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## **THE WTO DISPUTE SETTLEMENT SYSTEM: ISSUES TO CONSIDER IN THE DSU NEGOTIATIONS**

### **SYNOPSIS**

This TRADE Analysis discusses selected aspects of the WTO dispute settlement system that developing countries should consider as they continue to engage in the DSU negotiations.

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**THE WTO DISPUTE SETTLEMENT SYSTEM: ISSUES TO CONSIDER IN THE  
DSU NEGOTIATIONS**

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## I. Introduction

1. WTO Members are keen to progress on substantive issues in the DSU negotiations.<sup>1</sup> In order to do so, they should either support or oppose proposals, as the case may be, not just on the basis of short-term political considerations. Rather, they should "...focus on general principles, legal consistency, systemic implications of negotiating proposals, and alternative perspectives of what should be achieved in the long term"<sup>2</sup>.

2. As developing countries concentrate on the texts of proposals, it is possible that they might gloss over some elements or general issues related to WTO dispute settlement. These include: the importance of the DSU negotiations; the link between the negotiations and the case law; and the fundamental aspects of the WTO dispute settlement system.

3. The purpose of this paper is to highlight these issues so that developing countries should reflect upon them as they continue engaging in the DSU negotiations.

4. First, the paper discusses the link between the WTO case law and the ongoing DSU negotiations, showing, among other things, that there is a symbiotic relationship between the two processes. Secondly, it stresses the importance of the DSU negotiations by pointing out several factors that make dispute settlement a crucial part of the WTO. These factors are: the automaticity and exclusive jurisdiction of the WTO dispute settlement system; the binding nature of the international legal obligation to comply with DSB recommendations; the apparent prevalence of the dispute settlement organs over WTO committees; and the absence of effective checks on the dispute settlement organs. Thirdly, the paper recalls the nature of the WTO dispute settlement system. It focuses on three issues, namely: the mixture of judicial and diplomatic elements; the dual function of the WTO dispute settlement system; and the importance of improving WTO remedies. The final part concludes.

<sup>1</sup> Paragraph 30 of the Doha Ministerial Declaration mandated WTO Members to negotiate to clarify and improve the Understanding on Dispute Settlement (DSU). The negotiations are conducted in the DSB Special Session and are not part of the Single Undertaking. Initially, the deadline for the negotiations was May 2003. Having missed this and another deadline, the negotiations no longer have a deadline.

<sup>2</sup> "Developments in the Negotiations to Clarify and Improve the WTO Dispute Settlement Understanding since the July Package" in *The South Centre Quarterly on Trade Disputes: Second Quarter*, pp. 14 - 22, at p. 22.

## II. The Link between WTO Cases and the DSU Negotiations

5. There are three clear links between the cases in the WTO dispute settlement system and the on-going negotiations to clarify and improve the DSU. The relationship between the two processes is complementary and symbiotic in the sense that each draws from and informs the other.

### A. Cases inspiring negotiation proposals

6. The first link between cases and the negotiations is that some of the issues in the DSU negotiations have either been identified from or highlighted by the cases that have been decided thus far. There are several examples.

7. The sequencing problem came to the fore in the *EC- Bananas* dispute.<sup>3</sup> The EC had lost a dispute in which Ecuador, the US, and other complainants were challenging the EC banana regime. At the compliance stage, the EC and Ecuador had separately requested the establishment of panels under Article 21.5 to determine whether measures implemented by the EC were consistent with DSB recommendations. Since there is no requirement for a multilateral determination of non-compliance under Article 21.5 before retaliation can be requested under Article 22.6, the US requested Article 22.6 authorization to suspend concessions to the EC before the compliance of the measures could be determined under Article 21.5. This case highlighted the need for creating a sequence between the two Articles and several Members' submissions in the DSU negotiations have proposed sequencing.

8. The collective retaliation proposals were probably inspired by the same case since Ecuador could not adequately retaliate against the EC. The case highlighted the fact that suspension of concessions and other obligations is not always feasible because most developing countries lack the market size to make a credible retaliatory threat.<sup>4</sup> It was therefore not surprising when LDCs and the African Group proposed that an amended Article 22.6 should allow for collective retaliation in cases brought by developing countries against developed countries.<sup>5</sup> Mexico's proposal was also influenced by developing countries' lack of retaliatory capacity. Mexico submitted that suspension of concessions is problematic for Members that may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests. Its proposal says a complainant should be able to transfer to a third Member the right to suspend concessions in exchange for a negotiated benefit.<sup>6</sup>

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<sup>3</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R).

<sup>4</sup> Zimmermann, T., (2005) "WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation" in *Aussenwirtschaft – The Swiss Review of International Economic Relations*, Vol. 60 (2005) No. I, pp. 27-61, at p. 37. See further discussion on WTO remedies on pp. 17 - 22 below.

<sup>5</sup> TN/DS/W/17, 9 October 2002 and TN/DS/W/42, 24 January 2003, respectively.

<sup>6</sup> TN/DS/W/23, 4 November 2002.

9. The acceptance of *amicus curiae* briefs has been one of the most controversial issues arising from WTO case law. In *US – Shrimp* the Appellate Body ruled that panels can accept unsolicited information from entities that are not party to a dispute.<sup>7</sup> Subsequently, the Appellate Body said that it has legal authority to decide whether to accept and consider *amicus curiae* briefs.<sup>8</sup> In *EC – Asbestos* the Appellate Body devised a special procedure for that appeal only for dealing with *amicus curiae* briefs.<sup>9</sup> WTO Members criticized the Appellate Body for its actions in all three instances, perhaps indicating that the WTO remains a Member-driven organization.<sup>10</sup> To underline the latter point, some developing countries have proposed that panels and the Appellate Body must be expressly prohibited from accepting and considering unsolicited *amicus curiae* briefs.<sup>11</sup> Contrary to this position, the EC has proposed that panels and the Appellate Body should be allowed to accept and consider such briefs.<sup>12</sup> Interestingly, the procedure proposed by the EC is very similar to the one that the Appellate Body adopted in *EC – Asbestos*.

10. The *amicus curiae* briefs, collective retaliation and sequencing proposals show that sometimes WTO Members identify problems from the cases and seek to use the DSU negotiations to address those problems.

#### B. Using cases to support negotiating positions

11. Secondly, disputes can be used to raise awareness of and provide support for proposals submitted in the DSU negotiations. A good example here is the question of opening up the WTO dispute settlement system. Canada, the EC and the US strongly favour a transparent dispute settlement system that allows non-parties to observe hearings and to have access to parties' submissions. One of their arguments is that the system would appear more legitimate and get more domestic support if non-parties are able to see what transpires during dispute settlement proceedings. In fact, transparency is one of the fundamental aspects of most systems of dispute settlement, be they domestic or international. However, some developing countries are not in favour of transparency. Among other things, they fear that more transparency could prejudice chances of settlement.

