A	N/A	N/A	N/A	N/A
Established	Has not been established	Has not been established	Has not been established	Has not been established	Has not been established
http://www.sice.oas.org/tpd/cacm_mex/Implementation/FTC_Dec011_s.pdf (non-nationals) / http://www.sice.oas.org/tpd/cacm_mex/Implementation/FTC_Dec010_s.	N/A	N/A	N/A	N/A	N/A

MERCOSUR-Southern African Customs Union (SACU)	**Turkey-Korea**	**United States-Colombia**	**United States-Mexico-Canada Agreement (USMCA)**
Article 10, Annex V	Article 6.7.4	Article 21.7	Article 31.8
N/A	N/A	6 nationals & 1 non-national (Chair)	30 in total (no clear distinction between chairs & nationals)
Has not been established	Has not been established	Established	Established
N/A	N/A	On file with the authors	https://ustr.gov/sites/default/files/files/agreements/usmca/AnnexIVChapter31.pdf

Appendix 3: Main Phases and Statutory Timeframes in the Dispute Settlement Proceedings of the WTO and Selected FTAs[121]

Main procedural phases	Consultations	Free Trade Commission (FTC) intervention	Panel establishment	Panel composition
WTO DSM	Min. 60 days (DSU Art. 4.7)	N/A	Approx. 45 days or longer (DSU, Art. 6.1 and footnote 5)	30 days (DSU, Art. 8.7)[122]
ASEAN	Min. 60 days (Art. 5.1)	N/A	Max. 45 days (Art. 5.2)	Max. 30 days (Appendix II, section I.7)
CAFTA- DR	Min. 60 days (Art. 20.5.1 (a))	Max. 40 days (Arts. 20.5.4 and 20.6.1)	Max. 33 days (Arts. 20.6.2, 20.9.1(b) and 20.9.1(c))	
CPTPP	Min. 60 days (Arts. 28.7.1(a))	N/A	Max 65 days (Arts. 28.7.4, 28.9.2(d)(v)(C))	
EFTA-Georgia	Min. 60 days (Art. 12.4.1)	N/A	May exceed 150 days (Art. 12.4.3; Art. 7 of the PCA Optional Rules)	

[121] Where the information was available, in the footnotes below, we included the actual average timeframes for the relevant dispute settlement phases, in the WTO or particular FTA disputes. Note, however, that, under most FTAs, there has never been a formal dispute settlement proceeding. The Table excluded the timeframes for special subjects, such as 'perishable goods'.

[122] In reality, unless a party wishes that the WTO Director-General compose the panel immediately after the expiry of the twenty-day period following the panel establishment, it may take several months for the parties to agree on panellists.

Issuance of the panel / arbitration report	**Adoption of panel (arbitration) report, or decision to appeal**	**Approx. period between panel establishment and the adoption of report / issuance of the final FTA report not subject to adoption (in the absence of appeal)**
6 to 9 months from the date of panel establishment (DSU, Art. 12.9)	Max. 60 days from the issuance of the report (DSU, Art. 16.4)	330 days[123]
Max. 70 days from the date of panel establishment (Art. 8.2)	30 days (Art. 9.1)	100 days
Max. 210 days from the date of panel composition (Arts. 20.13.4 and 20.14.1)	N/A	210 days
Max. 180 days from the date of panel composition (Arts. 28.17.3 and 28.18.1)	N/A	180 days
Max. 150 days from the date of panel establishment (Arts. 12.6.1 and 12.10.3)	N/A	150 days

[123] The average timeframe for these proceedings is 554.33 days. *See* Tables & Statistics, http://worldtradelaw.net/databases/adoptiontiming1.php.

Appellate review	Adoption of appellate report	Approx. period between panel establishment and the adoption of appellate report
Max. 90 days from appeal (DSU, Art. 17.5)	Max. 30 days from the circulation to Members (DSU, Art. 17.14)	450 days[124]
Max. 90 days from appeal (Art. 12.5)	Max. 30 days from the circulation to Members (Art. 12.13)	220 days
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

[124] The actual average timeframe for these proceedings is 727.71 days. *See* Tables & Statistics, http://worldtradelaw.net/databases/adoptiontiming1.php.

