Ten Years of WTO Dispute Settlement

Commentary and Analysis from the Trade and Customs Law Committee of the International Bar Association

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ISBN 978-0-948711-67-1

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Printed and bound by Leopard Print Limited

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Developing Countries' Participation in WTO Dispute Settlement with Special Reference to Latin America

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Eighty of the WTO's developing country Members have never appeared before the WTO Dispute Settlement Body. It was recognised a decade ago that developing countries should benefit from special and differentiated treatment. Moreover, developing countries are major exporters of basic agricultural commodities which compete with commodities of developed countries. This being so, it is questionable why developing countries are not more actively involved in DSB proceedings. This chapter sets out to address the fundamental question of how developing countries can be encouraged to participate more actively in DSB proceedings.

In this regard, having identified legal costs, the power of protectionist interests and the length of proceedings as the main obstacles to developing country participation, the author advances several practical suggestions to remove these barriers. His primary recommendation is that the dispute settlement procedure be made more transparent. He also suggests that a voluntary public registry of law firms should be established within the WTO with an indicative table of maximum fees, and that a similar registry of consulting firms or NGOs operative in the fields of trade also be established. Problems of a systemic nature are also addressed such as non-compliance and the failure to implement DSB rulings, the non-retroactivity of DSB recommendations and the redundancy of retaliatory measures taken by developing countries. Specific recommendations are given for the requirement by Panels or the Appellate Body of guarantees of execution, the award to developing countries of legal and administrative costs, the payment of compensation in lieu of execution to developing countries and the establishment of a small claims court.

Introduction

This chapter refers to the legal grounds and public policy considerations for extending special and differentiated treatment to developing countries in the WTO dispute settlement process. Eighty developing countries, or 54 per cent of the 148 Members of the WTO, have never participated as complainants or respondents in this process and, therefore, have never benefited from this special treatment. In addition, the existing special treatment provisions are very general, not legally enforceable and have rarely been applied.

A majority of these non-participating countries export basic agricultural commodities also produced, exported and subsidised by industrialised countries to the detriment of the former. Thus, in many cases, these developing countries would have reasonable grounds to challenge the WTO consistency of these subsidies, but are prevented by a variety of factors. Some of these relate to their economic condition, but others to the constraints imposed on them by the dispute settlement process itself. This chapter set out the policy or legal measures that could be undertaken to overcome or correct those procedural constraints which have, so far, prevented greater participation of developing countries in theses processes.

Background

In contrast with the original GATT of 1947, which virtually ignored the situation of developing countries,[1] the provisions of both the 1994 WTO Agreement and of the Multilateral Trade Agreements[2] which are the integral part of it – and binding on all its Members – recognised the special and differentiated treatment due to these countries. This recognition, although stated in declaratory and general terms, responded to strong public policy considerations then in force and which remain valid today. Yet, after ten years, and notwithstanding that 'the WTO dispute settlement process has been widely acclaimed as one of most important components of the WTO'[3] and a 'remarkable success',[4] special and differentiated treatment of developing countries within this process, has yet to be implemented. Hence, although each and every Member is given the same rights, the legal costs, the length of the proceedings and the power of protectionist interests, among other factors, have limited greater developing country participation in the Dispute Settlement Understanding or DSU.[5] In this regard, the Latin American experience,

1 Out of the original 23 signatories of the GATT 1947, 11 were developing countries of which only three were from Latin America: Brazil, Cuba and Chile. The rest were Burma (Myanmar), Ceylon (Sri Lanka), China, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe) and Syria. On 27 June 1966, the amendments agreed by the Contracting Parties came into effect and a new article XXXVI recognised that special treatment was due to the least developed countries, and its paragraph 8 established that developed countries should not expect reciprocity from the former.

2 According to Article II(2) of the Marrakesh Agreement which established the WTO, the Multilateral Trade Agreements are those listed in Annexes 1, 2 and 3.

3 WTO Annual Report 2005, p 144 (hereinafter 'WTO Report').

4 'The Future of the WTO', Report of the Consultative Board chaired by Peter Sutherland or 'the Sutherland Report', 2005.

5 The 'Understanding on Rules and Procedures Governing the Settlement of Disputes' or, 'DSU', is one of the agreements included in Annex 2 of the Marrakesh Agreement and which are an integral part of the WTO, according to Article II(2) of that Agreement. The rules and procedures of the DSU apply to disputes brought under the provisions of the agreements listed in its Appendix 1 or

as discussed further below, is especially significant because it constitutes the precedent which is followed by other developing and least-developed countries.

Giving legal enforceability to developing country protection, and correcting the procedural constraints which limit their participation, should not, in our view, require major amendments to the DSU. A reform or a return to the politically-oriented system which prevailed under GATT, would be unjustified.

The corrections suggested in this chapter attempt, therefore, to supplement or fill the vacuums of the WTO agreements, and in particular of the DSU.

Developing country objectives under the WTO and covered agreements[6]

It is an objective of the WTO Agreement, according to its preamble, to 'ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development'. The preamble then recognises the 'need for positive efforts designed to ensure' the achievement of this objective[7].

In conjunction with this objective, the Agreement establishes that it must '... facilitate the implementation, administration, and operation, and *further the objectives* of this Agreement and of the Multilateral Trade Agreements (which include the DSU)'[8] (emphasis added).

The above objective of the WTO Agreement applies, therefore, *mutatis-mutandi*, to the implementation, administration, and operation of the DSU and of the covered agreements. This is confirmed by Article 3(3) of the DSU which states that 'all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements ... shall be consistent with those agreements and shall not *impede the attainment of any objective of those agreements*' (emphasis added).

Consequently, matters raised under the DSU and the covered agreements such as panel reports, appellate body recommendations, arbitral awards and/or the decisions of the Dispute Settlement Body or 'DSB'[9] must be consistent, pursuant to the above provisions, with the WTO objective of providing special and differential treatment to developing countries.

The public policy context

The significance given in 1994 by the WTO Agreement to the improvement of the share of developing countries in international trade was a reflection of the macroeconomic policies those countries adopted in the previous decades. Those policies included major structural reforms – strenuously advocated and promoted by the international financial community since the 1980s – which transformed state-regulated economies into market economies. They were implemented through

6 According to Article 1 of the DSU, the covered agreements are those listed in its Appendix 1.

7 Second paragraph of the preamble of the Marrakesh Agreement which established the WTO ('the Agreement').

8 WTO Agreement, *ibid*, Article III(1).

9 Article 2 of the DSU established the Dispute Settlement Body to administer its rules and procedures and Article IV(3) of the Marrakesh Agreement stated that the General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the DSU.

the privatisation of state enterprises, the termination of protectionist government subsidies, opening up to foreign investments, and the liberalisation of foreign trade.

