

**TRADE-RELATED AGENDA,  
DEVELOPMENT AND EQUITY  
(T.R.A.D.E.)**

**WORKING PAPERS**

**1**

**ISSUES REGARDING THE REVIEW OF  
THE WTO DISPUTE SETTLEMENT  
MECHANISM**

**SOUTH CENTRE**

**FEBRUARY 1999**

## **THE SOUTH CENTRE**

In August 1995, the South Centre became a permanent intergovernmental organization of developing countries. In pursuing its objectives of promoting South solidarity, South-South co-operation, and co-ordinated participation by developing countries in international forums, the South Centre has full intellectual independence. It prepares, publishes and distributes information, strategic analyses and recommendations on international economic, social and political matters of concern to the South.

The South Centre enjoys support and co-operation from the governments of the countries of the South and is in regular working contact with the Non-Aligned Movement and the Group of 77. Its studies and position papers are prepared by drawing on the technical and intellectual capacities existing within South governments and institutions and among individuals of the South. Through working group sessions and wide consultations which involve experts from different parts of the South, and sometimes from the North, common problems of the South are studied and experience and knowledge are shared.

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## PREFACE

The South Centre, with funding support from the UNDP, has established a pilot project to monitor and analyse the work of the WTO from the perspective of developing countries. Recognizing the limited human and financial resources available to the project, it focuses on selected issues in the WTO identified by a number of developing countries as deserving priority attention. It is hoped that the project will lead to more systematic and longer term activities by the South Centre on WTO issues.

An important objective of the project is to respond, to the extent possible within the limited resources, to the needs of developing country negotiators in the WTO for concise and timely analytical inputs on selected key issues under negotiation in that organization. The publication of analytical *cum* policy papers under the T.R.A.D.E. working paper series is an attempt to achieve this objective. These working papers will comprise brief analyses of chosen topics from the perspective of developing countries rather than exhaustive treatises on each and every aspect of the issue.

It is hoped that the T.R.A.D.E. working paper series will be found useful by developing country officials involved in WTO discussions and negotiations, in Geneva as well as in the capitals.

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South Centre, February 1999



## **EXECUTIVE SUMMARY**

The Dispute Settlement Mechanism under the World Trade Organization (Understanding on Rules and Procedures Governing the Settlement of Disputes) has been heralded as the anchor of the rule-based multilateral trading system embodied in the Uruguay Round Agreements. While this mechanism has gained some credibility among developing countries, it has not reversed the situation in which some developed countries are the major users of the system. This points to the need for further improvement in the Dispute Settlement Understanding (DSU) to ensure that developing countries derive greater advantage from the system and do not find it prejudicial to their interests. The review of the DSU currently underway in the Dispute Settlement Body (DSB) of the WTO provides such an opportunity.

Developing countries did not have great faith in the credibility of the dispute settlement mechanism under GATT 1947. Moreover, their attempts (complaint filed by Uruguay against fifteen developed countries in 1961 and the joint proposal by Uruguay and Brazil, tabled in 1965, to amend Article XXIII of the GATT 1947) to improve the dispute settlement mechanism under GATT 1947 did not lead to tangible results. Developing countries, therefore, did not make recourse to this mechanism very often.

While the new dispute settlement mechanism under the DSU of the WTO is an improvement on the previous mechanism, an examination of the experience of developing countries with the DSU in the first four years of its operation shows clearly that these countries are still facing a number of problems. These problems are related to:

- the cost of access to the dispute settlement process,
- issues of implementation of decisions and compensation, and
- the effective implementation of provisions regarding special and differential treatment in favour of developing countries.

In the review process, many developing countries, including Venezuela; India; Pakistan; Argentina; Costa Rica; Guatemala; Peru; Singapore, Thailand and Hong Kong, China, have presented proposals for improvements. These proposals aim to ameliorate the difficulties experienced by developing countries in the operation of the DSU, and are related to consultations, proceedings in the panels and the Appellate Body, implementation of DSB recommendations, special and differential treatment for developing countries, technical assistance to developing countries, and other matters under the DSU.

The DSB has agreed to extend the time period to complete the review of the DSU from the end of 1998 to the end of July 1999. Developing countries should use the extension in the time period to further elaborate and, if needed, submit additional

proposals to improve the operation of the DSU. The objective should be to achieve a satisfactory resolution to their concerns related to the issues regarding:

- equal access to the dispute settlement mechanism,
- adjustment of time-frames under the DSU,
- provision of compensation during the pendency of the dispute,
- implementation of DSB recommendations,
- operationalization of all provisions regarding special and differential treatment for developing countries,
- clarification of the rights of third parties,
- deterrence against misuse of the dispute settlement process, and
- clear directions to the panels and the Appellate Body regarding their respective roles and mandates.

Developing countries, moreover, need to point out that their concerns and proposals relate to problems of implementation and, hence, the acceptance of these proposals will maintain the balance of rights and obligations negotiated during the Uruguay Round. These proposed improvements in the operation of the DSU, therefore, should be accepted during the current review process instead of pushing them on to the agenda of any new negotiations.

Finally, proposals made by developing countries to improve the operation of the DSU are based on similar concerns. There is, therefore, need for coordination among them. In fact, developing countries can expect a much better response to their proposals from their developed country trading partners if they support each other and act in concert in the review process.

## I. INTRODUCTION

The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the Trade Negotiations Committee on 15 December 1993, in part reads as follows:

“Ministers ... invite the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.”

Under this Decision, WTO Members were mandated to complete a review of the operation of the current Dispute Settlement Understanding (DSU) by the end of 1998<sup>1</sup>, allowing the Third WTO Ministerial Conference, to be held in the United States in late 1999, to take a decision on whether to continue, modify or terminate the DSU. A number of informal consultations have been held at the WTO Dispute Settlement Body (DSB) for this purpose, but no consensus has emerged so far regarding whether or, if at all, to what extent the current DSU should be modified.

This paper is an attempt to analyse problems that have been encountered by developing countries in relation to the operation of the DSU. It is important to note however, that the analysis of substantive issues, raised and decided upon in the context of disputes that have been brought to the WTO dispute settlement mechanism so far, is beyond the scope of this paper. While the focus of the present paper is on issues of process related to the operation of the DSU, this should not diminish the importance of the issues of substance addressed in the panel/Appellate Body decisions which may be the subject of a follow-up paper in the future.

Before engaging in the analysis of the current DSU, it is useful to review the experience of developing countries under GATT 1947 in respect of the dispute settlement system, in order to highlight the difference and similarities between the past and the present situations.

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<sup>1</sup> The Dispute Settlement Body (DSB) of the WTO, in its meeting on 8 December 1998, agreed to ask the General Council to decide to continue and complete the review process including the preparation of the report by the end of July 1999. This proposal has been accepted by the General Council.

## II. DEVELOPING COUNTRIES AND DISPUTE SETTLEMENT UNDER GATT 1947

Developing countries had relatively little recourse to the GATT dispute settlement mechanism under GATT 1947, that is, before the inception of the WTO. **There may have been several reasons for this, but lack of trust in the system was by far the most important factor.**

In the 1950s, developing countries such as Pakistan, Cuba, Chile, Haiti and India actively used the nascent GATT dispute settlement mechanism to pursue their national interests. However, developing countries gradually lost interest in the system because, in the eyes of the developing countries, it largely failed to deliver the desired results. **This was amply demonstrated by the 1961 Uruguayan complaint, when Uruguay filed a case under GATT Article XXIII against fifteen developed countries, listing 576 trade restrictive measures.**<sup>2</sup> Robert Hudec describes the purposes of this complaint as follows:

“The Uruguayan complaint was showpiece litigation -- an effort to dramatize a larger problem by framing it as a lawsuit. The complaint was making two points. One was to draw attention to the commercial barriers facing exports from developing countries and the fact that, whether or not these barriers were legal, the GATT was not working if it could not do better than this. Second, although Uruguay carefully avoided any claim of illegality, the fact that many of the restrictions were obviously illegal would, Uruguay hoped, dramatize the GATT's ineffectiveness in protecting the legal rights of developing countries.”<sup>3</sup>

While the Uruguayan complaint may have been successful in highlighting what it considered to be commercial barriers, legal or otherwise, to developing countries' exports, it failed to achieve any significant reduction in these barriers through its legal action. Hudec concludes:

**“At the conclusion of the proceeding, Uruguay noted the removal of certain restrictions, but said that others have been added in the meanwhile and that consequently Uruguay's overall position was no better than before. The lesson to be drawn from the case, according to Uruguay, was that GATT law did not protect developing countries.”**<sup>4</sup>

However, although they had less recourse to the GATT dispute settlement system after this turn of event, developing countries still tried to improve the system in their favour by introducing formal changes to it. **In 1965, Brazil and Uruguay tabled a proposal for amending Article XXIII of the GATT.**<sup>5</sup> **Their proposal had four elements: (i) the**

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<sup>2</sup> *Uruguayan Recourse to Article XXIII*, BISD 11S/95.