Implementation period, including the determination of this period through arbitration
As a guideline, 450 days from the adoption of panel or appellate report (DSU, Art. 21.3(c))[125]
60 days, unless a longer period is agreed upon (Art. 15.1)
45 days to reach an agreement on resolution (Art. 20.16.1)
As a guideline, 450 days (Art. 28.19.5)
75 days to determine the period / no guidelines regarding the period itself (Art. 12.8.1)

[125] The indicative timeline in the DSU is fifteen months (i.e., approx. 450 days). However, in reality, this period may vary greatly between different disputes (e.g., from immediate compliance to nineteen months in document WT/DS477/19), & depends on many factors, such as the complexity of measures to be taken by the responding Member to remove the illegality.

Dispute settlement concerning compliance	**Arbitration on the quantum of retaliation in the event of non-compliance**
Max. 150 days with no appeal[126] (DSU, Arts. 16.4 and 21.5) and Max. 270 days with appeal (Arts. 16.4, 17.5, 17.14 and 21.5)[126]	Max. 60 days from the date of the expiry of the implementation period (Art. 22.6)
Max. 90 days (Art. 15.5)	Max. 60 days (Art. 16.7)
Max. 150 days (Art. 20.16.3) Retaliation may start 30 days after the report in the compliance / retaliation proceedings is issued (Art. 20.16.2)	
Max. 90 days (Arts. 28.20.1-3 and 28.20.5) Both issues are addressed by the original panel in the same proceeding	
Max. 90 days (Art. 12.8.3)	Max. 80 days (Arts. 12.9.1 and 12.9.3)

[126] The 150-day period includes the ninety-day period of panel proceedings & sixty days for adoption, during which the appeal can be filed. The 270-day period includes the 150-day period, the 90-day period of appellate proceedings, & thirty days for the adoption of the Appellate Body report. The actual average timeframes for these proceedings are: 312.40 days (with no appeal), & 582.16 days (with appeal). *See* Tables & Statistics, http://worldtradelaw.net/databases/adoptiontiming1.php.

Approx. total period until the authorization to retaliate, with consultations, panel composition, and appeal proceedings	**Subsequent reviews of compliance measures through arbitration**
1335 days (44.5 months) [128]	N/A
550 days (18 months)	N/A
568 days (19 months)[127]	90 days (Art. 20.18.1)
950 days (31.5 months)	90 days (Art. 28.21.1)
605 days (20 months), not counting the entire period of implementation	30 days (Art. 12.9.5)

[127] In the two known CAFTA-DR disputes, the actual timeframes varied significantly. In both of these disputes, the arbitration panel composition process took longer than it is envisaged under the DSM: *El Salvador - Tariff Treatment for Goods Originating from Costa Rica* (95 days), & *Guatemala – Labour* (451 days). Furthermore, whereas in the first dispute the period between the date of the arbitration panel composition & the issuance of the final report was approximately the same as the period envisaged under the CAFTA-DR (207 days), in *Guatemala – Labour*, this period was 1683 days. *See* FTA Panel Reports, *supra* note 36.

[128] In reality, this period may take 1924 days (sixty-four months) or longer. Our count is based on the optimistic assumption that the consultations will take 60 days, panel establishment – forty-five days, panel and appeal proceedings – 727.71 days, implementation – 450 days, compliance proceedings (with appeal) – 582.16 days, and the arbitration on the quantum of retaliation – sixty days (although the latter, on average, also requires a longer period).

Table (cont.)

Main procedural phases	Consultations	Free Trade Commission (FTC) intervention
EU- Ukraine	Min. 30 days (Art. 305.3)	N/A
Mexico-Central America	Min. 30 days (Art. 17.6.7)	The FTC sets a meeting within 10 days from the date of receipt of the request of a party for its intervention, which can be made within 30 days following the date of consultations request (Art. 17.7.4)
Pacific Alliance	Min. 30 days (Art. 17.5.4)	The FTC sets a meeting within 10 days from the date of receipt of the request of a party for its intervention, which can be made within 30 days following the date of consultations request (Art. 17.6.3)
Turkey-South Korea	Min. 30 days (Art. 6.5.1)	N/A
USMCA	Min. 75 days (Art. 31.6.1)	N/A