Underlying those policy changes was the implication that the increased participation of developing countries in international trade would outweigh or replace the benefits they received from official development assistance. According to Nobel Prize winner, Joseph Stiglitz, however, 'Outward-oriented policies ... succeed only to the extent that there are markets in which developing countries can sell their products, as well as international rules that allow developing countries to make good use of their areas of competitive advantage'.[10]

Thus, the persistence of protectionist trade barriers in industrialised countries, or of discriminatory trade rules which thwart the access of developing countries to larger markets, defeat the very purpose of those public reforms and question the future viability of their macroeconomic policies. This concern is compounded by the reductions in the levels of per-capita aid to the developing world which, according to Stiglitz, fell by nearly a third in the 1990s[11] and which has made this author conclude that, in the end, developing countries are left, 'in effect, with neither aid nor trade'.[12] Ironically, in what appears to be a reversal of priorities (back from trade to aid), the 2005 Gleneagles summit of the G8 in Scotland, condoned African debt and agreed to provide an additional $50 billion in world aid. The reason for this might be, according to an analyst, that such aid would be less costly than 'cutting the $250 billion that rich countries spend annually on farm support'.[13]

A different perspective was given by WTO Director-General, Pascal Lamy, before the Development Committee of the World Bank. Director Lamy, underlined the importance of a meaningful 'aid for trade package' to 'ensure that developing countries themselves are full partners in the process' and that 'unless developing countries feel ownership of aid for trade – and empowered to benefit from it – the initiative cannot, and will not succeed'. [14]

Developing country participation

Background

Without prejudice to the policy debate above and our reference below to developing country participation in Panel and Appellate Body rulings, our specific concern is the special and differential treatment which the WTO dispute settlement process should give all developing countries, including those of Latin America.

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10 Joseph Stiglitz, 'Two Principles for the Next Round or, how to Bring Developing Countries in from the Cold' at 453, 23 *World Economy* (April 2000) (hereinafter 'Stiglitz'). Cited by Gregory Shaffer, 'How to Make the WTO Dispute Settlement System work for Developing Countries', International Centre for Trade and Sustainable Development – ICTSD – 2003, p 50 (hereinafter 'Shaffer').

11 Stiglitz, *ibid*, notes that 'the figure was US$32.27 in aid per developing country resident in 1990, but only US$22.41 in 1997', p 437. Shaffer, *ibid*, note 167, p 50.

12 Stiglitz, *ibid*, p 438. Shaffer, *ibid*, note 170, p 50.

13 Tom Wright, 'Diagnosis for Global Trade Talks: Arterial Sclerosis', *International Herald Tribune*, 24-25 September 2005, p 13.

One preliminary question is, who are developing countries under the WTO?

The matter was raised in the context of Article 9.1 of the Safeguards Agreement in a dispute between the US and China and it remains unresolved.[15] China was of the view that the principle of self-designation of a developing country was a standard WTO procedure and should always apply.[16] In addition, it stated that in its Protocol of Accession it undertook not to benefit from the special and differential treatment provisions in the WTO Agreement on Agriculture, the SCM Agreement and the WTO Agreement on Trade Related Investment Measures, but claimed it had made no specific undertakings in relation to the Safeguards Agreement and its article 9.1.[17] Therefore, for the purposes of this last agreement, China's contention was that it should be treated as a developing country. The US disagreed and took the view that the WTO Agreement did not establish a procedure or method for determining when a Member can be designated a 'developing country'.[18]

Given the special terms under which China joined the WTO, in our view, those terms do not apply to other developing countries. China's condition is therefore, unique and different from that of all other developing countries. Without prejudice to the view that a methodology could be adopted in the future, its absence cannot invalidate the reiterated practice of the WTO. For example, in the *Bed Linen Case,* India contended that the EC had not taken into account the special situation established in Article 15 of the AD Agreement in favour of developing countries. A discussion ensued – which involved the United States as a third party – on whether the obligations towards developing countries imposed by Article 15 were procedural or substantive. Disregarding the outcome of this discussion, its significance was that neither the EC, nor the United States nor the Panel in its final ruling, disputed India's status as a developing country.[19] As in the case of India, the WTO throughout its reports, resolutions and general practice has implicitly recognised the status of Brazil, Korea, Mexico and other developing countries. Regarding the least developed countries, their situation is clearer because the WTO has expressly followed the definition of the United Nations.[20]

General participation

Between 1 January 1995 and 15 June 2005, there were 330 complaints notified to the WTO,[21] and according to the WTO's 2005 Report, up to 31 December 2005, approximately two-thirds of the disputes under the DSU were brought by industrialised countries and one-third by developing countries. There was no participation by the least-developed countries, except as third parties. The main

16 Daniel Moulis, Partner Freehills, Sidney, Australia 'Developing Countries, AD/CVD, and the Doha Development Round', 23 August 2005, p 4 (hereinafter 'Moulis').

17 Accession of the People's Republic of China, WT/L/432, 23 November 2001.

18 *US – Steel Safeguards,* paragraphs 7.1865,71871. Quoted from Moulis, *ibid,* p 3.

19 WTO document WT/DS/141. Quoted from Valentina Delic, 'Developing Countries and the WTO Dispute Settlement System' (hereinafter 'Delic'), in *Development, Trade and the WTO, A Handbook,* edited by Bernard Hoekman et al. (World Bank, 2002) (hereinafter 'Hoekman').

20 WTO, 'High Level Symposium on Trade and Development' Geneva, 17-18 March 1999, p 5, footnote 4.

21 Update of WTO Dispute Settlement Cases of 15 June 2005, WT/DS/OV/24 (hereafter, 'Case Update').

users among the industrialised countries were the US, the EU, Canada and Japan, and, among the developing countries, Brazil, India, Mexico, Korea, Thailand, Argentina and Chile.[22] Reflecting on this record, the report stated that 'the complexity and costs of litigation under the system have proven higher than anticipated' and that *'this may have made the system less accessible to certain developing countries'*[23] (emphasis added).

The above indicates, therefore, that, among the developing Member countries of the WTO, the least developed have not participated. There are 31 such countries and they are listed in Annex A. Of the rest, only seven are frequent participants and, of these, three are from Asia, and four from Latin America: Brazil, Mexico, Chile and Argentina.

It can, thus, be inferred that Latin American participation in the DSU is critical for every developing country (including the least developed) and for the system as a whole. Thus, if procedural costs and obstacles which affect Latin American participation are not adequately resolved, the participation of the rest is likewise affected. Also, as least developed countries have never participated in the process – except as third parties – the special treatment provisions of the DSU and covered agreements are void for them.

The report did not identify those 'certain developing countries' (different from the least developed) for which 'the system' has been 'less accessible'. These are the WTO Members which have not, until now, brought or responded to complaints and which, therefore, do not appear in the WTO update of cases.[24] They total 49 countries and are listed in Annex B. Consequently, together with the 31 least developed, there are 80 developing countries, representing 54 per cent of the 148 Membership, which have not participated in the WTO dispute-settlement process.