<sup>3</sup> Robert Emil Hudec, *Developing Countries in the GATT Legal System*, Geneva, 1987, p. 47.

<sup>4</sup> *Ibid*, p. 49.

<sup>5</sup> BISD 14S/139.

**present arrangement for action under paragraph 2 of Article XXIII should be elaborated in a way which would give developing countries invoking the Article the option of employing certain additional measures; (ii) where it has been established that measures complained of have adversely affected the trade and economic prospects of developing countries and it has not been possible to eliminate the measure or obtain adequate commercial remedy, compensation in the form of an indemnity of a financial character would be in order; (iii) in cases where the import capacity of a developing country has been impaired by the maintenance of measures by a developed country contrary to the provisions of the GATT, the developing country concerned shall be automatically released from its obligations under the General Agreement towards the developed country complained of, pending examination of the matter in GATT; and (iv) in the event that a recommendation by the Contracting Parties to a developed country is not carried out within a given time-limit, the Contracting Parties shall consider what collective action they could take to obtain compliance with their recommendation.**

**This proposal was not accepted by the Contracting Parties to GATT 1947.** However, it led to a modest change in the GATT dispute settlement procedure providing for a shorter time frame for complaints initiated by developing countries, known as the 1966 Decision, which is still in effect (DSU, Article 3.12.), though rarely used. **The developing countries remained disillusioned about the efficacy of the GATT dispute settlement mechanism.**

**Brazil, during the early phase of the Uruguay Round dispute settlement negotiations, again put forward formal proposals to give more favourable treatment to developing countries, arguing that their limited power of retaliation, as well as Part IV of the GATT and earlier decisions in their favour, required that they be provided with "a higher level of equality".<sup>6</sup> The rationale behind the new Brazilian proposal was the same as its 1965 proposal, and again it was not accepted.**

In the next section, the paper analyses the experience of developing countries vis-à-vis dispute settlement under the WTO.

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<sup>6</sup> John Croome, *Reshaping the World Trading System*, Geneva, 1995, p. 150.

### III. DEVELOPING COUNTRIES AND THE DISPUTE SETTLEMENT MECHANISM UNDER THE WTO

Developing countries' expectations from the dispute settlement mechanism of the WTO, as "a central element in providing security and predictability to the multilateral trading system"<sup>7</sup>, seem considerable. According to WTO Secretariat statistics, (Table I), in the relatively short time since the inception of the WTO, 40 of the total of 157 cases have been initiated by developing countries, either by themselves or in conjunction with complaints filed by developed countries.<sup>8</sup> Indeed, the very first complaint under the WTO was filed by a developing country against a developed country.<sup>9</sup> This would indicate that they are using the new dispute settlement system actively.

**TABLE I**  
**Participation of Developing Countries in the Dispute Settlement under the WTO as of 14 January 1999<sup>1</sup>**

	<b>Consultation Requests</b>	<b>Active Cases</b>	<b>Completed Cases</b>
<b>Total</b>	157	18	18
By developing countries <sup>2</sup>	40	3	8
By developing countries as % of total <sup>3</sup>	25%	17%	44%

1. Based on the information posted on the WTO web site (<http://www.wto.org>).

2. This includes cases jointly filed by both developed and developing countries.

3. At present, developing countries constitute about three-quarters of the total WTO membership.

**TABLE II**  
**Comparison of Participation by Developed and Developing countries in the WTO Dispute Settlement Process up to 14 January 1999<sup>1</sup>**

<b>Cases Filed by Developed Countries</b>		<b>Cases Filed by Developing Countries</b>		<b>Cases jointly filed by developed and developing countries</b>
Total	Against Developing Countries	Total	Against Developed Countries	Total
114	48	31	22	10

1. Based on the information posted on the WTO web site (<http://www.wto.org>).

<sup>7</sup> DSU, Article 3.2.

<sup>8</sup> See Table II for comparative figures regarding the use of the dispute settlement mechanism by developing and developed countries, respectively.

<sup>9</sup> *Malaysia - prohibition of Imports of Polyethylene and Polypropylene, complaint by Singapore* (WT/DS1).

This section presents a brief analysis of the experience of developing countries with dispute settlement under the WTO. The section is divided into three parts: (1) a brief description of panel cases under the WTO involving the developing countries either as complainants or as respondents; (2) an analysis of the operation of the provisions on special and differential treatment in favour of developing countries in the DSU; and (3) an outline of the major problems that have been encountered by developing countries in relation to the operation of the DSU.

### III.1 Panel cases under the WTO involving developing countries

As of 14 January 1999, ten panel and Appellate Body reports involving developing countries either as complainants or respondents, had been adopted.<sup>10</sup> These are briefly examined in the following pages.<sup>11</sup>

- (a) *United States - Standards for Reformulated and Conventional Gasoline, complaints by Venezuela (WT/DS2) and Brazil (WT/DS4).*

In January 1996, the panel examining the US regulations regarding the cleanliness of gasoline under the Clean Air Act found that they were not consistent with GATT Article III:4 in that imported gasoline was accorded less favourable treatment than domestically produced gasoline. The panel further held that the measure could not be justified under GATT Article XX. The panel recommended that the DSB request the United States to bring its gasoline regulations into conformity with its GATT obligations. The United States appealed the panel's finding on GATT Article XX(g). In April 1996, the Appellate Body issued its report, modifying the panel report on the interpretation of GATT Article XX(g) but concluding that Article XX(g) was not applicable in the case. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted by the DSB in May 1996. The United States announced implementation of the recommendations of the DSB in August 1998.

**This was the first WTO dispute that reached the panel/Appellate Body stage. The case is symbolic of the changing environment in that both complainants were developing countries and that the respondent was the United States.** It is also significant that the case involved an issue of trade and environment, an unsettled question with politically sensitive implications.

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<sup>10</sup> The full text of the reports referred to in this section are available from the WTO home page on the Internet (<http://www.wto.org>).

<sup>11</sup> **As noted earlier, the present paper deals only with issues related to the process under the DSU and discussion of the substantive aspects of the cases brought before the WTO is beyond its scope.**

(b) *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear, complaint by Costa Rica (WT/DS24).*

In its report circulated in November 1996, the panel found that the US restrictions imposed on imports of underwear from Costa Rica were not valid because the United States had not 'demonstrably' shown that serious damage was caused by the increased level of imports as required under the Agreement on Textiles and Clothing (ATC) and also because the United States failed to make an adequate attribution of serious damage to Costa Rican imports, as distinct from other imports. The panel also concluded that the United States violated the ATC because it retroactively applied the restriction starting from the date of the request for consultations. In the panel's view, the quota period should have started from the date of the official publication regarding the request. The panel recommended that the United States bring the measure challenged by Costa Rica into compliance with its obligations under the ATC. The panel further suggested that the United States bring the measure into compliance by immediately withdrawing the restriction.

Costa Rica appealed the panel's conclusions relating to the permissible effective date of application of the US transitional safeguards. In February 1997, the Appellate Body allowed Costa Rica's appeal. It concluded that the ATC does not permit the retroactive application of transitional safeguard measures. Thus, the United States could not apply the restriction prior to 60 days after the date it requested consultations. Later in February, the DSB adopted the Appellate Report and the panel report as modified by the Appellate Report. In April 1997, the United States informed the DSB that the contested measure had expired in March 1997.

**This case is significant in that it involved the textiles sector, a source of conflicts between many developed (importing) WTO Members and developing (exporting) Members. This was the first successful challenge under the DSU against invocation of the transitional safeguard mechanism under the ATC.**

(c) *Brazil - Measures Affecting Desiccated Coconut, complaint by the Philippines (WT/DS22).*

In March 1996, a panel was established at the request of the Philippines to consider whether Brazil's imposition of countervailing duties on desiccated coconut from the Philippines was consistent with the WTO rules. The Philippines claimed that the duties were inconsistent with Brazil's obligations under Article VI of GATT 1994 because, inter alia, Brazil had not established the basic prerequisites for imposing such duties and in particular had not correctly calculated the degree of subsidization. Brazil objected to this claim on the ground that the Tokyo Round Agreement on Subsidies and Countervailing Measures (Subsidies Code) was the only legal framework applicable to the dispute. In Brazil's view, the WTO agreements did not apply to countervailing duty investigations initiated prior to the date of entry into force of the WTO Agreement (i.e. 1 January 1995).

In its October 1996 report, the panel noted that the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides that it applies to countervailing duty investigations initiated after 1 January 1995. The investigation at issue was initiated prior to 1995. The panel concluded that Article VI of GATT 1994 could not be applied independently of the SCM agreement to a countervailing duty investigation initiated prior to 1995. As a result of this finding on the question of applicable law, the panel did not consider the merits of the Philippines' claims. The Philippines appealed from this finding. In February 1997, the Appellate Body issued its report upholding the panel's conclusions. The reports of the Appellate Body and of the panel, as upheld by the Appellate Body, were adopted by the DSB in March 1997.