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<sup>7</sup> *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), paras. 106-110.

<sup>8</sup> *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (WT/DS138/AB/R) paras. 39 and 42.

<sup>9</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R) paras. 50-51.

<sup>10</sup> See Charnovitz, S., "Judicial Independence in the World Trade Organization" at pp. 235-238, available at [www.worldtradelaw.net](http://www.worldtradelaw.net), last visited on 3 August 2005; and Mavroidis, P., "Amicus Curiae Briefs before the WTO: Much Ado About Nothing" available at [www.worldtradelaw.net](http://www.worldtradelaw.net), last visited on 3 August 2005.

<sup>11</sup> African Group - TN/DS/W/15, 15 September 2002, and Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe - TN/DS/W/18, 7 October 2002.

<sup>12</sup> TN/DS/W/1, 13 March 2002.

12. In what could be a bid to win more support for an open dispute settlement system, Canada, the EC and the US allowed the public to observe panels meetings in a dispute in which they are all parties.<sup>13</sup> This was a historic moment in the GATT/WTO system and one can say that these countries conducted a real-life experiment of their proposals on transparency.<sup>14</sup>

### C. Cases providing practical solutions to issues on the negotiating table

13. Thirdly, some cases have provided practical solutions to problems that are being negotiated. For instance, Members practically circumvent the sequencing problem by agreeing not to request retaliation until an Article 21.5 panel determines the consistency of an implementation measure. This practice is in line with the proposals that Members have submitted to cure the sequencing problem.<sup>15</sup> The fact that Members are already doing what has been proposed in the negotiations could make it easier for them to reach an agreement on the proposals related to the sequencing issue.

14. Developing countries should make the best they can of the relationship between the rulings in the actual disputes and the DSU negotiations. As has been shown above, the substantive and procedural aspects of the disputes do feed into the negotiations and could in some instances make the work of the negotiators easier. Disputes can provide an opportunity for soliciting more support for proposals that have been submitted in the DSU negotiations, can offer the means for trying out the feasibility of proposals, and can also provide practical solutions to problems discussed in the negotiations.

### III. Why are the DSU Negotiations Important?

15. Most developing country Members do not appear to consider DSU negotiations as a priority area. Agriculture, NAMA and Services negotiations are seen as being of more immediate concern. To be fair, this is understandable given their lack of human resources and the multiplicity of negotiations. This section of the paper discusses factors that attenuate the importance of the DSU negotiations.

#### A. Dispute settlement as enforcer of the covered agreements

16. However, the DSU negotiations are equally important because the DSU itself is a crucial element of the WTO system. As Article 3(2) of the DSU stipulates, the dispute settlement system is a central element in providing

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<sup>13</sup> See "Hormones panels to open proceedings with parties to the public" at [www.wto.org](http://www.wto.org), last visited on 8 August 2005. Interestingly, Canada and the EC had proposed that panel and Appellate Body proceedings should be opened to the public *if the parties agree* (EC: TN/DS/W/1, 13 March 2002, and Canada: TN/DS/W/41, 24 January 2003). A recent US proposal elaborates the benefits of an open WTO dispute settlement system: TN/DS/W/79, 13 July 2005.

<sup>14</sup> See "Experimental Transparency and Post-Retaliation Problems" in *The South Centre Quarterly on Trade Disputes, Third Quarter* (forthcoming).

<sup>15</sup> See JOB(04)/52. The group was composed of Argentina, Brazil, Canada, India, New Zealand and Norway.

security and predictability to the multilateral trading system. Some literature refers to the DSU as the crown jewel of the Uruguay Round agreements and the linchpin of the multilateral trading system.<sup>16</sup> Dispute settlement is necessary to the application of legislation, gives legislation some degree of formal enforceability and may be considered as the cornerstone of international trade law.<sup>17</sup> And, unlike the other covered agreements, the provisions of the DSU are horizontal in nature because they can be invoked to settle disputes arising under any of the covered agreements.

#### B. Automaticity and exclusive jurisdiction

17. The status of the dispute settlement system as arbiter and enforcer of the rules in the covered agreements is enhanced by its automaticity and exclusive jurisdiction. WTO membership means that a Member accepts in advance the jurisdiction of the WTO dispute settlement system. A Member has a right to bring a dispute against any other Member and panel establishment is almost automatic. It is practically impossible for a Member to block the establishment of a panel because Article 6(1) of the DSU provides that a panel shall be established unless the DSB decides by consensus not to establish a panel. The proposals to allow the establishment of a panel at the first DSB meeting at which a panel is requested will further enhance this automaticity. The other aspect of automaticity is that there is no practical possibility for blocking the adoption of a panel or Appellate Body report in the DSB. This is because Articles 16.2 and 17.14 stipulate that a panel and an Appellate Body report, respectively, shall be adopted unless the DSB decides by consensus not to adopt the report.

18. Regarding exclusive jurisdiction, Article 23 of the DSU requires Members to use the DSU whenever they seek to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements. This Article has been interpreted as being an “exclusive dispute resolution clause” and as requiring Members to use the DSU to the exclusion of any other system.<sup>18</sup> Any attempt to seek redress must be made in the institutional framework of the WTO only and pursuant to the rules and procedures of the DSU.<sup>19</sup>

19. The impact of the exclusive jurisdiction clause is far-reaching because the DSU radiates on all substantive obligations under the WTO. In addition, unlike in other international tribunals, Members cannot, strictly-speaking, challenge the jurisdiction of panels or the Appellate Body. Perhaps a WTO analogue to a jurisdictional challenge is when Members’ contest the adequacy of the terms of a

<sup>16</sup> Zimmerman, *supra*, at p. 35, and Hauser H., and Zimmermann T., (2003) “The Challenge of Reforming the WTO Dispute Settlement Understanding” *INTERECONOMICS – Review of European Economic Policy*, Volume 38, Number 5, September/October 2003, pp. 241-245, at p. 241.

<sup>17</sup> Trachtman, J., (1999) “The Domain of WTO Dispute Resolution” available at [www.worldtradelaw.net](http://www.worldtradelaw.net), last visited on 3 August 2005, at p. 5.

<sup>18</sup> *United States – Sections 301-310 of the Trade Act of 1974 (WT/DS152/R)*, para. 7.43.

