REMEDIES IN THE WTO DISPUTE SETTLEMENT SYSTEM
AND DEVELOPING COUNTRY INTERESTS*

by

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1 INTRODUCTION

The Dispute Settlement Understanding (DSU) is often seen as one of the most important achievements in the World Trade Organization (WTO) Agreement. While the GATT also contained provisions for conflict resolution, the DSU contains a number of innovations. In particular, it is generally seen as being superior to its predecessors in terms of the clarity of its provisions concerning procedural matters, and its provisions establishing a monitoring scheme to overview implementation. Recently, however, criticism has been voiced concerning the possibilities for poorer countries to take full advantage of the system. The purpose of this paper is to discuss one potentially important aspect of the role of the DSU for poorer countries, the question whether remedies against illegalities that are provided in the DSU allow poorer countries to defend their rights equally well as more affluent countries.

To this end, we will consider both legal and economic aspects of the DSU, and their interaction. Obviously, a full assessment of these issues can not be done in a single paper. First, there is very little economic research on the DSU in general, and in particular on its implications for poorer countries. Hence, we have in this respect to more or less start from scratch. Secondly, the issues involved are extremely complex. The relevant Agreements are many, and are often complicated from a legal point of view, and it is not unthinkable that sometimes they might admit conflicting interpretations of some of their many clauses. Then arises the question of gargantuan complexity concerning the impact of the implementation of these Agreements on the economies of different countries. But, the problems do not stop here: as will be argued below, there are important links between the Dispute Settlement (DS) system, and international politics. There is thus a significant need for rigorous research into these matters, and before we have the fruits of this we have to limit ourselves to (hopefully not too uninformed) intuition.

We will use the term «developing country» in two meanings. First, we use it in the conventional sense to denote a relatively poor country. In addition to low GNP/capita, these countries share features such as:

- small GNP relative to the major players in the trade arena;
- limited domestic legal resources;
- exports are concentrated in terms of products and trading partners;
- high average trade barriers;
- economic and political dependence on industrialized countries.
As will be discussed below, there are reasons to believe that countries characterized by these features may fair differently in the DS system, than more affluent countries.

Secondly, we will also use the term «developing country» in the legal sense used in the WTO Agreements, where a number of provisions refer specifically to «developing countries». However, in the WTO, as in Public International Law, there is no precise definition of the term «developing country». As a reflection of the principle of sovereignty, one generally accepts the principle of self-election, by which a country is a developing country by simply declaring itself to be one. All WTO Members can, invoking the self-election principle, declare a developing country status. All countries have chosen to do this at least once, with the exception of the European Community (EC), the United States, Canada, Japan, Switzerland, Norway, Australia and New Zealand.

Our main conclusion is that while the DSU contains several provisions which seek to improve the possibilities for developing countries to take advantage of the system, its basic structure nevertheless seems to make this difficult. Due to the lack of effective sanctions against violators of the WTO Agreement, sanctions that are provided by the membership as whole, at the end of the day countries are largely left alone in their struggle against violators, and consequently countries that are economically and politically weak are at disadvantage in the WTO system.

The structure of the paper is as follows. As a background to the DS, the next section briefly reviews the remedies available in two related legal systems – Public International Law, and the GATT before the WTO Agreement. Section 3 then presents and discusses the DS system. It starts by distinguishing between the type of complaints that can be brought before the DS, and then discusses losing Respondent’s obligations, and the difficulty in assessing whether these obligations have been respected. Subsection 3.4 focuses on the remedies – in particular, the withdrawal of concessions – that are available in the WTO legal system. Subsection 3.5 discusses provisions in the DSU that explicitly address developing countries, and the ensuing subsection discusses provisions in some other WTO Agreements with direct implications for the question at hand. Finally, some concluding comments can be found in section 4, and an Annex provides the provisions in the DSU which explicitly refer to developing countries.

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1 There are some provisions which refer to least developed countries. But, they usually only admit extra long transitional periods for the implementation of various agreements, and are not central to the issue at stake here.
2 THE LEGAL BACKGROUND

In order to put the remedies in the WTO in perspective, we will briefly review the role of remedies in Public International Law, and in the GATT.

2.1 REMEDIES IN PUBLIC INTERNATIONAL LAW

Customary International Law binds everybody who has not persistently objected to the formation of the custom at hand. States may however, through conventional means – such as the WTO agreement – deviate from customary rules. An understanding of Customary International Law is nevertheless useful. It is a body of law with solid foundations in practice, and any deviations require to be highlighted and understood. Also, as we will argue, the WTO legal system leaves unspecified central aspects of remedies. As a consequence, Customary International Law is, in principle, relevant to the WTO system, even though in practice it is rarely applied, as will be shown later in the paper.