It should be added that, within the participating developing countries, many have participated only once. Also of note is that the sustenance of the population of many of the 80 non-participating developing countries is dependent on the export of agricultural commodities which are also produced and subsidised by industrialised countries. It can, thus, be assumed that, if they had the resources, they would probably be submitting the corresponding complaints under the DSU.

Developing country participation in Panel and Appellate Body rulings

From 1 January, 1995 until 1 June 2005, there were 89 final Panel and Appellate Body rulings in WTO cases.[25]

Some of the complaints or responses of developing countries in these cases have been filed jointly with other countries, including industrialised countries, and around ten have been among developing countries themselves. In the disputes of developing and industrialised countries, some developing countries, such as India or Brazil, have participated in 12 cases each, while others, such as Egypt or Costa Rica, have participated only once.

22 WTO Report, *ibid*, p 144.
23 WTO Report, *ibid*, p 144.
24 Case Update, *ibid*.

The list of developing countries and the number of Panel and Appellate Body cases in which they have participated is as follows:

Country	*Number of cases*
(1) Brazil	12
(2) India	12
(3) Korea	9
(4) Argentina	8
(5) Mexico	5
(6) Chile	4
(7) Thailand	3
(8) Guatemala	3
(9) Honduras	2
(10) Antigua Barbud	1
(11) Dominican Republic	1
(12) Peru	1
(13) Turkey	1
(14) Egypt	1
(15) Pakistan	1
(16) Indonesia	1
(17) Malaysia	1
(18) Costa Rica	1
(19) Philippines	1
(20) Venezuela	1
(21) Ecuador	1
(22) Panama	1
Total: 22 developing countries	*71 cases*

The above figures indicate that only 22 developing member countries of the WTO have participated in the 89 final Panel and Appellate Body rulings of WTO cases adopted between 1 January 1995 and 15 June 2005. In addition, of those 22 countries, 13 have participated only once.

Consequently, only nine developing countries – out of the 148 member countries of the WTO – have participated more than once in the 89 Panel and Appellate Body rulings of WTO cases. Of these nine countries, six were from Latin America and the Caribbean: Brazil, Argentina, Mexico, Chile, Guatemala and Honduras. The other three were from Asia: India, Korea and Thailand.

DSU provisions on developing countries

The essence of the WTO dispute settlement system is to ensure that each and every member can exercise its rights under the covered agreements in equal terms.[26] This objective is not fulfilled, however, if, in practice, some Members have unrestricted access or can easily withstand the rigours, costs or duration of dispute settlement, and others cannot.

26 Article 3(2) of the DSU states that 'The *Members* recognise that it serves to preserve the rights and obligations of *Members* under the covered agreements ...'

The challenge, therefore, is to correct these inequities and to secure the trust and support of all developing countries in the dispute settlement system.

The DSU includes provisions which require that special treatment be given to developing and least-developed countries; they are attached as Annex C. They lack specificity, however, and are far weaker than those of the Enabling Clause adopted by/during the Tokyo Round in 1979.[27] Moreover, as stated earlier, those on special treatment for the least-developed have never been applied.

The Enabling Clause established the exception that 'differential and more favorable treatment to developing countries' would not be subject to the Most Favoured Nation Clause of Article 1 of GATT. This chapter will propose that this same exception be applied to the remedy of compensation when a party does not comply with a DSB ruling.

Corrective measures

As stated earlier, although the DSU grants all Members the same procedural rights in practice, their exercise by many developing countries is greatly limited.

Three categories of measures could help to overcome these limitations. The first consists of policy measures undertaken by the developing countries themselves. The second consists of legal measures which may require the approval of the WTO, but which may be sustained in the WTO and DSU provisions on special treatment for developing countries. The third consists of the establishment of a small claims court.

Policy measures

When circumstances allow, developing countries should increase their participation in the consultation process of Article 4 of the DSU. This process can serve to settle disputes diplomatically without the high costs of a formal adversarial process.

Another measure is participating as third parties in disputes which may affect them indirectly. Such participation would, likewise, not involve special costs, would familiarise governments with the procedural system and give them precious experience for dealing with future disputes. Third party participation has been used by developing and least-developed countries in a number of major WTO disputes. A case in point was the recent complaint of Australia, Brazil and Thailand against the sugar export subsidies of the European Community in which, of the 22 countries which participated as third parties, many were among the least developed.[28]

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27 'Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries' ('Enabling Clause') of 28 November 1979. See Analytical Index 'Guide to Gatt Law and Practice', Vol 1, pp 53-59.

28 These countries were Barbados, Belize, Canada, China, Colombia, Cote d'Ivoire, Cuba, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, New Zealand, Paraguay, Saint Kitts and Nevis, Swaziland, Tanzania, Trinidad and Tobago and the United States. See document WT/DS265/R, of 8 September 2004.

Finally, developing countries may greatly benefit by filing their claims collectively and/or joining the claims of industrialised countries against each other. When this has happened, the results have generally been favourable and this result would probably not have occurred had they proceeded on their own. This was the case when the United States filed a complaint against the European Community for its restrictions on the importation and sale of bananas. The complaint was joined by Ecuador, Guatemala, Honduras, Mexico and Panama, and favoured the complainants.[29] This was also the case of the complaint of the European Community against the United States for the application of the Dumping and Subsidy Offset Act of 2000 or 'Byrd Amendment'. Brazil, Chile, India, Indonesia and other countries joined this complaint which also favoured the complainants.[30]

Legal or procedural measures

The purpose of one category of legal measures would be to increase the transparency of the process. They would include, among others, public panel hearings, admitting *amicus curiae* and expanding the supply of professional services, both legal and technical.

Our recommendation is to establish a public registration of law firms and, separately, a public registration of consultancy firms or non-governmental organisations. Both would be under the direct supervision of the DSB.

As stated below, these proposals would supplement and not overlap with the legal services provided by the Advisory Centre of the WTO or the WTO Secretariat under Article 27(2) of the DSU.

Greater transparency

The philosopher Kant stated that 'what is not susceptible of publication is unjust'.[31]

The wild upheavals of Seattle, Cancun and even Geneva, have amazed this writer. Irrespective of the improvements required by the WTO system and frustrations with the ongoing Doha trade negotiations, the institutions established in Marrakesh, and most particularly the DSU, have clearly benefited developing countries.

The misguided image of the Organization can be attributed to blatant ignorance, but also to a state of general frustration which prevails in modern societies and which, from time to time, expresses its anger in wide and different directions. Countermeasures to dissipate these perceptions are therefore, to a certain extent, urgent.

The health and future of the institution requires, we believe, that its dispute-settlement mechanism be amply divulged and explained worldwide. Governments and civil societies of member countries should be fully apprised of Panel and Appellate Body procedures and decisions. In this regard, the following measures could be considered:

29 Document WT/DS27/AB/R.

30 Document WT/DS217/AB/R, WT/DS234/AB/R and WT/DSB/M/142, of 27 January 2003.

31 Quoted from Carlos Peña, *El Mercurio*, 22 September 2005, p 2, Santiago, Chile.

Opening panel hearings to the general public

At the time of writing, it was announced that for the first time in WTO history, the general public would be allowed to attend panel hearings. The relevant case is the 'Continued suspension of obligations in the EC hormones dispute'.[32] This bodes well for the WTO and its newly appointed Director-General, Pascal Lamy. It should, thus, help dispel false perceptions and improve the general image of the institution.