<sup>19</sup> *United States – Import Measures on Certain Products from the European Communities (WT/DS165/R)* paras. 6.17-6.19. For a more recent case on Article 23, see *European Communities – Measures Affecting Trade in Commercial Vessels (WT/DS301/R)* paras. 7.175– 7.195.

request for a panel.<sup>20</sup> Members' attempts to limit the issues that they want a panel to address can also be viewed as amounting to a jurisdictional challenge in some sense. For example, when the US recently asked for a panel to be established in the Airbus-Boeing dispute the EC argued that some of the US claims cannot be considered by the panel because they were not raised by the US during the consultations held in November 2004.<sup>21</sup> The panel has been established and it will decide whether or not it can address those claims. However, the EC's argument is an attempt to limit the jurisdiction of the panel and to define the claims that it wants the panel to address.

### C. Legal obligation to comply with recommendations and rulings

20. Article 23 of the DSU is not only an exclusive jurisdiction clause; it also requires Members to abide by the rules and procedures of the DSU. One such rule, Article 21.1, stipulates that prompt compliance with recommendations or rulings of the DSB is essential. Since DSB rulings or recommendations correspond to the recommendations in the adopted panel and Appellate Body reports, Members must comply with the reports. Simply put, there is an international legal obligation to comply with adopted panel and Appellate Body reports. This view is substantiated by article XVI:4 of the Marrakech Agreement which states that each WTO Member must ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.<sup>22</sup>

21. Thus WTO Members have to comply with the rulings of a dispute settlement system whose jurisdiction can hardly be challenged.

### D. Prevalence over WTO committees

22. The importance of the dispute settlement system is further shown when one compares its standing in relation to other organs of the WTO. The adoption of the DSU led to clear separation between the judicial and political or legislative organs. An inevitable question arises as to the relationship between the dispute settlement and the other WTO bodies, especially the various committees.

23. In two cases in which this relationship was addressed, the Appellate Body either stated or suggested that the dispute settlement mechanism can address issues that are being dealt with, or have been dealt with, by the competent

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<sup>20</sup> McRae, D., (2004) "What is the Future of WTO Dispute Settlement?" J. INT'L ECON. L. 7(1) 3-21 at p.14.

<sup>21</sup> *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/1). A panel has also been established to adjudicate on EC claims in *United States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS317/1). See generally Bridges Weekly Trade News Digest, Volume 9, Number 27 (27 July 2005), available at [www.ictsd.org](http://www.ictsd.org), last visited on 4 August 2005.

<sup>22</sup> For detailed reasoning on why there is an international law obligation to comply with panel and Appellate Body reports, see Jackson, J., (2004) "International Law Status of WTO Dispute Settlement Reports: Obligations to Comply or "Buy Out"?" AM J. INT'L L., Vol. 98, No. 1, 109-125 (Jackson: International Law).

committees. In *India – Quantitative Restrictions*<sup>23</sup> India had argued that panels are not allowed to examine the overall justification for balance-of-payments restrictions under Article XVIII:B. The Appellate Body rejected that argument and found that panels can review balance-of-payments justification even though the BOP committee is also mandated to carry out such reviews. In carrying out its work, a panel is not required to treat the findings of the BOP Committee as dispositive; rather, the Committee findings are merely part of the evidence that the panel examines.

24. The Appellate Body in *Turkey – Textiles*<sup>24</sup> referred to the ruling in the *India – Quantitative Restrictions* case, suggesting that panels also have jurisdiction to assess the overall WTO-compatibility of RTAs, despite the existence and mandate of the Committee on Regional Trade Agreements (CRTA). One of the implications of this case is that the findings of the CRTA are not conclusive; an RTA may be challenged in dispute settlement even if the CRTA has declared it WTO-compatible.<sup>25</sup>

25. These rulings have been criticized. Writing about the *India – Quantitative Restrictions* case, a former director of the Legal Affairs Division of the GATT secretariat said:

“The Appellate body...ruled that the provisions allocating competence to the judicial organs of the WTO...prevail over the provisions assigning competence to the political organs...in the case of balance of payments measures...This ruling has shifted decision-making authority from the political to the judicial organs of the WTO, and consequently changed the negotiated institutional balance in the WTO.”<sup>26</sup>

26. Such criticism points to the tension between the dispute settlement organs and the political bodies of the WTO. Tensions are normal in nation states and also in intergovernmental institutions.<sup>27</sup> In the case of the WTO, the tension is heightened because of the imbalance between the legislative and judicial branches of the organization.

<sup>23</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90/AB/R).

<sup>24</sup> *Turkey – Restrictions on Imports of Textile and Clothing Products* (WT/DS34/AB/R).

<sup>25</sup> For a discussion on the relationship between the dispute settlement system and the CRTA, see “Revisiting EPAs and WTO Compatibility”, *South Centre Analytical Note*, SC/TADP/AN/DS/2 (July 2005) pp. 9-14 available at [http://www.southcentre.org/tadp\\_webpage/researchpapers\\_listds\\_webpage.htm](http://www.southcentre.org/tadp_webpage/researchpapers_listds_webpage.htm) last visited on 5 August 2005.

<sup>26</sup> Roessler, F., “The Institutional Balance Between the Judicial and Political Organs of the WTO” Presentation to the John F. Kennedy School of Government, Harvard University, June 2000.

<sup>27</sup> Ehlermann, C., (2002) “Tensions between the dispute settlement process and the diplomatic and treaty-making activities of the WTO” *World Trade Review* 1:3, pp. 301-308, at p. 304 (Ehlermann: Tensions).

27. To recap, the dispute settlement system is the enforcer of the Provisions of all the covered agreements. It enjoys a considerable degree of automaticity; and its jurisdiction can hardly be challenged. Members that are party to a dispute have to comply with the ruling because there is a binding international law obligation to do so. And the dispute settlement process prevails over the other bodies, at least the committees. The dispute settlement organs thus have a lot of power that should ideally be subject to checks by other bodies within the WTO.

#### E. Ineffective checks over the dispute settlement system

28. The problem is that there is no effective legislative or political check over the panels and the Appellate Body. Although dispute settlement reports are adopted by a political organ (the DSB), the reverse consensus rule means that it is almost impossible for a report not to be adopted.

29. There are two other ways for Members to control the judicial organs. The first is to establish new treaties or amend present ones under Article X of the Marrakech to legislatively reverse the outcome of a dispute settlement report.<sup>28</sup> The second is through the exclusive authority to adopt interpretations of the WTO agreements under Article IX of the Marrakech Agreement – Members can adopt an interpretation whose effect is to overrule a dispute settlement report or aspects of that report.

30. Amending the covered agreements requires a two-thirds majority of Members to be in favour of the amendment; and authoritative interpretation requires three-quarters majority. So in principle these procedures can be used to ensure that flawed adopted reports do not become precedents and do not have an adverse systemic impact. But the reality is that there have been very few amendments or interpretations in the GATT/WTO system. As some observers have noted,

“At least one thing is clear about WTO interpretations and amendments: they are not designed to be taken regularly or readily. In fact, there has not been a single interpretation or amendment adopted since the WTO came into effect in 1995, and there were only six amendments (the last in 1965) in the previous forty-eight years of GATT.”<sup>29</sup>

31. Indeed only in the rarest of circumstances will enough Members agree that the consequences of a report are so harmful that the decision must be reversed through amendment or interpretation.<sup>30</sup> It could be easier to agree that a

<sup>28</sup> Trachtman, *supra*, at p. 8.

