Contemplating compliance: European compliance mechanisms in international perspective
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CHAPTER 6

WTO
The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.


The TPRM? Useless. [...] I mean, who cares about the TPRM?

Respondent #3.
1. INTRODUCTION

The OECD peer review method has served as a blueprint for peer review and mutual surveillance mechanisms in a number of other international organizations. One example is the WTO, with its Trade Policy Review Mechanism (TPRM), which functions in parallel with the official Dispute Settlement System. This chapter will first say something about the history and function of the WTO, its legal instruments and institutional set-up. The Dispute Settlement System and the TPRM will be discussed next, while finally the effectiveness of the WTO’s compliance mechanisms is analyzed.

2. ABOUT THE WTO: HISTORY AND FUNCTIONING

The World Trade Organization was established on January 1, 1995. However, its origins go back to the General Agreement on Tariffs and Trade of 1947 (GATT), which for almost 50 years was the de facto organization for international trade. Originally it had been the intention to establish an International Trade Organization (ITO) as a counterpart to the Bretton Woods institutions: the World Bank and the International Monetary Fund. The Economic and Social Council (ECOSOC) of the UN, which was created in 1945, convened a conference in 1946 on the notion that peace is not only achieved through the abolishing of crime, but also (or maybe even more so) through cooperation in the field of trade and economics. Thus 23 countries (including the US, Canada and the UK) started negotiations with the goal to create an agreement to ensure postwar stability and prevent excessive protectionism such as existed in the interbellum.

In 1947, the United Nations Conference on Trade and Employment adopted the Havana Charter establishing the ITO. The proposed organization was meant to be a “proper” international organization, including an institutional chapter

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2 The 23 countries were: Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia (Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, the United Kingdom and the United States (preamble to GATT 1947).

governing membership, organs, functions, decision-making and the like. During the ITO negotiations the parties had already agreed on several important tariff reductions. It was thought that these concessions should be applied as soon as possible, even before the ITO negotiations were concluded, and they were meant to be incorporated into the Havana Charter later on. This *General Agreement on Tariffs and Trade*, therefore, would be applied on a provisional basis only until the ITO entered into force.

It soon became apparent that, most importantly, the US Congress (which after the 1948 elections was primarily Republican, with a Democrat President) would no longer approve the ITO Charter. However, since the GATT contained a grandfathering clause, thereby leaving national law unaltered, there was no need for ratification of that Agreement by the US Congress and it could therefore be adopted without any problems.

Since the GATT was an agreement to be provisionally applied until the ITO came into being, it incorporated virtually no institutional provisions. The GATT did provide for a small secretariat that was to come into action once the ITO had been established, which was overseen by the Interim Commission for the International Trade Organization (ICITO). Given the dependence of the Secretariat on the ICITO, however, the powers of this institution were quite weak. Other weaknesses of the GATT can be pointed out, such as: 1. its provisional character; 2. the conclusion of several related but separate agreements, the relation of which to the GATT was never clarified; and 3. its weak decision-making structure – this includes the existence of a non-plenary body and the need for all decisions to be taken on the basis of Article XXV *GATT 1947*. This article provided for decision-making by the

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4 About 45,000 tariff concessions were negotiated, affecting roughly $10 billion worth of trade (for more on the negotiations process concerning the GATT see Irwin, D.A. *et al.*, *The Genesis of the GATT* (Cambridge University Press, New York 2008))

5 The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, in Annex I to GATT 1947, states in its first provision: “The Governments of [the signatories] undertake [...] to apply provisionally on and after 1948 (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.” Some also call Part II of the GATT the heart of the Agreement, since it covers topics such as covering national treatment, antidumping, subsidies, safeguards, balance of payments, prohibition of quantitative restrictions, general exceptions to the obligations assumed, and dispute settlement.


8 Ibid.
Contracting Parties through majority voting; however, nothing was said about the bindingness of the decisions taken.\(^9\)

Throughout the years that GATT was applied on a provisional basis, it functioned increasingly as a *de facto* international organization.\(^10\) In six additional negotiating rounds, more and more far-reaching tariff concessions were agreed upon, as well as separate agreements and additional instruments such as those on subsidies and countervailing duties, technical barriers to trade, import license procedures, public procurement and anti-dumping.\(^11\) However, the Member States became increasingly frustrated with the functioning of the system, especially the toothless consensus-based dispute settlement system, which had led to an increase of agreements between individual Member States and unilateral trade sanctions.\(^12\)

In 1986 the eighth GATT round started with a Ministerial Conference in Punta del Este, Uruguay. This eight-year-long Uruguay Round ended up establishing not only a new system for the world trade order, but also introduced a so-called “single-undertaking” approach, which meant that States could only accept or reject the results of the negotiations as a whole, instead of rejecting the structure in separate agreements.\(^13\) The final act of the Uruguay Round thus included 46 agreements and 25 resolutions, including the Agreement Establishing the World Trade Organization. The Act was signed in 1994, and was subsequently ratified by 76 Member States before entering into force in January 1995.\(^14\)

The WTO was meant to act as “the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments”.\(^15\) The main purposes of the WTO,

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\(^9\) Although decision-making was officially by majority voting, in practice decisions were adopted by consensus.


\(^12\) Ibid., pp. 11-30. Agreements were made such as the Multi-Fibre Agreement, in effect from 1974, where developed and developing countries entered into bilateral agreements requiring the exporting countries to limit their exports of certain textiles and clothing. Other examples are the increased use of voluntary export restraints (VERs), government procurement, technical specifications and administrative procedures.

\(^13\) The structure was still along the lines of separate agreements. However, Member States could only accept all agreements simultaneously since they were annexed to the one WTO Agreement.


\(^15\) Article II(1) WTO Agreement.
according to Article III WTO Agreement are to 1) facilitate the implementation, administration and operation, and further the objectives of the covered agreements; 2) provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements; 3) administer the Dispute Settlement Understanding as well as the TPRM; and 4) cooperate with the IMF and the World Bank. It is thus clear that not only is the WTO meant to maintain and facilitate, but also to further develop the world trade order. It ended the provisional application of the GATT 1947, and terminated any grandfather clauses that existed under that Agreement. This has made it possible for the Organization to be much more effective in developing the world trade order than was previously the case.

2.1. Institutional Structure

Similarly to the OECD, the WTO has an extensively subdivided structure, with several committees, working groups, councils and the like for specialized subjects. These all derive from the three main organs: the Ministerial Conference (MC – representative body), the General Council (GC – executive body) and the Secretariat (administrative body).

The MC is the principal organ of the WTO, composed of representatives of all Members and meeting at least once every two years. It carries out the functions of the WTO, and has the authority to take (binding) decisions. Examples of the functions the MC carries out are appointing the Director General of the WTO, adopting staff regulations, setting up committees, authentically interpreting and amending the Multilateral Trade Agreements, waiving obligations imposed on a Member, and deciding on the negotiation and regulation of new subjects as well as the acceptance of new Members.

