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## I. CASE ANALYSES

### A. FLEXIBILITY IN WTO DISPUTE SETTLEMENT – *US-SHRIMP*

#### Introduction

Ecuador has triumphed in a challenge concerning the WTO-consistency of certain United States anti-dumping measures on frozen warm water shrimp from Ecuador and the US Department of Commerce (USDOC) practice of “zeroing” in dumping margins calculations.<sup>1</sup> This is the second time that Ecuador has obtained a favourable ruling against a major WTO developed country Member.<sup>2</sup> The difference between the two instances is that the resolution of the latter dispute has been achieved through an innovative use of the flexibility of the WTO dispute settlement system.

#### Facts and Rulings

The main issue in the dispute was the USDOC’s use of zeroing as applied in respect of anti-dumping measures on certain frozen warm water shrimp from Ecuador. Ecuador contended that the measures at issue violated Article 2.4.2 of the Anti-Dumping Agreement. The US did not contest Ecuador’s claim because of a procedural agreement between the two parties. It recognized that a similar measure was found to be inconsistent with Article 2.4.2, first sentence, in the *US – Softwood Lumber V*<sup>3</sup> dispute. The Panel found that Ecuador had made a prima facie case of a violation, and, since the US did not submit any arguments, that Panel held in favour of Ecuador. It concluded that the USDOC acted inconsistently with Article 2.4.2 and that the US had

nullified and impaired Ecuador’s benefits under the Anti-Dumping Agreement. The Panel recommended that the Dispute Settlement Body should request the US to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

#### Analysis

##### Procedural agreement

There have been quite a number of anti-dumping disputes involving the US in the past two to three years. This was just another such dispute, and it could have gone without much notice. However, the procedural element of the dispute has made it stand out as a historic dispute in GATT/WTO dispute settlement.

At the organizational meeting of the Panel, the main parties, Ecuador and the US, informed the Panel that they had reached an agreement on certain procedural issues. The agreement provided that the US would not contest Ecuador’s challenge and that Ecuador would not request the Panel to make suggestions, under the second sentence of Article 19.1 of the DSU, on how the US should implement the Panel’s recommendations. They also agreed to share the drafts of their written submissions with each other before submitting them to the Panel and to cooperate to ensure an expeditious resolution of the dispute. In addition to this procedural agreement, the parties proposed an accelerated timetable which the Panel used as a basis for the expedited timetable that it adopted.

Article 3.7 of the DSU requires Members to exercise their judgment as to whether dispute settlement proceedings would be fruitful. It appears that both Ecuador and the US were convinced that the proceedings would be fruitful, and would yield a positive solution to their dispute. The possibility of using this type of procedural agreement highlights the flexibility of the WTO dispute settlement system. It shows that disputing parties can cooperate to facilitate effective and expeditious third party resolution of their dispute and that the WTO dispute settlement system permits

<sup>1</sup> *United States – Anti-Dumping Measure on Shrimp from Ecuador* (WT/DS335/R). The third parties were: Brazil, Chile, China, the European Communities, India, Japan, Korea, Mexico, and Thailand.

<sup>2</sup> The first was the famous *EC – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R).

<sup>3</sup> *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264/AB/R).

Members a certain degree of leeway to propose ways of addressing issues that are not provided for in the rules. However, the flexibility is limited because the proposals by Members have to be sanctioned by the panel, unlike arbitration where there is full party autonomy.

### Effect on actual proceedings

The procedural agreement should be contrasted from a mutually agreed solution. The agreement in this case was in relation to the procedure and not the result of the proceedings. Although the US refrained from presenting arguments against Ecuador's claim, and there was no disagreement between the parties as regards the substantive matters, the parties did not say that they had reached a mutually agreed solution. Hence, the Panel had to decide on how to proceed to determine the claim.

### *Objective assessment*

Article 11 of the DSU requires panels to conduct an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and to make such other findings as will assist the Dispute Settlement Body (DSB) in making recommendations or in giving the rulings provided for in the covered agreements. This is the function of panels in WTO dispute settlement. Indeed, carrying out an objective assessment of the matter is the very root of the dispute settlement system.

The Panel found that its function of carrying out an objective assessment was not affected by the US's decision not to contest Ecuador's claim. It said that its responsibility remained the same: to make an objective assessment of the claim as required by Article 11. The main parties and the third parties agreed that the Panel had to proceed to make an objective assessment despite the procedural agreement reached between the main parties. As the EC stated, the Panel was not compelled to follow the opinions of the parties -

its duty was not to sanction the mutual understanding but to make an objective assessment, regardless of the lack of substantive disagreement between the parties.<sup>4</sup> This is consistent with earlier WTO dispute settlement interpretation of Article 11. In one case, it was said that a panel cannot be expected to conduct an objective assessment of the matter if it only refers in its reasoning to the specific provisions cited by the parties.<sup>5</sup> In another, it was stated that a panel's interpretation of the text of a relevant WTO agreement cannot be limited by the particular arguments of the parties.<sup>6</sup> A panel may conduct an objective assessment in the absence of arguments from one of the parties.

### *Burden of proof*

The burden of proof in a normal WTO dispute, where the respondent contests the claims of the complainant, lies with the party that asserts the affirmative of a claim or a defence.<sup>7</sup> Indeed, it is true of most judicial systems of dispute settlement that he who avers must prove. Thus the complaining party has to make a prima facie case of a violation of the relevant agreement and then the burden shifts to the responding party to rebut the complainant's prima facie case.<sup>8</sup> According to the Appellate Body, a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a

<sup>4</sup> Additionally, in its response to a question posed by the Panel, Korea opined that merely sanctioning the mutual understanding of the parties would not amount to an "examination of the matter in light of the relevant provisions" by the panel as required under Article 7.1 of the DSU.

<sup>5</sup> *Argentina – Safeguard Measures on Imports of Footwear (EC)*, (WT/DS121/AB/R), para. 74.

<sup>6</sup> *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather II (Recourse to Article 21.5 by the United States)*, (WT/DS126/RW), para. 6.19.

<sup>7</sup> The full formulation, that proof lies upon the one who affirms not the one who denies, derives from the Latin maxim "ei incumbit probatio qui dicit non ei qui negat".