This case, although it reached the appellate stage, did not resolve the dispute at issue because both the panel and the Appellate Body avoided a ruling on the merits of the case for technical reasons. **This illustrates the increased emphasis on legal positivism and judicial restraint under the WTO regime, as opposed to pragmatic solutions which were prevalent under GATT 1947. The lesson from the unsuccessful result for the complainant is that under the WTO dispute settlement mechanism, what appears to be a strong case could be lost because of certain legal technicalities.** However, the implication of this particular case for the WTO dispute settlement mechanism is rather limited because the case involved special circumstances during the transition period from GATT 1947 to GATT 1994. Now that the co-existence of the old and new regimes is over, it is unlikely that this particular issue will arise again in the future.<sup>12</sup>

- (d) *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, complaint by India (WT/DS33).*

Like the above-mentioned Costa Rican Underwear case, this dispute concerns a transitional safeguard measure imposed by the United States on imports of textile products. In its report circulated in January 1997, the panel found that the measure was in violation of the ATC.

In reaching its conclusion, the panel adopted a rather restrictive approach regarding its scope of examination. For instance, in assessing the conformity of the US measure with Article 6.2 of the ATC, the panel restricted its review to an examination of a statement issued by the US investigating authority when the United States requested consultations under the ATC with India in April 1995. Following its finding of violation, the panel did not go on to consider India's request that it find that the importing country has to choose at the beginning of the process whether it will claim the existence of "serious damage" or "actual threat of serious damage" to the domestic industry because, in India's view, they were two separate concepts, not interchangeable with each other. Nor did the

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<sup>12</sup> It should be noted, however, that Sri Lanka, another developing country, has requested consultations with Brazil regarding a similar measure. *Brazil - Countervailing Duties on Imports of Desiccated Coconut Milk Powder from Sri Lanka (WT/DS30).*

panel consider India's claim that the United States consulted with India only on the basis of "serious damage" and referred the matter to the Textiles Monitoring Body (TMB) on that basis, not on the basis of "actual threat". The panel also declined to consider India's claim that the United States had improperly backdated the effective date of the restraint.

India obviously was not satisfied with this narrow finding by the panel. Although the United States had lifted the measure against imports from India in December 1996, even before the issuance of the final report of the panel, India filed a notice of appeal in February 1997. The grounds for appeal included issues regarding (i) which party bears the burden of proof concerning the legality of trade restrictive measures; (ii) what role the TMB should play in the dispute settlement process in the textiles sector; and (iii) whether a panel is required to make findings on all legal claims made by the complaining party. In April 1997, the Appellate Body issued its report upholding the legal findings and conclusions of the panel on all issues. As to the burden of proof, the Appellate Body agreed with the panel that it was up to India to present evidence and argument sufficient to establish a presumption that the measure was inconsistent with the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption. Regarding the role of the TMB, the Appellate Body concluded that the statement in the panel report on what information the TMB may take into account was purely a descriptive comment and not "a legal finding or conclusion" which the Appellate Body "may uphold, modify or reverse". On the issue of "judicial economy", the Appellate Body concluded that the panel's finding that it only needed to address those legal claims that it considered necessary for the resolution of the dispute was consistent with the DSU as well as the practice under GATT 1947 and the WTO Agreement.

In May 1997, the DSB adopted the reports of the panel and the Appellate Body. There was no implementation issue because the restraint was no longer in place at the time of the adoption.

**India's motive in bringing this case was probably systemic, rather than economic. That is why India pursued the case even after the revocation of the measure by the United States. In response, the Appellate Body came up with clear-cut rulings on the burden of proof and judicial economy, which may not have necessarily satisfied India, but nevertheless greatly influenced later practice in the WTO. The Appellate Body Report on Shirts and Blouses became an important precedent regarding these two issues, often cited by later panels and the Appellate Body itself. With respect to the role of the TMB and other issues, the answer was even less satisfactory from the Indian point of view. The panel made a statement, with which India disagreed, albeit in the form of *obiter dictum*.<sup>13</sup> The Appellate Body simply avoided the question. A lesson to be learned from this case is that one cannot expect too much of**

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<sup>13</sup> *Obiter dictum*: An expression of opinion on a matter of law, given by the legal panel, but not essential to the decision, and therefore not of binding authority.

**rule-making from the WTO dispute settlement system. As adjudicatory organs, both the panels and the Appellate Body would generally exercise a judicial restraint and limit their rulings to issues which are absolutely necessary for bringing the dispute to a positive conclusion. Given the importance attached by the Appellate Body to the treaty interpretation rules enshrined in the Vienna Convention, while it is possible to seek certain clarifications of existing rules by panels or the Appellate Body, they will never be able to substitute the role of negotiators in resolving systemic issues.<sup>14</sup>**

- (e) *European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27).*

This case is sometimes referred to as Bananas III because previously there were two failed challenges by certain banana exporting countries against the EC bananas regime under GATT 1947.<sup>15</sup> The complainants alleged that the EC's regime for importation, sale and distribution of bananas was inconsistent with GATT Articles I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the Agreement on Trade-Related Investment Measures (TRIMs Agreement) and the General Agreement on Trade in Services (GATS). A panel was established in May 1996. In its May 1997 report, the panel found that the EC's banana import regime, and the licensing procedures for the importation of bananas in this regime, were inconsistent with the EC obligations under GATT 1994 and the GATS. The panel further found that the Lomé waiver granted to the EC, waived only the inconsistency with GATT Article XIII (regarding allocation of quotas), but not inconsistencies arising from the licensing system. In June 1997, the EC appealed from these findings. The Appellate Body mostly upheld the panel's findings, but reversed the panel's findings that the inconsistency with GATT Article XIII was waived by the Lomé waiver, and that certain aspects of the licensing regime violated GATT Article X and the Import Licensing Agreement.

The Appellate Report and the panel report as modified by the Appellate Body were adopted by the DSB in September 1997.

In November 1997, the complainants requested that the "reasonable period of time" for implementation of the recommendations and rulings by the DSB be

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<sup>14</sup> This, however, seems to have changed with the Appellate Body report on the Shrimp-Turtle case (discussed later in this section) where the Appellate Body has been alleged to have failed to exercise judicial restraint and has moved into the area of rule making which is the mandate of the WTO membership only.

<sup>15</sup> *EEC - Member States' Import Regime for Bananas*, complaints by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, panel report circulated on 3 June 1993 (DS32/R) and *EEC - Import Regime for Bananas*, complaints by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, panel report circulated on 11 February 1994 (DS38/R). Neither report was adopted by the GATT Council.

determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. The Arbitrator found the reasonable period of time to be from 25 September 1997 to 1 January 1999. Amendment to the EC bananas regulation was announced in July 1998 in purported compliance with the recommendations. The complainants did not agree that the amended regulation implemented the DSB recommendations, and in September 1998 indicated that they might take recourse to Article 21.5 of the DSU, requesting the referral to the original panel regarding the consistency with the WTO rules "of measures taken to comply with the recommendations".

Procedural wrangling between the complainants and the respondents, however, kept the complainants from getting the panel established by the DSB. Moreover, while Ecuador pursued the reconvening of the original panel under Article 21.5 of the DSU, the United States went ahead and invoked its domestic procedures to implement its threat of retaliation against the EC exports to the US, as stipulated under Article 22.6 of the DSU. The United States announced a preliminary list of EC exports which it was considering for a 100 per cent tariff in retaliation for the EC's presumed non-compliance with the Appellate Body findings. The list was finalized on 18 December 1998 and the US is set to impose retaliatory tariffs on EC exports worth US\$520 million from March 2 1999 if the EC fails to change its regime for the importation of bananas. (Under Article 22.6 of the DSU, the DSB is bound to accord permission for retaliation to the complainant upon request, as such request can be denied only by consensus of all members including the complainant.)

Another interesting development occurred on 15 December, 1998, when the EC itself asked for the establishment of a panel to find that its implementation measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged" under the DSU.

The DSB, at a special meeting held on 12 January 1999, agreed to two separate requests from Ecuador and the EC to refer, under Article 21.5, to the original panel in the dispute over the EC's implementation of DSB recommendations concerning its bananas importation regime. Ecuador requested the panel to verify whether the DSB recommendations have been effectively implemented by the EC as it believed that the new EC measures continued to violate provisions of various WTO Agreements. Colombia, Costa Rica, Côte d'Ivoire, Dominican Republic, Dominica, Jamaica, Mauritius, Nicaragua, St. Lucia, and Saint Vincent and the Grenadines indicated their interest in participating as third parties, whereas Mexico reserved the right to request its own Article 21.5 procedure. The EC requested the panel to look into the regulations it had adopted to implement the DSB recommendations regarding its bananas importation regime. The EC also said that it wanted to induce a challenge to its implementing measures and hoped that with the establishment of the two panels, a proper examination under Article 21.5 would be carried out. The US, Panama, Guatemala and Honduras objected to the EC request while St. Lucia supported it. India also expressed its opinion that a member should not be denied the opportunity to seek a ruling on the legality of its own measures and showed concern about a winning party in a dispute going to the retaliation phase automatically to the detriment of the losing party.