The GC is also composed of representatives of all Members at the Ambassador's level, and shall “meet as is appropriate”, which is normally every two months. It takes over the functions of the MC in the intervals between the meetings of the MC, as well as carrying out its own functions as assigned to it by the Agreement. The GC is responsible for the continuing, day-to-day management of the WTO and its activities. One of its most important functions is to discharge

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17 Article IV(1), WTO Agreement.
the responsibilities of the Dispute Settlement Body (DSB) as established in the DSU, as well as of the Trade Policy Review Body (TPRB) as established under the TPRM. However, under the WTO Agreement these two bodies are functional emanations of the GC – which can, if necessary, appoint a chairman and rules of procedure for these bodies.20

Another function specific to the GC is that it can create subsidiary organs, which in turn can create their own committees.21 Article IV(5) of the WTO Agreement provides for a Council for Trade in Goods, a Council for Trade in Services, and a Council for Trade Related Aspects of Intellectual Property Rights, which oversee the application and functioning of the Multilateral Trade Agreements, the GATS (General Agreement on Trade in Services) and the TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights), respectively.22 These Councils are all composed of representatives of all Member States, and according to Article IV(5) receive “guidance” from the GC, while the GC can also “assign functions” to them. In practice, the latter rarely ever happens.23

The Secretariat of the WTO is headed by a Director-General (DG, appointed by the MC), who in turn appoints the members of staff. The WTO Agreement gives the DG very little power, not much beyond running the Secretariat (Article IV) and proposing the budget (Article VII). The Ministerial Conference determines the DG’s powers and duties. In practice, the DG takes on greater responsibility than is officially accorded to him or her, such as conducting the negotiations for the Doha Development Agenda or other trade negotiations.24 Nevertheless, since the official functions of the role are quite limited, every DG needs to assert himself or herself in practice.25

The Secretariat itself functions independently of national governments, and has no official decision-making powers. Its functions are thus limited to the

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20 Article IV(3) and IV(4), WTO Agreement.
21 Article IV(5) and IV(6), ibid.
22 These three areas cover the multilateral trade agreements as they are in the Annex to the WTO Agreement, where part A covers all agreements on trade in goods (based on and including the GATT 1947), part B contains the GATS and part C the TRIPS.
24 Ibid., p. 117. The Doha Declaration has appointed the DG chairman of the Trade Negotiations Committee, which supervises the overall conduct of the negotiations.
25 The DG of the WTO has a very weak position related to e.g. the DGs of other international organizations – the DG for UNESCO has the right of initiative, in the WHO the DG is ex officio secretary of the Health Assembly and of the Board, in the FAO the DG has full power and authority to direct the work of the organization (for more examples, see ibid.).
26 Article VI of the WTO Agreement dictates that the responsibilities of the DG and the staff of the Secretariat shall be “exclusively international in character”, where on the one hand the secretariat shall not “seek or accept instructions from any government or any other authority external to
logistic, technical and professional support of the councils and committees, dissemination of information and the organization of the Ministerial Conferences. It gives advice to candidate Members, and offers legal expertise in the context of dispute settlement.27

2.2. WTO Instruments

The WTO has three main categories of legal instruments. First and most important, there are the agreements. The Annexes to the WTO Agreement contain 46 agreements: Annex 1 contains the trade-related provisions, Annex 2 the DSU, Annex 3 the TPRM and Annex 4 the Plurilateral Trade Agreements.28 There is no real hierarchical structure between the different agreements; corresponding to general international public law all agreements are of equal rank in relation to each other. The WTO Agreement does provide that in the event of a conflict between the WTO Agreement and any of the Multilateral Trade Agreements, the WTO Agreement prevails.29 However, the difficulty of solving conflicts between the several Agreements has often come to the fore in dispute settlement procedures, regarding for example the relationship between the GATT and GATS, or between the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT). The rules laid down in the Agreements are binding on all Members of the WTO (and for the plurilateral Agreements for the relevant signatories).

Second, interpretations play a significant role. The MC and GC have exclusive authority to adopt, by three-fourths majority, interpretations of the agreements.30 These interpretations are binding on the WTO, the bodies and the Member States, and need to be taken into account in case of dispute settlement.31

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28 Plurilateral Agreements have optional membership, with a special role regarding their rules on institutions and decision-making. Examples are the Agreement on Government Procurement or on trade in Civil Aircraft.
29 Article XVI:3 WTO Agreement.
30 Article IX(2), WTO Agreement. In case of interpretation of one of the Agreements in Annex 1 to the WTO Agreement, they shall take their decision based on a recommendation of the Council overseeing the functioning of that Agreement.
Third, the MC and the GC have the possibility to take decisions. The term “decision” in the context of the WTO does not have the same meaning of a “legally binding decision” which it had in the EU and the OECD, as was seen above. In the WTO, a decision is not necessarily legally binding. In general, it can be said that WTO decisions are binding when they concern internal organizational questions, or the topics to be addressed by the individual bodies. When addressed to the Members, they are often in non-binding form since there is no corresponding explicit authorization. The WTO “internal law” also belongs in this category, such as rules of procedure for the several bodies, rules on the budget and so on.\textsuperscript{32} Examples of binding decisions are the adoption of the Final Act of a Ministerial Conference, Ministerial Decisions and Decisions of the General Council, where some may give rise to new treaty rights or obligations.\textsuperscript{33}

In order to ensure compliance with those rules that are legally binding on the Member States (and thus have external effect), there are two mechanisms that have the task of surveillance and obtaining implementation with the substantive international trade law covered by the Agreements. The first is the well-known DSU, which governs the settlement of disputes between Member States. The second is the TPRM, an institutionalized form of peer review, which is meant to enhance transparency and improve coherence in the application of WTO law. It is thus meant to improve compliance with the rules and to prevent disputes from arising by clarifying how to apply existing rules. The next section will discuss the DSU, while the TPRM and the issue of compliance will be dealt with in the following sections.

3. THE DISPUTE SETTLEMENT UNDERSTANDING

This section will describe the workings of the dispute settlement system under the original GATT 1947 and under the current WTO DSU, as well as analyze some of the distinguishing features and characteristics of the dispute settlement mechanism as it is today.

\textsuperscript{32} Ibid., p. 29.

\textsuperscript{33} On the bindingness of WTO decisions, see e.g. Footer (2006), pp. 176-178.
3.1. Dispute Settlement under GATT 1947

The failed Havana Charter contained a quite specific system of dispute settlement for the ITO. While excluding any unilateral measures, it provided for voluntary arbitral jurisdiction, arbitral awards, recommendations and “appropriate and compensatory” measures, as well as the possibility for an advisory opinion by the International Court of Justice. However, since the ITO was never to be, the GATT was applied on a provisional basis without the provisions envisioned for the actual organization.

The GATT 1947 Agreement contained two elements relevant for dispute settlement: Article XXII provided for the possibility of consultations between any of the Member States with respect to “any matter affecting the operation of this Agreement [GATT]”. If such consultations were unsuccessful, “The Contracting Parties” could intervene and consult with the “accused” Member State. Article XXIII then (entitled ‘Nullification or Impairment’) provided for the possibility of referring a complaint concerning the nullification or impairment of benefits accruing to a Member State to the Contracting Parties, who would investigate the matter and make appropriate recommendations. As a final possibility, Article XXIII:2 offered the option to suspend the application of concessions or other obligations under the Agreement if the circumstances were serious enough to justify such action.

In the beginning, these provisions meant that where consultations failed to resolve a dispute, the dispute would be handled by working parties, consisting of representatives of interested Contracting Parties, including the parties to the dispute, and deciding on the basis of consensus. Due among other things to the increase in Membership of the WTO and the need for more authoritative rulings, proceedings were in the end “legalized” more with the establishment of a legal office within the GATT Secretariat and the codification of dispute settlement procedures.

In 1952, the working parties were replaced by a system of panels of three to five independent experts (often diplomats with little or no legal training) from contracting parties not involved in the dispute.\(^{34}\) The GATT Council (all Contracting Parties) would have to adopt the recommendations and rulings of the panel by consensus before they became legally binding on the parties to the dispute.\(^ {35}\)


This meant that also the parties to the dispute would have to agree to the establishment of a panel and the adoption of the panel report, which offered them (and other Members, for that matter) the possibility to block the adoption. In 1981 an Office of Legal Affairs was established within the GATT Secretariat to help the panels with the drafting of panel reports. The improvement in the legal quality of the reports and the use of previous panel reports as precedents, as well as the application of customary rules of interpretation, helped to evolve the GATT dispute settlement system from a diplomatic to a rules-based judicialized system, "based primarily on the authority of legal obligations". However, problematic issues still remained under GATT, such as the adoption of Council decisions regarding panels by consensus, the lack of an opportunity for appeal or of legal options to act against a non-compliant Member State after the adoption of a panel report.