<sup>8</sup> The classic statement on burden of proof in the WTO was laid down in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R) at p. 14 (*US – Wool Shirts and Blouses*).

matter of law, to rule in favour of the complainant that has made out the prima facie case.<sup>9</sup>

It follows that in a dispute where the respondent does not contest the claims, the Panel need only make a finding on whether or not the complainant has established a prima facie case of violation of the WTO agreements at issue. The panel has to examine whether the complainant has presented evidence and legal arguments sufficient to demonstrate that the impugned measure is inconsistent with the relevant provisions of a covered agreement. The Panel found, in this case, that Ecuador had made a prima facie case. If it were otherwise, the Panel could not have proceeded to rule on the claim because it is an error to rule when a prima facie case has not been made.<sup>10</sup>

The approach taken by the Panel on objective assessment and burden of proof is similar to that of the International Court of Justice (ICJ) in cases where a party fails to appear and/or does not defend a case. The ICJ does not automatically render a favourable judgment for the appearing party. Rather, the Court has to satisfy itself, not only that it has jurisdiction, but also that the claim of the party appearing is well founded in fact and law. Further, non-participation does not affect the validity of the judgment rendered by the ICJ, and that the judgment still binds the non-appearing party.<sup>11</sup>

### Power of precedent

The *US – Shrimp* dispute was influenced heavily by precedent. Ecuador argued that the material facts in the dispute were the same or very similar to those examined by the Appellate Body in *US – Softwood Lumber V* and that the challenge was identical to the one in that

case. Ecuador also stated that the legal reasoning supporting its claim was identical to the reasoning of the Appellate Body in *US – Softwood Lumber V*. Hence Ecuador did not have to come up with new interpretations or legal reasoning in order to convince the Panel that it had made a prima facie case of WTO-inconsistency. Rather, it simply stated that the Appellate Body's analysis in *US – Softwood Lumber V*, albeit not binding, was persuasive especially in light of the factual and other similarities between the two disputes.

The US did not contest the assertion regarding the similarities in the two disputes nor the reliance on *US – Softwood Lumber V*. It appears that it is because of the similarities that the US decided not to contest the substantive claims made by Ecuador. Since the Appellate Body had found in several disputes that similar measures were WTO-inconsistent, the US was left with no credible arguments against Ecuador's claim.

Noting Ecuador's reliance on *US – Softwood Lumber V*, the Panel stated that it was not bound by the reasoning of the Appellate Body in that case. But it also acknowledged that adopted Appellate Body reports create legitimate expectations among WTO Members<sup>12</sup> and that panels are expected to follow the Appellate Body's conclusions in earlier disputes especially where the issues are the same<sup>13</sup>. The Panel pointed out that there was a consistent line of Appellate Body reports holding that measures of the kind challenged by Ecuador are inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. After considering those reports and finding the reasoning in *US – Softwood Lumber V* to be persuasive, the Panel adopted the reasoning as its own and held that Ecuador had made a prima facie case of violation.

<sup>9</sup> Ibidem and *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (WT/DS26/AB/R), para. 104.

<sup>10</sup> *United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services*, (WT/DS285/AB/R), para. 139.

<sup>11</sup> *Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. USA)* (Merits) ICJ Reports 1984, p. 14.

<sup>12</sup> *Japan – Taxes on Alcoholic Beverages*, (WT/DS10/AB/R), at p. 14, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, (WT/DS58/AB/RW) paras 108-109, and *United States – Final Dumping Determination on Softwood Lumber from Canada*, (WT/DS264/AB/R), paras 109-112.

<sup>13</sup> *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, (WT/DS268/AB/R), at para. 188.

In the previous issue of the South Centre Quarterly on Trade Disputes, it was noted that that precedent may assist in settlement of cases especially where there is a clear line of case authorities pointing out the WTO-inconsistency of a particular measure or type of measure.<sup>14</sup> Although this dispute was not settled, it has shown the impact that precedent can have on WTO dispute settlement proceedings. The dispute has demonstrated how precedent can facilitate the achievement of the objective of prompt and effective resolution of disputes, while also reducing costs. First, in the *US – Shrimp* dispute, precedent took away the need for litigating or presenting extensive arguments on an issue that is “settled”. Ecuador simply relied on the reasoning contained in an adopted Appellate Body report for its legal argument. As a result, its written submission was very brief, unlike most other written submissions in WTO dispute settlement. The legal costs for the preparation of the written submission, and for the whole proceedings, were probably much less than those of a typical WTO dispute settlement proceeding. Second, reliance on precedent spares adjudicators from having to come up with new legal reasoning and interpretation in each and every case. In *US – Shrimp*, the Panel adopted the prior Appellate Body reasoning as its own and proceeded to rule on the matter. Hence the dispute can be used as a concrete example of how reliance on precedent may promote efficiency and lessen costs in WTO dispute settlement.

The question one may ask is: if the case was so clear, why did the parties not reach a mutually agreed solution? The likely answer is that Ecuador wanted to preserve all its rights. Given the Panel’s finding of WTO-inconsistency, Ecuador has the option of initiating an Article 21.5 proceeding and of eventually asking for authorization to suspend concessions or obligations if the US fails to comply with the recommendations of the DSB. In contrast, mutually agreed solutions do not give rise to implementation or retaliation rights.

<sup>14</sup> See “*US – Zeroing: Precedent in the WTO*”, in the *South Centre Quarterly on Trade Disputes: Fourth Quarter 2006*, at pp 10-19.

### DSU negotiations and expedited procedures

The use of this particular procedural agreement in WTO dispute settlement is novel; but the idea of expedited procedures is not new. Several Members have proposed fast track or expedited dispute settlement procedures in the DSU negotiations. For example, Australia proposed expedited procedures in relation to safeguard measures and access to compensation through Article 25 of the DSU.<sup>15</sup> Another Member, Japan, suggested expedited procedures for “hit and run” situations in cases of discretionary measures.<sup>16</sup>

But Brazil’s proposal<sup>17</sup> is the most pertinent in relation to the procedural agreement used in *US – Shrimp*. The essence of the proposal was that whenever a Member considers it is being affected by a measure that was found to be WTO-inconsistent in a previous adopted dispute settlement report, it could request the establishment of a fast track panel that would be composed, if possible, of the same panelists that served in the original panel that considered the matter. Brazil suggested including a new Article in the DSU for a fast track procedure. The procedure would include: establishment of a panel at the same DSB meeting where it first appears on the agenda, unless the parties agree otherwise; that the new panel would have the same panelists as those who served on the panel that has already ruled on the measure at issue; and that the panel would be composed within 10 days of its establishment. The proposal also suggested shortened time-frames for the actual dispute settlement proceeding – that is, the litigation phase.

