

JUSTICE FOR ALL IN THE DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANIZATION?

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I. INTRODUCTION

The World Trade Organization (WTO) was established in 1995 with the purpose of extending trade disciplines to services and intellectual property rights. To ensure the efficacy of the realization of this objective, it was necessary to ensure that the organization has a broad membership. In the General Agreement on Tariffs and Trade (GATT) period (1947–1995), the membership was small and consisted mostly of Western developed countries, a “gentlemen’s club” of trading nations. The new WTO Agreements are important to ensure trading opportunities for the old club members in developing countries. Possibly even more important in ensuring a wide membership for the WTO is guaranteeing the enforcement of intellectual property rights on newly industrialised or industrialising countries mostly in Asia.

Attracting countries into the WTO was done by forecasting not only trade opportunities but also by promising a fairer trading system, ensuring the system would promote sustainable development and that positive efforts would be made for developing countries.

The dispute settlement system is a crucial element in the realization of the hopes of the WTO members and the realization of the organization’s objective. This Article will review the failure of the system to live up to the high hopes that were created at the inauguration of the system as well as the proposed improvements.

II. DEVELOPING COUNTRIES IN THE DISPUTE SETTLEMENT SYSTEM

The position of developing countries in the WTO dispute settlement system is ambivalent.¹ Their position is procedurally better than in the GATT period because the WTO is a rule-based system and not a power-based system.² It is generally accepted that a rule-based system with a quasi-judicial dispute settlement system serves the interests of developing

¹ GARY P. SAMPSON & W. BRADNEE CHAMBERS, *DEVELOPING COUNTRIES AND THE WTO: POLICY APPROACHES* (2008), available at http://archive.unu.edu/unupress/sample-chapters/developing_countries_and_the_WTO_web.pdf (“WTO law suffers from the same ambivalence as WTO politics.”).

² It is important to note that only a small number of developing countries were GATT contracting parties. Most functioned outside the system and were therefore free to engage in protectionist, trade-restricting, and import-substituting policies. See generally Olu Fasan, *Global Trade Law: Challenges and Options for Africa*, 47 J. AFR. L. 143 (2003) (discussing the imbalance in the WTO and how the imbalance can be dealt with so that less wealthy countries can take advantage of a rules-based system).

countries, least-developed countries (LDCs) and small economies better.³ Renato Ruggiero, first Director-General of the WTO, declared that the dispute settlement system is “an important guarantee of fair trade for middle-sized exporting nations.”⁴

But developing countries have been among the most vocal critics of the dispute settlement system. Their confidence was already shattered by what has been described as the betrayal of the Uruguay Round and the disregard of their interests in the Sutherland report.⁵ As developing countries face an increasingly independent and activist dispute settlement system enforcing a substantive body of rules that they regard as biased against them, most developing countries have become more fearful of the system and its consequences.⁶ The African Group sharply notes that “in their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement.”⁷ Fasan writes that developing countries have become hostage to the quasi-judicial enforcement of skewed rules.⁸

An impartial dispute settlement system based on legal rules may be more advantageous to developing countries but it would be naive to assert that the WTO is based on rules only and not on power.⁹ Empirical analysis suggests that the system still reflects power-based relationships.¹⁰ The Quad Countries (EU, U.S., Canada, and Japan) gain more out of the dispute settlement system because they can afford to employ a full-time team to

³ See John Whalley, *Developing Countries and System Strengthening in the Uruguay Round*, in *THE URUGUAY ROUND AND DEVELOPING ECONOMIES* 409 (Will Martin & L. Alan Winters eds., 1996); James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 *REV. INT'L POL. ECON.* 543 (2004) (“Conventional wisdom suggests that moves to establish binding, third party arbitration in international law generally favor smaller, less powerful states.”).

⁴ Renato Ruggiero, Dir. Gen., WTO, Address to the Korean Business Association (Apr. 17, 1977), available at http://www.wto.org/English/news_e/spr_e/seoul_e.htm.

⁵ See Donald McRae, *Developing Countries and “the Future of the WTO,”* 8 *J. INT'L ECON. L.* 603 (2005) (“The Uruguay Round is often portrayed as a betrayal. Developing Countries agreed to TRIPS in exchange for a liberalization of agricultural and other trade that never eventuated.”).

⁶ See generally Fasan, *supra* note 2 (discussing developments in the wake of the 1994 Uruguay Round).

⁷ Negotiations on the Dispute Settlement Understanding, *Proposal by the African Group*, para. 2, TN/DS/W/15 (Sept. 15, 2002) [hereinafter African Group Proposal].

⁸ Fasan, *supra* note 2, at 162.

⁹ Asif H. Qureshi, *Participation of Developing Countries in the WTO*, 47 *J. AFR. L.* 174–75 (2003).