Public seminars

On the occasion of the ten-year anniversary of the WTO, first-level seminars have been held to divulge the work of its Appellate Body in different regions of the world. This writer had the privilege of attending the one held in Sao Paulo, Brazil, in May 2005.

Seminars and conferences which educate public opinion on the operation of the DSU and of cases relevant to developing countries should be held regularly. On account of the limited resources available, consideration should be given to holding joint regional programmes with, among other institutions, the World Bank, the Inter-American Development Bank, the Asian Development Bank, and/or the African Development Bank. In addition, similar programmes could be undertaken with specialised non- governmental organisations.[33]

Publications

There is worldwide interest in WTO dispute settlement issues. Yet, without prejudice to academic publications now dispersed in many periodicals and the internet, there is no regular WTO publication devoted exclusively to dispute settlement issues. A journal dedicated to analysing such matters is, in our view, long overdue and would certainly attract contributions from reputed authors. In this regard, the Foreign Investment Law Journal of the International Centre for the Settlement of Investment Disputes (ICSID) of the World Bank would be a good precedent to follow.

Support of amicus curiae (friends of the court)

Developing countries have generally been opposed to the admission of *amicus curiae* by non-state actors. This attitude probably reflects lack of experience, as recourse to this practice is generally accepted in common-law countries, and, in some cases, the closeness of their own societies.

The Appellate Body admitted *amicus* for the first time in the *Shrimp-Turtle* case,[34] basing itself on an interpretation of Article 13 of the DSU which provides that panels may seek information and technical advice from any individual or body.

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32 www.wto.org WTO News. Hearings of 12 and 15 September, 2005, US-EC, DS320 and Canada/EC, DS 321.

33 The International Centre for the Settlement of Investment Disputes (ICSID) has been holding joint annual conferences and seminars with the American Arbitration Association and the International Court of Arbitration of the International Chamber of Commerce.

34 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO docWT/DS58/AB/R, adopted 6 November 1998.

Although there are no regulations on the subject, in practice, panels have understood, on the basis of the *Shrimp-Turtle* case, that they have discretion to accept or reject such requests.

In the absence of regulations, some of the issues panels should consider when confronted with these requests, are:

(1) whether the request is indeed an *amicus* or is, instead, a post-argumentation brief on behalf of one of the parties after the lapse of the corresponding deadlines;

(2) whether the request is using confidential information, not available to the general public, which could raise the issue of breach of confidentiality by one of the parties;

(3) admission of an *amicus* should not imply access to confidential information or create additional duties for the Panel and/or the Appellate Body.

When circumstances warrant it, the admission of an *amicus* from NGOs will rarely affect the final outcome of a case but, in many cases, can be helpful to developing countries. Closing the door on them would reinforce charges of secrecy against the institution and not benefit developing countries. The current practice of case-by-case approval by panels should be supported for as long as there are no regulations on the subject.

Registration of law firms[35]

In ordinary life and under normal circumstances, non-participation in litigation is, generally, a good sign. However, when non-participation or the non-exercise of trade remedies results from an inability to sustain the costs, length and rigours of WTO litigation, the signal is exactly the opposite.

There is consensus that one major factor preventing greater participation among developing countries is the high cost and length of litigation. Related factors are, of course, their institutional weaknesses which result in an inability fully to understand and address the complexities of processes. An effective solution to these weaknesses is, of course, not within the realm of the WTO system but of other institutions or governments. However, there are specific measures that can be undertaken to help reduce the costs of litigation.

One major reason why developing countries cannot fully exercise their WTO rights is their inability to defray the legal costs charged by the select group of law firms which work in this area. A perpetuation of this situation could seriously affect and undermine the future of the system. Recognition of this problem led to the establishment, in July 2001 by a distinguished group of countries and organisations, of the Advisory Centre on WTO Law, as an intergovernmental organization independent from the latter. It provides advice and training on WTO law to developing countries and countries with economies in transition.[36] Without prejudice to the important contribution this Centre is making, a solution to the problem described above is not within its capacity.

35 On the subject of WTO *members* using outside counsel see 'Editorial Comment: Outside Counsel in WTO Dispute Processes', Marco CEJ Bronckers and John H Jackson, *Journal of International Economic Law* (1998) 155-58.

36 Information on the Centre may be obtained from www.acwl.ch

The current problem can be alleviated in several ways. In this connection, a distinction should be made between the legal services provided by law firms and the technical services provided by consultancy firms to which we refer below.

Regarding law firms, one possibility is the establishment by the WTO of a voluntary public registry of firms interested in representing or advising developing countries in WTO disputes. Attached to this registry would be an indicative table with the maximum suggested fees for the services involved. Their amount could be related to the per-capita income, GDP, trade volume or a combination thereof, of the interested countries. Appropriate regulations and a basic code of ethics would define the applicable rules and standards under the supervision of the DSB.

Such a registry would serve multiple purposes. First, it would create transparency within the WTO in connection with the identities and relations of law firms with developing countries. As the registry would be voluntary, there would be no obligation to disclose the fees charged or paid. Of course, either of the parties could make disclosures at their discretion which is not different from the present situation.

A second purpose would be the expansion of the number of law firms providing services to developing countries. It would be an incentive for broadening the spectrum of interested law firms and promoting healthy competition which should lead to a reduction of fees. In addition, it would probably attract law firms from developing countries and contribute to the diffusion, education and understanding of WTO issues before the public opinion of those countries. Moreover, it would open access to the provision of *pro-bono* services and reinforce the transparency of the dispute-resolution process.

Registration of consulting firms or non-governmental organizations (NGOs)

The provision of technical services by NGOs to developing countries in WTO disputes can be important. One reason this has rarely happened is because of the general lack of transparency of the litigation process. This can be attributed to the developing countries themselves which have – mistakenly, in our view – opposed efforts towards opening the process to NGOs or to the admission in appropriate cases of *amicus curiae*. Thus, as is demonstrated by the Peru–EC case mentioned below, if NGOs were to be regularly and adequately informed, opportunities could arise that would greatly benefit them.