About a week later, the US, Guatemala, Honduras, Mexico and Panama, in a letter dated 20 January 1999, asked for consultations with the EC under Article 4 of the DSU to find a solution regarding the EC's amended bananas importing regime. This move for consultations was expected to come into play after the WTO authorization for the US sanctions, that was expected to be granted by the DSB in its meeting scheduled on 25 January 1999. Japan, on the other hand, was urging a compromise. The compromise proposal by Japan, which was supported by some developing countries also, aimed at the suspension of the consideration of the US request for authorization of sanctions until the reconvened panel (on the request of the EC and Ecuador) has given its final ruling. This, Japan hoped, would preserve the right of the US to retaliate while putting off the automatic authorization until the time the reconvened panel has pronounced itself on the EC's amended bananas regime.

The DSB meeting, scheduled for 25 January, was postponed repeatedly. For the first time in the history of the WTO, there was objection to the adoption of the agenda for the DSB meeting. Two small Caribbean banana-growing island countries, St. Lucia and Dominica, objected to the inclusion in the agenda of the US request for authorization to retaliate against the EC. This unprecedented move led to angry outbursts from the US and protracted negotiations between the EC and the US diplomats in Geneva. The Director General of the WTO acted as a facilitator for the negotiations which led to a compromise that allowed the DSB to finally meet and conduct its business. Among the elements of this compromise are:

- an agreement between the two parties to proceed immediately to consultations under Article 4 of the DSU to find a mutually agreed solution to the problem of the EC's amended bananas import regime;
- the original panel, already reconvened to deal with the two requests under Article 21.5 of the DSU, has also been given the task of arbitrating, under Article 22.6 of the DSU, on the extent of the US retaliation against the EC exports to the US by 1 March.
- the systemic issues concerning the relationship of Article 21.5 and 22.6 of the DSU need to be resolved expeditiously and the General Council as well as the DSB should address this as a priority issue.

This procedural wrangling regarding implementation of the DSB recommendations in the bananas case is due to an ambiguity in the DSU which has been exploited by the two major trading powers.<sup>16</sup> While Article 21.5

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<sup>16</sup> The following excerpts from the statement by the ambassador of Ecuador to the WTO, as reported in the media, are relevant in this regard: "We are dismayed that the US and the EU seem to be using the banana dispute to pursue trade policy agendas which have little to do with bananas

provides for the reconvening of the original panel to determine the conformity of the measures adopted by the losing party with the DSB recommendations, Article 22.6 allows the complainant to seek authorization for retaliation which can not be denied by the DSB. Moreover, this authorization must be sought within a period of 30 days after the adoption of measures by the losing party. There is no link or order established in the DSU in respect of these two provisions. At a more fundamental level, the DSU is not very clear as to when, how and by whom the conformity of measures adopted by the losing party with the DSB recommendations is to be decided.

**The saga of “Bananas III”, without prejudice to its final outcome, has raised some important questions for the consideration of developing countries. These are:**

- i. Is there a need to define clearly which WTO members have the right to bring up disputes before the DSB? It is a fact that the US is not a major exporter of bananas. Admittedly, the US is defending the rights of its multinational corporations engaged in the production of bananas in Latin American countries and their export to the EC. But allowing the US to bring this case also opens the door for disputes in the future that are filed not in the defence of a country’s own exports, but in order to open markets for the exports of its multinational corporations, no matter where these exports have been produced.**
- ii. Who has the right to decide whether the measures adopted by the losing party are in conformity with the DSB recommendations? If this is the right of the complainant, as the US seems to imply, this may lead to retaliation against developing countries even when they claim to have complied with the DSB recommendations.**
- iii. Is retaliation really an option for developing countries? All the co-complainants in the bananas dispute are developing countries. But no matter how frustrated they feel with the EC implementation of the DSB recommendations, not one of them has opted for retaliation like the US. The fact is that hardly any developing country can afford to seek, or effectively employ, retaliation against a major developed country. Retaliation is an instrument in the multilateral trading system that is more likely to be used against them than by them.**

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... .” “Both the US and the EU need to recognize that other countries are heavily impacted by the prolonged bilateral ‘to and fro’ that is taking place”.

(f) *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, complaint by the United States (WT/DS50).*

This dispute concerns patent protection for pharmaceutical and agricultural chemical products in India. Pursuant to Article 65.4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), India, as a developing country Member of the WTO, has delayed the product patent protection in respect of pharmaceutical and agricultural chemical inventions until 1 January 2005. Under Article 70.8(a), those Members which do not make available patent protection for pharmaceutical and agricultural chemical products as of 1 January 1995, must provide a means by which patent applications can be filed to preserve novelty and priority in respect of these applications. Since they are not obligated to examine the applications or to grant patents during the transition period, the applications under Article 70.8(a) are often referred to as 'mailbox applications'. Furthermore, Article 70.9 requires that "exclusive marketing rights" must be granted, even during the transition period, to certain products which were subject to mailbox applications.

Immediately before the entry into force of the WTO Agreement, the Indian administration introduced a legislative bill to amend the Patents Act so that India can have a system of mailbox applications for pharmaceutical and agricultural chemical products, as well as that of exclusive marketing rights. However, parliament failed to enact the bill. India received mailbox applications under the authority of administrative instructions to the Patent Controller and there was no mechanism for the grant of exclusive marketing rights.

The panel report, which was circulated in September 1997, found that India did not comply with its obligations under Article 70.8(a) because it failed to establish a mechanism that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical or agricultural chemical inventions. The panel made an alternative finding, in case the Appellate Body reverses its finding on this particular point, that India failed to comply with the transparency obligations (publication and notification) under Articles 63.1 and 63.2. Furthermore, the panel found that India was not in compliance with its obligations under Article 70.9 because it failed to establish a system for the grant of exclusive marketing rights. India appealed these findings in October 1997.

In its December 1997 report, the Appellate Body upheld, with certain modifications regarding the reasoning, the panel's finding on Articles 70.8(a) and 70.9, but ruled that Article 63 was not within the panel's terms of reference. The Appellate Report and the panel report, as modified by the Appellate Report, were adopted by the DSB in January 1998. At the DSB meeting in April 1998, the United States and India announced that they had agreed on an implementation period of 15 months.

This dispute was the first WTO case where a panel or the Appellate Body made a ruling on the TRIPs Agreement. Although there are many pending consultations involving alleged violations of the TRIPs Agreement (mostly between developed countries, because developing countries and countries in transition are entitled to delay the application of substantive provisions of the TRIPs Agreement until 1 January 2000), they rarely reach the panel/Appellate Body stage. The situation could drastically change after the year 2000, if developed countries choose to secure compliance with the TRIPs Agreement by developing countries and countries in transition by rigorously having recourse to the dispute settlement mechanism.

**This dispute involves another systemic issue, that is, consecutive panel requests regarding the same subject matter by a WTO Member which was a third party in the original panel process. In this particular case, the EC took the position that it was entitled to have a full panel review by virtue of Article 10.4 of the DSU because it was a third party in the original panel (WT/DS50) and filed a new panel request (WT/DS79). India considered this action to be abusive and submitted procedural objections, requesting the panel to reject the EC's complaint. The panel (consisting of the two panelists who served in the original panel and a different chairperson) nevertheless went ahead and issued its report, largely reaffirming the results of the previous case. The panel report was adopted by the DSB in September 1998.**

- (g) *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, complaint by the United States (WT/DS56).*

This case concerns the imposition of specific duties on footwear, textiles, apparel and other products in excess of the bound rates and other measures taken by Argentina. The panel report, which was circulated in November 1997, found that the minimum specific duties imposed by Argentina on textiles and apparel were inconsistent with the requirements of GATT Article II and that the statistical tax of three per cent *ad valorem* imposed on imports was inconsistent with the requirements of GATT Article VIII. Argentina appealed from these findings. In its March 1998 report, the Appellate Body upheld, with some modification, the panel's finding and conclusions. The Appellate Report and the panel report, as modified by the Appellate Body, were adopted by the DSB in April 1998.