¹⁰ See Peter Holmes et al., *Emerging Trends in WTO Dispute Settlement: Back to GATT?* (World Bank Policy Research Paper, N° 3133, 2003).

monitor the reports, to safeguards their rights, and to enforce their entitlements. It is commentators from those countries that are most hostile to strengthening procedural advantages for developing countries and LDCs.¹¹ The current procedural set-up ostensibly based on sovereign equality hides a weighted voting system that entrenches real power in the hands of the few.¹² This “organised hypocrisy in the procedural context” serves them well and is safeguarded by their resistance to meaningful change.¹³ Only a minority of developing countries can benefit from the system. Countries like Argentina, Brazil, Chile, China, India, Mexico, South-Africa, and Thailand are well placed to use the system to their advantage. These countries are atypical developing countries and are better classified as emerging economies.¹⁴

Most developing countries and all LDCs can be only be disappointed in the system despite it being heralded as one of the great success stories.¹⁵ The African Group, of which thirty-four members are LDCs, formulates it succinctly: “Experience has shown that the [dispute settlement system] has not satisfactorily and clearly aimed in its operation to contribute towards the tangible attainment of the development objectives of the WTO Agreement.”¹⁶ Who could disagree with former Director-General Supachai Panitchpakdi’s understated observation that “[for] all its virtues, . . . [the] system is not perfect”?¹⁷ Many developing countries, and especially LDCs, cannot afford to mount a serious defense if they are facing a claim; let alone identify and prepare a case.¹⁸ Only one case has ever been brought by an LDC and not a single panellist from an LDC has been appointed.¹⁹ This

¹¹ Ignacio Garcia-Bercero & Paolo Garzotti, *DSU Reform: What Are the Underlying Issues?*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 123, 146 (Dencho Georgiev & Kim Van der Borgh eds., 2006).

¹² See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 342 (2002).

¹³ *Id.*

¹⁴ See Mohan Kumar, *Dispute Settlement in the WTO: Developing Country Participation and Possible Reform*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 11, at 177, 182.

¹⁵ See Supachai Panitchpakdi, *Foreword*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 11, at 9, 9; Kumar, *supra* note 14, at 179–80. For statistics on participation of developing countries and LDCs, see Qureshi, *supra* note 9, at 173; Pretty Elizabeth Kuruvila, *Developing Countries and the GATT/WTO Dispute Settlement Mechanism*, 31 J. WORLD TRADE 171, 203 (1997); CONSTANTINE MICHALOPOULOS, DEVELOPING COUNTRIES IN THE WTO 167 (2001).

¹⁶ African Group Proposal, *supra* note 7, at 1.

¹⁷ See Panitchpakdi, *supra* note 15, at 9–10.

¹⁸ See Amin Alavi, *African Countries and the WTO’s Dispute Settlement Mechanism*, 25 DEV. POL. REV. 25, 31–32 (2007) (noting the problem of “the rising cost of initiating litigation, which many countries are not able to afford”).

¹⁹ *Dispute Settlement: Dispute DS 306; India – Anti-Dumping Measure on Batteries from*

unbalanced representation in panels and the Appellate Body was noted with concern by the African Group that stressed that a “balanced geographical representation will assist in promoting a balanced [dispute settlement] that reflects the various backgrounds and inherent concerns of the entire WTO membership.”²⁰

A few developing countries have used the opportunities offered by intervening in dispute settlement procedures.²¹ India and China, for example, actively use the third party intervention to learn the process and train their diplomats to be better prepared. Any developing country that has the human capacity to be so involved, even if only to observe the proceedings as a passive observer without filing written submissions, would be well advised to make use of this learning opportunity.²² But again, this opportunity reveals an important difference in the level of engagement of developing countries and the main players in the system. The EU and the U.S., as a matter of strategy, declare a third party interest in almost every Appellate Body Proceeding that they are not involved in as a disputant.²³ The Appellate Body actively encourages such third party participation and takes care to glean their views and opinions.²⁴ It is, for the small number of countries that can afford to be actively involved in every case, a valuable opportunity to give direction to the reasoning of the Appellate Body and by extension to the direction of WTO law.

Access to justice is thus a genuine issue for many WTO members to such an extent that it brings the legitimacy of the system in question if it not forcefully addressed. Hence, the system demands structural and substantive reforms to address this if the system wants to remain credible for all WTO members.²⁵ Indeed, the African Group states:

Bangladesh, WORLD TRADE ORG., http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds306_e.htm (last visited Aug. 20, 2011); Dispute Settlement Body, *Diagnosis of the Problems Affecting the Dispute Settlement Mechanism: Some Ideas by Mexico*, at 4, TN/DS/90 (July 16, 2007); Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, 9 J. INT’L ECON. L. 427, 440 (2006).

²⁰ African Group Proposal, *supra* note 7, at 6. For a chart of the participation of African countries in panels and the Appellate Body, see Mosoti, *supra* note 19, at 440.

²¹ Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in INT’L CTR. TRADE & SUSTAINABLE DEV., TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO 1, 14 (Victor Mosoti ed., 2003).

²² See Smith, *supra* note 3, at 554 (explaining that the Appellate Body created the passive observer category to make it easier for developing countries to participate).

²³ *Id.* at 561.

²⁴ Shaffer, *supra* note 21, at 10–13.

²⁵ Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/7 (Oct. 9, 2002) [hereinafter LDC Group Proposal].