### 3.2. Dispute Settlement under the WTO

With the establishment of the WTO in 1995 and the accompanying DSU, an elaborate (quasi-) judicial dispute settlement system was provided for based on the GATT provisions, very much like the practical application of those provisions in the last years prior to the WTO. New elements of the mechanism, however, were the introduction of a quasi-automatic adoption of requests for panel establishment, panel reports and the authorization to suspend concessions; a strict timeframe for the various stages of the dispute settlement process; automatic bindingness of rulings upon the parties; and the possibility of appellate review of the GATT dispute settlement system see e.g. Hudec, R., 'The New WTO Dispute Settlement Procedure' (1999) 4 Minnesota Journal of Global Trade.

36 Although there was and is no official use of precedent (or *stare decisis*) and rulings are binding as between the parties to that particular dispute, adopted GATT and WTO panel and AB reports do “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute”. (Appellate Body Report, US — Shrimp (Article 21.5 — Malaysia), para. 109; and Appellate Body Report, Japan — Alcoholic Beverages II DSR 1996:I, 97 at pp. 107-108).


39 Although nothing is said about the bindingness of the rulings in the WTO Agreement or the DSU itself, they certainly are binding in the traditional internal law sense. Arguments can be found to support this assertion in the language of several of the clauses of the DSU, which speaks e.g. of the obligation to perform a recommendation to conform, or of the absence of an obligation to withdraw a measure in non-violation cases – which would imply there is an obligation to withdraw in violation cases. For more on the bindingness of WTO rulings, see Jackson, J.H., 'The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation' (1997) 91 (1)
of panel reports. The Dispute Settlement Body (DSB) now officially handles the administration of the disputes, a body composed of representatives of all WTO members. It has the authority to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreements”.

Adjudication in the WTO system can be divided into two phases: the administrative and judicial phase. The administrative phase consists of consultations between the complainant and the defendant, the procedure of which has been outlined in Article 4 DSU. This phase is obligatory, since the WTO prefers the settlement of disputes through mutual agreement, whereby the Members are urged to attempt to obtain satisfactory adjustment of the matter before taking recourse to further action. The phase is meant to serve as a way to reach a solution without recourse to actual litigation, as well as to define the subject-matter and scope of the litigation if no solution is found. Although many cases lead to an officially announced Mutually Agreed Solution pursuant to these consultations, or remain inactive definitely, a large number of the cases also proceed to the second phase.

In the second, judicial phase a panel is established according to Article 4.7 DSU upon request of the complaining party if consultations fail to settle the dispute within 60 days of requesting the consultations. The second phase itself consists of three parts: first the panel procedure, which is the first and sometimes final instance of procedures, before an ad hoc panel established following the procedure laid out in Article 6 and further DSU. Second comes the procedure

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41 Article 2:1 DSU.
42 Horn and Mavroidis call this the bilateral and the multilateral phases (Horn, H. and P.C. Mavroidis, ‘A Survey of the Literature on the WTO Dispute Settlement System’ (2007) 6020 CEPR Discussion Paper). In this dissertation the terms administrative and judicial phase are chosen, as they are somewhat reminiscent of the phases of the infringement procedures and make comparative analysis easier later on in this book.
43 According to Article 4.6 DSU consultations are to be confidential, however others may be present during consultations when they have a substantial trade interest in the consultations, after notification to the parties to the dispute and DSB and the acceptance by the party to which the request was addressed (Article 4.11 DSU).
44 Here, a reference is made only to the official cases: those announced to and published by the Dispute Settlement Body. As Horn and Mavroidis describe: These cases represent only “the tip of the tip of the iceberg”, and it is unclear what conclusions can be drawn from any empirical research on the official data (Horn and Mavroidis (2007), p. 30).
45 The members of the panel are chosen according to the will of the parties to the dispute. Only in case of disagreement between them, the panelists will be appointed by the Director General of the
before the Appellate Body (AB), which is similar to a court of last instance and hands final judgment over a dispute. The AB is a standing body, to which seven judges are appointed on four-year terms.\(^{46}\) The AB can no longer go into the factual matters of the case, which are taken to have been examined in depth by the panel in the earlier instance. Appeals, therefore, have to be based on points of law. Third and final, when a ruling by the AB has been made and a party does not comply with the ruling within a certain timeframe,\(^{47}\) resort can be taken to a so-called ‘compliance panel’ under Article 21.5 DSU. This panel can examine the WTO consistency of implementing measures. If it finds the Member concerned has indeed not implemented the rulings within the set timeframe, it can authorize the other party to the dispute to take retaliatory measures or suspension/termination of concessions until the original report is complied with. Figure 7.1 shows the four steps of the dispute settlement procedure.

![Diagram of WTO Dispute Settlement System](image)

**Figure 7.1** The Phases of the WTO Dispute Settlement System

It is important to realize that during the entire process, the parties to the dispute can still negotiate. Moreover, the panel and AB reports do not tell the

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\(^{46}\) These judges are persons of recognized authority unaffiliated with any government (Article 17 DSU).

\(^{47}\) According to Article 21.3 of the DSU, the Member concerned must inform the DSB within 30 days of its intentions in implementing the recommendations and rulings of the AB. This implementation must be within a “reasonable period of time for”.

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losing party how to bring its behavior into conformity with the rules and obligations of the WTO. Article 19 of the DSU states quite clearly that the panel or AB “shall recommend the Member concerned bring the measure into conformity with the Agreement”, but that it “may suggest ways in which the Member concerned could implement the recommendations”. Article 19.2 adds, “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”.48 This means that the way the losing party to the dispute changes its behavior after the adoption of the report can also be a subject of consultation and negotiation between the parties to the dispute. All that is required is for the Member State to bring its measure into conformity with the Agreement.

3.3. Features and Character of the Procedure

The new dispute settlement system has helped to resolve many of the problems that existed under the GATT mechanism and that had rendered that system less effective than it could have been. In particular, the formalization of a complainant’s right to a panel, providing for the automatic adoption of panel reports through “reverse consensus”,49 the availability of appellate review and the establishment of a mechanism with jurisdiction over all disputes arising under the covered agreements have increased the system’s effectiveness. This section discusses some important features as well as the character of the WTO dispute settlement procedure.

3.3.1. Some Features of the Dispute Settlement System

Some interesting features of the WTO dispute settlement procedures pertain to its intergovernmental character, the absence of a requirement of legal interest, the purpose of the system, the preference for friendly settlement when possible, and the possibility for sanctions as an ultimate remedy.

Intergovernmental

48 Similar to the declaratory rulings by the Court of Justice of the European Union during the infringement procedures.
49 Reverse consensus means that a panel report will only not be adopted when all members (including the winning party in a dispute) agree it should not be.
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An important element of the WTO dispute settlement procedure is that a dispute can only be brought before a panel by a Member of the WTO against another Member. There is thus no central or supra-national WTO body that can bring a Member State before a panel in order to achieve compliance with WTO rules. This fact is seen by some as one of the reasons for the relatively low number of WTO cases since the organization’s inception.\textsuperscript{50} When this is compared to the EU system for instance, it is clear from statistics that Member States prefer taking recourse to the Article 258 TFEU procedures by notifying the European Commission of another Member State’s non-compliance, rather than invoking Article 259 and taking the matter to the Court themselves.\textsuperscript{51} In the WTO, most disputes end before a panel ruling, and most of these even before a panel is requested. As one scholar put it: “the success of the WTO system hangs on its ability to encourage bargaining in the shadow of weak law”.\textsuperscript{52}

\textbf{No requirement of legal interest}

There is no provision in the DSU requiring a Member to have a certain legal interest in the case at hand in order for them to have recourse to the dispute settlement system. In \textit{EC-Bananas III} it was held by the Appellate Body that “a Member has broad discretion in deciding whether to bring a case against another Member under the DSU” and furthermore that “Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly”.\textsuperscript{53} In \textit{Mexico-Corn Syrup (Article 21.5 – US)}, the Appellate Body stated it must presume that a Member submits a request for a panel in good faith, and that Article 3.7 DSU “neither requires nor authorizes a panel to look behind that Member’s decision and to question its exercise of judgment”.\textsuperscript{54} In general it can thus be stated that a Member is presumed to act in good faith and to have an interest (direct or indirect, according to the wording of Article 3.7 DSU) in bringing the case before a panel. This is easy to fulfill, given the fact that WTO cases are supposed to be about “trade opportunities”, and not actual trade flows.