<sup>29</sup> Posner, T., and Rief, T., (2000) “Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalisation”, 24 *Fordham International Law Journal*, pp. 481 – 518, at pp. 504-505, quoted in Shaffer, G., (2003) “Defending Interests – Public-Private Partnerships in WTO Litigation”, p. 156, footnote 37.

<sup>30</sup> McRae, *supra*, at p. 13. Weiler says the circumstances would have to be utterly unique to envisage a consensus in the General Council and/or Ministerial Conference to overturn an

report is legally flawed, but it would be near impossible for Members to agree that a ruling that is legally correct is politically unacceptable. As it is, there is little that the legislative or political bodies can do as a way of providing checks and balances for the dispute settlement system.

32. To summarize, the discussion in this section of the paper shows that dispute settlement has a prominent role in the WTO and so the importance of the DSU negotiations should not be underestimated. Panels enjoy automaticity and exclusive jurisdiction; there is a binding international law obligation to comply with DSB rulings and recommendations; panels and the Appellate Body have more authority than other WTO bodies, especially committees; and there are no effective legislative or political checks on adopted dispute settlement reports.

#### **IV. The Nature of the WTO Dispute Settlement System**

33. Having set out some salient general issues, that is, the link between actual disputes and the negotiations and the importance of the DSU negotiations, the latter part of the paper will highlight selected specific aspects of the WTO dispute settlement system that developing countries must reflect upon as they engage in the DSU negotiations. These aspects are the mixture of judicial and diplomatic elements in WTO dispute settlement system, the dual function of the system, and the inadequacy of the available remedies. These are discussed in turn.

##### **A. Judicial and diplomatic elements**

34. “Judicialisation” is perhaps one of the most discussed aspects of the WTO dispute settlement system. Decisions taken during the Uruguay Round marked a shift towards a judicial dispute settlement system and the provisions of the DSU show that Members intended to create a juridical system. However, judicialisation was not instantaneous. The old GATT dispute settlement system had developed progressively on the basis of the thin text of Article XXIII of the GATT 1947, the dispute settlement practice under Article XXIII, and the periodic codification and clarification in dispute settlement procedures.<sup>31</sup> The GATT became a more judicial instrument in the 1970s and 1980s when the cornerstones were laid for the evolution to the present DSU.<sup>32</sup>

35. Despite the adoption of the DSU, there is a considerable lag in internal appreciation and internalization of the new architecture: the diplomatic ethos that developed in the context of the old GATT dispute settlement system

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interpretation or decision of the Appellate Body: Weiler, J.H.H., “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement”, Harvard Jean Monnet Working Paper 9/00, at p. 11, available at <http://www.jeanmonnetprogram.org/papers/papers00.html>, last visited 4 August 2005. See also Zimmermann, *supra*, at p. 39.

<sup>31</sup> Petersmann, E-U., (2003) “WTO Negotiators Meet Academics - The Negotiations on Improvements of the WTO Dispute Settlement System” J. INT’L ECON. L. (6) 237 at p.239.

<sup>32</sup> Zimmermann, *supra*, at p.36.

tenaciously persists despite the reforms.<sup>33</sup> Thus the DSU still has elements of diplomacy. For example, Article 4 requires parties to hold consultations before they can request the establishment of a panel; Article 3.7 states that before bringing a case, Members should consider whether invoking the DSU would be fruitful; the same provision indicates a preference for mutually acceptable solutions to disputes; and Article 3.10 provides that requests for conciliation and the use of the dispute settlement should not be intended or considered as contentious acts.

36. One of the ailments that international trade law experts have diagnosed is the imbalance between the strong judicial branch and the weak and ineffective political/legislative branches of the WTO.<sup>34</sup> However, some of their prescriptions for redressing this imbalance differ. One expert proposes that some elements of the GATT diplomatic approach should be re-introduced in WTO dispute settlement.<sup>35</sup> Another is firmly opposed to re-introducing more diplomacy in the DSU and instead suggests that Members should collectively strive to strengthen the decision-making process in the other WTO bodies.<sup>36</sup> Another expert cautions that the persistence of diplomatic practices and habits in the context of a juridical framework might end up undermining the very rule of law and some of the benefits that the DSU was meant to produce.<sup>37</sup>

37. The difference in theoretical approach also manifests itself in the DSU negotiations. There appears to be a profound controversy regarding the overall direction that the DSU should pursue, to wit, whether it should continue its route towards more rule-orientation and adjudication or whether it should return to a more diplomatic (power-oriented) approach.<sup>38</sup> Some of the proposals that have been submitted thus far would strengthen the judicial aspects of the DSU whereas other proposals would give Members more control over the dispute settlement process. The table below summarises proposals on either side:<sup>39</sup>

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<sup>33</sup> Weiler, *supra*, at p. 3. The coexistence of diplomatic and judicial elements is not completely smooth because there are differences between the ethos of lawyers and the ethos of diplomats in relation to several issues. For instance, there are two strands of thought regarding the nature of the dispute settlement system: “pragmatists” argue for a diplomatic approach that stresses conciliation and problem-solving over legal precision; “legalists” or “rule-oriented” proponents hold that legally-binding rules will provide more certainty and fairness: Barfield, C., (2002) “WTO Dispute Settlement System in Need of Change” *Intereconomics: Review of European Economic Policy* 37.3 131-135 at p.131.

<sup>34</sup> See generally: Barfield, *supra*; Bossche (2003) “The Doha Development Round Negotiations on the Dispute Settlement Understanding” available at [www.worldtradelaw.net](http://www.worldtradelaw.net) last visited on 30 August 2005; Charnovitz, *supra*; Ehlermann, C., (2003) “Reflections on the Appellate Body of the WTO”, *J. INT’L ECON. L.* 6(3) 695 – 708 (Ehlermann: Reflections); Ehlermann: Tensions, *supra*; Hauser, *supra*; and Zimmermann, *supra*.

<sup>35</sup> Barfield, *supra*, at pp. 134-135, recommending also that the judicial bodies must be reined in.

<sup>36</sup> Ehlermann: Reflections, *supra*, at p. 706 and Ehlermann: Tensions, *supra*, at pp. 306-308.

<sup>37</sup> Weiler, *supra*, at p. 4.

<sup>38</sup> Zimmermann, *supra*, at 49 and Hauser, *supra*, at 243, both stating that there seems to be no consensus on whether the trend towards judicialisation should continue.