It should be clearly affirmed, that the DS [dispute settlement] is not just about expedition or speed, it is also about real justice to all Members; and that the DS must be part of the mechanisms for attaining the development objectives of the WTO as an institution. Its success should be equally determined on the basis of the extent to which findings and recommendations fully reflect and promote the development objectives.²⁶

III. DEVELOPING COUNTRY PROPOSALS TO REFORM THE DISPUTE SETTLEMENT SYSTEM

The awareness of their precarious position has led developing countries to formulate proposals that are simultaneously defensive, attempting to restrict the progressive strengthening of the system, and combative, fighting to improve their own interests in the system. These include proposals to overcome the lack of expertise and experience in the system or to address the cost of acquiring such expertise and proposals to improve the special and differential treatment provisions. Both these sets of proposals are discussed in this section. Other proposals, such as those aimed at turning back some of the developments introduced by the Appellate Body and supported by developed countries and the proposals to change the system of enforcement are discussed in the relevant sections.

The lack of experienced personnel is a recurring issue for developing countries and one that is identified time and time again as a major obstacle for developing countries in making better use of the system.²⁷ The proposals call for better training for civil servants from LDCs, financial support for legal assistance, and the establishment of a not-for-profit law firm.²⁸ Some of these have been achieved either wholly or in part. The technical assistance and training has been increased with donations from individual WTO members.

Overcoming the lack of human resources by hiring private counsel proved an issue when St. Lucia retained counsel to represent it in the Bananas Case. Despite opposition from the U.S. and the EU, the Appellate Body allowed the use of such private counsel, stressing its particular significance to allow

²⁶ African Group Proposal, *supra* note 7, at 7.

²⁷ See, e.g., Fabien Besson & Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis* 9–11 (2004) (unpublished paper presented at the International Conference on Policy Modeling); Andrew T. Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 205–35 (2002).

²⁸ See Contribution of Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding (DSU), TN/DS/W/21 (Oct. 10, 2002) [hereinafter Jamaica Contribution].

full participation in dispute settlement procedures for developing countries. It was a useful step for developing countries but one that came with additional problems. Hiring private counsel is very costly; a cost that is difficult to bear for developing countries.

The Advisory Centre for WTO Law was established to provide legal assistance to developing countries and LDCs at reduced cost or in some cases *pro bono*.²⁹ Support from the most powerful members of the WTO for this initiative is absent. In the EU, only some Member-States supported it, notably The Netherlands as a driving force behind the initiative, but the EU as such did not support it. Seemingly the United States, Japan, Germany, France and the EU collectively preferred not to assist this initiative that could support developing countries in litigating against their interests.³⁰ The African Group stresses that the Advisory Centre should not be regarded “as a panacea for all institutional and human capacity constraints of developing countries.”³¹ Also, the Advisory Centre only provides a service to requesting developing countries with a viable case. Identifying violations of WTO law and collecting pre-litigation data is beyond the Centre’s mandate and resources.³² For most LDCs this proves a hurdle that is insurmountable. Many developing countries are, moreover, not a member of the Advisory Centre or perceive having the Advisory Centre as sole provider of subsidised legal support as unfair.³³

Brown and Hoekman have proposed public-private partnerships to bring what they term the ‘missing cases’ to the WTO.³⁴ These are cases that have not been litigated by developing countries because of the costs associated with WTO litigation. They propose harnessing private interests to engage with the public sector to identify cases, bring them before the WTO dispute settlement system, and generate public and political support to remove the offending measures. Potential private partners that are identified, include international law firms, and nongovernmental organizations (NGOs). It is suggested that international law firms can be motivated to offer *pro bono* services to developing countries for self-interested reasons as well as altruistic reasons.³⁵ Neither offers a convincing argument why international

²⁹ See Kim Van der Borgh, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 2 J. INT’L ECON. L. 723–28 (1999).

³⁰ *Id.*; Smith, *supra* note 3, at 567; Chad. P. Brown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT’L ECON. L. 875 (2005).

³¹ African Group Proposal, *supra* note 7, at 2.

³² Brown & Hoekman, *supra* note 30, at 875.

³³ Garcia-Bercero & Garzotti, *supra* note 11, at 147.

³⁴ Brown & Hoekman, *supra* note 30, at 861.

³⁵ *Id.* at 877–80.

law firms would offer a structural solution to the lack of human and financial resources of developing countries. This does not diminish the fruitful cooperation that can arise in those fortuitous cases where the interests of these law firms and the developing countries seeking their services coincide. Similar problems are associated with issue-based NGOs. Such NGOs may have an interest in being engaged more directly in WTO litigation to further their agenda, but as Brown and Hoekman themselves rightly observe, "the action of an NGO may not be aligned with the interest of the developing country that is being used as the vehicle to publicly air the NGO's issue."³⁶

Some proposals from developing countries outline methods such as the setting up a Dispute Settlement Fund to improve access to justice by integrating the cost of the procedure, including legal fees and costs of experts, in the system.³⁷ As the proposal of the African Group summarizes it: "Every decent legal system ensures that parties that would not be able to exercise their rights in the judicial system for financial constraints are provided means to do so."³⁸

All these proposals aim at reducing the cost of litigation for developing countries in the dispute settlement system as it exists. But proposals have also been brought to change the system itself either by internalizing the cost of litigation or by recognizing the difference between the Members.³⁹

India and China have proposed that if a developing country prevails in a case against a developed country, the developing country should recover its litigation costs.⁴⁰ It should not be surprising that EU commentators are rather hostile to such proposals and refer to increased futile litigation, which risks overthrowing "the delicate balance between 'political' and 'quasi-judicial' arms of the WTO."⁴¹ They only see as merit in exploring some compensation for a reasonable amount of expenses incurred by an LDC when a developed country is found in violation of WTO commitments in a case brought by an LDC.⁴² As observed earlier, no case has ever been brought by an LDC.