### **Concluding remarks**

The *US – Shrimp* dispute has highlighted the flexibility of the WTO dispute settlement system by making use of an innovative procedural agreement between the main parties. The dispute shows the power of precedent in

<sup>15</sup> TN/DS/W/34 (22 January 2003), TN/DS/W/49 (17 February 2003) and JOB(05)/65 (29 April 2005).

<sup>16</sup> TN/DS/W/22 (28 October 2002)

<sup>17</sup> TN/DS/W/45 (11 February 2003) and TN/DS/W/45/Rev.1 (4 March 2003).

the WTO and attests that it may be possible to use the fast track procedure suggested in the DSU negotiations. Such a procedure would be useful especially for developing countries because of possible time and cost savings. The drawback is that there would have to be a strong line of case authority against its position to convince a responding party not to put up a substantive defence.

## B. CANADA – DAIRY: SEMINAL INTERPRETATION OF SUBSIDIES DISCIPLINES

### Introduction

Subsidies are one of the major sticking points in the current negotiations on agriculture. The positive outcomes of the fairly recent *EC – Sugar* and *US – Cotton* subsidies disputes<sup>18</sup> strengthened developing countries' resolve in their bid to ensure the elimination and reduction of subsidies provided by developed countries. While these disputes raised the profile of agricultural subsidies, such subsidies had been addressed in WTO dispute settlement before.

This case analysis reviews one of the early WTO cases concerning agricultural subsidies. It seeks to examine how the subsidies disciplines were interpreted by the panels and the Appellate Body in both the original dispute and the two Article 21.5 arbitrations. It will also trace how those interpretations have been affirmed, followed, altered or discarded in subsequent cases.

### Facts and findings

The dispute involved the Canadian system of government support for domestic milk production and export and also its tariff rate quota system for fluid milk imports. Canada had a supply management system for industrial milk which included administered support prices and subsidies. There was also an "Import for Re-Export Program" under which government-listed dairy products were permit-

ted for import. In addition, the Canadian Dairy Commission (CDC), a statutory corporation reporting to the Minister of Agriculture and funded by the federal government, was established to ensure a fair return for efficient producers of milk and cream, and to give dairy products' consumers continuous and adequate supply of high quality dairy products. Among other functions, the CDC could make payments to producers for price stabilization purposes and could establish minimum and maximum prices and payment terms for producers. The losses of the CDC in exporting dairy surpluses were funded by a scheme on milk classes, which was part of a classified pricing system for milk.

The Canadian federal and provincial legislation also established milk marketing boards in each province. Comprised exclusively or mostly of dairy producers, the boards had power to issue and administer quotas, pool returns, set prices, and enter into cooperation agreements with each other and with the CDC. Milk producers were prohibited from selling milk without using the boards as intermediaries. The milk boards cooperated under a "National Milk Marketing Plan" whose objective is to regulate the marketing of milk and cream products.

New Zealand and the US brought challenges claiming inconsistencies with Articles 9.1(a), 9.1(c), 3.3 and, alternatively, 10.1 of the Agreement on Agriculture. They contended that Canada was violating Article 3 by providing export subsidies in excess of the support reduction commitment levels in Canada's schedule. Alternatively, they claimed, Canada was circumventing its export subsidy commitments and thereby violating Article 10.1. Further, the US challenge also included Article 3 of the Subsidies and Countervailing Measures Agreement, GATT Article II:1(b) and Article 3 of the Agreement on Import Licensing Procedures.

It was held by the Panel that Canada acted inconsistently with Articles 3.3 and 8 of the Agriculture agreement by providing export subsidies under Articles 9.1(a) and 9.1(c) in excess of quantity reduction commitments. Further, Canada was found to be in violation

<sup>18</sup> *European Communities – Export Subsidies on Sugar*, WT/DS266/AB/R and *United States – Subsidies on Up-land Cotton*, WT/DS267/AB/R

of Article II:1(b) of the GATT. The Appellate Body upheld the finding on Article 9.1(c) but reversed the one on Article 9.1(a) and some of the Panel's interpretation.

## Analysis

### Article 9.1(a) of the Agreement on Agriculture

Article 9.1 lists the export subsidies that are subject to reduction commitments under the Agriculture Agreement. The list is not exhaustive and the term "export subsidies" is supposed to be interpreted broadly.<sup>19</sup> One of the export subsidies, under Article 9.1(a), is "the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance". Under Article 3.3 of the Agriculture Agreement, each WTO Member is prohibited from providing this kind of export subsidy in excess of the budgetary outlay and quantity commitment levels specified in its Schedule and from providing such subsidies to agricultural products that are not specified in the Schedule. The export subsidy commitments hence cover commitments and obligations relating to both scheduled and unscheduled agricultural products.<sup>20</sup> In addition, Article 8 of the Agriculture Agreement stipulates that each "Member undertakes not to provide export subsidies otherwise than in conformity with [the Agriculture] Agreement and with the commitments as specified in that Member's Schedule."

The dispute brought into issue the interpretation of elements of Article 9.1(a) of the Agriculture Agreement. The Panel had found that Canada was providing export subsidies under Article 9.1(a) in excess of its quantity reduction commitment levels and thereby violating Articles 3.3 and 8 of the Agriculture Agreement. It had stated that an export subsidy exists when it is established that: (a) there

are direct subsidies, including payments-in-kind; (b) these are provided by governments or their agencies; (c) to a firm, an industry, producers of an agricultural product, a cooperative, or other association of such producers or to a marketing board; and (d) which are contingent on export performance. On appeal, Canada challenged the Panel's interpretation of "direct subsidies, including payments-in-kind" and "governments or their agencies".

### Direct Subsidies, Including Payments-In-Kind

The Panel had found that payments-in-kind are a type of direct subsidy, and hence the existence of a "payment-in-kind" meant that there was also a direct subsidy. It defined "payment" as a gratuitous act, a bounty or benefit provided, for example, to achieve a policy objective. The Appellate Body agreed that "payments-in-kind" were a form of direct subsidies and further stated that the term "payment" denotes "a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient". But, a payment-in-kind does not necessarily connote a gratuitous act or bounty. A payment-in-kind may be made either gratuitously or for full or partial consideration. Whereas a payment-in-kind in exchange for partial consideration denotes grant of a subsidy, there is no subsidy when full consideration has been given for the payment-in-kind. This means that a finding that a payment-in-kind has been made does not necessarily mean that there is a subsidy.