<sup>39</sup> Adapted from Zimmermann, *supra*, at p. 50, with some variations.

Proposals strengthening rule orientation	Proposals strengthening power orientation
<ul style="list-style-type: none"> <li>• Strengthened notification requirements for mutually acceptable solutions and written reports on the outcome of consultations;</li> <li>• Compliance reviews of mutually agreed solutions;</li> <li>• Reduced time frames;</li> <li>• Creation of a professional permanent panel body ;</li> <li>• Improving terms of appointment of the Appellate Body;</li> <li>• Regulating sequencing and implementation;</li> <li>• Strengthening enforcement and the cost of non-compliance;</li> <li>• Strengthening third party rights;</li> <li>• Increasing external transparency.</li> </ul>	<ul style="list-style-type: none"> <li>• Automatic lapse or withdrawal of consultations/panel requests;</li> <li>• Calls for separate opinions by individual panelists/Appellate Body Members which set out the full reasoning and state clearly the party that has prevailed;</li> <li>• Flexibility during appellate review: interim review and the suspension of the appellate procedures;</li> <li>• Deletion of findings from reports;</li> <li>• Partial adoption procedures;</li> <li>• Extension of time-frames by agreement of the parties;</li> <li>• Obliging adjudicating bodies to submit certain issues to the General Council for interpretation.</li> </ul>

38. Members' approaches to the judicial/diplomatic issue do not depend on their developmental status. For instance, although both can easily use their influence to benefit from a power-oriented system, Australia and the EC appear to favour elements that will strengthen the rule-oriented system. Australia has proposed reductions in the time-frames in dispute settlement process. This proposal is partly inspired by the need to look for time savings so as to compensate for any additional time that might result from some of the proposed changes to the DSU. In addition, the proposal seeks to ensure that WTO-inconsistent measures are maintained for short periods of time only. The EC has proposed that there should be a permanent panel. It believes that a permanent panel would enhance effectiveness, quality and legitimacy, and could also save time both in the selection process and during the proceedings (because the panelists would have more experience).<sup>40</sup>

39. In contrast, the African Group does not see any justification for a standing panel. Further, it proposes that: the General Council shall be regularly briefed on and shall consider the WTO jurisprudence; and that parties to proceedings shall have a right to refer questions of interpretation to the General Council at any stage of the proceedings. These proposals arise from the African Group's dismay that panels and the Appellate Body have come up with "surprises" in their interpretation and application of WTO provisions, in some cases totally

<sup>40</sup> For EC proposals, see TN/DS/W/1, 13 March, 2002 and JOB(05)/48, 24 March, 2005; for Australia's proposal, see JOB(05)/65, 29 April 2005.

unexpected and unintended in the negotiation of the provisions.<sup>41</sup> The African Group submissions show an inclination towards a less judicial dispute settlement system, a system in which the WTO political bodies can input.

40. Thus Hauser and Zimmermann correctly point out that:

“while one might expect at first that this [the more judicial or more diplomatic debate] is largely an issue that divides larger and smaller nations, it is not as simple as that: many developing countries equally argue for strengthening the negotiating mechanisms, as they are disappointed with the final outcome of litigation.”<sup>42</sup>

41. In fact, it seems that Members are not consistent in their support for either a more judicial or a more diplomatic dispute settlement system. Some propose amendments that would pull the DSU in opposing directions. For example, the US is a major proponent of external transparency. This is evidenced by its submissions and also by its agreeing to open up panel proceedings to the public in the Hormones dispute. As noted earlier, transparency is one of the fundamental principles of any judicial system of dispute resolution, as “justice must not only be done but must be seen to be done”. One would therefore think that the US is in favour of a rule-oriented system. However, some of its other submissions advocate for Member control of dispute settlement. For example, it has proposed that there should be interim review in appellate proceedings and also that parties should be allowed to agree to delete from a report findings that are not helpful or necessary for resolving the dispute.<sup>43</sup> Such proposals would bring in more political control over the dispute settlement process.

42. Indeed, it might not be necessary for WTO Members to adopt a firm ideological position whereby they consistently support proposals that will lead to a more judicial or a more diplomatic system. What is more important is to ensure that whichever proposal they submit or support will improve rather than harm the dispute resolution system.

43. The imbalance between the effectiveness of the judicial and political systems in the WTO should not be addressed by weakening the dispute settlement system. Instead, Members should strive to make recourse to Articles IX and X of the Marrakech Agreement feasible so that there can be a real check for panels and the Appellate Body. That would enable Members to overrule flawed dispute settlement reports by adopting authoritative interpretations of

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<sup>41</sup> African Group, TN/DS/W/15, 25 September 2002.

<sup>42</sup> *Supra*, at p. 243.

<sup>43</sup> US submission: TN/DS/W/13, 22 August 2002; TN/DS/W/46, 11 February 2003; and TN/DS/W/79, 13 July 2005. See also “Hormones panels to open proceedings with parties to the public” at [www.wto.org](http://www.wto.org), last visited on 8 August 2005. See TN/DS/W/52, 14 March 2003 for submission on deletion of findings.

WTO provisions under Article IX. Alternatively, Members would be able to use Article X to amend provisions when a panel or Appellate Body ruling shows that the provision does not reflect the negotiators' intentions.

44. However, improving the political decision-making process should not result in giving the political organs the authority to meddle with the dispute settlement process. That would be taking a step backwards.

#### B. The function of the WTO dispute settlement system

45. The "function" of the WTO dispute settlement system is an issue that deserves serious consideration and that must always be borne in mind when negotiating to clarify and improve the DSU.

46. GATT panels saw their duty as encompassing both the application of the GATT provisions in order to resolve disputes between the parties and seeking to reach a friendly accommodation.<sup>44</sup> Disputes were mainly treated as internal, to be resolved quickly within the organization.<sup>45</sup> Some of these attributes were carried over to the DSU. Article 3.3 provides that *prompt settlement is essential* to the maintenance of a *proper balance* between the rights and obligations of Members. Article 3.4 states that recommendations and rulings of the DSB shall be aimed at achieving a *satisfactory settlement* of the matter. Article 3.7 stipulates that the aim of the dispute settlement system is *to secure a positive solution* to the dispute and that *a mutually acceptable solution is preferred*. And, Article 17.4 allows only the main parties, not third parties, to appeal a panel report. These provisions show an intention to focus on the actual dispute itself and to ensure that it is resolved quickly and to the satisfaction of the parties. Less thought is given to Members that are not the main parties in the dispute or to non-members.

47. Panels and the Appellate Body recognize that both prompt settlement and a focus on resolving the dispute are essential aspects of their work. The clearest indication of this is the use of judicial economy. In *US - Shirts and Blouses*, the Appellate Body stated that panels are not required to decide issues that are not necessary to dispose of a particular dispute; and that the basic aim of dispute settlement in the WTO is to settle disputes.<sup>46</sup> Judicial economy has been invoked in numerous other cases after this.