**As in the India Patents case, the EC was an interested third party in the original panel procedure. It requested the establishment of a panel regarding essentially the same subject matter (Argentina - Measures Affecting Textiles and Clothing, WT/DS77) in September 1997 and the panel was established in October 1997.**

**Also as in the India Patents case, the respondent strongly objected to this recurrent litigation. Since the same individuals as in the original panel were appointed to serve on the second panel, Argentina argued that they were inherently biased against the respondent, and that their**

**appointment was in violation of the Rules of Conduct. The matter was referred to the Chairman of the DSB, who ultimately rejected Argentina's objection. This case by the EC against Argentina is still pending, and it remains to be seen how the Appellate Body rules on this systemic issue.**

**Generally speaking, the background to the course of action adopted by the EC in the India Patents and Argentina Textiles cases is that WTO Members, other than the complainants, do not automatically benefit from the compensation or retaliation provisions of Article 22 of the DSU in cases where the respondent does not implement the recommendations or rulings of the DSB. Some take the view that this type of behaviour should be discouraged. For instance, Andrew Shoyer argues:**

**"Members will monitor developments in these disputes [India Patents and Argentina Textiles] carefully to determine their effect on the overall enforcement mechanism. If the problem is deemed to be a serious one, then Members will need to consider whether to curtail the rights of parties to bring complaints in the WTO that have already been heard. Alternatively, the Members might consider whether to expand the benefits accruing to non-parties after a settlement or dispute settlement panel report, thereby reducing the incentive to bring 'copycat' complaints."<sup>17</sup>**

- (h) *Indonesia - Certain Measures Affecting the Automobile Industry, complaints by the European Communities (WT/DS54), Japan (WT/DS55 and WT/DS64) and the United States (WT/DS59).*

This case concerns Indonesia's national car programme. Under a presidential decree issued in February 1996, only one company was designated a "pioneer" company and only "national cars" manufactured by this company were made eligible for special tax breaks under certain requirements including local content requirement. Complaining parties alleged that this and other related measures were in violation of the WTO rules. A single panel to hear all the complaints was established in June 1997. The panel report, which was circulated in July 1998, found that the contested measures were in violation of Indonesia's obligations under GATT Articles I:1, III:2, III:4 and X:3(a), as well as Article 2 of the TRIMs Agreement and Article 5(c) of the SCM Agreement.

While the panel procedures were going on, due to the changed economic environment in Asia, Indonesia's economy slid into a critical condition, necessitating emergency assistance from the International Monetary Fund (IMF). As part of the deal with the IMF, the Indonesian government announced the termination of the national car programme. In the light of these developments, Indonesia did not appeal the panel's findings, and the panel report was adopted by the DSB in July 1998.

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<sup>17</sup> Andrew W. Shoyer, "The First Three Years of the WTO Dispute Settlement: Observations and Suggestions". *Journal of International Economic Law* 1, No. 2, 1998, pp. 292-293.

The substance of this panel report may be of interest to many developing countries because it deals with the important question of trade and investment. However, as pointed out, it is not this paper's task to analyse those substantive issues. Instead, **one systemic issue highlighted in this dispute, that is, participation of private counsel, should be noted. The Indonesia Auto case was the first WTO case where a principal party in a dispute chose to have a non-national private counsel in its delegation to plead before a panel.**<sup>18</sup>

- (i) *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, complaint by the European Communities and their member States (WT/DS79).*

This case has already been discussed under (f) above. Since India did not file a notice of appeal, the panel report, which had been circulated to WTO Members in August 1998, was adopted by the DSB at its September 1998 meeting.

- (j) *United States - Import Prohibition of Certain Shrimp and Shrimp Products, complaint by India, Malaysia, Pakistan and Thailand (WT/DS58).*

This case, often regarded as a sequel to the earlier Tuna-Dolphin cases under GATT 1947, has been portrayed as involving the politically sensitive issue of possible conflict between the objectives of trade liberalization and the preservation of the environment. What is often overlooked is that the case was fundamentally about non-discrimination and about the extra-territoriality of domestic laws of a major trading power. The complaint was not so much about whether there should be measures to save turtles, but as to whether each exporting country should adopt similar measures in line with the domestic law of a major trading power, under the threat of losing market access to that country.

This case, dated 8 October 1996, concerns a joint complaint by India, Malaysia, Pakistan and Thailand against a ban on the importation of shrimp and shrimp products from these countries imposed by the US under Section 609 of US Public Law 101-162. The complainants alleged the violations of Articles I, XI, and XIII of GATT 1994, as well as nullification and impairment of benefits. Accordingly, the DSB established a panel at its meeting on 25 February, 1997. Australia, Colombia, the EC, Philippines, Singapore, Hong Kong, Guatemala, Mexico, Japan, Nigeria and Sri Lanka indicated their interest as third parties.

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<sup>18</sup> It is true that the issue of participation in the process by a private counsel was already discussed in the Appellate Report on the *Bananas* case. See Debra P. Steger and Susan M. Hainsworth, "World Trade Organization Dispute Settlement: The First Three Years", *Journal of International Economic Law* 1, no 2 (June 1998), p. 220. However, the *Bananas* case involved Saint Lucia, a third party, and the Appellate Body hearing, whereas, in the Indonesian case, it involved the respondent and the panel proceedings.

The panel, after due deliberation, found that the import ban on shrimp and shrimp products as applied by the US was inconsistent with Article XI.1 of GATT 1994 and can not be justified under the exceptions under Article XX of GATT 1994. The panel also held that, under Article 13 of the DSU, it could not entertain the unsolicited briefs submitted by the NGOs directly to the panel. The report of the panel was circulated on 15 May 1998. On 13 July, 1998, the US indicated its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body reversed the panel's finding that the US measure at issue was not within the scope of measures permitted under Article XX of GATT 1994. The Appellate Body also ruled that the panels had a "discretionary authority" to consider or reject non-solicited material. However, the Appellate Body also concluded that the US measure, while qualifying for exceptions under Article XX (g) of GATT 1994, failed to meet the requirements of the chapeau of Article XX of GATT 1994 regarding objective and non-discriminatory application of the measure in question. The DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body, on 6 November 1998.

The US informed the DSB, in its meeting on 25 November 1998, that the US would implement the DSB recommendations "consistent not only with our WTO obligations but also with our firm commitment to the protection of endangered species, including sea turtles". No details of the US implementation plan were provided. However, the US and the complaining WTO members announced in the DSB meeting, held on 1 February 1999, that they had reached an agreement that the US would have 13 months, that is up to December 1999, to implement the DSB recommendations.

The discussion on the substance of the case is beyond the scope of this paper. **But this case has raised two important issues related to the process of dispute settlement under the DSU. Developing countries raised these issues in the DSB meeting of 6 November and it is expected that these will become part of the agenda for the review of the DSU. These are:**

- i. **Can the Appellate Body take upon itself the role reserved for member countries only? According to Article IX of the Marrakesh Agreement Establishing the World Trade Organization, the Ministerial Conference and the General Council of the WTO have the exclusive authority to interpret the Multilateral Trade Agreements. In the shrimp-turtle case, the Appellate Body has adopted a novel interpretation of Article 13 of the DSU. While Article 13 allows the panels to seek information, it implicitly bars them from considering unsought information. However, the Appellate Body, by allowing panels to consider unsolicited material submitted by NGOs, has in effect interpreted Article 13, a matter clearly reserved for members. In the absence of firm action by WTO members, this trend may continue and may eventually lead to a situation where the Appellate Body takes upon itself the role of interpretation of Multilateral Trade Agreements --**

- something that can upset the balance of rights and obligations in the Agreements envisaged by the negotiators.**
- ii. **Can NGOs enjoy privileges superior to those accorded to WTO members? By allowing the panels to consider unsolicited submissions by the NGOs, the Appellate Body has granted the NGOs a place in the dispute settlement process which has not been given even to the WTO members. No WTO member, except for the parties to the dispute and those that have reserved their rights as third parties, has a right under the DSU to make submissions to the panels. The granting of this privilege to the NGOs is also in direct conflict with the contractual nature of the Organization where only the member countries have the rights to exercise and discharge obligations.**

The above brief discussion of certain aspects of the disputes involving developing countries, either as complainant or defendant, that have reached the final stage of adoption of the DSB recommendations so far, brings out a number of problems relating to the operation of the DSU. Some of these problems are further elaborated in Section III. below.

### **III.2 Operation of the provisions on special and differential treatment in favour of developing countries in the DSU**

The following provisions in the DSU set out certain special and differential treatment for developing countries: Articles 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24 and 27.2.

- (a) *Article 3.12 (Invocation of the Decision of 5 April 1966 [BISD 14S/18])*

Article 3.12 reads as follows:

"Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail."

The drafting history of the 1966 Decision has already been discussed in Section II of the paper. Essentially, the 1966 Decision makes available an expedited dispute settlement procedure for developing countries as an alternative to the

normal process. **To date, no developing country has had recourse to this provision under the WTO.**

(b) *Article 4.10 (Consultations)*

Article 4.10 reads as follows:

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

**This provision does not specify the elements of "special attention" to be given to the particular problems and interests of developing countries during consultation and hence there are no means to assess the level of compliance by WTO Members with this provision. It may be noted, however, that this can be considered part of a wider problem in the sense that a number of special and differential treatment provisions in various WTO Agreements are rather of a declaratory nature and, in the absence of implementation modalities, have not been of any practical use to developing countries.**

(c) *Article 8.10 (Composition of a panel)*

Article 8.10 reads as follows:

"When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member."