\textsuperscript{50} Tallberg (2002), p. 637.
\textsuperscript{51} See chapter 3 on the EU infringement procedures.
\textsuperscript{53} \textit{EC – Bananas III}, paras. 132 – 136.
A Member State can also be heard as a third party to a dispute when it has a substantial interest in the case at hand, meaning when “any benefit accruing to it directly or indirectly [...] is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded.” However, any legal findings apply only to this case and to the parties concerned.

**Purpose of the system**

The dispute settlement system is there to preserve the rights and obligations of the members under the covered agreements and to clarify the existing provisions of those agreements. It is therefore not there to protect common or union interests or the rights of third parties, in contrast to the EU Article 258 procedure, for example. The aim of the dispute settlement system is thus more political in that the goal is to settle disputes. The system does not have as its primary goal to induce compliance with the rules of the organization as such. Article 3.7 of the DSU states quite clearly: “the aim ... is to secure a positive solution to a dispute”, while Article 3.3 DSU emphasizes, “prompt settlement [...] is essential to the effective functioning of the WTO.”

Nevertheless, despite the fact that the system is meant to resolve disputes between Member States and is not meant as a compliance mechanism per se, in practice it does to a large extent function as such, at least during the judicial phase. The panels and the AB review whether the measures taken by the defendant state are indeed in non-conformity with the rules and obligations under the WTO Agreement. If they are, the non-compliant State is obliged to remove the offending measure, thereby bringing itself into conformity with WTO rules. The dispute is thus solved through inducing compliance by the Member States.

**Friendly settlement**

As a logical consequence of the dispute-solving character of the system, the DSU prefers Members to settle their differences through consultations if possible. This is the obligatory first step in the dispute settlement procedure. It is still possible to end a dispute through negotiations while it is already before a panel, in contrast to for example the EU system. In the EU system, the infringement procedures also encourage the peaceful settlement of disputes between the Commission and the Member State, but once a procedure has started it is not auto-

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55 Article XXIII:1 GATT.
56 Article 3:2 DSU.
matically stopped when the Member State adheres to the EU rules. The possibility of ending a dispute when it is already before a panel is, among other things, due to the fact that dispute settlement under WTO rules is not meant to protect common or higher WTO interests. Thus, when the parties no longer want to continue the procedure, it is not up to a panel or the DSB to proceed anyway.59

So far, 462 disputes have been brought to the WTO since 1995.60 For 223 cases, panels were established and are actively working or have reported. For the other 239 disputes, in as far as they are not currently pending after consultations have been requested, either the WTO has been notified of a mutually agreed solution (94 cases), or the dispute has been dropped or settled in some other way before the establishment of a panel. This means that in roughly half of all cases, a solution was found without recourse to the WTO dispute settlement system’s judicial phase. It could be that the mere fact of requesting consultations on a certain matter signals the complainant’s seriousness. The respondent, wanting to prevent the establishment of a panel and having to comply with a binding panel report, will then be more likely to look for a friendly solution to the dispute than without this signal. This could explain the fact that a mutually agreed solution or another manner of settling the dispute was found in so many cases.61 Early settlement (that is, before or during consultations) is beneficial for both parties, both in an economic and social sense. Reaching a settlement in later stages of the procedure may also be preferred to awaiting the outcome of litigation. In that way the defending party can choose to undertake measures which are beneficial to the Member’s stakeholders (industry, consumers), thereby avoiding the possibly costly legislative changes the outcome of panel proceedings could involve.62

Sanctions
A last element of interest, and one which again distinguishes the WTO dispute settlement procedure from the EU infringement procedures for example, is the fact that whereas the EU Court of Justice can impose penalties on a non-compli-

59 In the EU, once the deadline to end the alleged infringement provided by the Commission in its reasoned opinion has passed, the Commission can bring proceedings even when the Member State has remedied the violation after the deadline. Moreover, under certain conditions proceedings can also be brought when a Member State complyes within the deadline. See also chapter 2, section 2.4 in the present thesis.
ant Member State, in the WTO such penalties cannot be awarded. When a party does not promptly comply with the recommendations or rulings of the DSB (pursuant to Article 21 DSU), however, the other party can request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the covered agreements (suspension of concessions as allowed by Article 22 DSU). However, these provisions on trade sanctions do not allow for the imposition of penalties. This is of course in line with general international law, where the focus is on restoring the balance between the parties. No “international crime” has been committed, and thus no punishment is necessary. This absence of penalties is seen by some as a reason for the existence of persistent non-compliance with the rulings of the AB – since there is no ultimate penalty for non-compliance.

It has been argued that “a regime that is concerned with redress for those who claim that their rights have been infringed, is different in focus from a system whose main concern is to provide consequences for those who do not comply with its rules”. For the WTO, the aim is to settle disputes and to offer redress, not damages. Nor does it want to sanction or punish those who are non-compliant. Compensation in the WTO is a temporary measure until implementation is achieved, and is meant as an incentive for the offending state to bring its laws into compliance. This means a return to conformity through restitution in integrum. It has often been argued that the lack of compensatory remedies should be addressed under WTO rules, but as of yet the option has not been provided for. Other suggestions regarding changes to the compensatory system of the WTO include the introduction of a choice between monetary payments to or suspension of concessions by the prevailing party; a retrospective assessment of remedies, calculations thus starting before the date set for implementation.

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63 E.g. Bronckers, M. and N. van den Broek, ‘Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement’ (2005) 8 (1) Journal of International Economic Law. Others believe that rather than turning to hard sanctions to address non-compliance, softer mechanisms should be used more intensively, such as publicity, education, capacity building etc. (see e.g. Charnovitz (2001)).
64 Persistent non-compliance refers to cases such as EC – Bananas III, or EC - Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body WT/DS26/AB/R & WT/DS48/AB/R, adopted 16 January 1998 (cases which were originally started in 1996 and only found a solution in 2009 and 2012, respectively).
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– thereby preventing unnecessary delays in implementation,68 and the increase of sanctions over time.69 In any case, it has been shown that the introduction of penalty payments is capable of increasing compliance with rulings.70

3.3.2. Character of the Dispute Settlement System

The character of the dispute settlement system under the WTO has, despite the changes made to it, retained some of the diplomatic character it had under the GATT 1947. Early settlement is encouraged under the WTO as much as under GATT 1947 and remains the prevalent way to solve disputes. Panels are requested in less than half of all cases.71 The negotiations and consultations that take place during early settlement are not made publicly known. Members other than the parties to the dispute are not present during consultations.72 It thus remains unclear on what grounds the early settlement has taken place, and what political and diplomatic issues may have played a role in this stage.

Moreover, smaller or developing countries have a weaker position under the habit of early settlement. They have fewer resources, both financial, human as well as knowledge resources, to spend on dispute settlement than the larger and developed members. Since their aggregate trade value is less than that of the developed members, and remedies under WTO law are limited, they have less to gain from a successful claim. A simple cost-benefit analysis reveals that the balance usually tips over toward the developed countries in early settlement, since developing countries have more to lose when a case continues to the judicial

68 However, this suggestion is not very efficient: It just heightens the cost of being the target of compensatory actions, without inducing earlier compliance. Any Member that was able to comply with a ruling within the reasonable period for compliance will not have to pay or suffer retaliatory damages at all, so why start the calculation of the height of these remedies on a date still within the reasonable period of time?
71 Between 1995 and 2011 panels were established in 234 cases out of 423 requests for consultations. Panel reports were adopted in 154 cases, while arbitration awards were made in 12 cases only (19 awards).
72 Most consultations are between the complaining and responding members only. However, it is possible in some cases (under Article XXII GATT only, not under Article XXIII GATT), when agreed to by both consulting parties, for third parties with a substantial interest to participate. It is also possible to request good offices, conciliation and mediation, involving an impartial third party, under Article 5 of the DSU. This may continue during the panel process if so agreed by the parties to the dispute.
phase and less to gain. Statistics seem to bear out this phenomenon. Access to dispute settlement has indeed proved to be problematic, especially for developing and least developed countries. Some efforts have been made to improve access for these Member States, but much remains to be done in that area if the system wants to reach all Member States effectively.