48. The DSU negotiations show that some Members place a premium on prompt settlement. An example par excellence is the Australian proposal for reduced time-frames.<sup>47</sup> Other proposals reflect the view that dispute settlement is a matter for the disputants and that the disputants should be able to control the time-frames and other aspects of the process. For example, the EC submitted a proposal aimed at giving the disputants extensive authority to extend any time

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<sup>44</sup> McRae, *supra*, at p. 7.

<sup>45</sup> Weiler, *supra*, at p. 5.

<sup>46</sup> *US- Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R) p 19.

<sup>47</sup> JOB(05)/65, 29 April 2005.

period in the DSU.<sup>48</sup> Similarly, the US and Chile proposal to allow disputants to delete parts of panel or Appellate Body reports that they do not agree with indicates that they view dispute resolution as being primarily focused on the parties to the dispute.<sup>49</sup>

49. However, dispute settlement is more than just a mechanism for the application of legislation to disputing parties. It is also a mechanism of governance and guidance. Some provisions of the DSU suggest that the WTO dispute settlement system has a greater role than just resolving the dispute between the parties; and that its rulings affect entities other than the main parties. For example, Article 3.2 provides that the dispute settlement system is the central element in ensuring security and predictability in the multilateral trading system. To ensure predictability, the dispute settlement system has to give well-reasoned rulings from which WTO Members and non-Members can learn what the provisions mean and how they should be applied in the absence of a dispute. Article 3.2 also states that the DSU aims at preserving the rights and obligations of Members under the covered agreements and clarifying the existing provisions.<sup>50</sup> Article 3.5 provides that all solutions shall not nullify or impair benefits to *any* Member under the covered agreements, nor impede the attainment of any objective of the agreements. Article 3.6 requires solutions mutually agreed by disputants to be notified to the DSB. And Article 21 provides rules for multilateral surveillance of the implementation of DSB recommendations and rulings. Articles 3.5, 3.6 and 21 show that dispute settlement reports are of interest to all the WTO Members.

50. Some of the WTO case law recognizes that rulings and recommendations of the dispute settlement system affect a much wider community than just the disputants.<sup>51</sup> In *EC – Bananas*, the Appellate Body quoted the panel statement that:

“increased interdependence of the global economy means Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.”<sup>52</sup>

51. Further, a panel has expressly stated that the impact of WTO disciplines goes well beyond the WTO Member governments:

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<sup>48</sup> TN/DS/W/1, 13 March 2002.

<sup>49</sup> TN/DS/W/52, 14 March 2003.

<sup>50</sup> Preserving rights and obligations supports the notion of the desirability of developing jurisprudence that not only would accord particular disputants some predictability and reliability but also would provide guidance to all government Members of the WTO: Jackson: *International Law*, supra, at p.116.

<sup>51</sup> Ng'ong'ola, C., “African Contributions to Dispute Settlement Negotiations in the World Trade Organisation: An Appraisal” SATRN Working Paper No. 8, (February 2004) p.44 (On file with author).

<sup>52</sup> WT/DS27/AB/R para 136.

“it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.”<sup>53</sup>

52. Third party participation in disputes shows that developing countries are aware that the dispute settlement system is more than just a mechanism for the main disputing parties to settle their differences.<sup>54</sup> It demonstrates that they appreciate the systemic impact of dispute settlement reports. This is also reflected in the DSU negotiations where some proposals are either based on, or aimed at enhancing, the broad reach of dispute settlement. The proposals on external transparency exemplify this. An introductory paragraph of a US submission on transparency and open meetings says:

“over 10 years of experience under the WTO dispute settlement system has demonstrated that the recommendations and rulings of the Dispute Settlement Body can affect large sectors of civil society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in those recommendations and rulings.”<sup>55</sup>

53. Other notable proposals inclined towards a dispute settlement mechanism that has a systemic impact are the ones on third party rights, on unsolicited *amicus curiae* briefs, and, to some extent, on separate opinions.

54. Some Members do not support these proposals. A fair amount of the opposition is based on the view that the purpose of dispute settlement is to settle disputes between the parties and that opening up the system would make it difficult for the parties to reach a mutually satisfactory solution.

55. Thus the dual nature of the dispute settlement system is reflected in the DSU provisions, the case law, and the DSU negotiations. This is likely to continue in the future. Indeed it would be undesirable for the DSU to focus on the disputants only, or to place its systemic function over that of settling disputes. At the very least, the system should be able to resolve disputes satisfactorily and promptly. The dispute settlement system is the only way in which WTO

<sup>53</sup> *United States – Sections 301-310 of the Trade Act of 1974* (WT/DS152/R) paras 7.73, 7.75-7.77.

<sup>54</sup> Jackson : *International Law*, supra, at p.120, makes the point in relation to all WTO Members.

<sup>55</sup> TN/DS/W/79, 13 July 2005.

Members can enforce rights and obligations under the covered agreements. However, security and predictability in the multilateral trading system can be achieved through well-reasoned decisions that not only solve the actual dispute but also provide useful guidance to future panels and all parties affected by the WTO rules.

56. In the DSU negotiations, developing countries should bear in mind the need for panels and the Appellate Body to achieve a proper balance between settling disputes and providing future guidance.

### C. WTO remedies

57. If a judicial system professes that its function includes settling disputes, then it must offer effective remedies to successful parties. This is because a judicial system of dispute settlement is measured not only by the standard of reasoning it employs or the number of cases it decides but also by the effectiveness of the remedies it provides. The WTO dispute settlement system has produced thousands of pages of jurisprudence, creating a body of case law that was probably not envisaged by the negotiators during the Uruguay Round. But, the question is whether successful complainants were granted effective remedies. This question is very pertinent because Article 3.4 of the DSU says the recommendations and rulings of the DSB shall be aimed at achieving a *satisfactory settlement* of the matter; and also because the DSU prohibits recourse to any other system of dispute resolution.

58. Currently, there are three remedies in the WTO. The first is cessation: the removal of a measure that has been found to be WTO-inconsistent. This requires either total withdrawal or amendment of the measure. The second remedy is compensation. It is voluntary in nature as the disputing parties are supposed to negotiate mutually acceptable compensation. Compensation is in the form of trade concessions: it involves offering enhanced market access or other concessions to a successful complainant. The DSU neither provides for nor prohibits monetary compensation.<sup>56</sup> The third remedy is the suspension of

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<sup>56</sup> Monetary compensation was offered and accepted in *United States - Section 110(5) of the US Copyright Act*, Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1.