Justice for all WTO members requires that the system is not blind for the differences of its members. The WTO Agreements contain several provisions on Special and Differential (S&D) treatment that recognise the different

³⁶ *Id.* at 882 n.37.

³⁷ See Jamaica Contribution, *supra* note 28, at 3–4; African Group Proposal, *supra* note 7, at 4.

³⁸ African Group Proposal, *supra* note 7, at 2.

³⁹ See generally WTO, South Centre, *The WTO Dispute Settlement System: Issues to Consider in the DSU Negotiations*, TRADE Analysis Doc. SC/TADT/TA/DS/1 (Oct. 2005).

⁴⁰ See Garcia-Bercero & Garzotti, *supra* note 11, at 148.

⁴¹ *Id.*

⁴² *Id.*

position of some WTO members, but these provisions have proved less than effective as developing countries and LDCs are reluctant to call upon them as it brings their weaker position into sharp focus.⁴³ It reduces their position of sovereign equals by tainting their rights with notions of charity.⁴⁴ It also raises the fear that when they prevail in the proceedings, it will reduce the normative force of the ruling.⁴⁵ Whereas the overall procedure is characterised by a high level of automaticity, several S&D provisions are not activated automatically when relevant.

The scepticism and frustration of developing countries with special and differential treatment is shared by the Sutherland report. It calls into question the wisdom of such discrimination but acknowledges it as a valid concept because it is part of the GATT *acquis*.⁴⁶ Since S&D measures are likely to remain a political demand, the WTO should do more to make these measures effective.

The effectiveness of existing S&D provisions was questioned by the LDC Group with regard to Article 12.11 of the Dispute Settlement Understanding (DSU) that compels a panel to explicitly indicate the form in which the S&D rules have been taken into account. But these provisions must be activated by the developing country by pointing out the relevant S&D to the panel. Similarly, Article 8.10 DSU allows a developing country to request the appointment of a developing country panellist. LDCs reject the burden imposed on developing countries and LDCs to raise these S&D provisions on the basis of the adage *jura novit curiae*—the court knows the law. The application of such provisions should therefore not depend on a trigger from developing countries or LDCs but it should be an obligation on panels and the Appellate Body to respect these provisions to the full without a need request their application.⁴⁷

Jamaica argues for an effective implementation of Article 21.8 DSU that provides that if a case is brought by a developing country, “The DSB [Dispute Settlement Body] shall take into account not only the trade coverage of measures complained of but also their impact on the economy of developing-country member concerned.”⁴⁸

⁴³ Alavi, *supra* note 18, at 33.

⁴⁴ See Qureshi, *supra* note 9, at 194.

⁴⁵ See FRIEDER ROESSLER, SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES UNDER THE WTO DISPUTE SETTLEMENT SYSTEM (2005).

⁴⁶ McRae, *supra* note 5, at 604.

⁴⁷ LDC Group Proposal, *supra* note 25, at 2.

⁴⁸ Jamaica Contribution, *supra* note 28, at 7.

The proposal extends this provision to cases that are brought against a developing country.⁴⁹ The method of implementation should, according to the Jamaican proposal, be addressed in the panel or Appellate Body report.⁵⁰

Gradually, a more pernicious concern has entered the public debate concerning the limited participation of developing countries in the dispute settlement system. The main trading powers have a hold over developing countries through other agreements and arrangements, not in the least development assistance and preferential arrangement outside the WTO system. For developing countries, and especially for LDCs, this support can represent an important economic factor in their foreign policy. It can influence their position in trade negotiations, in consultations, in the decision to request a panel, in the decision to request to activation of S&D measures and in the feasibility of using retaliation in the event the developing country prevails in dispute settlement proceedings. The empirical study by Zejan and Bartels suggests a significant relationship between the initiation of disputes by developing countries and aid they receive.⁵¹ They suggest that self-censorship may be operating on the part of developing countries.⁵²

IV. THE PRIMITIVE REMEDIES OF WTO DISPUTE SETTLEMENT ARE ONLY FOR THE STRONG MEMBERS

Disputing parties are bound by the report of a panel or the Appellate Body once it is adopted by the Dispute Settlement Body (DSB), a procedural step that is largely a legal fiction as it occurs automatically (reversed consensus rule). The parties are then expected to comply promptly with the recommendations and rulings contained in the adopted report.⁵³ The first objective of an adopted report is always the withdrawal of the measure found to be inconsistent with the WTO Agreements.⁵⁴ If immediate implementation is not practical, the DSU provides for a reasonable period of time to achieve implementation.⁵⁵ This period of time has to be approved by

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Pilar Zejan & Frank L. Bartels, *Be Nice and Get Your Money — An Empirical Analysis of World Trade Organization Trade Disputes and Aid*, 40 J. WORLD TRADE 1021–47 (2006).