Another area where developing countries have a disadvantage relative to the richer Member States is when non-compliance has indeed been established by a panel or AB report. Some have called the WTO’s dispute settlement system a system of “breach and pay”, where continued non-compliance is possible as long as a Member is willing and able to compensate or endure retaliation. It is clear that the more developed or larger Member States will be able to sustain such a situation of breach and pay much longer than less developed or smaller Member States.

It has been argued that the reason for the continued preference for early settlement has to do with uncertainty. The complainant has the choice between a unilateral trade measure on the one hand and filing for dispute settlement on the other. In considering the option of retaliation, it also needs to consider the costs for the retaliating country itself, in terms of the restriction of imports that in a way punishes the Member’s own importers and retailers of imported goods as well as consumers.

The defendant must weigh the cost of potential retaliation, the cost of reputation loss by breaking WTO rules, setting a precedent for non-compliance by others, and even consider national political elements, such as being able to point towards a WTO ruling when tying the hands of domestic (protectionist) lobby groups. Neither of the parties knows what weight the other accords to the costs of retaliation and of continued non-compliance. According to Busch and Reinhardt, the anticipation of a ruling and the desire to avoid it is the system’s most effective means of extracting market-liberalizing concessions. The strength of the procedure thus follows from the normative force of the rulings combined with community pressure (or peer pressure) to observe them, as well as a weight-

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73 See e.g. Bown (2009).
74 McRae (2008).
75 For more on the access of developing countries to WTO dispute settlement, see Bown (2009).
78 Ibid., p. 147.
ing of the costs and benefits of non-compliance. A Member may choose to comply because of reciprocity, reputational issues, fear of retaliation and jeopardizing international cooperation on other issues.\textsuperscript{80} It has been shown that the most important element in making governments comply is the potential cost of retaliation, whereas the other factors play a more limited role.\textsuperscript{81}

To improve transparency in and understanding of the WTO rules, and thereby improve adherence to these rules (and thus lessen the need for dispute settlement, either in the administrative or the judicial phase), the WTO has also introduced an institutionalized form of peer review: the TPRM.

4. THE TRADE POLICY REVIEW MECHANISM

The transparency principle is essential to the workings of the WTO. States, individuals as well as companies involved in international trade need to know about the conditions of trade in order to ensure a balanced and effective functioning of the world trade system. Transparency makes these conditions clearer, as it 1. enables the contracting parties to appreciate trade policies and their impact on the functioning of the multilateral trading system; 2. provides better understanding of trade policies; and 3. demonstrates issues of non-compliance or non-conformity with trade rules.\textsuperscript{82} The TPRM sets out to increase transparency in and understanding of the trade policies of the WTO Member States, thereby increasing adherence to the rules of the WTO.

A first attempt at transparency of trade policies was made by Article X of the original GATT, which called for the prompt publication of laws, regulations and rulings pertaining to international trade. However, the Member States never really acted on this obligation.\textsuperscript{83} After the adoption of the 1979 “Understanding on Notification, Consultation, Dispute Settlement, and Surveillance”, the Secretariat submitted two reports per year on the state of the world trading system.\textsuperscript{84}

\textsuperscript{80} Hippler Bello (1996), p. 417.
\textsuperscript{84} See Article 24, GATT (1979) Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 265/210)
PART III  Compliance Mechanisms in International Organizations

Trade Policy Review Mechanism as such was finally introduced as a provisional feature during the Uruguay Round Negotiations, and subsequently became a permanent part of the WTO system under Article III(4) of the WTO Agreement: “The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the “TPRM”) provided for in Annex 3 to this Agreement”.

The TPRM is set out in Annex 3 to the Marrakesh Agreement. The purpose of the mechanism is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of members.  

According to the text of the WTO Agreement, the TPRM enables regular collective appreciation and evaluation of individual Members’ trade policies and practices and their impact on the world trading system. The mechanism is meant as a forum where policies can be explained and concerns can be expressed on a non-confrontational and non-legalistic basis. In fact, the WTO Agreement expressly sets out that the mechanism “is not intended to serve as a basis for enforcement of specific obligations under the [WTO] Agreements” (emphasis added). Since the TPRM is not part of the agreements covered by the DSU, it is also procedurally impossible to base a claim on breach of the rules under the TPRM.

Peer review in a trade context can provide a forum for examination of the enforcement policies in individual countries – a forum for national implementation to be monitored and for Members to voice dissatisfactions with another’s enforcement policies. This in turn may result in increased compliance with policy.

“The CONTRACTING PARTIES agree to conduct a regular and systematic review of developments in the trading system. Particular attention would be paid to developments which affect rights and obligations under the GATT, to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding.”

85 WTO Agreement, Annex 3.
87 WTO Agreement, section A(i).
88 See supra fn 22.
obligations. The TPRM thus, through increasing transparency and disseminating information, can indirectly increase compliance with WTO rules.

The Trade Policy Review Body (TPRB) publishes two kinds of reports: the Individual Country Review, and an annual overview of developments in international trade, which may have an impact on the international trading system. The latter is a general report on the workings of the TPRM and developments in international trade and is assisted by an annual report from the Director-General of the WTO highlighting significant policy issues affecting the trading system. The former – the individual country reviews – essentially examine every national policy to check its compatibility with the WTO agreements.

The TPRB is the designated body to carry out periodic trade policy reviews: the Individual Country Reviews. Each member is obligated to report regularly to the TPRB, describing the Member’s trade policies and practices. The members also provide reports when there are significant changes to their trade practices, as well as annual statistical updates. The review by the TPRB itself is based on a policy statement by the Member under review as well as a report prepared by economists in the Trade Policy Review Division. The most critical source of information however are the responses to questionnaires sent by the Secretariat and the results of fact-finding missions. A preliminary report is sent to the government under review for comments, after which the final report is circulated to Member States. This report is then discussed in a meeting of the TPRB, the results of which are published together with the final report. These reviews of individual countries are carried out in periods representative of the Member’s share of world trade. The EU, for example, is reviewed every two years, while smaller or less-developed country Members are reviewed every six years or even less frequently.

The TPRM process is thus quite similar to the OECD peer review process: 1. Information is collected about and from the country under review; 2. Members of the TPRB Secretariat travel to the reviewed country to interview country officials and discuss outstanding questions; 3. The Secretariat drafts a report, on which the country under review can comment; 4. The final report, together with a policy statement from the country, is circulated to the Member States, who are invited to submit written questions; 5. The TPRB organizes a review meeting.

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89 Peer review: merits and approaches in a trade and competition context.
90 The frequency of the reviews is dependent upon the impact of individual members on the functioning of the multilateral trading system.
91 The Secretariat remains solely responsible for the content of the report, despite the influence of the Member’s government. The final report is an objective evaluation of the situation.
open to all Member States. The Report is discussed, and at the end of two half-day meetings, disseminated and made public.

The Reports are all structured similarly, with a part on the economic situation of the Member State, a second part on the trade policy regime (institutional framework) including investment policies, a third on the Member’s trade policies and practices that examines the existing trade measures, and a final part on trade policy by sector.\textsuperscript{92}

One crucial element of these trade reviews, which stands in contrast to the OECD peer reviews, is that at no point in time are any recommendations made for actions to be taken by the Member under review. The reports are overviews of the individual countries’ policies, with an aim to enhance transparency and to have Members learn from each other. Especially for developing country Members, these reviews are very useful in terms of capacity building and technical assistance. The findings in the report often do point towards areas where change might be needed, and the concerned member’s policy statement at the publication of the report also often contain remarks on how the country’s trade policy will take the findings into account. If the Member State then subsequently does not adhere to its statements in the report, its reputation will surely suffer, internally as well as externally.