### Governments or their Agencies

As stated above, one of the necessary elements for the existence of a subsidy is that there must be a payment from a government or its agencies. The Panel had concluded that the CDC was an agency of the government. It had also found that the milk marketing boards carried out governmental actions because they received authority from the governments, were controlled and supervised by governments, and their mandates and functions were defined and altered by governments. Since the milk marketing boards played a decision-

<sup>19</sup> *US – Upland Cotton*, para. 615.

<sup>20</sup> *United States – Tax Treatment for "Foreign Sales Corporations"* WT/DS108/AB/R, paras. 146-147.

making role in the Canadian Milk Supply Management Committee (CMSMC), the CMSMC was also a government agency.

The Appellate Body confirmed that a government agency is an “entity which exercises powers vested in it by a government...to regulate, restrain, supervise or control the conduct of private citizens”. A governmental agency need not be bound to do only what it is instructed to do; it may have some discretion in exercising its powers.

To determine whether or not an entity is a governmental agency, one must look at the source of the entity’s powers and also the functions that the entity performs. In the case at hand, the source of the power was clearly governmental since the entities operated in a legal framework set up by federal and provincial legislation, and any modifications to their powers were done by governments. The functions were also found to be governmental partly because the orders and regulations of the milk marketing boards were enforceable in courts of law, meaning that the State could ensure that the regulatory functions and decisions of the boards were carried out. Since the governments retained ultimate control, it was immaterial that the officers of the boards were dairy producers and that the boards enjoyed a high degree of discretion in the exercise of their powers. Equally immaterial was the fact that the boards’ objectives were to foster the interests of producers since governments normally act to promote the interests of particular sectors in an economy or community.

#### **Article 9.1(c) of the Agreement on Agriculture**

According to Article 9.1(c), another type of export subsidies subject to reduction commitments are “payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived”. The Panel stated that for a measure to

fall within Article 9.1(c) there must be “payments on the export of an agricultural product” and the payments must be “financed by virtue of governmental action”.

#### Payments

The Panel had concluded that the ordinary meaning of “payments” includes “payments-in-kind”. Canada challenged this interpretation because, unlike other provisions, Article 9.1(c) does not expressly mention “payments-in-kind”. The Appellate Body recalled that it had defined “payments” under Article 9.1(a) as involving a transfer of economic resources, either in the form of money or its equivalent, such as goods or services. The existence of a payment does not require the presence of two separate entities; payments may include transfer of resources within one economic entity.<sup>21</sup>

The wording and context of Article 9.1(c) do not limit the payments to those in monetary form. The term “financed” includes payments made in the form of goods and services. As the Appellate Body aptly noted, some of the export subsidies in Article 9.1 expressly involve subsidies granted for non-money consideration, and none of the Article 9.1 subsidies is limited to money payments.

Part of the context of Article 9.1(c) is Article 1(c) of the Agriculture Agreement. Article 1(c) suggests that “revenue foregone” should be taken into account when assessing whether budgetary outlay commitments have been exceeded with respect to the export subsidies in Article 9.1. Since “revenue foregone” may be non-monetary, a restrictive reading of “payments” under Article 9.1(c) would mean not taking into account “revenue foregone”. The Appellate Body also held that the failure to make express mention of “payments-in-kind” under Article 9.1(c) did not mean that the notion was excluded from that Article. This is because “payments-in-kind” was already included in the ordinary meaning of “payments” in Article 9.1(c).

<sup>21</sup> *EC – Sugar Subsidies*, paras. 262-265

Hence the provision of goods at discounted prices (below market rates) constitutes “payment” under Article 9.1(c) in that the payment is made to the recipients of the part of the price that is not charged. The recipients get, in another form, the equivalent of a monetary payment equal to the revenue foregone.

In order to determine whether goods are provided at a discounted or reduced rate, it is necessary to set an objective standard or benchmark which shows the proper value of the goods or services. Article 9.1(c) does not state the standard for assessing when a measure involves a “payment” in the form of payments-in-kind. The Appellate Body said it was necessary to examine the facts and circumstances of a measure, including the regulatory framework for that measure, to determine the proper basis for comparing whether the measure involves “payments”.

The Panel in the first Article 21.5 arbitration used the price at which milk is sold by producers in the domestic market as the right benchmark. It also referred to the world market prices as the alternative benchmark. The Appellate Body reversed the Panel’s finding that the domestic market price was the right benchmark. It said that use of the government-fixed domestic price as a benchmark was inappropriate in a situation where a producer, not the government, chooses to produce and sell in the marketplace at a price it freely negotiates. Further, the Appellate Body recognized that world market prices could be a measure of the value of the goods to a producer. However, world market prices did not provide a valid basis for comparison where the goods are competitive on the world market because of subsidization. Using the world market prices for making comparisons where there is subsidization could permit Members to defeat the export subsidy commitments under Agriculture Agreement.

The Appellate Body opted instead to rely on the total cost of production as a basis for determining the existence of “payments” under Article 9.1(c). An advantage of the cost of production benchmark was that its use respected the integrity of the disciplines on domestic support and export subsidies. In the

circumstances of the dispute, the Appellate Body found that the average total cost of production was the suitable benchmark for determining whether sales involved “payments” under Article 9.1(c). The average total cost was calculated by dividing the fixed and variable costs of producing all milk by the total quantity of milk produced. The Appellate Body noted that the clear differential between the domestic market price and the relevant milk prices suggested that those prices were below the average total cost of production and hence might involve payments within Article 9.1(c).

In the Second Recourse to Article 21.5 arbitration, the Appellate Body elaborated on the cost of production standard. Canada had argued that the Panel erred in using a single industry wide average cost of production figure as opposed to each individual producer’s cost of production. The Appellate Body pointed out that although the conduct of private parties may be relevant in the subsidies disciplines, ultimately, the obligation at issue is an international obligation imposed on a WTO Member. The question is whether or not the WTO Member is in compliance with its obligations with regard to its commitment levels. Thus, the appropriate benchmark is the single, industry-wide cost of production figure and not the cost of production figures for individual producers. The industry-wide figure is the sum of the costs of production of all producers. According to the Appellate Body, the industry-wide figure enables aggregation of the cost of production data into a single national standard that can be used to assess Canada’s compliance with its international obligations.