The 'sardines' dispute is one of those rare situations in which the support provided by an NGO to a developing country enabled the latter to prevail against the European Union.[37] In this case, Peru challenged an EC regulation that maintained that only one specie, the *Sardina pilchardus Walbaum*, could be marketed under the name 'sardines' in the EC. This meant similar species which inhabit the Pacific Ocean and were marketed by Peru could not be sold in Europe. Without prejudice to the many valid arguments submitted by Peru in support of its claim, what was instrumental to the final outcome was the support the country received from the UK's Consumers' Association and the *pro-bono* legal services of Clyde & Co. What was unprecedented about the panel's decision, which was confirmed on appeal, was that it recognised the arguments made by a non-party in a letter attached by Peru; those of the Consumers' Association. Another twist was that what prompted

37 DS/231/AB/R and DSB decision of 26 November 2002.

the participation of the largest European consumer group and its lawyers was the posting of Peru's submissions for the case on the website of the Advisory Centre on WTO Law, which was assisting Peru.[38]

The above case established four important precedents. First, it illustrates the importance for developing countries of publicising and divulging their WTO cases. Second, it proves the critical assistance NGOs can provide to developing countries in WTO disputes with large countries. Third, it shows the influence the submissions from an NGO can have in a highly controversial dispute. Fourth, it highlights the importance of the legal assistance the Advisory Centre on WTO Law can provide to developing countries.

Based on the above, a voluntary public registry of consulting firms or, more generally, of NGOs interested in providing services to developing countries would be amply justified. Such a registry would contribute to the transparency of the dispute settlement process and create collaboration opportunities between NGOs and developing countries for the benefit of the latter. This registry would be separate from and different to that of law firms but would include similar requirements to those already indicated. A table of indicative maximum fees would be attached and the DSB would have the responsibility for adopting and supervising the appropriate regulations and code of ethics.

Small claims court

The case for the establishment of a small claims court has been cogently developed by the chief economist of the Swedish national board of trade.[39] The author highlights the unfairness of the WTO's procedures which apply uniformly and indiscriminately to large and small countries without differentiating between the sizes of claims or countries.

Thus, a US$1,000,000 claim which would represent 1.47 per cent of exports or 0.17 per cent of GDP for Burundi would be totally irrelevant for the United States as it would represent 0.000025 per cent of exports or 0.000009 per cent of GDP. At least some 25 member countries of the WTO would be in similar situations.[40]

Alongside a demonstration of the need for a court that addresses the complaints of 54 per cent of the WTO Membership which, to date, have not exercised their rights before the DSU, the author lists the following issues that would have to be resolved for its establishment:

(1) What type of claims and for what amount?
(2) Who would be the judges? Ad-hoc panels or specialised standing judges?
(3) What countries would have access to the court and under what standards?
(4) Would small court rulings have the same procedural value as present WTO rulings?
(5) Would appeals be available and before whom?

38 See the excellent description 'EC Sardines: A New Model for Collaboration in Dispute Settlement?' by Gregory Shaffer and Victor Mosoti, *Bridges*, October 2002, pp 15, 16, 22, ICTSD.

39 Hakan Norsdtrom, 'Access to Justice in the WTO – the case for small claims procedures', Paper submitted by the author in a personal capacity as part of the International's Centre for Trade and Sustainable Development project on WTO Dispute Settlement and Sustainable Development, Sao Paulo, Brazil, 22-23 June 2006 (hereafter 'Nordstrom').

40 Nordstrom, p 2.

Compliance and implementation of DSB's rulings

Article 21(1) of the DSU states that 'prompt compliance with the recommendations or rulings of the DSB is essential in order *to ensure effective resolution of disputes to the benefit of all* Members' (emphasis added). This basic principle is reinforced by Articles 3(7) and 22(1) of the DSU.

The last sentence of Article 3(7) states that 'The *last resort* which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis *vis-à-vis* the other Member, subject to authorisation by the DSB of such measures' (emphasis added).

This 'last resort' principle of article 3(7) is reiterated by article 22(1) which adds that '... neither compensation nor the suspension of concessions or other obligations *is preferred to full implementation* of a recommendation to bring a measure into conformity with the covered agreements' (emphasis added).

The above provisions state the very fundamental principle that compliance with the DSB's rulings and recommendations *benefit all* Members and is to be preferred to compensation or suspension of concessions or other obligations. Thus, prompt and full compliance is basic to the system and benefits all Members, but especially, developing countries because they lack the resources to withstand lengthy litigation.

The record of the last ten years demonstrates that, in general, Members have complied with the DSB's recommendations and rulings. Suspension of concessions and other obligations have been largely the exception and requests for compensation have not been made.[41] The record also shows that requests for suspension of concessions and other obligations have been made mostly by the larger industrialised countries against each other. By contrast, it is only on rare occasions that developing countries have retaliated against industrialised countries. A notable exception was the banana case where Ecuador, after an acrimonious and protracted dispute with the EC, which started in 1997, obtained the approval of the DSB to use cross-retaliation by means of countermeasures under a different agreement, in this case under the TRIPS Agreement.[42] Ecuador's action was remarkable in that, instead of suspending concessions in sectors which the EC would have been indifferent to, it selected the only one where suspensions were really meaningful. In the end, however, Ecuador decided not to retaliate because of a change in the EC's banana import regime.[43]

Developing countries have rarely requested suspension of concessions or other obligations because, being unable to sustain the costs of lengthy disputes, they generally do not reach those final stages. This is especially true when confronted by opponents which apply a deliberate strategy of protracting compliance with the DSB's recommendations. Faced with this reality, rather than pursue their rights for an indefinite number of years, they will be inclined to compromise their rights at the very early stages of the dispute. By contrast, industrialised countries have unlimited resources and count on the quick exhaustion of their adversaries by mere attrition. This has led to the practice of buying out which has increased the

41 In the WTO's ten years, 'in at least 15 cases retaliation has been authorised due to lack of compliance, and several cases are still pending compliance by the losing party'. See WTO Report, *ibid*, p 144.

42 'Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS).

43 WTO report, *ibid*, p 46.

asymmetries in the Members' relations and been detrimental to the system.[44] This anomaly defeats one basic purpose of the dispute settlement process, alienates a significant number of Members and can endanger the future of the system.

The proposals given below would introduce corrections or innovations to the dispute settlement rules with the purpose of ensuring developing countries' procedural rights. They consist of incentives for prompt compliance or disincentives to combat abusive postponements of DSB's rulings, and would reinforce or supplement the existing provisions of the DSU.

Some of the measures proposed include, among others: guarantees of execution, provisional measures, award of legal and administrative costs, retroactivity, application of monetary compensations, and effective retaliation.

Guarantees of execution

The second sentence of article 19(1) of the DSU states that,

> 'In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.'

The above provision is consistent with the principles of last resort of compensation and suspension of concessions, and preference for full implementation, of Articles 3(7) and 22(1), respectively, mentioned earlier.

The record of the last ten years indicates that the effective and prompt fulfilment of the above principles is critical for developing countries. The record also shows that industrialised countries in their disputes with the former have on occasion abusively delayed their implementation of the DSB's recommendations. Indeed, the Sutherland Report has stated that '... some countries, including some of the major trading partners, such as the US and the EU, are acting in a recalcitrant manner, and not taking measures that would effectively, and in a timely manner, fulfil their obligations'.[45]

Based on the above Article 19(1) and the circumstances of a particular case, a Panel and/or the Appellate Body should have the authority to order that, in disputes concerning developing countries, implementation of their recommendations against industrialised countries be adequately guaranteed. Such order should be an integral part of the corresponding panel or Appellate Body recommendation. It could consist of a surety bond or financial security for an amount at least equivalent to that of the nullification or impairment of the benefits concerned. To determine this amount, the opinion of an expert or arbitrator could be required. Failure to provide the guarantee within an established time period would be tantamount to non-compliance with the recommendations and would enable the complaining party to request compensation or suspension of concessions in accordance with Article 22 of the DSU.