<sup>57</sup> See, for instance: Anderson, K., (2002) "Peculiarities of Retaliation in WTO Dispute Settlement", 1 *World Trade Review* 123; Barfield, C., *supra*; Bronckers, M., and Broek, N., (2005) "Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement", 8 *J. INT'L ECON. L.* 101; Charmody, C., (2002) "Remedies and Conformity under the WTO Agreement" 5 *J. INT'L ECON. L.* 307; Charnovitz, C., (2001) "Rethinking WTO Trade Sanctions", 95 *AM. J. INT'L L.* 792; Grané, P., (2001) "Remedies under WTO Law" 4 *J. INT'L ECON. L.* 755; Hoekman, B. and Mavroidis, P., (2000) "WTO Dispute Settlement and Surveillance" *World Economy* Vol. 23, no. 4, p. 527-542; Hudec, R., "Broadening the Scope of Remedies in WTO Dispute Settlement", available at [www.worldtradelaw.net/article/hudecremedies.pdf](http://www.worldtradelaw.net/article/hudecremedies.pdf) last visited 14 August 2005 (Hudec: Remedies); Jackson, J., (2000) "Dispute Settlement and the WTO: Emerging Problems", in *From GATT To The WTO: The Multilateral Trading System In The New Millennium* 67; Kearns, J., and Charnovitz, S., (2002) "Adjudicating Compliance in the WTO: A Review of DSU Article 21.5", 5 *J. INT'L ECON. L.* 331; Kufuor, K., (1997) "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes", 31 *J.*

concessions or other obligations. This is commonly referred to as retaliation: a successful complainant can request the DSB to authorize it to suspend concessions or other obligations in relation to the losing party if the negotiations for compensation fail.

59. These remedies are applied prospectively. Both compensation and retaliation are temporary remedies because the DSU prefers cessation. Article 3.7 states that the first objective of the dispute settlement system is to secure the withdrawal of the WTO-inconsistent measures.

60. The present WTO remedies are not satisfactory. Their problems have been well-documented in the literature and will only be summarized here.<sup>57</sup> First, withdrawal of inconsistent measures does not recompense the loss incurred from the moment that the measure was introduced to the point of withdrawal. Secondly, trade compensation depends on the consent of the party found to be violating the rules. Thirdly, some Members do not have the capacity to use any enhanced market access they may obtain as trade compensation. This is especially so when the complainant is a developing country. Fourthly, although retaliation can be used to pressurize the offending Member and to appease the domestic constituency of the retaliating Member, it is not an ideal remedy. It amounts to shooting oneself in the foot because raising trade barriers against the offending Member might produce negative effects for the economy of the retaliating Member. In fact, it is ironic that the WTO, an institution that preaches trade liberalization, relies on trade protectionism in the form of retaliation as a means of neutralizing the effect, or forcing the disappearance, of illegal trade restrictions.<sup>58</sup>

61. Two GATT/WTO luminaries have expressed their concern about WTO remedies in the following manner:

“The disproportionate impact of [retaliation] can be viewed as a serious flaw in the basic structure of WTO remedies. [T]he WTO remedies fall a good bit short of what one might ask of an effective legal system”;<sup>59</sup>

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WORLD TRADE 117; MacLean, R., (2002) “The Urgent Need to Reform the WTO’s Dispute Settlement Process”, 8 INT’L TRADE L. REG. 137; Mavroidis, P., (2000) “Remedies in the WTO Legal System: Between a Rock and a Hard Place”, 11 EUR. J. INT’L L. 763; Pauwelyn, J., (2001) “Enforcement and Countermeasures in the WTO: Rules are Rules - Toward a More Collective Approach”, 97 AM J. INT’L L. 335 (Pauwelyn: Enforcement); Shaffer, G., (2003) “How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies”, in *Towards a Development Supportive Dispute Settlement System in the WTO*, ICTSD Resource Paper No. 5, pp. 1-65, available at <http://www.ictsd.org/pubs/series.htm>, last visited 28 August 2005; Subramanian, A., and Watal, J., (2000) “Can TRIPS Serve as an Enforcement Mechanism for Developing Countries in the WTO?” 3 J. INT’L ECON. L. 403.

<sup>58</sup> Pauwelyn: Enforcement, *supra*, at p.343. Similarly, Shaffer comments that “ironically, the legal consequences of trade discrimination can be an authorized escalation of it”: *supra*, at p. 38.

<sup>59</sup> Hudec: Remedies, *supra*, at p.27 and p.43.

and

“In many ways, the DSU provisions on remedies, especially the temporary measures of compensation and suspension, are deeply flawed, and even dysfunctional.”<sup>60</sup>

62. Some of the case law in the WTO has recognized the problematic nature of retaliation. For example, the arbitrators in the *EC - Bananas* case stated that:

“Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality.”<sup>61</sup>

63. In a previous arbitration in the same case, the arbitrators also mentioned that the suspension of concessions was not in the economic interest of the parties.<sup>62</sup> This supports the view that retaliation is costly for the complainant too.

64. Developing countries’ submissions in the DSU negotiations show their awareness of the problems with the current remedies. Three submissions can be cited here.

65. The African Group proposal states that injury suffered is not compensated satisfactorily in situations where the offending measures are withdrawn before or after the commencement of proceedings; and that the means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members. The LDC Group proposal says that the question of little or no utilization of the dispute settlement by developing and least-developed country Members is linked to the inadequacies and structural rigidities of the remedies available to poor countries that successfully litigate a dispute. In relation to retaliation, Mexico’s 2002 proposal pointed out that a Member may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests. It said this problem affects not only developing countries and least-developed countries, but also small countries whose economy is

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<sup>60</sup> Jackson: *International Law*, supra, at p.123.

<sup>61</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 DSU*, WT/DS27/ARB/ECU, 24 March 2000, para. 177.

<sup>62</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 DSU*, WT/DS27/ARB, 9 April 1999, para. 2.13.

concentrated in one or only a few sectors and whose main imports are primary goods.<sup>63</sup>

66. These and other concerns have led developing countries to propose various means of improving remedies.<sup>64</sup> Some of the proposals build on the current remedies while others seek to introduce new remedies drawn from international and domestic legal systems. For example, the proposed transfer of the right to retaliate is an enhancement of the current retaliation remedy. Likewise, collective retaliation is a means of making the present retaliation remedy more effective and more compliance-inducive.