⁵² *Id.*

⁵³ Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226, art. 21.1 (1994) [hereinafter DSU].

⁵⁴ *Id.* art. 3.7.

⁵⁵ *Id.* art. 21.3.

the DSB and can either be determined on the basis of a proposal by the member concerned, or it can be the time agreed by the parties.⁵⁶ Failing to reach agreement, the issue is to be decided by arbitration.⁵⁷ The reasonable period of time should not exceed fifteen months.⁵⁸

However, if the measure at issue is not withdrawn voluntarily, the DSU contains several measures to coerce the party to comply with the report by bringing its regulation in line with WTO Agreements. First, the parties can agree on trade compensation.⁵⁹ This trade compensation takes the form of additional trade advantages but it is a voluntary agreement and cannot be demanded as of right.⁶⁰ The use of compensation is further complicated by the rules of the DSU that are not supportive of using compensation. If trade compensation is agreed, this additional market access is not limited to the complaining party but is multilateralized to the entire WTO membership. Such compensation is, moreover, unlikely to benefit the industry that was directly affected by the contested measure. Especially in those cases where this industry was the driving force and in some cases the financial backer of the complaint, it would be politically impossible to agree on compensation that does not reflect their interests.⁶¹ The difficulties in using trade compensation have meant that it has only been used once and is not a realistic option in the current system.⁶² To use trade compensation, the complaining party first has to request retaliation as this procedure will lead into Article 22.6 DSU to ascertain the level of nullification and impairment. Clearly these procedures would need to be disentangled for compensation to become a more realistic option. The EU proposes that arbitration to determine the level of nullification and impairment should be made possible before the request for authorisation to retaliate.⁶³

The remedy of last resort in WTO dispute settlement is the suspension of concessions or other obligations, in short, retaliation. Retaliatory measures can only be taken when authorised by the DSB.⁶⁴ The level of the suspension of concessions or other obligations authorized by the DSB has to be equivalent to the level of the nullification or impairment.⁶⁵ The retaliation

⁵⁶ *Id.* art. 21.3(a)–(b).

⁵⁷ *Id.* art. 21.3(c).

⁵⁸ *Id.*

⁵⁹ *Id.* arts. 3.7, 22.2.

⁶⁰ *See id.* art. 3.7 (stating that compensation can occur only after the DSB gives authorization based on member's request).

⁶¹ *See Garcia-Bercero & Garzotti, supra* note 11, at 143.

⁶² *See EU Contribution 4* (informal working paper) (on file with the author).

⁶³ *Id.* at 5.

⁶⁴ DSU, *supra* note 53, art. 3.7.

⁶⁵ *Id.* art. 22.4.

is temporary and can only be maintained until the inconsistent measure has been removed.⁶⁶ The requesting party submits a list of measures it proposes to take to the DSB. If the responding party objects to the proposed level of suspension, the issue is submitted to the original panel or, if that is not possible, to an arbitrator appointed by the Director-General.⁶⁷ The arbitrator will estimate the level of impairment as the basis for determining the appropriate level of suspension of concessions.⁶⁸

Retaliation as a method of enforcement lacks the legitimacy that the system as a whole attempts to achieve.⁶⁹ First, it contravenes the objectives of the WTO Agreements as it does not promote predictability, a basic principle of the system.⁷⁰ Perhaps even more importantly, it leads to a restriction of international trade. It would be more constructive and more in line with the WTO objectives to accord additional trade advantages to the prevailing party rather than denying trade advantages to the party that has contravened the WTO Agreements (compulsory trade compensation).⁷¹ The current system is, moreover, inappropriate in cases where the prevailing party is economically much weaker as the retaliation will resort little or no effect and is likely to harm the winning party economically.⁷² Most WTO members are developing countries that cannot effectively use retaliation. The system therefore leaves most WTO members without recourse to enforceable justice. It also makes short shrift of one panel's assertion that "carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick."⁷³ True as it may be that authorisation to suspend concessions and other obligations was granted in only 2% of cases, the "dread factor" is only one part of the explanation.⁷⁴ The dread factor emanating from a threat with retaliation from an LDC and from many

⁶⁶ *Id.* art. 22.8.

⁶⁷ *Id.* art. 22.6; Jacques H.J. Bourgeois, *Sanctions and Countermeasures: Do the Remedies Make Sense?*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 11, at 37, 37–42; Jeff Waincymer, WTO LITIGATION: ASPECTS OF FORMAL DISPUTE SETTLEMENT 676–77 (2002).

⁶⁸ DSU, *supra* note 53, art. 22.6.

⁶⁹ *Id.*; EU Contribution, *supra* note 62, at 3.

⁷⁰ EU Contribution, *supra* note 62, at 4.

⁷¹ See Bourgeois, *supra* note 67, at 37–42; Marco Bronckers & Naboth Van den Broek, *Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 11, at 43, 49.

⁷² Bronckers & Van den Broek, *supra* note 71, at 49.

⁷³ WTO Panel Report, *U.S. – Sections 301–310 of the Trade Act of 1974*, WT/DS/152/R, Dec. 22, 1999, para. 7.89.