The exclusive purpose of the guarantee would be to ensure prompt compliance with the Panel's or Appellate Body's recommendations. It would be deposited and

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44 'To allow governments to "buy out" of their obligations by providing "compensation" or enduring "suspension of obligation" also creates major asymmetries of treatment in the system. It favors the rich and powerful countries which can afford such "buy outs" while retaining measures that harm and distort trade in a manner inconsistent with the rules of the system.' Sutherland Report, *ibid*, p 54.

45 Sutherland Report, *ibid*, p 54.

administered by the DSB and subject to its rules and regulations. It would be returned upon the satisfactory fulfilment of the DSB's rulings and executed only if, after the lapse of the applicable deadline, implementation had not been forthcoming and the complaining party chose compensation in lieu of suspension of concessions or other obligations. Its amount would be charged to that of compensation and adjusted in accordance with the pertinent ruling.

Provisional measures

The DSU is different from most international settlement of disputes mechanisms[46] in that it does not consider or envisage provisional measures for the immediate protection of the legitimate rights of complainants. Such measures could include – based on the injury being suffered by the complaining party – the temporary discontinuance or suspension, prior to the panel's recommendations, of the challenged measures.

The absence of this remedy gives unprincipled defendants ample room for lengthening the dispute settlement process. For complainants of developing countries – and complainants in general – this remedy would ensure their legitimate rights and contribute to the credibility of the system.

However, as opposed to the requests for guarantees of execution referred to earlier, there is no specific legal authority for granting these measures. Their introduction would require amending the dispute settlement procedures and specifying the conditions for their adoption.

The award of legal and administrative costs

In so far as legal and administrative costs deter broader developing country participation, the inclusion of these costs in Panel or Appellate Body rulings against industrialised countries, would help increase developing country participation and stimulate timely compliance by the former with the DSU's procedures.

Its adoption should be within the powers of the DSB and its implementation be coordinated with our recommendation of establishing a public registry of law firms. These two recommendations should reduce the costs of litigation and promote greater participation of developing countries in the dispute settlement system.

Retroactive application of the DSB's recommendations

The non-retroactivity of Panel and Appellate Body rulings and recommendations is an incentive for non-compliance with the multilateral trade agreements. It has been noted that when countries apply safeguards, their markets can remain closed for almost three years without ulterior consequences to the importing country whilst causing irreparable damage to the other party.

However, neither the DSU nor the covered agreements, authorise the retroactive application of these recommendations. This situation is not consistent with the rules of international arbitration institutions or, indeed, with municipal law which,

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46 For example, Article 47 of ICSID states: 'Except as the parties may otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of the party.'

generally, allow, in the appropriate circumstances, the retroactive application of final court awards or rulings.

The matter was raised in the context of the Agreement on Textiles and Clothing (ATC) and it was resolved that ' ...in the absence of an express authorisation in Article 6.10, ATC , to backdate the effectivity of a safeguard restraint measure, a presumption arises from the very text of article 6.10 that such a measure may be applied only prospectively ....'[47]

On the assumption that an agreement to give retroactive effect to Panel and/or Appellate Body's recommendations existed, the issue which would need to be resolved would be to determine from which date the recommendations would apply. Would it be from the date of the inconsistent measure, or from the date on which consultations started? Or, would it be from the date the panel was established?

Compensation

The fourth sentence of Article 3(7) of the DSU states that 'the provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of a measure which is inconsistent with a covered agreement'. This last resort principle is reiterated in Article 22(1) which adds that neither compensation nor suspension of concessions is to be preferred to full implementation.

Compensation and suspension of concessions are temporary remedies whose ultimate purpose is to force compliance with a Panel or an Appellate Body ruling and which, therefore, should cease upon withdrawal of the inconsistent measure.

The use of compensation could be important to developing countries which in a situation of last resort will always prefer an immediate remedy to one whose execution may take many years. Moreover, if the appropriate amendments are effected and developing countries can indeed exercise this remedy, its mere availability should prompt industrialised countries towards timely compliance with a Panel or an Appellate Body decision. Such an amendment would specify that remedies would include the grant of financial compensation to the complaining developing party by the industrialised party that was found to be in violation of the DSB's rules.[48]

Until now, compensation has never been used. There would be two basic reasons for its non-application. The first is that, under the Most-Favoured Nation clause of Article 1 of GATT, all other Members could then invoke this remedy and, thus, render it impracticable.

However, the Enabling Clause referred to earlier, established, as an exception, the non-application of Article 1 of GATT to 'the differential and more favorable treatment to developing countries'. It, thus, constitutes a precedent which should justify its application to a compensation request from a developing country. The acceptance of this exception would not allow other countries to invoke the most-favoured nation clause of Article 1 of GATT.

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47 *US – Underwear*, p 14, DSR 1997. WT/DS24/AB/R. Quoted from 'WTO Appellate Body Repertory of Reports and Awards, 1995-2004', compiled by the Appellate Body Secretariat, p 281.

48 An amendment proposal along these lines has been made by Pakistan. See WTO document WT/GC/W/162, cited by Delich, *ibid* p 71.

The other objection is that its amounts could be enormous and impossible to execute. However, the money value of rulings which have favoured developing countries have not, until now, been huge.

Another consideration in favour of this remedy is that payments should not necessarily be of lump sums. Payments in reasonably scaled instalments would probably be satisfactory.

On the other hand, if the financial guarantees of execution of Panel or Appellate Body rulings referred to earlier, are approved, and the implementation of recommendations is not executed within the time period established in Article 22(1) of the DSU, those guarantees could, in that event, be used to pay compensation.

Principles similar to those described above are currently in force in the US-Chile Bilateral Free Trade Agreement (FTA),[49] and could be considered by the WTO. Pursuant to this Agreement, compensation, the payment of monetary assessments and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity, nullification or impairment of the benefits reasonably expected from the application of specific provisions of that Agreement.[50]

The above compensation is available when a complaining party considers that the party complained against has failed to carry out the action plan agreed for implementation of the panel's final report. If the parties cannot agree on compensation, or the alleged wrongdoer fails to observe its terms, the complaining party may suspend, in accordance with the terms of the Agreement, the application to the other party of benefits of equivalent effect.[51] However, the complaining party may not suspend benefits if the party complained against provides written notice that it will pay an annual monetary assessment. If the parties cannot agree on the amount of the assessment, its amount shall be set at a level, in US dollars, equal to 50 per cent of the level of the benefits the panel determines to be of equivalent effect.[52] The monetary assessment shall be paid to the complaining party in equal, quarterly instalments beginning 60 days after the party complained against gives notice it intends to pay an assessment. Yet, when the circumstances warrant it, the assessment may be paid into a fund for appropriate initiatives to facilitate trade between the parties, including reducing reasonable trade barriers.[53]

The provisions of the Chile-US FTA, which are replicated in the US-Singapore FTA, demonstrate the practical feasibility of compensation when a party fails to comply with a panel's final ruling.