The cost of production standard includes non-monetary costs such as the “imputed amount for the costs of the producer’s family labour and management, and for the costs of the owner’s equity”. This is consistent with the interpretation that “payments” includes transfer of economic resources in a non-monetary form. To limit the cost of production standard to cash costs would overlook the possibility of payments that are made in a non-money form. The labour and management services rendered by a producer’s family

should be included because the provision of the labour and services has an opportunity cost. In addition, the remuneration for such services is a cost to the producer; it is not part of the profit. Similarly, the investment of equity by the owner has an economic opportunity cost since the equity cannot be used elsewhere. And, the profits of the enterprise are arrived at after accounting for the cost of the equity. The Appellate Body noted the incongruity of excluding the costs of family labour, management and equity from the cost of production while including these costs when they are provided by others. It further stated that the inherent difficulty of ascribing a value to the non-cash cost should not prevent the use of an objective cost of production benchmark.

Finally, the Appellate Body had to decide if selling costs such as transport, marketing and administrative costs, should be excluded from the cost of production standard. It held that the selling costs are part of the economic resources that the producer invests and should be included in the cost of production figure, which is supposed to indicate the value of the product to the producer.

The Appellate Body approach was followed subsequently in *EC – Sugar Subsidies* where the use of the total cost of production benchmark and the average total cost of production standard was affirmed.<sup>22</sup>

#### “Financed by Virtue of Governmental Action”

The word “financed” has been defined as referring to the mechanism or process by which financial resources are provided.<sup>23</sup> Several factors can determine whether or not a payment is “financed by virtue of government action.” On the facts of this case, the Panel depended on factors such as: (a) that the supply of milk was managed by agencies of the federal or provincial governments; (b) that the agencies determined the time and quantity of the of milk that may be processed for export; (c) that they negotiated the sale price of milk with the processor or exporter; (d) and that they de-

termined effective selling price, collected the price paid and determined the pooling of returns to producers, and paid out the returns to the producers. The Appellate Body said there was a strong presumption that the conduct of the bodies was governmental action, since all the entities involved in the supply of milk were government agencies. In fact, governmental action was indispensable at every stage of the supply of milk and for the transfer of resources. Thus, the transfer of resources was “by virtue of governmental action”.

The Appellate Body had an opportunity to explain the interpretation of the phrase “financed by virtue of governmental action” in the Recourse to Article 21.5 arbitration. Noting that Article 9.1(c) does not place qualifications on the type of governmental action, the Appellate Body opined that the Article includes all the activities by which governments control, regulate or supervise individuals. It further noted that the presence of governmental action does not denote the existence of an export subsidy. Rather, the words “by virtue of” means “there must be a demonstrable link between the governmental action at issue and the financing of the payments, whereby the payments are, in some way, financed as a result of, or as a consequence of, the governmental action”. Since the interpretation of “payments” in Article 9.1(c) shows that it is not necessary that the payment come from the government, payments may be financed by virtue of governmental action even though the government is not involved in large parts of the financing.

This last point was affirmed in *EC – Sugar Subsidies*. In that case, the Appellate Body said that by stating “whether or not a charge on the public account is involved” Article 9.1(c) “expressly provides that the government itself need not provide the resources for producers to make payments. Instead the payments may be made by private parties”.<sup>24</sup> However, where a government does not make the payments, it must be so involved in the process by which the private party funds payments that a nexus exists between “government action” and “financing”.<sup>25</sup>

<sup>22</sup> *EC – Sugar Subsidies*, paras. 266-7

<sup>23</sup> *EC – Sugar Subsidies*, para. 236.

<sup>24</sup> *EC – Sugar Subsidies*, para. 236.

<sup>25</sup> *EC – Sugar Subsidies*, para. 237.

There are certain difficulties in making a finding that payments are financed by virtue of governmental action. The Appellate Body in *Canada – Dairy* expressly referred to the difficulties. First, it is more difficult to establish the link between financing of payments and governmental action when payments-in-kind involved. The difficulty is compounded when the payment is made by an independent economic operator and not by the government. Second, “it is extremely difficult to define the precise character of the required link between governmental action and the financing of payments, particularly where payments-in-kind are at issue”. Since government is involved in a lot of regulatory activity, there might be need for a tighter nexus between the financing and the government action in some cases. For example, where a government regulatory framework merely enables a third party to make and finance payments, the link between the governmental action and the payments would be too tenuous for the payments to amount to payments financed by virtue of governmental action. These difficulties mean that the existence of the link must be identified on a case-by-case basis and the particular government action and its effects must be fully considered.

The Appellate Body in *EC – Sugar Subsidies* agreed with the case-by-case determination of the link between the governmental action and the financing. The EC had argued that the governmental action at issue was not as pervasive as the governmental action at issue in *Canada – Dairy*. Recalling the need for a case-by-case determination, the Appellate Body said it was not useful to compare the governmental action in two different disputes.<sup>26</sup>

In the Second Recourse to Article 21.5 arbitration, the Appellate Body also recalled that governmental action may be a single act or omission, or a series of acts or omissions and that there is no need for government compulsion for a payment to be “by virtue of government action”. It pointed out that governmental action in the domestic market was instrumental in providing a significant proportion of producers with the necessary resources for making sales below the cost of production.

<sup>26</sup> *EC – Sugar Subsidies*, para. 244.

The action extended beyond establishing a regulatory environment in which producers choose to make export payments using their own resources.

### Concluding remarks

Subsidies disciplines are one of the key issues in the WTO negotiations on agriculture. Some of the current disciplines have been interpreted in WTO dispute settlement. The *Canada – Dairy* dispute settlement reports are instructive in that the Panels and the Appellate Body provided useful insight into how to determine the existence of export subsidies under Articles 9.1(a) and (c) of the Agriculture Agreement. The dispute highlighted some difficulties: for example, the Agriculture Agreement does not provide guidance on how to conduct a cost analysis when using the cost of production as a benchmark. However, despite such difficulties, the interpretation and approach in *Canada – Dairy* has been affirmed and followed in subsequent high profile cases on agricultural subsidies.