However, neither the statements made both in the Government Report provided before the review meeting nor the statement made by the government at the time of the meeting usually contain very strong commitments. Conversely, in the concluding remarks of the chairman of the TPR meeting at the end of the process, it does become clear where some of the most important issues lie. Since this is the most accessible information regarding the review process, it is liable to have the most impact. Phrases such as: “members are concerned”, “the member is encouraged to review policies”, “policies are seen as a hindrance to trade”, “the member is requested to inform or clarify further” and so on are not uncommon.

The TPRB itself has been quite positive about the functioning of the TPRM in its own annual reports. It finds the body is functioning effectively, while expressing satisfaction with the structure, quality and content of the reviews. Appraisal in academic literature is much less positive, where critical comments have described Trade Policy Reviews (TPRs) as

\begin{quote}
Cumbersome to read and clogged with compendium-style information. They are analytically superficial and relentlessly uncritical. They differ in their coverage and approach one from another. Furthermore, the
\end{quote}

\textsuperscript{92} The sectoral part often concentrates on agriculture and services, areas where restrictive measures are frequent.
procedures for preparing and discussing TPRs lack efficiency and public participation. It is therefore unsurprising that TPRs are deemed to have no discernible effect on trade policies. Other trade policy assessment, for instance by the World Bank, are more rigorous and outspoken.\(^93\)

One official even went as far as to comment: “The TPRM? Totally useless!”\(^94\)

Although these critiques contain very relevant truths, they are somewhat harsh. The TPRM reports can lead to peer pressure as well as pressure on a national public level. The mechanism is not meant as an enforcement mechanism, but is a compulsory review where a country’s practices are measured against the WTO standards. When, for example, the report states that a certain member has significantly increased its anti-dumping practices since the last review, this might be an incentive for other members to exert pressure on their peer to reduce this amount. In this manner the objective reports of the TPRB do have certain enforcement characteristics. In practice, the reviews have indeed led, albeit modestly, to revision of national legislation by several members in order to conform to WTO rules.\(^95\)

In order to improve the impact of the TPRs, the WTO could learn from the peer review practices of the OECD – a system to which the TPRM bears strong resemblance. The idea of naming-and-shaming, active dissemination through the press, making critical analyses and providing policy recommendations which are checked against actual policy changes in following reviews – these are all elements the TPRM could introduce or apply more rigorously than has been done to date. However, in how far the TPRM will be able to reach the same level of effectiveness as the OECD peer reviews remains to be seen. Although the results of the TPRM cannot be used for dispute settlement, the existence of this compliance mechanism remains at the back of the Member States’ minds. While the existence of a strong compliance mechanism in the EU serves as an extra incentive for the Member States to try and solve their problems through softer mechanisms, the availability of a strong mechanism in the WTO may have entirely the opposite effect due to the legal separation between the TPRM and the DSU. More on the influence this separation has on the effectiveness of these two compliance mechanisms will follow in the final sections of this chapter. A general analysis

\(^{93}\) Zahrnt (2009), p. 2.
\(^{94}\) Respondent #3.
of the effect of a strong mechanism in the background in different international organizations is made in the final chapter to this thesis.

5. WTO COMPLIANCE

The WTO dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements”, with the aim of promptly settling situations “in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member”.\(^\text{96}\) In the WTO system, therefore, the focus of the mechanism is on the rights and obligations of the Member States as they themselves perceive it.

This stands in contrast to the situation under the EU infringement procedures, for example, where the aim is to ensure the fulfillment of obligations under EU rules – compliance sec or as determined by the European Commission. Under the infringement procedures it is the Commission that decides whether in its opinion compliance is achieved or not and whether to take the alleged non-compliant Member State to Court – not the Members themselves. One could say therefore that the WTO dispute settlement system is somewhat more similar to the EU system under Article 259 TFEU, where a Member State can start procedures against another Member State if the Commission decides not to act.

One notable difference between the EU and the WTO dispute settlement systems are the respective goals of the systems. Whereas the aim of the EU infringement procedures is to bring a Member State into compliance with its obligations under EU law, the goal of the WTO dispute settlement system is rather “to secure a positive solution to a dispute”.\(^\text{97}\) As the WTO puts it: “The priority is to settle disputes, not to pass judgement”,\(^\text{98}\) and the first objective is therefore to obtain a “solution mutually acceptable to the parties to a dispute”.\(^\text{99}\) Such solutions must be WTO-conform.\(^\text{100}\) Only when this solution cannot be found, an investigation will be launched into whether the measures concerned are found to be inconsis-

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\(^{96}\) Article 3.2 DSU.  
\(^{97}\) Article 3.7 DSU.  
\(^{99}\) Ibid.  
\(^{100}\) Article 3.5 DSU: “All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.” (emphasis added).
tent with the provisions of any of the covered agreements, and whether further actions can be taken. The main objective of the WTO DSU is thus not adjudication but rather dispute settlement, and therefore falls under what was classified earlier as a dispute settlement mechanism where the underlying obligations are of a bilateral nature, as opposed to an enforcement mechanism where obligations are of a more collective nature.101

Nevertheless, Article 22.1 indirectly defines compliance as being “full implementation of a recommendation to bring a measure into conformity with the covered agreements”. This is used in the context of post-panel/AB adjudication, where investigations have been made to see whether the measures at stake are inconsistent with the provisions of any of the covered agreements and no mutually satisfactory solution has been found. To bring the measure into compliance with the covered agreements is then the next option, before the imposition of compensation payment or suspension of concessions.

Before this stage, however, it is possible to find a mutually satisfactory solution where in fact the measure is not brought into consistency with the covered agreements but is rather modified in such a manner, or compensation offered, so the complaining member will not bring the case before a panel. Actual compliance with WTO rules may thus not necessarily have been reached, although officially the solution must be WTO compatible according to the DSU. Rather, a level of non-compliance acceptable to the parties to the dispute may continue to exist. A comparison can here be made to the pre-judicial phase of the EU infringement procedures, where the Commission decides whether a solution offered by the Member State concerned is satisfactory to no longer pursue the case until before the courts. It is thus possible under the WTO dispute settlement system, as with the prejudicial stage of the European infringement procedures, that actual compliance has not been reached after that stage.

There is an important difference between the EU system and the WTO system, which relates to what was said earlier about whether or not a common interest is pursued through the supervision of a more or less supranational institution. The ultimate goal of the WTO dispute settlement system is to solve disputes between Member States in such a way that the solution is in conformity with the obligations under WTO rules. The ultimate goal of the EU infringement procedure is to obtain compliance with EU rules sec. Whether or not this has solved a dispute between Member States is not important as such. There is thus potentially more room under WTO consultations to reach agreement between the parties than there is under the preliminary stages of the infringement proce-

101 See supra: Introduction to Part III.
dures. Moreover, the WTO is a system in which every Member can take on the role of Attorney General, where it is left up to the Member States themselves to decide whether or not a mutually satisfactory solution has been found. Under EU law on the other hand, this decision is left to the Commission. There is thus potentially less room for diplomatic or political influence on the discussions / consultations in the pre-judicial stages of the EU procedures, given the independent status of the Commission, as compared with the two opposing Member States under WTO consultations.

When the WTO system is examined from a compliance perspective, there are a few comments that can be made. First of all, as noted above the discretion left to the Member States is quite large. Not only can they decide whether they want to start procedures, but they are also the masters of the dispute in the sense that, if a solution can be reached between the parties without involvement of the panel or Appellate Body, this is the preferred route to be taken.

Second, and in combination with the discretion left to the Member States, the aim of the system is not necessarily to reach full compliance, but rather to reach a level of compliance acceptable to the parties to the dispute.