⁷⁴ See Kumar, *supra* note 14, at 180.

developing countries could be more accurately described as carrying a blunt toothpick.

A further problem with the current system is the prospective nature of retaliations and compensation. The prospective nature of remedies is an inheritance from GATT where it was unsuccessfully challenged in 1965.⁷⁵ The forward-looking remedies leave the system open to abuse by opportunistic WTO members who can maintain WTO inconsistent protection for their domestic industry for almost three years without the economic cost of such protectionism ever being presented to them. After all, a party complaining about a measure will easily have to wait thirty-two to thirty-five months for relief through the dispute settlement system's panel and Appellate procedures and the expiry of the reasonable period of time.⁷⁶ If the measure after this period has not been withdrawn, it will take another 200 days to obtain a decision from the arbitrator to determine the appropriate level of suspension. Worse still, if a new measure is taken that again installs WTO inconsistent protection; the wait is extended by 90 to 225 days before a panel can determine the WTO inconsistency and another 60 to 91 days for the Appellate Body to confirm it.⁷⁷ In the worst case scenario, it can take three to four and a half years to arrive at a decision that allows the compensation or the suspension of concessions. During these years, the contested measure can be maintained and the economic harm mounts—economic harm that can be difficult to recover from for economically weaker members. It is perhaps one of the reasons why developed countries maintain their measures until they are found to be inconsistent by a panel or the Appellate Body twice as often as developing countries.⁷⁸

A limited form of relief could consist of interim measures or preventive measures. Such measures can bridge the time it takes to come to a final decision and thereby avoid irreparable damage. The Mexican proposal envisages the complaining party establishing at the outset of the procedure

⁷⁵ See Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES* 345, 360–61 (Friedl Weiss & Jochem Wiers eds., 2000).

⁷⁶ The average time from request for consultations to establishment of a Panel: 198 days; from establishment of the Panel to adoption of report(s): 16 months and 9 days; average RPT between 9.98 and 11.98 months. WTO Doc. JOB(03)/225/Rev.1 (Oct. 22, 2004).

⁷⁷ DSU, *supra* note 53, art. 21.5.

⁷⁸ Mateo Diego-Fernández, *Compensation and Retaliation: A Developing Country's Perspective*, in *WTO AND DEVELOPING COUNTRIES* 233 (George A. Bermann & Petros C. Mavroidis eds., 2007). Diego-Fernandez has calculated that as “of 29 October 2004, consultation requests against developing country members were followed by Panel requests 53 times. In the case of consultation requests against developed country members, the number grew to 117 times.” *Id.*

that the contested measure is causing irreparable damage and proposing remedies to limit the harm. If the panel supports the argumentation of the complaining party, damage-limitation measures would be taken within 30 days by the responding party. Failing that, the complaining party would be authorised to take such measures. These measures would be in place for the duration of the dispute settlement procedure until the DSB terminates them or until authorisation for retaliatory measures is granted.

An interesting development in this respect occurred in *Article 21.5 DSU Panel in Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*.⁷⁹ In this case, the panel decided that retroactive and even punitive sanctions are possible in the WTO and based this conclusion on the Vienna Convention on Treaties and the effectiveness of sanctions.⁸⁰ The case was terminated after the parties reached a compromise and was not later scrutinized by the DSB even after several WTO members objected to retroactive sanctions as being contrary to the “intention of the drafters” of Article 19 DSU.⁸¹ Australia condemned the decision as “judicial adventurism” going beyond what is permissible under the DSU.⁸² The U.S. similarly stressed that it did not “agree with every word of the panel report” and that the panel’s remedy went beyond what they had sought.⁸³ The decision of the panel nevertheless has merit as it puts a stop to the “hit-and-run” abuses that the current system is open to and because it could provide for compensation that better reflects the real harm done.⁸⁴

The prospective nature of the enforcement mechanism has been criticised in many of the reform proposals.⁸⁵ Mexico has proposed to determine the appropriate level of retaliation through arbitration from the moment the panel report is circulated to all WTO members prior to the adoption by the DSB. Retaliation could then be implemented from the moment of adoption. A less radical alternative would be to start the arbitration process immediately following the adoption of the report. The level of retaliation could moreover be determined retrospectively from the moment the contested measure was taken, the moment the request for consultation was notified to the DSB or the moment the panel was established. Such retrospective determination would constitute a shift in the relations between the parties. Currently, any delay

⁷⁹ WTO, Panel Report, *Subsidies Provided to Producers and Exporters of Automotive Leather*, ARTICLE 21.5 DSU PANEL, Australia, WT/DS126/RW (Jan. 21, 2000).

⁸⁰ *Id.*

⁸¹ Bourgeois, *supra* note 67, at 37–42.

⁸² Mosoti, *supra* note 19, at 443.

⁸³ *Id.* (citing Dispute Settlement Body, *Minutes of Meeting Held in Centre William Rappard*, WT/DSB/M/76 (Feb. 11, 2000)).

⁸⁴ *Id.*

⁸⁵ See African Group Proposal, *supra* note 7, at 1.

favors the responding party. By introducing retrospective determination of the level of retaliation, the magnitude of the retaliation increases, and therefore the risk to the responding party increases. This shift would promote a speedy resolution of the conflict and would diminish the risk of abuse of the procedure.