## C. DSU NEGOTIATIONS: WHITHER IN 2007?

### Introduction

WTO negotiations resumed in January 2007 after a six-months slumber. One of the reasons given for the resumption of the negotiations was that there was renewed commitment to completing the Doha Round from the highest political level, business, and civil society.

The negotiations across the Round were suspended in July 2006. It was not clear if the DSU negotiations were suspended together with whole Round since the DSU negotiations are not part of the Single Undertaking.<sup>27</sup> Nevertheless, following the suspension, there were no formal meetings of the Dispute Settlement Body (DSB), Special Session, and it seems that both the WTO Secretariat and the Members proceeded treated the DSU negotiations as

<sup>27</sup> Paragraph 47, Doha Ministerial Declaration.

suspended. Now that the negotiations have resumed, Members will also resume the DSU negotiations. This note provides a brief overview of the state of play of the DSU negotiations prior to the suspension in July 2006 as a starting point for facilitating developing country engagement in the DSU negotiations in 2007.

## **DSU negotiations in 2006<sup>28</sup>**

### *Single undertaking*

In 2006, the DSU negotiations started at a fairly upbeat pace after the instruction in Paragraph 34 of the Hong Kong Ministerial Declaration, to the effect that the DSB Special Session should “continue to work towards a rapid conclusion of the negotiations”. The call for rapid conclusion, without setting a specific deadline was perhaps recognition of the DSU negotiations’ failure to meet any of the previous deadlines. The absence of a deadline led to differences amongst Members as to whether the DSU negotiations had to be completed together with the rest of the Doha Round.

Some Members favoured linking the DSU negotiations to the deadline for the Doha Round. For example, Norway said that Paragraph 1 of the Hong Kong Ministerial Declaration had made it clear that all negotiations should be finished by 31 December 2006, and that this included the DSU negotiations despite their being outside the single undertaking. Similarly, the EC, Japan and Mexico opined that the DSU negotiations should be finished within the timeframe for the whole Doha Round even though they were not part of the single undertaking. According to Australia, there is an expectation that the timeline for the DSU negotiations will be the same as that for the rest of the negotiations. This ex-

pectation appears to be shared by other countries – like Nicaragua and Egypt - who stated that the DSU negotiations should neither lag behind the others nor continue past the Doha Round. To avoid the DSU negotiations dragging, Canada suggested that there should be a notional deadline.

On the other hand, other Members insisted that the DSU negotiations were envisaged to be separate from the rest of the Doha Round and should therefore be viewed and treated as such. Both India and Israel preferred an independent time frame for the DSU negotiations, and India specifically said there should be no linkage between these negotiations and the other issues in the Doha Round. Israel opined that it was the systemic importance of the DSU negotiations that made it necessary for them to be treated independently. A number of Members supported the position taken by India and Israel.

A good finishing point for this description of the views on the single undertaking is Brazil’s statement. Brazil said it was indisputable that the DSU negotiations were not part of the single undertaking, but there was an expectation that the negotiations would be concluded together with the rest of the Doha Round. Hence, the more useful approach was to focus on the substantive issues. The substantive issues will be addressed below, after the following summary of the process of the negotiations.

### *Process*

The DSU negotiations follow a two-track complementary approach, namely, formal and informal processes. The formal process comprises of the actual DSB Special Session meetings. However, even in these formal meetings, the real discussions on substantive issues are conducted informally with the result that the discussions are not reported in the minutes of the Special Session. The Chair of the DSB Special Session has stressed that the formal process is necessary for maintaining transparency and monitoring the progress of the negotiations. It is also in the formal process that decisions may be taken or adopted.

<sup>28</sup> This section is based on the following DSB Special Session meeting reports: Minutes of Meeting Held on 22 February 2006 (TN/DS/M/30), Minutes of Meeting Held on 21 March 2006 (TN/DS/M/31), Minutes of Meeting Held on 24-25 April 2006 (TN/DS/M/32), Minutes of Meeting Held on 22 May 2006 (TN/DS/M/33), and Minutes of Meeting Held on 13 July 2006 (TN/DS/M/34).

The informal process is two-fold. One is the usual consultations between the Chair and the different delegations, as happens with most other negotiations in the Doha Round. The other aspect of the informal process is where Members meet to discuss proposals/submissions. An example par excellence of a discussion group in the informal process is the Mexican Group. This is open to all Members and allows for initial discussion of proposals before their submission to the Special Session. Members then refine their proposals on the basis of the comments received during the informal discussions. The Mexican Group is supported by a lot of Members that are active in the DSU negotiations as it is believed to facilitate convergence and consensus on issues contained in the proposals. Members are encouraged to use the informal process and to participate in the work of the informal groups.

The use of the informal processes is a corollary of the bottom-up approach taken in the DSU negotiations. The bottom-up approach means that Members drive the process by making submissions, discussing and revising them; as opposed to the approach where the Chair comes up with his own text and suggestions.

### *Substantive issues*

The discussions in the Special Session in 2006 focused on a number of issues, most of which have already been raised by Members. This section provides an overview of the issues that were considered in the Special Session.

There seems to be a marked commitment to addressing the development dimension of the DSU. Some Members attach a lot of importance to the development dimension and support other Members dealing with this issue. Others have pointed out that development issues deserve a lot of focus, and should be prioritized. The Chair also urged Members working on proposals relating to developing country participation to intensify efforts and submit proposals.

Only one developing country-specific proposal was submitted and discussed in 2006. The like-minded group of developing countries<sup>29</sup> suggested that the right to cross-retaliate should be available to developing countries engaged in a dispute against a developed country Member despite the threshold in Article 22.3.<sup>30</sup> They also indicated that payment of legal costs could help improve developing country participation in WTO dispute settlement. Hence their previous proposal on litigation costs was re-drafted to take into account concerns about definitions and the operation of the re-imbusement of litigation costs and to make the proposal simple, practical and operational. The group also made specific proposals on special and differential treatment (S&DT). First, they proposed strengthening Article 4.10 by obliging developed country Members to give adequate chance for developing countries to request S&DT, and obliging them to explain rejection of each request. In addition, they suggested a new sentence in Article 6.2 so that the issue of according special attention to the particular problems and concerns of developing countries, and of taking into account the relevant WTO provisions on differential and more favourable treatment, could be justifiable before panels and the Appellate Body. The proposal also put forward textual amendments to Article 12.10 to extend the consultation period for developing countries and provide them with more time for submissions, hence making the Article operational. Finally, the submission introduced a footnote to Article 21.3(c) to oblige arbitrators determining the reasonable period of time to consider the particular problems and interests of developing country Members in interpreting the particular circumstances that would determine the reasonable period of time.