Third, compliance with the rules of the organization is potentially improved by the existence of the softer mechanism of the TPRM. The system works parallel to the DSU, and while it is not meant to serve as a basis for litigation, it increases transparency regarding Member State trade policy practices. It thus works as a complementary system alongside the DSU in achieving compliance with the rules of organization. In fact, it is much more focused on achieving compliance than the DSU, which has as its aim the settlement of disputes. Since this is explicitly not the goal of the TPRM, the interaction between the two systems potentially provides an interesting dynamic. In practice, however, the interaction is quite limited, due to the fact that the TPRs do not provide actual policy analyses or recommendations. Dissemination through media and other channels is also quite limited, so the impact in the sense of peer pressure though those means is not as strong as it could be. One of the recommendations for improvement of the TPRM that has been heard repeatedly over the years, both on the side of the TPRB as well as in academic literature, specifically concerns the process of dissemination.\(^{102}\)

\(^{102}\) Zahrnt (2009).
6. THE EFFECTIVENESS OF WTO COMPLIANCE MECHANISMS

Now that the set-up and functioning of the two compliance mechanisms of the WTO has been examined, an analysis of their effectiveness can be undertaken. This chapter will here examine the three elements formulated in chapter 2.1: A: the goal, B: the compliance, and C: the effectiveness. The final chapter will explore D: the comparison.

6.1. The Goal of the WTO Compliance Procedures

The DSU and the TPRM do not set out to attain the same objective: the DSU is aimed at settling disputes, while the TPRM addresses compliance issues.

The purpose of the DSU’s dispute settlement system is not only, as the name itself might seem to imply, the settlement of disputes. It also serves to preserve the rights and obligations of the members as well as to clarify the existing provisions of the WTO agreements.\(^{103}\) The DSU provides as well that prompt compliance with the rulings under the DSU is essential in ensuring effective resolution of disputes.\(^{104}\) It can thus be said to reach its goals when i) disputes are definitely settled, ii) they are settled in such a way as to preserve the rights and obligations of all members, iii) the provisions of the agreements are interpreted and clarified so as to provide the members with a predictable multilateral trading system,\(^{105}\) and iv) when rulings under the DSU are complied with in a prompt manner. The aim of the mechanism is to secure a positive solution to a dispute\(^{106}\) – compliance is not the primary goal. However, the final solutions, whether proposed by the parties themselves in the administrative phase or by the Panels and AB in the judicial phase, do need to be in compliance with the rules of the organizations.

The purpose of the TPRM is the opposite of the DSU. Its goal is to contribute to the compliance of the Member States with the rules of the organization, and is explicitly not meant to serve as the basis for enforcement or dispute settlement. So even though both systems have the ultimate intended effect of achieving compliance with the rules of the organization, their actual direct aims are different.

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\(^{103}\) As provided by Article 3 DSU.

\(^{104}\) Article 21.1 DSU.

\(^{105}\) Article 3 DSU also provides: the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.

\(^{106}\) Article 3.7 DSU.
6.2. Compliance

Before the effectiveness of the WTO compliance mechanisms is examined, four compliance-related questions need to be asked regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior. This way the extent to which compliance can be reached under the mechanisms used in the WTO can be determined.

Expected behavior
The first question regards the obligations the Member States are expected to adhere to. The DSU applies to what are called the “covered agreements”, meaning the WTO Agreement and the Multilateral Trade Agreements, as well as the Plurilateral Trade Agreements for as far as the parties to those agreements have set out the terms for the application of the DSU to that Agreement.

The TPRM applies to the Multilateral Trade Agreements and to the Plurilateral Trade Agreements where applicable, and thereby not to the WTO Agreement itself. This is logical, since the focus of the TPRM is on trade policies as such, and not adherence to institutional rules as under the WTO Agreement.

Hard or soft obligations
The second question deals with the character of the underlying obligations. Both the DSU and the TPRM apply to legally binding, hard norms, as laid down in the Agreements. This means that a soft compliance mechanism, which involves instruments such as increased transparency, information dissemination, peer review and peer pressure in the shape of the TPRM, also in fact covers hard obligations. However, according to the TPRM, para TPRM, para. A(i), the results of the TPRM cannot be used for the enforcement of specific obligations, while the reports contain legally non-binding recommendations and advice only.

Actual behavior given the element of discretion
The third question goes to the core of the compliance problem: When is a WTO Member State non-compliant? For both mechanisms it is theoretically the case that a Member State is non-compliant when it does not adhere to the obligations under the agreement targeted by the specific mechanism. But who determines when non-compliance exists?
Under the DSU, the determination of a violation is left up to the Member States themselves – the only parties that can initiate proceedings. Moreover, most cases are solved during the phase of (informal) consultations, where it is only the parties to the procedure that discuss and negotiate among themselves.\footnote{Although third parties can also participate under certain conditions. See \textit{supra}, fn. \textit{72}.} The Member States are thus up to a certain point Masters of the Dispute – which is logical in the Member-driven organization that is the WTO. Of course, any mutually agreed solutions reached during the time of consultation need to be brought to the attention of the DSB and any relevant Councils and Committees, where any Member may raise any point.\footnote{Article 3.6 DSU.} Nevertheless, there is no objective independent body during this phase that decides whether or not compliance has been reached – it is left in the hands of the contracting parties. In practice, solutions to a dispute are often not communicated to the organization, and thus official scrutiny of what exactly has been concluded between the parties to the dispute is difficult. Discretion therefore does play a role in the administrative part of the dispute settlement procedures.

However, in the event that the parties are not able to come to an agreement under the prejudicial phase, the dispute is left in the hands of a panel, and when needed eventually in the hands of the Appellate Body. These bodies, then, determine whether or not the disputed trade measure indeed breaks a WTO agreement or an obligation under it. In theory, these reports need to be adopted by the DSB, but as this is done by reverse consensus, the adoption is quasi-automatic.

Determinations of non-compliance under the TPRM are made by the TPRB. In contrast to the OECD’s country reports, the Member State under review cannot influence the contents of the reports. Instead, the observations of that country are published separately from the TPRB Report. The Member States themselves thus do not determine non-compliance with the rules of the WTO; they can only provide the necessary information to the TPRB and explain or provide their view of alleged instances of non-compliance. On the other hand, the TPRB is composed of Member State representatives, and in that light the Member States – through the TPRB – determine the extent to which a Member State is in compliance with WTO law.

\textbf{Intentional or non-intentional non-compliance}

This last element refers to the underlying reasons for non-compliance. Whereas the first, administrative part of the dispute settlement procedure provides for the opportunity to explain oneself to the complaining party, and therefore allows for
the rectification of non-intentional non-compliance to some extent, the judicial part does not. Nevertheless, in the case that a breach is determined, a reasonable period is given to the non-compliant Member State to rectify the situation. Moreover, in the case of compensation or retaliation, this period is extended due to the need for negotiations on compensation between the parties, or the necessity of requesting the DSB’s permission to suspend concessions of obligations. Furthermore, this compensation or retaliation does not have retroactive effect. This thus gives the non-compliant Member State the opportunity to rectify the situation. If non-compliance was non-intentional and rather due to differing interpretations of WTO rules for example, the Member State is thus not “punished” for its non-compliant behavior.

The TPRM, then, is targeted at cases of non-intentional non-compliance. Its aim is to increase transparency in and understanding of the trade policies of the WTO Member States, and thereby increase adherence to the rules of the WTO. When the compliance pyramid is applied to the WTO, an interesting divide between the TPRM and the DSU can be discerned. Whereas the TPRM incorporates the two first steps of prevention and compliance, the DSU embodies the next two steps of a legal system and sanctioning. What this divide means for the effectiveness of the two systems will be examined in the next section, after an exploration of the four compliance steps.