In many cases, developing country Members which are parties to a dispute exercise their rights under Article 8.10 when the panel composition is being discussed. When a developing country Member so requests, the Secretariat always includes panelist candidates from the developing world when it proposes nominations for the panel under Article 8.6. If there is no agreement between the parties regarding the panel composition, the Director-General of the WTO must determine the composition pursuant to Article 8.7. In this case also, if there is a request from a developing country Member under Article 8.10, the Director-General has always accommodated such a request. **However, developing country Members can waive their rights under Article 8.10 if they so wish. In the event, two out of the ten cases listed in Section III.1 above were heard by panelists from developed countries only.**<sup>19</sup>

(d) *Article 12.10 (Extension of time periods)*

Article 12.10 reads as follows:

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<sup>19</sup> *Shirts and Blouses case* (WT/DS33) and *Argentina Textiles case* (WT/DS56).

“In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.”

Generally, this provision has been complied with to the extent that panels have demonstrated a certain flexibility regarding the time frame of their work at the request of developing country Members, although the time periods for submission of material are normally agreed by consensus among the disputing parties. **To date, there is no case where the DSB Chairman has formally made a decision regarding the extension of consultation periods under this provision.**

(e) *Article 12.11 (Panel reports)*

Article 12.11 reads as follows:

"Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

Generally, this provision has been complied with to the extent that whenever a developing country Member has invoked any special and differential treatment provision in the WTO agreements before a panel, the panel's response is made in its report. **However, to date, no panel report has explicitly cited this particular provision, that is, Article 12.11 of the DSU, in either the "Findings" section or in the description of the party's arguments.**

(f) *Article 21.2 (Implementation)*

Article 21.2 reads as follows:

“Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.”

**This provision, like Article 4.10, is rather hortatory, and it is difficult to assess the level of compliance by WTO Members, although in some cases (e.g. Bananas) Members have raised matters affecting the interests of developing countries in connection with the surveillance of implementation.**

(g) *Article 21.7 (Idem.)*

Article 21.7 reads as follows:

“If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.”

This provision was clearly taken from the language of the 1979 Understanding on Notification, Consultation, Dispute Settlement and Surveillance.<sup>20</sup> **To date, the DSB has not considered further actions regarding implementation most probably because the developing country Members which were on the complaining side have not explicitly invoked this provision.**

(h) *Article 21.8 (Idem.)*

Article 21.8 reads as follows:

“If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.”

Like Article 21.7, this provision was carried over from the 1979 Understanding.<sup>21</sup> **To date, the DSB has not taken specific action under this provision.**

**It is rather surprising that many developing countries that have been involved in disputes under the WTO have not taken recourse to special and differential treatment under Articles 12.10, 12.11, 21.7 and 21.8. The continuing non-recourse by developing countries to these provisions suggests that there may be ‘systemic’ reasons for this. Careful analysis is**

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<sup>20</sup> Paragraph 23 of the Understanding reads: “If the matter is one which has been raised by a less-developed contracting party, the CONTRACTING PARTIES shall consider what further action they might take which would be appropriate to the circumstances.” BISD 26S/210.

<sup>21</sup> Paragraph 21 of the 1979 Understanding reads in part: “... If the case is one brought by a less-developed contracting party, ... in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also impact on the economy of less-developed contracting parties concerned.”

**therefore required to identify the reasons for this apathy on the part of developing countries and to suggest appropriate remedial actions.**

- (i) *Article 24 (Special procedures involving least-developed country Members)*

Article 24 reads as follows:

"1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

"2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations, the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member, offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate."

**It is not possible to assess the operation of this Article because no least-developed country has been involved in WTO disputes either as complainant or respondent.**

- (j) *Article 27.2 (Responsibilities of the Secretariat)*

Article 27.2 reads as follows:

"While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat."

Similar provisions already existed within the GATT 1947 framework under the 1979 Understanding, but the Secretariat service in this respect was expanded under the WTO.

The Technical Cooperation and Training Division currently employs two full-time legal officers and two consultants, each available one day a week, who provide legal advice. Occasionally, other consultants are hired to provide advice in a specific dispute.

**This is a very important issue as many developing countries feel that a major constraint on their optimum utilization of the WTO dispute settlement mechanism is the lack of adequate legal resources locally in the South on the one hand, and, the considerable cost of hiring outside legal experts, on the other. While arrangements under Article 27.2 have been useful in this regard, they are certainly not enough to fulfil the needs of developing countries. Moreover, this is not only a matter related to the insufficiency of the secretariat resources. Under Article 27.2 of the DSU, the experts in the secretariat are required to maintain their impartiality in the sense that, unlike lawyers hired to fight a case, they are constrained from advising on the best manner of pursuing a case with a view to gaining a favourable adjudication. This means that, in spite of the technical assistance provided under Article 27.2, developing countries still need to hire lawyers to assist in the presentation of their case.**

The above analysis shows that all provisions in the DSU regarding special and differential treatment have not been fully and effectively implemented. This is a major cause of concern for developing countries, discussed further in the next session.

### **III.3 Major problems encountered by developing countries in the functioning of the DSU**

The experience of developing countries with the implementation of the DSU so far indicates a number of problems. These problems can be put into three broad categories relating to:

- i) the cost of recourse to the dispute settlement,
- ii) the implementation of decisions regarding cases brought by developing countries against developed countries and the related issue of compensation, and
- iii) the effective implementation of provisions on special and differential treatment in favour of developing countries.

#### ***a. Cost of access to the dispute settlement process***

The present dispute settlement process is very costly as considerable human and financial resources are required to prepare and follow the case through the consultation to the appeal stage spanning a lengthy period of close to three years. Due to the lack of local expertise needed to go through this increasingly complex and lengthy legal process, many developing countries have no option but to hire professional legal experts from developed countries.

**Developing countries, therefore, weigh the costs and benefits of launching the process very carefully even when they are otherwise convinced that their rights have been impaired or another WTO member has not discharged its obligations. In addition to the financial costs, smaller developing countries have also to consider the possible political cost if the country deemed to be infringing their rights happens to be a major developed country. This can upset the balance of rights and obligations in the system, as developed countries are not constrained by cost considerations -- either financial or political -- to the same extent.**

***b. Issues of implementation of decisions and compensation***

The expected benefit accruing to a developing country that has obtained a favourable decision by a panel/Appellate Body on a complaint against a developed country is limited to the withdrawal of the measure in question by the developed country concerned. Failure to do so, or to provide compensation to make up for the loss suffered by the developing country from the continuation of the offending measure, entitles the developing country to retaliate. This represents an improvement over the dispute settlement process under GATT 1947. But developing countries still face at least three problems so far as the implementation of decisions is concerned:

- i. It may take up to thirty months from the start of the dispute settlement process until the withdrawal of the offending measure. The export opportunities for the complaining developing country in the developed country concerned may suffer irreparably during this time.**
- ii. The export loss to the developing country during the intervening thirty month period can be substantial but there is no provision for compensation for this loss even when the measure in question is found to be in contravention of the WTO rules. This can be particularly damaging for smaller developing countries which are highly dependent on a limited number of export products/markets.**
- iii. The final remedy is to allow the complaining country to take retaliatory action against the defending country. But this has serious practical limitations, as developing countries will find it extremely difficult to take any retaliatory action against a developed country. This is due not only to political considerations but also to the unequal economic relationship where, generally, developing countries are more dependant on the continuing relationship with developed countries for their economic growth and development.**

***c. Effective implementation of provisions regarding special and differential treatment***

Experience in this regard indicate that:

- i. The various provisions regarding special and differential treatment in the DSU have not been implemented with equal effectiveness.**

- ii. The implementation of certain provisions has not been effective due either to the fact that such provisions are of a declaratory nature and have no implementation modalities, or to the fact that developing countries have failed to use them.**
  
- iii. Special and differential treatment had been provided in order to facilitate equal participation by developing countries in the dispute settlement process. In spite of improvement in the recent past, participation by developing countries in dispute settlement is still far from being equal to that of developed countries.**

## IV. THE REVIEW OF THE DSU: PROCESS AND PROPOSALS

This section takes a brief look at the process of the review of the DSU with a view to outline the pros and cons for developing countries regarding the time frame to conclude the review. It also examines briefly the proposals submitted by developing countries during the course of the review process.

### IV.1 Process for the Review

The DSB was supposed to complete the review of the DSU by the end of 1998. However, the way the major developed countries participated in the process gave rise to the feeling that these countries might prefer to extend the review process beyond 1998. As late as October 1998, Japan was the only QUAD (U.S., E.U., Japan and Canada) country that had formally submitted proposals for improvements in the DSU.

The President of the United States made certain concrete proposals regarding transparency of the dispute settlement process in a speech delivered on the occasion of the 50th anniversary of the multilateral trading system. However, these proposals were not immediately followed up in the DSU review process by the US delegation. The thinking of the United States appeared to be the following: since WTO Members had not yet had an opportunity to test some provisions of the DSU (most notably Article 22), it was unlikely that a full and adequate review of the DSU could be completed by the end of 1998.<sup>22</sup> Thus, the United States appeared to be in favour of extending the review process beyond 1998.