Other proposals include collective retaliation, whereby several WTO members would support the prevailing party in its retaliation, and negotiable remedies that would create a market in retaliation rights.⁸⁶ Neither of these proposals is likely to find sufficient support among WTO members. They constitute a valuable intellectual exercise to reveal problems and possibilities rather than a serious option for the future of WTO remedies.

Collective retaliation was first proposed in GATT as part of the 1965 developing country proposals.⁸⁷ Developing countries rejected the system of bilateral retaliation as unfair and ineffective for developing countries. They argued that collective retaliation whereby several developing countries together could retaliate against a developed country member would yield more results as it would have a greater economic impact. As level of retaliation is supposed to reflect the level of economic harm; such collective retaliation would surmount this level and would in fact be punitive.⁸⁸ Developing countries argued that the economic harm of GATT's inconsistent measures had a greater impact on their economies because having their access to developed markets being restricted removes a potential for large growth on such markets. The punitive element of collective retaliation was thus described as a "development multiplier."⁸⁹

These ideas and their motivation have been revived in the current proposal for the reform of WTO remedies. The African Group reiterated that retaliation is not a practical remedy for individual developing country Members to use against developed country Members.⁹⁰ If they did, they could suffer further economic damage themselves.⁹¹ The African Group concludes that "this handicap of developing-country members means that the system is skewed against them."⁹² In the LDC Group proposal, the principle of collective responsibility is advanced to multilateralize the right and responsibility to enforce the recommendations of the DSB.⁹³ It envisages, as

⁸⁶ See *infra* notes 87–96 and accompanying text.

⁸⁷ Hudec, *supra* note 75, at 360–61.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ African Group Proposal, *supra* note 7, at 3.

⁹¹ *Id.*

⁹² *Id.*

⁹³ LDC Group Proposal, *supra* note 25, at 4.

a matter of special and differential treatment, that in cases where developing or LDC members successfully pursued a claim, collective retaliation should be automatically available.⁹⁴ The proposal also retains the punitive elements as it continues stating that the DSB should not be constrained by quantification on the basis of the rule on nullification and impairment.⁹⁵ The African proposal would authorise all WTO members to retaliate collectively against a developed member that adopts measures in breach of WTO obligations against a developing member.⁹⁶ The proposal contains a similar increase of the level of retaliation beyond the equivalent level of nullification and impairment of benefits.⁹⁷

The proposal to create negotiable remedies would see the creation of a market in tradable retaliation rights.⁹⁸ In such a system, a prevailing party could decide to retaliate or to convert its retaliation rights into financial means to compensate it for the economic damage suffered by selling its rights to another WTO member that would get access to temporary protection of its market.⁹⁹

It is, however, financial compensation that has attracted most attention in diplomatic as well as academic discussions. The LDC Group has expressed itself in favor of such compensation, adding that such remedy should be collectively exercised according to the United Nations model.¹⁰⁰ The sanction would be taken by all WTO members. If the prevailing nation is a developing country or LDC, the collective sanction would be instituted as a right at the simple request of the developing country or LDC.¹⁰¹ The African Group proposal also envisages financial compensation, especially to cover the period until the withdrawal of the measures in breach of WTO obligations.¹⁰² This compensation would not constitute an alternative to the withdrawal of inconsistent measures.¹⁰³

Bronckers and Van den Broek suggest that developing countries should opt for financial compensation as the preferred improvement to the remedies conundrum rather than continuing to support various options that are

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ African Group Proposal, *supra* note 7, at 3.

⁹⁷ LDC Group Proposal, *supra* note 25, at 4.

⁹⁸ Kyle Bagwell et al., *The Case for Auctioning Countermeasures in the WTO*, NAT'L BUREAU OF ECON. RESEARCH (Working Paper No. 9920, 2003).

⁹⁹ *Id.*

¹⁰⁰ LDC Group Proposal, *supra* note 25, at 4.

¹⁰¹ *Id.*

¹⁰² African Group Proposal, *supra* note 7, at 3.

¹⁰³ *Id.*

unlikely to yield a diplomatic consensus.¹⁰⁴ Among the advantages of financial compensation—and contrary to retaliation—is the fact that financial compensation does not entail a restriction to international trade. Financial compensation also avoids targeting innocent victims: economic sectors in the WTO member country that has maintained a WTO inconsistent measure that have no link to the dispute but are targeted by retaliation. There is no reason to assume that financial compensation would be less efficient in achieving compliance with the WTO Agreements; it seems certainly more likely to be effective when a developing country or LDC prevails in a dispute against a developed country.