Suspension of concessions or other obligations (retaliation)

When a Member fails to comply in time with the DSB's recommendations and rulings and the parties cannot agree on a satisfactory compensation, the ultimate remedy for the complaining party is to request authorisation to suspend concessions

49 See article 22.14(3) and footnote of the Chile-US Free Trade Agreement which came into force on 1 January 2004. See www.ustr.gov/trade_agreements/bilateral/Chile_FTA/final_texts.

50 Article 22.15(2) of the Chile-US FTA, *ibid.*

51 Article 22.15 (2) of the Chile-US FTA, *ibid.*

52 Article 22.15(5) of the Chile-US FTA, *ibid*

53 Article 22.15(6) of the Chile-US FTA, *ibid.*

or other obligations under a covered agreement.[54] However, the level of suspension must be 'equivalent to the level of the nullification or impairment'.[55]

Due to the differences in their levels of development, suspension of concessions by a developing country rarely have an impact on an industrialised country, and can be ignored by the latter. Moreover, they increase the price of imported goods and, thus, hurt consumers in the retaliating country. In addition, its execution can be excessively prolonged, costly and frustrating which explains why very few developing countries have had the resources and tenacity fully to exercise this remedy[56]

The costs and pains of exercising retaliation is illustrated by the banana case referred to below. It was started in 1993 under GATT by a group of producing and marketing countries against individual European countries and was terminated by mutual agreement in 2002. However, it has cropped up again in 2005.

This case is unique for a number of reasons. First, it took over ten years for the complainants to end the respondents' import restrictions on bananas. Second, the respondents exhausted every procedural recourse or device available to prevent or delay compliance with the DSB's rulings. Third, the complainants, especially Ecuador, showed unwavering determination to surmount every procedural obstacle and follow the process to its final end. Fourth, it was the first WTO case where a developing country was authorised to impose sanctions on an industrialised country. Fifth, it was the first time the DSB authorised cross-retaliation. Sixth, the authority to apply cross-retaliation probably induced settlement of the dispute. Lastly, it highlighted the 'sequencing problem posed by' Articles 21 and 22 of the DSU which is referred to below.

Description

The first complaint was made under GATT Article XXIII by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela against the import restrictions on fresh bananas by individual European countries. The panel report of 3 June 1993 found that the quantitative restrictions on the import of bananas was inconsistent with GATT Article XI(1) and that the preferences given to ACP countries[57] were inconsistent with Article 1 of GATT[58]

On February 1993, the EEC adopted Council Regulation No 404/93 on the common organisation of the bananas market and the same five complainants requested the establishment of another GATT panel under Article XXIII. The panel report of 11 February 1994, found that the new EEC regulations remained inconsistent with GATT Articles I, II and III.[59] Yet, in December 1994, the EEC was

54 Article 22(1) of the DSU.

55 Article 22(4) of the DSU.

56 An exhaustive and compelling description of the retaliation process is given by Robert Z Lawrence, 'Crimes & Punishments? Retaliation under the WTO', Institute of International Economics, Washington DC, October 2003.

57 ACP countries are certain countries from Africa, the Caribbean and the Pacific regions which received trade benefits from the European Union under the former Lome and now under the Cotonou Convention.

58 GATT document DS32/R of 3 June 1993.

59 GATT document DS/38/R of 11 February 1994.

granted a waiver under GATT Article XXV(5) to bring its tariff preferences to ACP countries under the Lome Convention in conformity with Article 1 of GATT.[60]

On 7 June 1996, another panel was established to examine the complaints of Ecuador, Guatemala, Honduras, Mexico and the US. The complaints stated that the EC's tariff discrimination went far beyond the waiver granted and that regulation No 404/93 continued to be inconsistent with GATT 1994. Four separate panel reports, upheld by the Appellate Body reiterated that the EC's regulations were inconsistent with GATT Articles I, III, X and XIII, with article 1 of the Licensing Agreement, and Articles II and XVII of the GATS.[61] The Appellate Body and panel reports were adopted by the DSB on 25 September 1997.[62]

The reasonable period of time within which, under Article 21(3)(c) of the DSU, the EC had to bring its import regime in conformity with the DSB's rulings was determined by binding arbitration.[63] In addition, as the EC disagreed with the consistency of the DSB's rulings with the covered agreements, the matter was referred by Ecuador, under Article 21(5), to the original panel which concluded that the implementation measures taken by the EC were not fully compatible with its WTO obligations. The panel report was adopted by the DSB on 6 May 1999.[64]

In November 1999, after talks on compensation failed, Ecuador requested sanctions worth US$201.6 million through cross-retaliation by suspending concessions under the TRIPS, GATS and GATT 1994 Agreements. It invoked Article 22(3)(c) which allows a complaining party – when it considers that it is not practicable or effective to suspend concessions on other sectors under the same agreement, and the circumstances are serious enough – to suspend concessions or other obligations under another covered agreement. The matter was referred to the arbitration of the original panel pursuant to Article 22.6.

The arbitrators found Ecuador could request authorisation to suspend concessions and other obligations under GATT 1994 and under GATS, and (to the extent that suspensions were insufficient to reach the level of nullification and impairment determined by the arbitrators), under TRIPS in the following sectors of this Agreement: section 1 (copyright and related rights); Article 14 on protection of performers, producers of phonographs and broadcasting organisations; section 3 (geographical indications); and section 4, industrial designs. On 18 May 2000, the DSB authorised Ecuador to suspend concessions to the EC as requested.[65]

On 30 April 2001, Ecuador and the EU announced that they had reached an agreement on the application of EC Council Regulation No 216/2001 of 29 January, which established a first come-first served new system of tariff quotas. Pursuant to this agreement, upon implementation of the new import regime: 'Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year *vis-à-vis* the EC would be terminated.'[66] On 21 January 2002 the

60 GATT document L/7604 of 9 December 1994.
61 General Agreement on Trade in Services (GATS).
62 WTO document WT/DS27/AB/R of 1997.
63 WTO document WT/DS27/15.
64 WTO document WT/DS/OV/24, of 15 June 2005, p 158.
65 WTO document WT/DS/OV/24, of 15 June 2005, p 194.
66 'Understanding on Bananas between the EC and Ecuador' of 30 April 2001, WTO document WT/DS/OV/24, of 15 June 2005, p 194.