While the European Union later submitted substantive proposals to improve the operation of the DSU, it also seemed to favour an extension of the time period to complete the review. It can be argued that the European Union was interested in prolonging the review process to garner support for its proposal regarding the start of a new round of comprehensive trade negotiations in early 2000. Many more countries would be inclined to support the European Union demand for a comprehensive round if it can be shown that there are major issues to be negotiated in a number of important areas, including the DSU, under the WTO.

**These apprehensions were confirmed when the DSB was unable to conclude the review by end 1998 and agreed to continue the review process until the end of July 1999.**

**This decision, at least partly, is in the interest of developing countries. They will have more time to analyse their experiences, coordinate with each other and prepare concrete proposals for improvements in the DSU. However, developing countries should be careful to point out that their proposals relate to essentially implementation problems. The resolution of implementation problems does not require new cross-sectoral negotiations, as the existing balance of rights and**

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<sup>22</sup> This view seems to have been confirmed by the developments in the bananas dispute between the US and the EU.

**obligations is not being disturbed. Developing countries should also realize that if, on the other hand, the improvement of the operation of the DSU becomes part of any new round of negotiations, they would certainly be asked to pay a price in areas of interest to major developed countries in return for effecting operational improvements in the DSU. This will be tantamount to paying twice for the same thing, as developing countries had already made major concessions during the Uruguay Round on the expectation of being equal participants in the rule-based multilateral trading system and the new dispute settlement mechanism.**

#### **IV.2 Proposals by Developing Countries to Improve the Operation of the DSU**

During the review process, many developing countries have already submitted in a number of proposals for the improvement of the operation of the DSU. These proposals are based on the experience of developing countries with the operation of the DSU thus far and, if implemented, will greatly improve the relevance and effectiveness of the DSU from a developing country perspective. The following is a brief summary of these proposals:

*(a) Proposals related to consultations under the DSU*

- i. Timely notification by the parties to a dispute to the DSB of mutually agreed solutions (Article 3.6)<sup>23</sup>;
- ii. More disciplines on the complaining party at the consultations stage (Article 4);
- iii. Elimination of the requirement of a "trade" interest for joining in consultations (Article 4.11) so that WTO members who have a "systemic interest" rather than a trade interest can also join as third parties.

*(b) Proposals related to proceedings in the panels and the Appellate Body*

- i. Selection of panelists from a fixed pool of candidates to ensure that the panelists have the necessary knowledge and expertise;
- ii. Ethical standards for panelists so as to avoid conflicts of interest;
- iii. Permitting private counsel to participate in panel proceedings so that smaller countries that lack the adequate local expertise are better able to represent their case;
- iv. Requiring all documentary evidence to be submitted no later than the time when the second written submissions are due, so as to avoid unnecessary delays;

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<sup>23</sup> At least in one case the parties to the dispute, which happened to be two major developed country WTO members, delayed the notification of the resolution of the dispute, agreed between them, to the DSB. They did not even inform the third parties to the dispute, in this case developing countries, about this resolution.

- v. Recognition of the current practice of allowing strict time limits (such as under Articles 12.9 or 17.8) to be exceeded with the consent of the parties;
- vi. Reversing the recent Appellate Body ruling regarding unsolicited submissions by the NGOs, so that only the parties to the dispute and third parties have the right to make written submissions to the panels and the Appellate Body (Article 13);
- vii. Ensuring that the Panels and the Appellate Body do not exceed the role granted to them under the DSU, unlike the Shrimp-Turtle case when the Appellate Body seems to have interpreted the Agreement which is clearly the mandate of the WTO members only;
- viii. Ensuring that the notice of appeal by the party that wishes to appeal against a ruling by a panel is clear so that the other party can prepare its defence in time and the process is not unduly delayed;
- ix. Creating a procedure for remand of the case to the panel if it is found that the panel has failed to make adequate findings on facts, to ensure that the Appellate Body does not become a fact finding body and its review, as intended, is restricted to legal questions only.

*(c) Proposals related to implementation of DSB recommendations*

- i. Reconsidering the provision regarding cross-retaliation that allows for retaliation in one sector (goods) for a perceived lapse by the losing party in another sector (services or intellectual property), as this provision is more likely to work against developing countries;
- ii. Clarifying Article 21.5 to spell out clearly all the steps that have to be undertaken and the length of various stages to decide disputes over compliance with the DSB recommendations;
- iii. Providing, in cases when implementation is questioned by a developing country that has won a case against a developed country, for compliance issues to be resolved by the original panel within 30 days, instead of 90 days, and without any further procedural requirements.

*(d) Proposals related to special and differential treatment for developing countries*

- i. Developing a monitoring mechanism to check whether special and differential treatment provisions in the DSU are being implemented, as many of these provisions have not yielded concrete benefits to developing countries;
- ii. Setting up an independent advisory unit staffed with legal experts to assist developing countries involved in dispute settlement proceedings;

- iii. Extending the “reasonable time” granted for implementation of the DSB recommendations from 15 to 30 months for developing countries.

(e) *Proposals related to technical assistance to developing countries*

- i. Expanding the Secretariat services under Article 27.2 by
  - Increasing the number of consultants (at the service of all Members) to five;
  - Setting up an independent legal unit within the Secretariat to provide legal advice to all Members;
  - Establishing a permanent Defence Counsel to help developing and least-developed countries when cases are brought against them;
  - Establishing a trust fund to finance ‘strategic alliances’ with lawyer's offices or private firms to expand the scope of consultancy and advisory services.
- ii. Publication of a ‘guide’ which outlines the facilities made available under Article 27.2.

(f) *Proposals related to other matters under the DSU*

- i. Enabling all parties to a customs union to participate fully, should they wish to do so, in the panel proceedings regarding a common trade policy of that customs union;
- ii. Clarification of the interpretation of Article 6.1 regarding the so-called consecutivity of panel requests so that the dispute settlement mechanism is not used as a means of harassing developing countries by bringing repeated cases against them, by different parties but on similar grounds;
- iii. Allowing a third party participant a legal standing equal to the litigating parties under certain conditions (to deal with the question of ‘copycat’ complaints<sup>24</sup>);

**These proposals purport to ameliorate the difficulties experienced by developing countries in the operation of the DSU. These suggested improvements in the DSU can be put into practice fairly easily if there is the political will to accommodate the genuine concerns of developing countries.**

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<sup>24</sup> See reference in footnote 17.

## V. SUMMARY OF RECOMMENDATIONS TO IMPROVE THE OPERATION OF THE DSU

The DSU under the WTO has to some extent given hope to developing countries in the rule-based multilateral trading system and improved their participation in the dispute settlement. However, further improvements in the DSU are needed to ensure equal participation of developing countries in the dispute settlement under the WTO. As discussed in the previous section, many proposals have already been submitted by developing countries during the review process to achieve this objective. These proposals, as well as other proposals that may be submitted in this regard in future, seek to improve the system in the following important respects.

### *a. Equal access to the dispute settlement mechanism*

It is essential to ensure that the costs associated with using the dispute settlement process do not act as barriers to access to the process. It will require provision of adequate legal assistance to both the complainant and defendant developing countries by strengthening and expanding the coverage of present Article 27.2 of the DSU. **Whichever mode of delivery is finally agreed to by WTO members for this purpose, that is, increasing the number of consultants, setting up an independent legal unit within or outside the Secretariat, appointment of a permanent Defence Counsel, or establishment of special arrangements with private lawyers, it should adhere to the following criteria:**

- i. The resources are adequate and sufficient to provide the necessary legal assistance to developing countries during all phases of the dispute settlement process.**
- ii. The requirement of impartiality is relaxed so that the WTO legal experts are not constrained in their task of assisting the developing countries, and may proffer advice on all aspects of a dispute such that the case of the complaining or responding developing country is strengthened.**

### *b. Adjustment of time-frames*

The present period of up to thirty months between the start of a dispute and its final determination can be too long for complainant developing countries as they have considerably less capacity to absorb the adverse effects of measures taken against them. **This can be achieved by making it mandatory to use the relevant provisions of the Decision of 5 April 1966 (BISD 14S/18), instead of provisions in Articles 4, 5, 6 and 12 of the DSU, in all cases brought by a developing country against a developed country.**

***c. Provision of compensation for loss during the pendency of the dispute***

Developing countries that are dependant on a limited number of export products/markets can suffer heavy trade losses during the course of a dispute regarding a measure taken against them by a developed country. The damage is not limited to foregone exports. The market may be lost permanently to competitors and substitute products. **Article 22 of the DSU can be expanded to provide for compensation for the loss suffered by a complainant developing country during the pendency of a complaint against a developed country. The panel should be mandated to determine the amount of compensation in all cases where measures by developed countries against developing countries are found to violate the WTO rules. This will help prevent the initiation of trade-related measures on frivolous grounds by developed countries, and hence will serve an important objective of the dispute settlement process, that is, the prevention of trade disputes.**