Prevention in terms of capacity building and rule clarification is the hallmark of the TPRM. The purpose of the mechanism is to increase adherence to the rules through increased transparency in and understanding of the trade policies and practices of the Members, as well as their impact on the multilateral trading system. The TPRs are in fact a type of Monitoring report, where a check is kept on developments concerning individual trade policies, their compatibility with the rules of the organization and other practices that have an effect on the world trade system. In order to write the reports, surveys are sent out, data are gathered with the help of country officials, and visits to the reviewed country are made to discuss certain issues. By monitoring policy developments in the countries under review and increasing mutual understanding, adherence to the rules of the organization can be increased.

There is, however, no link between the WTO’s TPRM and its legal system. What is more, it is not possible to use the findings of the TPRM for enforcement purposes. This divide between the two systems was made since it was thought that countries would be more open and transparent if they knew that what they said during the TPRs could not be used against them later. A legal system does exist, of course, but it is separate from the TPRM.

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109 TPRM, para. A(i).
course, in the shape of the dispute settlement system. The DSU also has a managerial side in the shape of the consultations phase, which is meant to arrive at a mutually agreed solution, and offers the possibility to clarify the parties’ positions and to talk to each other in a meaningful way. Moreover, the system itself, and especially the possibility of sanctions, or rather compensation and retaliation, does have a preventive influence. The community costs, meaning the concerns relating to reputation and emulation by other countries, in particular create an incentive to comply or attempt to avoid the judicial proceedings.

However, the most important element of the DSU is its legal system with the panel and appellate procedures, as well as in the possibility for compensation or retaliation. Although the term ‘sanction’ as such is not employed in the DSU, the purpose of the compensation or retaliation is to induce compliance. Article 22.8 DSU states that suspension actions “shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed ...” while Article 23.2(c) adds that suspension actions are “in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.” They thus effectively function as sanctions, as instruments of enforcement.\(^\text{110}\)

The divide between the soft TPRM with its focus on the first two steps of the pyramid and the hard DSU with its focus on the top two steps stands in sharp contrast to the previous systems discussed in this dissertation. Both mechanisms are applied to the same hard obligations under WTO rules, and though their direct aims differ, they have the same ultimate goal of achieving compliance with the rules of the organization.

However, the TPRM mainly targets non-intentional compliance through managerial efforts, while the DSU is more geared towards remedying intentional compliance through enforcement. The managerial phase of the DSU, the consultations, plays an important role as half of all disputes are solved during this stage. This phase is probably so effective at ending disputes due to the shadow of the legal side of the dispute settlement system hanging over the consultations. Parties know that a panel, costly in financial as well as community costs, will be established if a solution is not found. However, this phase is not meant as a means to induce compliance with WTO, but aims to reach a mutually agreeable solution between the parties concerned. Given the power of the parties and the lack of scrutiny in this phase, it is debatable in how far actual compliance is reached during this phase. Moreover, the phase is not so much meant for clarification, capacity building or information dissemination, but rather as a last,

\(^{110}\) Charnovitz (2001).
obligatory way to avoid the judicial part of the procedures. It can thus be seen more as the political part of the procedures, as compared to the legal panel and AB proceedings, than as a means to solve non-intentional non-compliance.

The fact that the DSU does not incorporate managerial elements such as those that exist under the TPRM to a greater extent, while instances of non-compliance cannot be referred from the TPRM to the dispute settlement system, undermines the effectiveness of both systems – as will be discussed in the next section. As one official remarked:

It is long lists of questions and reports. I never have seen anybody modifying its legislation, because of the TPRM. I mean I had fun, and sometimes you put questions to the US and to China and say this is not compatible and the like. But then there is this sentence in the TPRM agreement saying that the information collected in TPRM cannot be used for litigation. I mean, who cares about the TPRM, are only the people who have to collect the replies. [...] I mean you can bash every country you want and say what they do is outrageous. But there is no pressure, no naming-and-shaming from the TPRM. No. No way.111

6.3. Conclusions on Effectiveness

The TPRM is often criticized for its lack of actual scrutiny and recommendations to the Member States at the end of the reviews. Many do not see it as an effective or even useful system.112 This is surprising, especially given the similarities of the system to the OECD peer review mechanism, which is heralded as a system that has quite some influence on Member State policies, or at least one with results that are often taken into account in national policy debates.113 Explanations are usually found in the lack of recommendations, no active dissemination through the press, no critical analyses and no follow-up on the implementation of national laws, only an analysis of new and existing laws without looking at how these laws are actually carried out in practice.

One very important difference between the OECD and the WTO, however, is the complete lack of an enforcement system in the OECD. The WTO, on the other hand, has the elaborate dispute settlement system alongside the TPRM. This difference may also explain to some extent the perceived difference in effectiveness between the two peer review mechanisms.

111 Respondent #3.
112 See section 4 in this chapter.
113 See the previous chapter.
First, the results of the TPRM may not be used for enforcement purposes. Nevertheless, any information divulged under the TPRM is readily publicly available after the reports are published. Member States may hesitate to be completely frank and transparent, given the information’s potential to be used indirectly in dispute settlement. Even if not allowed directly, certain information can still draw attention to certain practices of a Member State that may otherwise have gone unnoticed. This may also explain the lack of firm commitments of Member States at the end of the peer review process.

Second, the DSU system also to a certain extent incorporates managerial elements during the consultation phase. In the European infringement procedures, the preliminary managerial stage of that system in combination with the existence of alternative procedures provides the Member States with ample opportunity to weed out non-intentional non-compliance, as well as the possibility to solve instances of non-compliance at a relatively early stage. Creating a divide between the TPRM and the DSU may not allow the preliminary phase of the DSU to come to full potential, while the TPRM is not put to effective practical use. The idea behind the divide is probably the thought that Member States will speak out more, and be more transparent when they do not have to fear the use of their information in contentious proceedings. However, reality shows that given the existence of the DSU, this fear of using the TPRM information for the DSU exists nevertheless. It could thus render both the DSU as well as the TPRM more effective if an institutional and operational link between the two mechanisms were made.

Criticisms that are heard regarding the effectiveness of the DSU concern its weak enforcement capabilities, other than compensation or retaliation, and the bias of the system toward the richer and more developed economies. By integrating the TPRM and the DSU, developing countries will potentially benefit, while the introduction of harder sanctioning possibilities may become less controversial. When the managerial base of the pyramid is strengthened, and possibilities for friendly settlement are thus increased, informational asymmetries between richer and poorer countries will diminish through application of the TPRM. This is beneficial to developing countries, which often draw the short straw during consultations as they have less capacity and a lower budget to make investigations. Moreover, a stronger pyramid base will be more capable of carrying a heavier top, in the sense of increased sanctioning possibilities. Given the stronger base, with more information and transparency, fewer cases will continue through all four steps of the pyramid. And of those cases that do enter the last step of sanctions, a larger proportion will be caused by intentional non-compliance, as the
increased transparency in the bottom steps will have weeded out more non-inten-
tional non-compliance.

Integrating the two systems, however, is probably a step too far. Moreover, it
would not do justice to the TPRM as it functions today. It not only reviews a coun-
try's trade practices, but it also highlights interconnections between trade and
internal economic developments, sectoral effects of trade policies or the influ-
ence of other policies such as competition or investment. Nevertheless, strength-
ening the managerial basis of the DSU by increasing transparency and reducing
information asymmetries may help to increase the effectiveness of that system.
On the other hand, stronger critiques, recommendations and other improve-
ments that may lead to more peer pressure will improve the functioning and ef-
fectiveness of the TPRM.

7. CONCLUSIONS

The interaction, or rather the lack thereof, between the soft TPRM and the hard
dispute settlement system can be seen as a very important explanation for the
lack of effectiveness of the TPRM and the weak enforcement capabilities of the
DSU. The option of integrating the systems, or at least making the results of the
TPRM available for use within the dispute settlement system, may remedy both
problems. Given the likelihood that this will remain an impossibility, lessons
should be learned from the disadvantages of the divide. Building a stronger man-
gerual foundation for the DSU, while increasing the enforcement possibilities in
the TPRM through adding to the two upper steps by improving its peer pressure
capabilities, will improve the effectiveness of both systems.