The prospect of introducing financial compensation has already elicited criticism. Financial compensation would be a fundamental change in the system by moving away from enshrining a balance of interests as the central plank of the WTO and placing the rule of law firmly at the centre of the organisation thus creating legal certainty for individuals and companies involved in international trade. Furthermore, financial compensation can be directed at the companies that actually suffer the economic damage by having their export opportunities curtailed by WTO inconsistent measures. Bronckers and Van den Broek argue that financial compensation is in line with the preambular language of the Marrakesh Agreement extolling as the WTO objectives: “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of goods and services.”¹⁰⁵ They argue that “the engine for such economic growth is fuelled by private activity, and the WTO obligations generally limit government’s interference with this activity.”¹⁰⁶ The panel in *US – Sections 301-310 of the Trade Act of 1974* similarly emphasised that:

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

¹⁰⁴ Bronckers & Van den Broek, *supra* note 71, at 49; *see also* Negotiations on the Dispute Settlement Understanding, *Proposal on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe* at 2, TN/DS/W/19 (Oct. 9, 2002) (“The above proposal is without prejudice to the other proposals tabled/to be tabled by other developing-country Members on ‘collective retaliation’ ‘large scale retaliation’ ‘prohibiting non-complying Members from invoking dispute settlement procedures under the DSU and covered agreements, etc.’”).

¹⁰⁵ Bronckers & Van de Broek, *supra* note 71, at 56.

¹⁰⁶ *Id.*

objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.¹⁰⁷

Though individual economic actors are mostly responsible for the realisation of the trade opportunities created in the framework of the WTO, the overwhelming majority of its members are hostile to any move away from its governmental character or to allowing their individual or corporate citizens using the WTO Agreements in domestic actions.¹⁰⁸ When the idea of financial compensation was first discussed in 1965, developing countries were unambiguous in their proposal. Financial compensation would not serve to compensate private interests but would support the government's development programme.¹⁰⁹ It seems this attitude has not changed but it is noteworthy that the African proposal—that is supportive of some forms of monetary compensation—refers to the interests and injury suffered by industries of developing-country members.¹¹⁰

Some fears have been raised that financial compensation would open the door for industrial countries to use it as an alternative to implementing the ruling and recommendation of adopted reports and keeping their inconsistent measures in place. But this argument is equally valid for retaliation where some countries seem to assume that “paying the price”; *in casu* bearing the cost of retaliation is equivalent to complying with the decision. It should be clear that this is not a matter of choice. Adopted reports have to be implemented promptly, paying the price in the form of financial compensation or bearing the cost of retaliation is not an equivalent alternative.

A further concern is that being forced to pay financial compensation would be a bitter blow for developing countries and LDCs. None of the proposals from developing countries or LDCs include an obligation on themselves to be forced to pay financial compensation. The proposal is always asymmetrical. Bronckers and Van den Broek recognise the problem but rather suggest a solution that maintains symmetry. In this scenario, LDCs would be temporarily exempted from having to pay financial compensation

¹⁰⁷ WTO Panel Report, *supra* note 73, para. 7.73.

¹⁰⁸ Case T-174/00, *Biret Int'l SA v. Council* and Case T-210/00, *Établissements Biret et Cie v. Council*, 2002 E.C.R. II-17, para. 62 (“The purpose of the WTO agreements is to govern relations between States or regional organizations for economic integration and not to protect individuals.”).

¹⁰⁹ Hudec, *supra* note 75, at 361.

¹¹⁰ This is in the context of DSU, *supra* note 53, art. 22.2. See African Group Proposal, *supra* note 7, at 4.

and developing countries would have the choice not to pay financial compensation but would then also not have the right to request financial compensation.¹¹¹ A special S&D rule is further proposed whereby developing countries could be exempted from having to pay financial compensation in a specific case on the basis of a reasoned request.

V. CONCLUSION

The procedure of dispute settlement in the WTO has been described as the crown jewel of the organisation largely for its judicial features. The system has compulsory jurisdiction and enforcement measures. But the judicial nature of the system is in question in the review process. Determining the future direction of the system will depend on whether the members support a mature judicial system or prefer to keep diplomatic control. The current U.S. administration is supportive of a strong, transparent dispute settlement procedure as long as they can opt to ignore its outcome by “paying the price.” This is a highly objectionable position as it does not promote the rule of law in international economic relations and reinforces the view of developing countries that the system is skewed against them.

Developing countries often oppose a strengthening of the judicial nature as they want to maintain the WTO as an intergovernmental organisation whose decisionmaking procedures in dispute settlement should not be overly transparent. This is an unfortunate view as transparency could highlight the questionable legitimacy of the substantive rules of the organisation. It would be hard to argue that the WTO pursues substantive justice for all its members. In that sense, the reluctance of developing country members to strengthen a procedure to enforce these rules is justified.

This dichotomy between substantive and procedural justice is the major challenge. Creating an exemplary dispute settlement procedure to enforce rules that are questionable from the point of view of developing countries and that, moreover, offers a qualitatively different access to justice for developing and industrialised countries, is a cynical exercise. The Doha Development Round should address both the substantive and procedural concerns so that the dispute settlement system can be strengthened to support the rule of law for the benefit of all WTO members. At present, such a move seems unlikely and the review is probably going to result in minor procedural improvements rather than addressing the major issues. This will give rise to disappointment for developing countries—the majority of the

¹¹¹ See Bronckers & Van den Broek, *supra* note 71, at 64–65.

WTO membership. It also constitutes a denial of developed countries' responsibilities that form part and parcel of globalisation thereby endangering economic globalisation and undermining further its legitimacy to the detriment of all WTO members.