<sup>29</sup> Cuba, Egypt, India, Malaysia and Pakistan (Job(06)/222 – 10 July 2006, Job(06)/222/Corr.1 – 13 July 2006, and Job(06)/222/Add.1 – 28 July 2006.

<sup>30</sup> Article 22.3 requires a Member to retaliate in the same sector in which a violation or other nullification or impairment has been found, failing which, to retaliate in other sectors in the same agreement. It is only when it is not practicable or effective to retaliate in other sectors in the same agreement and when the circumstances are serious enough that a Member may retaliate in another covered agreement.

The revised proposal from the like-minded group was the only proposal with a specific focus on developing country concerns. The stated commitment to the development dimension was not matched by the number of proposals presented in 2006. There is need for more developing countries to engage in the DSU negotiations and to re-assert or revise their development-related proposals. As one Member said, it would be useful for Members to know what is on the table on special and differential treatment in order to allow for thorough and constructive discussion of all the relevant issues and pave way for agreement. This call should be taken seriously.

Developing countries are encouraged to participate in WTO dispute settlement as third parties so that they may learn by observing. Third party participation is seen as a cost-effective way of getting familiar with the dispute settlement procedures. One would therefore expect that developing countries, especially those less acquainted with the WTO dispute settlement system, would be at the forefront in proposing improvements to third party rights. This was not the case in 2006. Instead, it was the frequent developing country users of dispute settlement system - Argentina, Brazil, India and Mexico (as part of the G-7) – that pushed for improved third party rights.<sup>31</sup> The G-7 submitted a revised proposal on third party rights.<sup>32</sup> The changes clarified the scope of the rights of third parties under Article 10.2 and ensured that language of Article 10.3 and 17.4 more closely reflected the intentions of the G-7. The suggested amendment to Article 17.4 would permit Members who were not third parties at the panel stage to appear as third parties at the appellate stage. The rights of such Members would be the same as those of the initial third parties.

The consultation stage is an important step in the WTO dispute settlement process. It is therefore not surprising that a number of proposals relating to consultations were considered in the Special Session. On one end, Japan felt that there was no need to change Article 4.11 in relation to the acceptance or

denial of requests to join consultations. But, it supported the stipulation of a time-frame for responses to requests to join in consultations, and the requirement of written responses to requests for consultations.<sup>33</sup> These elements had already been propounded by the G-7 and Hong Kong, China, in Job(05)/19/Rev.1 and Job(06)/89<sup>34</sup> respectively. In the said proposal, Hong Kong, China additionally suggested that there should be a presumption of acceptance of a request to join in consultations unless the responding Member and the complaining Member jointly or separately reject the request. The current wording of Article 4.11 allows the respondent alone to reject requests to join in consultations. The aim of Hong Kong China's proposal is to avoid arbitrary rejection of requests, in line with the notion that although disputes are bilateral matters between the main disputing parties, rulings have a bearing on the whole WTO membership.

Hong Kong China also stated that its proposal would permit greater transparency in the consultation process; Switzerland took the transparency issue further. It proposed that disputing parties must be required to furnish a progress report on the status of the consultations to the DSB every 60 days. Further, the proposal suggested an obligation for Members to notify not only the mutually agreed solution but also the substance of the agreed solution.<sup>35</sup> This would help inform other parties that are interested in the dispute, which is important because a settlement between the main parties might come at the expense of the non-participating parties. In line with Switzerland's concerns about transparency, the like-minded group of developing countries slightly revised the text contained in TN/DS/W/18 to emphasize that Members must give sufficient details of any mutually-agreed solution of any matter formally raised under the WTO dispute settlement system.<sup>36</sup>

Some of the evidence presented in WTO disputes may be proprietary or commercially sensitive company information and also other

<sup>31</sup> The other members of the G-7 are Canada, New Zealand and Norway.

<sup>32</sup> Job(05)/19/Rev.1 – 10 March 2006.

<sup>33</sup> Job(06)/175 – 8 June 2006.

<sup>34</sup> 19 April 2006.

<sup>35</sup> Job(06)/224 – 11 July 2006.

<sup>36</sup> Job(06)/222 – 10 July 2006.

sensitive information held by Members. Hence increased transparency in dispute settlement has to be balanced with the preservation of the confidential nature of such information. Canada presented a revised version<sup>37</sup> of its 2003 proposal on confidential information, in view of the need for effective procedures for handling such information in the dispute settlement process. The revision not only widened the concept of confidentiality but also extended the reach beyond panels to include arbitrations and procedures under Annex V of the Agreement on Subsidies and Countervailing Measures.<sup>38</sup>

The question of unsolicited amicus curiae briefs is highly contentious. The like-minded group's revised proposal dealt with the issue for both the panel and appellate stage. In The proposal suggested adding a footnote to Article 13 to prohibit panels from accepting or considering unsolicited information or technical advice. The proposal also suggested a footnote to Article 17.9 to the effect that the Appellate Body must not accept or consider information from any individual or body other than the main parties and the third parties. The proposed Article 17.9 footnote is more prohibitive than the Article 13 one because it does not permit seeking information from other international organizations or experts. It suggests that any information accepted and considered at the appellate stage must either directly come from the parties or must be attached to the parties' submissions.

One of the main issues that the US has consistently advocated in the DSU negotiations is improving flexibility and member control in WTO dispute settlement. This covers a number of topics, including use of public international law in WTO dispute settlement and interpretative approaches. Its 2006 proposal was meant to provide draft parameters concerning the measure under review in WTO dispute settlement. The proposal dealt with the appropriate order of analysis in dispute settlement, the definition of a measure, and

the distinction between mandatory and discretionary measures.<sup>39</sup> The US suggested that Members could provide additional guidance on these issues through adopting an authoritative interpretation under Article IX of the WTO Agreement or through a DSB decision.