Panel establishment	**Panel composition**	**Issuance of the panel / arbitration report**	**Adoption of panel (arbitration) report, or decision to appeal**
Max. 15 days (Arts. 307.2, 307.5 and 307.6)		Max. 150 days from the date of panel establishment (Art. 310.1)	N/A
Request for panel establishment may be made within 30 days after the FTC meeting (Art. 17.8.1(b)). The panel is then composed within the max. 30-day period (Art. 17.10.1)		Max. 150 days from the date of panel composition (Arts. 17.15 and 17.16.1)	N/A
Request for panel establishment may be made within 30 days after the FTC meeting (Art. 17.7.1). The panel is then composed within the max. 40-day period (Arts. 17.13.2 and 17.13.4)		Max. 150 days from the date of panel composition (Arts. 17.15.1, 17.15.2, 17.15.3, 17.15.7 and 17.16.1)	N/A
Max. 52 days (Arts. 6.7.2 and 6.7.3)		Max. 150 days from the date of panel establishment (Art. 6.10.3)	N/A
Max. 35 days (Art. 31.9.1)		Max. 210 days from the date of panel composition (Art. 31.17)	N/A

Approx. period between panel establishment and the adoption of report / issuance of the final FTA report not subject to adoption (in the absence of appeal)	Appellate review	Adoption of appellate report
150 days	N/A	N/A
150 days	N/A	N/A
150	N/A	N/A
150 days	N/A	N/A
210 days	N/A	N/A

Approx. period between panel establishment and the adoption of appellate report	Implementation period, including the determination of this period through arbitration
N/A	85 days to determine the period / no guidelines regarding the period itself (Arts.311 and 312)
N/A	30 days from receipt of the final report to agree on the resolution of the dispute (Art. 17.18.1.a)
N/A	30 days from receipt of the final report to agree on the resolution of the dispute (Art. 17.20.1)
N/A	95 days to determine the period / no guidelines regarding the implementation period (Arts. 6.11.2 and 6.12.6)
N/A	45 days from receipt of the final report to agree on the resolution of the dispute (Art. 31.19.1)

Dispute settlement concerning compliance
Max. 60 days (Art. 313.3)
Max. 60 days after the original arbitration panel is recomposed / no timeline for the panel composition (Arts. 17.19.1 and 17.19.3)
Max. 80 days after the original arbitration panel is recomposed / no timeline for the panel composition (Arts. 17.22.3 and 17.22.4)
Max. 75 days (Arts. 6.11.3 and 6.12.6)
Max. 120 days (Art. 31.19.3) Both issues are addressed by the original arbitration panel in the same proceeding

Arbitration on the quantum of retaliation in the event of non-compliance	Max. 85 days (Art. 315)		125 days (Arts. 6.12.2-6.12.6)	
Approx. total period until the authorization to retaliate, with consultations, panel composition, and appeal proceedings	425 days (14 months), not counting the entire period of implementation[130]	340 days (11 months), not counting the period for the compliance panel composition	370 days (12 months), not counting the period for the compliance panel composition	527 days (17.5 months), not counting the entire period of implementation	485 days (16 months) [129]
Subsequent reviews of compliance measures through arbitration	105 days (Art. 316)	N/A	N/A	N/A	N/A

[129] While no arbitration panel reports have so far been issued under the USMCA, in all of the three NAFTA trade disputes in which the arbitration panel reports were issued, the actual timelines for the issuance of these reports significantly exceeded the statutory deadline: *US – Cross-border Trucking Services* (923 days), *US – Safeguard on Broom Corn* (446 days), and *Canada – Agricultural Products* (737 days). Moreover, it took on overage 300 days to compose the arbitration panel in these disputes. *See* NAFTA Chapter 20 Panel Reports, WORLD TRADE LAW https://www.worldtradelaw.net/databases/nafta20.php.

[130] As explained in Part II above, in the only dispute adjudicated under this FTA, *Ukraine – Export Prohibition on Wood Products*, the establishment and composition of the arbitration panel was delayed by approximately twelve months. Moreover, due to the COVID-19 pandemic, the Final Report in this dispute was issued with a slight delay, i.e. approximately 11 months after the date of the arbitration panel composition. *See* Final Report (Section 1) in FTA Panel Reports, *supra* note 36.