***d. Implementation of decisions***

As mentioned earlier, hardly any developing country is in a position to take retaliatory action against a developed country even if authorized to do so by the DSB. **This problem can be resolved by amending Article 22 to provide for either of the following two options in cases brought and won by developing countries against developed countries:**

- i. joint retaliatory action by all WTO members against the offending member which has refused to either remove the offending measure or to pay compensation; or**
- ii. mandatory removal of the measure violative of WTO rules. (This will reduce the options of the defendant developed country.)**

***e. Operationalization of all provisions regarding special and differential treatment***

**The review process should involve a comprehensive analysis of the implementation of all provisions on special and differential treatment.** This analysis would serve the following broad objectives:

- i. It should lead to the elaboration of an implementation mechanism wherever such a mechanism is missing in the present provisions.** For example, the “special attention” mentioned in Article 4:10 may be interpreted to mean, *inter alia*, that consultations initiated against a developing country by a developed country are held at a place convenient for the developing country concerned. This would improve the situation where, due to financial constraints, developing countries are often unable to bring experts from their capitals during the consultation period.
- ii. It should identify the reasons as to why certain special and differential treatment provisions, for example, Articles 12.10, 12.11, 21.7, 21.8, have not**

**been invoked by developing countries.** Such an analysis will enable improvements to be designed that lead to a more extensive use of these provisions by developing countries.

***f. Clarification of the rights of third parties***

There are some important issues related to the rights and obligations of the third parties in a dispute that need to be clarified. These include:

- i. Eliminating the requirement of “trade” interests for developing countries that wish to join in consultations under Article 4.11;**
- ii. Keeping the developing countries that are third parties to a dispute informed of the developments during the consultations between the complainants and the defendants;**
- iii. Clarifying the rights of third parties in the event of the settlement of the dispute between the litigating parties at any stage of the process.**

***g. Deterrence against misuse of the dispute settlement process***

Due to the asymmetric political powers and economic capacities of developed and developing countries, the former may bring a large number of disputes, some even on frivolous grounds, against the latter. There have also been instances where developed countries brought repeated cases, on the same grounds, against developing countries. (EC against India - Patent Protection for Pharmaceutical and Agricultural Chemical Products - WT/D579 and EC against Argentina - Measures Affecting Textiles and Clothing - WT/D577)

The proposals to address these issues include:

- i. The complainant developed country may be asked to pay the cost of the dispute incurred by the defendant developing country, if the case brought by the former is not maintained by the panel/Appellate Body.**
- ii. WTO members may be prohibited from bringing cases against a developing country member once a case on similar grounds involving the same developing country has been decided by a panel/Appellate Body.**

***h. Clear directions to the panels and the Appellate Body regarding their respective roles and mandates***

Some recent panel/Appellate Body rulings have necessitated a clear demarcation of the roles of these two most important bodies that are at the centre of the dispute settlement mechanism under the WTO. While sometimes the panels have failed to make adequate

findings on issues of fact, the Appellate Body has gone beyond its intended remit, limiting it to the review of legal questions only, and has become a fact finding body. The Appellate Body has also shown a tendency to venture into areas clearly reserved for WTO members. Moreover, the panels and the Appellate Body, in a couple of instances when dealing with politically sensitive disputes among major developed countries, have given ambiguous rulings. This has allowed both the parties to the dispute to claim victory. But it has also raised questions about the strength and the reliability of the dispute settlement system itself.

The following proposed measures may help to overcome the problems outlined above:

- i. **The respective roles of the panels and the Appellate Body should be clearly defined and any ambiguity that still exists in this respect should be removed.**
- ii. **The role of the Appellate Body should be limited to reviewing the questions of law and there should be a provision for remanding the case back to the original panel if the issues of fact have not been adequately addressed by the panel in its original ruling.**
- iii. **The panels and the Appellate Body should in no circumstances be allowed to take upon themselves the role reserved for the WTO members.**
- iv. **The panels and the Appellate Body should be directed to give, to the extent possible, clear rulings that are less prone to conflicting interpretations. They should also be advised not to attempt to make “politically correct” rulings.**

To sum up, the present review of the DSU is an important opportunity to ensure that developing countries are able to take greater advantage of the dispute settlement mechanism of the WTO. Developing Countries have already submitted a number of reasonable proposals to the DSB in this regard. These proposals will be the subject of discussion in the DSB in the coming months. Developing countries should be ready to defend and advance these and other follow up proposals forcefully and collectively. Only in this way can they expect the review of the DSU to lead to improvements they desire in the system.

## **VI. BY WAY OF A POLICY CONCLUSION**

The DSU has been depicted as one of the pillars of the Uruguay Round Agreements, in that it will ensure their fair and balanced implementation. It has been also billed as one of the principal tools which will help developing countries protect and promote their interests in the evolving “rule-based” international trading system.

Judging by use made of the dispute settlement mechanism so far, it is clear that the DSU is probably poised to play a significant role in WTO and in the further evolution of the international trading system. In the three years since the WTO began to function, there were almost as many cases subject to dispute settlement (157), as there were in the 50 years of GATT's existence (196). The same applies to developing countries participation, 41 in WTO and 40 in 1947 GATT.

As an evolving major aspect of WTO work, dispute settlement merits very close attention by developing countries. The review earlier in this document of the dispute settlement process, as it has developed so far, outlined some of the major issues and concerns from the point of view of the developing countries and presented the principal recommendations made by developing countries regarding how to improve their participation and position in dispute settlement.

In concluding this document, it is important to emphasize that the DSU is characterized by a number of features common to the Uruguay Round Agreements and WTO as a whole, namely,

- The DSU assumes that the actors in the dispute settlement process are of similar strength and comparable levels of development and that rules corresponding to a level playing field are appropriate;
- The DSU is not intended to be supportive of development-related needs;
- The legal skills and advice needed for participation in the dispute settlement under the DSU are not equally available to all parties; those with greater economic strength and financial resources are better able to mobilize the skills etc. needed for this purpose;
- Political and economic power are the key factors in the implementation process and in forcing compliance on a reluctant party. Developing countries, as weaker partners, are at a double disadvantage. If a developing country balks at a panel or Appellate Body ruling in favour of a developed country complainant, it has to face sanctions and pressures by a more powerful country from the North. If, on the other hand, the latter balks at a judgement in favour of a developing country complainant, a developing country is hardly in a position to mobilize and exert the necessary pressure to force compliance or to retaliate.

These are issues which merit the collective attention of developing countries. Some of the possible steps and improvements necessary to improve developing countries' participation in the dispute settlement process have already been outlined. But there is also much that

developing countries can do themselves to improve their position by means of co-operative action, as for example:

- establishing a joint service for legal expertise, or a South network accessible and available to all, at minimal or no cost;
- the regular exchange of information and experience between developing countries;
- undertaking regular group consultations and reviews regarding the functioning of the dispute settlement system, including the outcomes of individual cases.

Apart from matters dealing with problems of process, developing countries face a major challenge regarding the underlying substantive issues in disputes brought by countries for adjudication under the DSU, and the potential implications of the rulings for their development prospects and national sovereignty. This challenge emerges from the very character of the Uruguay Round Agreements signed by the developing countries, and the likely prospect that DSU could emerge as an additional instrument used by the advanced countries to interfere in the South's development process.

While this working paper has not dwelt on the substantive outcomes and implications for development of the various cases that have been dealt with so far under the DSU, these matters will nevertheless require priority attention. The case involving Indonesia's so-called "national car project" illustrates some of the potential development implications of legal rulings of panels and the Appellate Body. The broader significance of this case is illustrated by the major campaign mounted by the countries of the North against this "national car project" and the fact that its abandonment was one of the conditionalities of the IMF rescue package for Indonesia which *de facto* precluded Indonesia from challenging the panel ruling in WTO.

The ruling in this case, based on TRIMs as one of the principal Uruguay Round Agreements, deters developing countries from considering the idea of developing "national" industry through the sort of policy mechanisms which previously were employed by successful developed and developing countries alike to foster infant industries. This is a strategic matter for the South, which merits its collective attention and response in the context of the implementation, review and revision of the Uruguay Round Agreements, and of the further evolution of WTO and its various instruments, with a view to making them all more supportive of national development.

Unless the legal foundations of the Uruguay Round Agreements are supportive of development and cognizant of developing countries' specific characteristics, needs and aspirations, it is unrealistic to expect that the DSU will generate outcomes that will be balanced and equitable from the perspective of the South. Except with respect to matters of process, the DSU itself can hardly become "development-friendly". The potential inherent in DSU can only be harnessed more deliberately and systematically in support of development needs if developing countries, as a group, press in a concerted way for changes in the basic thrust of policies across the spectrum of WTO agreements, both present and future.

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