67. On the other hand, the proposal for retrospective compensation, and especially the provision of monetary compensation as reparation for past harm, seeks to increase the scope and nature of WTO remedies. Monetary compensation is a remedy that is used widely in domestic legal systems and in international tribunals, be it in public international law, investment arbitration or in trade agreements outside the WTO. Proposals for monetary compensation in the GATT were made as early as 1965; and were considered by developed countries as being outside the realm of the possible.<sup>65</sup> But this has not discouraged developing countries from proposing monetary compensation in the DSU negotiations and should not discourage them from pressing for it.<sup>66</sup>

68. Although the ineffectiveness of the remedies might affect all Members, developing countries are at a much greater disadvantage because they almost always have no capacity to utilize market access offered as trade compensation or to retaliate effectively. Thus, even if a developing country succeeds in dispute settlement, it is still not guaranteed an effective remedy. The situation is different for developed countries. If a developing country loses a case and does not want to comply, a developed country can easily retaliate by blocking the developing country's access to its market. A developing country's economy would be greatly affected given the lack of diversification and high dependence on not only few exports but also few export markets. In addition, it is quite conceivable that if retaliation fails, the developed country might withdraw or threaten to withdraw preferences or aid and might use other extra-WTO means to force compliance.

69. Developing countries' helplessness even after succeeding in a WTO dispute might be seen as supporting the conventional wisdom that:

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<sup>63</sup> TN/DS/W/15, 25 September 2002 (Africa Group); TN/DS/W/17, 9 October 2002 (LDC Group); and TN/DS/W/23, 4 November 2002 (Mexico). See also TN/DS/W/40, 23 January 2003 (Mexico's proposed textual changes). For an objective discussion of the African and LDC Groups' proposals on remedies, see Ng'ong'ola, *supra*, at pp. 55-60.

<sup>64</sup> See <http://www.law.georgetown.edu/iel/research/projects/dsureview/synopsis.html> last visited on 14 August 2005.

<sup>65</sup> Hudec: Remedies, *supra*, at p.16.

<sup>66</sup> See Bronckers and Broek, *supra*, for a good discussion on financial compensation and a summary of the key elements of a mechanism for financial compensation in the WTO. While recognizing that it might not be easy to get all Members to support the introduction of financial compensation, they urge developing countries and private business to rally around the proposal.

“It is a waste of time and money for developing countries to invoke the WTO’s dispute settlement procedure against industrial countries.”<sup>67</sup>

70. Over the past year the formal and informal discussions in the DSU negotiations have focused on panel composition, post-retaliation, remand authority, sequencing, third party rights, time saving in dispute settlement, and transparency.<sup>68</sup> These are all important systemic issues. However, developing countries must ensure that a discussion of these issues does not overshadow or prevent effective consideration of the remedies problems and proposals. There is a danger of this happening because some Members refer in passing to a “package” which does not include remedies. Developing countries should resurrect their remedies concerns and bring them to the fore.

71. Given that trade law experts, WTO case law and WTO Members all recognize that the present remedies are inadequate, one of the outcomes of the DSU negotiations must be more effective remedies. The negotiating mandate is to clarify and *improve* the DSU. The whole process might be rendered meaningless if remedies are not strengthened. Schaffer has stressed the importance of the remedies issue thus:

“...in the current review of the WTO Dispute Settlement Understanding, the central issue for developing countries is that of remedies. For developing countries not to press this issue would be a lost opportunity. Developing countries may not prevail immediately but they could strive to do so, both in DSU review and, over the longer term, in the Doha round of trade negotiations.”<sup>69</sup>

72. The optimum legal system is not simply the strongest system but the one that is most helpful in enforcing the rights of complainants while at the same time preserving the desired degree of freedom to deal with adverse legal rulings against one’s own behaviour.<sup>70</sup> As long as its remedies remain ineffective, the WTO dispute settlement system cannot be deemed as an optimal system.

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<sup>67</sup> Hudec, *The Adequacy of WTO Dispute Settlement Remedies for Developing Country Complainants*, in DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK 81, at p. 81 (Bernard Hoekman *et al.*, eds. 2002).

<sup>68</sup> See “Developments in the Negotiations to Clarify and Improve the WTO Dispute Settlement Understanding since the July Package”, *supra*.

<sup>69</sup> Shaffer, *supra*, at p. 58. He suggests that developing countries could say that they will only accept proposals for transparency (only those aspects that are not structurally biased against developing country interests) if developed countries accept improvements in remedies: at p. 57.

<sup>70</sup> Hudec: Remedies, *supra*, at p.10.

## V. Conclusion

73. The paper set out to highlight some aspects of the WTO dispute settlement system that developing countries must be aware of, reflect upon, and bear in mind as they continue engaging in the DSU negotiations. It was deemed important to discuss those issues because it is easy for negotiators to overlook some of the underlying features of the system that they seek to improve when they get bogged down in the specific proposals texts. That could lead to a sub-optimal result in the final text of the DSU. This section summarises some of the main points made in the paper.

74. The DSU negotiations should not be seen in clinical isolation from the disputes adjudicated by the panels and the Appellate Body. As this paper has shown, there is a complementary relationship between the disputes and the negotiations. This relationship is manifested in various ways. For example, some cases have inspired the proposals made in the negotiations. In some instances, disputes have been used to raise awareness of and to support negotiating positions. Further still, some disputes have provided an opportunity to develop practical solutions to issues that are currently being negotiated. Developing countries should explore whether they can use the disputes they are currently involved in to increase awareness of, and gain support for, their proposals in the negotiations.

75. It is understandable that due to lack of resources, developing countries might not prioritize the DSU negotiations. Nevertheless, the importance of the DSU negotiations should not be underestimated. This is because dispute settlement has a prominent role in the WTO. Panels enjoy automaticity and exclusive jurisdiction; there is a binding international law obligation to comply with DSB rulings and recommendations; panels and the Appellate Body have more authority than other WTO bodies, especially committees; and there are no effective legislative or political checks on adopted dispute settlement reports. Because of these factors and the role of dispute settlement as the means for clarifying and enforcing the covered agreements, developing countries should give as much attention as they can within their means to the DSU negotiations.

76. Following from the preceding paragraph, developing countries should ensure that the negotiations *do* clarify and improve the DSU. They should assess proposals in light of the nature and basic characteristics of WTO dispute settlement so that whatever proposals they support really improve the DSU. As the paper has recalled, the WTO dispute settlement system has judicial and diplomatic elements. And, although their basic function is to settle disputes, panels and the Appellate Body also have a great role in clarifying and interpreting the WTO agreements and developing case law that guides all parties

affected by the multilateral trading system. The discussion has shown that these elements are recognized by analysts, WTO jurisprudence and WTO Members.

77. Finally, the paper has emphasized that the improvement of remedies should be a priority area for developing countries in DSU negotiations. Developing countries have already submitted various proposals on remedies. These include collective retaliation, the possibility of transferring retaliation rights, and retrospective monetary damages. At the moment, remedies are not receiving the attention they deserve in the DSU negotiations. The proposals on remedies will probably not be accepted without a fight from those who benefit from the current skewed remedies. Therefore, developing countries should get as much political support as they can and insist that effective remedies must be part of any outcome of the DSU negotiations.

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