Another area of interest for the US is transparency in dispute settlement. This is evidenced by its previous proposals<sup>40</sup> and its willingness to open up panel proceedings for public observation. After extolling the virtues of greater transparency for the public and for other WTO Members, the US presented a revised legal text on transparency. The US proposal spoke to permitting the public to observe panel, Appellate Body and arbitration meetings, allowing public access to submissions and statements, and ensuring that the final report is circulated to Members and released to the public once it is issued to the parties.<sup>41</sup>

Post-retaliation procedure has been a major area of concern for users of the WTO dispute settlement system. The problems with the current provisions are evident from the case concerning the "Continued Suspension of Obligations in the EC – Hormones Dispute."<sup>42</sup> Several Members have advocated amendments to the provisions on post retaliation. The G-6 presented a revision of their earlier proposal<sup>43</sup> on post-retaliation procedures, taking into account comments from other Members.<sup>44</sup>

<sup>39</sup> TN/DS/W/82/Add.2 – 17 March 2006.

<sup>40</sup> TN/DS/W/46 – 11 February 2003.

<sup>41</sup> TN/DS/W/86 – 21 April 2006.

<sup>42</sup> *United States – Continued Suspension of Obligations in the EC- Hormones Dispute*, WT/DS320 and *Canada – Continued Suspension of Obligations in the EC- Hormones Dispute*, WT/DS321. The original dispute was *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (United States) and WT/DS48/AB/R (Canada). See "Experimental Transparency and Post-Retaliation Issues: EC - Hormones" in *The South Centre Quarterly on Trade Disputes*, Third Quarter 2005, pp. 3-11, available at <http://www.southcentre.org/info/scquarterlytradedisputes/TradeDisputesQtrly2005q3.pdf>, last accessed on 22 March 2007.

<sup>43</sup> Job(04)/52, 19 May 2004. The G-6 comprises of Argentina, Brazil, Canada, India, New Zealand and Norway.

<sup>44</sup> The contribution from the G-6, which also included textual revisions on their earlier proposal on

<sup>37</sup> Job(06)/56 – 17 March 2006.

<sup>38</sup> Annex V contains the procedures for developing information concerning serious prejudice in consultations initiated under Article 7 of the SCM Agreement.

The informal discussions after the presentation in the Special Session showed that a number of elements had to be explored further. Building on an earlier proposal on the creation of a specific post-retaliation procedure,<sup>45</sup> the EC and Japan presented a new proposal introducing the possibility for upward or downward adjustment of the retaliation if the implementing Member's new measure increased or decreased the level of nullification or impairment.<sup>46</sup> The proponents said they would subsequently submit a revised version of the entire text of Article 22.8 when the work on post-retaliation was completed.

In summary, the DSB Special Session dealt with post-retaliation, transparency in WTO dispute settlement generally, transparency and third party rights in consultations, S&DT, third party rights, acceptance and consideration of unsolicited amicus curiae briefs, flexibility and member control in dispute settlement, and protection of business confidential information. All this work was done in the first half of 2006: there were no meetings of the Special Session after the suspension of the negotiations in July 2006.

### **Whither in 2007?**

The DSU negotiations have been going on for a long time. They started as the DSU review before the launch of the Doha Round, and were affirmed and given a fresh mandate in Paragraph 29 of the Doha Ministerial Declaration. Despite the lengthy negotiation period and the several deadlines set, substantive results have been elusive. The Hong Kong Ministerial Declaration did not set a new deadline for the DSU negotiations but most Members agree on the need for urgency. They also agree that the participation of all delegations is necessary, and that there should be greater political involvement. The DSU negotiations have thus far taken a much lower political profile than the agriculture and services negotiations, for example. Members feel that substantive

results could be attained if the political profile matched the advances made at the technical level.

There is still a lot of work to be done at the technical level. The informal and bottom up approach means that delegations should provide inputs and drive the process. Members are encouraged to submit legal texts with their proposals and to follow the guidelines for drafting proposals, for example, ensuring that language is similar to that used in the rest of the DSU. Some have said that the DSB Special Session should focus on issues that had been thoroughly discussed and on which there was a likelihood of consensus. It has also been said there is need for textual proposals and revisions, especially for proposals that had not been discussed for a long time. These statements make it imperative for developing countries that are not active participants in the DSU negotiations to put forward their views and ensure sufficient discussion of their proposals.

India, the Africa Group and the LDC Group were working together in 2006 to explore commonalities in their respective proposals. The African Group was also engaged in intensive consultations to revise proposals and was working with other Members on issues of common interest. It is hoped that all these consultations and work will not only continue but also intensify, so that they may culminate in proposals that will enjoy consensus in the Special Session without compromising the objectives of the developing countries.

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remand authority for the Appellate Body, was made in an informal room document that was to be circulated later as a Job document. It appears that the document has not been circulated up to now.

<sup>45</sup> Job(05)/47, 24 March 2005.

<sup>46</sup> Job(05)/47/Add.1 – 19 April 2005.

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**ABOUT THE QUARTERLY**

International trade dispute settlement is now prominent. In particular, WTO dispute settlement has become a very important part of the multilateral trading system and is playing an increasingly crucial role in WTO rule interpretation. The panel and Appellate Body reports show how the provisions of the various WTO agreements should be interpreted and applied to real cases in real life. The developing jurisprudence might support the process towards a fairer market oriented trading system but it can also undermine the carefully negotiated texts of the WTO agreements. It is therefore important for developing countries to be aware of the potential utility and the potential adverse impacts of the WTO dispute settlement mechanism vis-à-vis their concerns in the negotiations.

The main purpose of this quarterly is to provide analyses, from a developing country perspective, of the various legal, political and process-related issues arising from WTO dispute settlement. However, the coverage will also extend to, where necessary, bilateral and regional trade disputes. By being equipped with such analyses, developing countries will be better positioned to understand how they can use the rules to ensure that their benefits are maximized under the multilateral trading system.

The quarterly is divided into several parts, namely: concise analyses of WTO panel and Appellate Body reports or of international trade disputes in other forums – this part will sometimes carry general articles pertaining to trade disputes; brief descriptions of notable dispute settlement reports or new or pending disputes; and, sometimes, updates on WTO Dispute Settlement Understanding review negotiations.

It is hoped that the publication will be useful not only to developing country officials engaged in international trade negotiations and trade policy formulation, but also to scholars, academics and others interested in WTO matters and international trade law generally.

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