EC announced that, through Council Regulation No 2587/2001, the EC had implemented the final phase of the Understanding with the US and Ecuador.[67]

The latest development is that on 25 September 2005, the EC submitted a request for arbitration of a new most-favoured nation banana tariff of 187 euros per ton under a new regime that would replace Regulation No 2587/2001 to the DSB. This tariff proposal would eliminate previous quota ceilings, but has met opposition from Latin American producers.[68] The discussion remains outstanding at the time of writing

Cross-retaliation.

As a result of the understanding Ecuador reached with the EC, the DSB's authorisation to apply cross-retaliation under TRIPS was never applied. However, the mere fact it was approved has given this remedy significant and unforeseen consequences. At the same time, its approval may also indicate the insufficiency which ordinary retaliation has for developing countries in their disputes with industrialised countries.

In the case of Ecuador, its sanctions were to be imposed by a country of 12 million inhabitants and a GNP of about US$20 million against a continental bloc of 374 million inhabitants and a GNP of US$8,000,000 million.[69] Retaliation in the same sector was, thus, considered to be ineffective.

Ecuador stated that its retaliatory action resulted 'from the exhaustion of the channels available under the multilateral dispute settlement system'[70]. It further stated that its objective was not to seek punishment but 'to induce the violating Member to comply with the conclusions and recommendations of the DSB'. It added, 'in the banana case this means that the European Community must introduce a new banana import regime that is compatible with WTO rules'.[71]

The authorisation given to Ecuador to apply cross-retaliation under TRIPS was instrumental to the final understanding reached with the EC. The question, now, is whether this remedy may also be effective for developing countries in future disputes. As its application has not been tested, careful examination of its practicality or usefulness is imperative.

Retaliatory measures under TRIPS will normally consist of compulsory legislation as occurred, in a different context, in Brazil.[72] Such measures will involve the disputing parties and also the private holders of patents or trademarks who will, most certainly, dispute such action in the local or the international courts. In

67 Document WT/DS/OV/24, of 15 June 2005, p 196.

68 www.ictd.org *Bridges Weekly*, 14 September and 5 October 2005.

69 Cristian Espinosa, 'The WTO Banana Dispute: Do Ecuador's Sanctions Against the European Communities Make Sense?' *Bridges*, pp 3 and 10, Year 4, No 4, May 2000 (hereafter, 'Espinosa').

70 Espinosa, *ibid.*

71 Espinosa, *ibid*, p 3.

72 Under law 9279, of 1997, Brazil permitted the issuance of compulsory licences in cases where patent holders chose to supply the market through imports rather than through local production. The measure was aimed principally at the pharmaceutical industry in connection with the high prices of drugs for AIDS. See Keith Mascus. 'Benefiting from Intellectual Property Protection', in Hoekman, *ibid*, p 375.

addition, before retaliating, a country would have to assess its needs and the national availability of alternative products in substitution of those that would be banned. The matter is complex as it has to be assumed that the affected products are providing a needed service in the country concerned.

We have learned that, on 6 October 2005, Brazil requested authorisation to suspend its obligations with the US under the TRIPS and GATS agreements for the amount of US$1.037 billion. This request was made to induce compliance with the DSB's ruling against the US subsidies on cotton. Brazil is targeting US patents, copyrights, trademarks, industrial designs, and the protection of undisclosed information. It also proposes to inflict damage by denying access to US enterprises in the business, communication, construction, distribution, financial, tourism, and transport services sectors.[73] As was to be expected, the US responded on 17 October arguing that both the type and amount of Brazil's retaliation were inappropriate and submitted a request for arbitration to the DSB.[74]

These considerations would indicate that cross-retaliation under TRIPS or GATS may be a powerful remedy to induce compliance with the DSB's rulings but that, at the same time, the convenience and usefulness of its application must first be carefully assessed. In addition, cross-retaliation can prompt an escalation of the dispute into other areas with unforeseen and dire consequences for both parties.

Sequencing

The Banana case referred to earlier highlighted the sequencing issue raised by Articles 21 and 22 of the DSU.

According to Article 21(4) of the DSU, the total time to implement a Panel or Appellate Body report shall not exceed, absent exceptional circumstances, 18 months from the date of adoption of such report. However, this period can still be extended if 'there is disagreement as to the existence or consistency with a covered agreement of the measures taken to comply with the recommendations and rulings' of the DSB. If such a situation arises the matter may again return to the original Panel or, if the Panel considers it cannot provide its report within 90 days, the matter will be referred to the DSB.[75]

For the reasons listed earlier, there have been few developing countries that have pursued a case until its final Panel or Appellate Body ruling. It has, therefore been damaging to the dispute settlement system that in the *only* case in which a developing country prevailed over an industrialised country – the Banana case – the contradictory timelines of Articles 21 and 22 of the DSU, enabled the EC endlessly to prevent compliance with the DSB's rulings. The proposal of a new Article 22.2(a)(iii) which would require parties to await the completion of compliance reviews (up to nine months, if the panel report is appealed), before they could obtain authorisation from the DSB to apply retaliation, appears to be a reasonable solution to this problem.

73 *Bridges Weekly*, ICTSD, Vol 9, No 34, 12 October 2005.
74 *Bridges Weekly*, ICTSD, Vol 9, No 35, 19 October, 2005.
75 Article 21(5) of the DSU.

Conclusions

Our analysis, though not exhaustive, has highlighted the justification for adopting concrete measures that may increase and improve developing country participation in WTO dispute settlement. Some measures can be justified and supported by the existing provisions on special and differentiated treatment for developing countries which are listed in Annex C. Others would require treaty amendments. The persistent lack of full participation of developing countries in the entire process, or participation limited to just a few dozen countries will not benefit the system but can hurt the objectives of international trade and the future of the WTO.

ANNEX A

Least developed countries Members of the WTO[76]

Asia	*Africa*	*Oceania*	*Caribbean*
Bangladesh	Angola	Solomon Islands	Haiti
Cambodia	Benin		
Maldives	Burkina Faso		
Myanmar	Burundi		
Nepal	Central African Republic		
	Chad		
	Democratic Republic of Congo		
	Djibouti		
	Gambia		
	Guinea		
	Guinea-Bissau		
	Lesotho		
	Madagascar		
	Malawi		
	Mali		
	Mauritania		
	Mozambique		
	Níger		
	Rwanda		
	Senegal		
	Sierra Leone		
	Togo		
	Uganda		
	Zambia		

Total: 31 Countries

76 The list of least developed countries is taken from the Office of the High Representative for the Least Developed Countries, United Nations.

ANNEX C

DSU's provisions on developing and least developed member countries[78]

Article 3

General provisions

12. 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 the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

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

Article 8

Composition of Panels

10. 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 panellist from a *developing country Member.*

Article 12

Panel Procedures

10. 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.

11. 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.

Article 21

Surveillance of implementation of recommendations and rulings

2. 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.

7. 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.

8. 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.

Article 24

Special procedures involving least-developed country Members

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.

Article 27

Responsibilities of the Secretariat

2. 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.