The function of remedies has a much debated philosophical dimension, which is the extent to which they should simply attempt to strictly «remedy» a situation or to what extent they should provide a means to deter violations. When deciding on the appropriate level for the remedy to deter an illegality, one would from an economic point of view naturally look at the gains from this act to its author. In law, however, a «punitive damage» refers to a reparation which is (significantly) larger than the loss incurred by the injured party, but not necessarily linked to the gains of the author of the illegal act. In penal law there is an argument against the use of such punitive damages which is the alleged detrimental effect on the prospects of rehabilitating criminals of such penalties. Such arguments can normally not be made in the context of international relations, however, at least not in the trade field. Still, international practice shows rare examples of punitive damages granted by adjudicating bodies.

The basis for an evaluation of remedies in the WTO DS that we use in this paper is the Draft on State Responsibility prepared by the International Law Commission (ILC). The ILC was requested to codify Customary International Law in the field of state responsibility. Draft treaties prepared by the ILC are open to signature by interested parties. While still in the state of a draft, the

2 The only exceptions are those reflected in Arts. 53 and 64 of the Vienna Convention on the Law of Treaties.
3 One of the best-known remedies is the treble damages-remedy in the US antitrust law.
4 In the award on Rainbow Warrior, for example, the arbitrator fixed the amount of compensation at 7 millions dollars which clearly exceeded by a wide margin the (non-quantified) damage; see Decaux (1991).
ILC work is of central importance with regard to questions concerning state responsibility, and has in practice already inspired international adjudicating bodies.\(^6\)

According to Arts. 41 and 42 of the ILC Draft, a state which is the author of an illegal act has two obligations: to *stop* the illegal act (cessation); and to provide *reparation* to the injured party. The Draft makes it compulsory for parties to a dispute to submit upon request of one of them, their dispute to third party adjudication. In such a case, and generally speaking, in Public International Law the rule *non ultra petita* circumscribes the ambit of the powers of the adjudicating body: an adjudicating body cannot recommend more than it has been asked to. This rule is irrelevant as far as the cessation of the illegal act is concerned, however. Adjudicating bodies can recommend cessation of the illegal act even in the absence of such a request by the allegedly injured party; adjudicating bodies will do so anyway, in case they are persuaded that the act they are examining is illegal. As we will see later, this is not the case in the WTO legal system. Conversely, the *non ultra petita* rule is relevant with respect to reparation.

*Forms of reparation*

An injured party can claim, in addition to the cessation of the illegal act, reparation. The ILC Draft provides a comprehensive scheme in order to ensure full reparation to the injured party. Ideally, this would be achieved by reconstructing the situation as it existed before the illegal act was committed – reestablishment of the *status quo ante*; this remedy is denoted *restitutio in integrum*. But, in practice the reestablishment of the *status quo ante* is often very difficult to achieve and it might even involve causing damage to *bona fides* third parties. Also, Art. 43(c) of the ILC Draft limits injured parties' right to request *restitutio in integrum* to cases where such form of reparation

«…would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation».

Standing case-law in the international sphere admits a different form of reparation in case reestablishment of the *status quo ante* is excessively onerous: "restitution by equivalent", i.e., compensation. The reestablishment of *status quo ante*, as of the time when the illegality was initially committed, then serves as guide for the calculation. The ILC Draft thus states that awarded damages

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\(^6\) See, for example, the comments on the arbitration award on *Rainbow Warrior* by Charpentier (1986) and Apollis (1987).
can include already incurred damage (*damnum emergens*) as well as future profits that are foregone because of the occurrence of the illegal act (*lucrum cessans*), and interest. Punitive damages are not included in this compensation. The assessment of *damnum emergens* is in most cases straightforward. Quantifying the *lucrum cessans* can be very difficult, however, since this typically involves assessing counterfactual situations. However, «[r]eparation must, *as far as possible*, wipe out all consequences of the illegal act...»\(^7\), which means that even if the awarded damages do not fully repair the injury suffered, they should aim at repairing as high a proportion of the injury as possible.

There are two limitations to the discretion of the adjudicating body, however: First, the judiciary is bound by the *non ultra petita* rule, which means that the requested damages (exaggerated or not) operate as ceiling for the judiciary’s decision in this respect. Secondly, it is necessary for the adjudicating body to establish that the illegal acts *directly* cause damage in the sense of foregone income. Consequently, remotely related foregone income will not be compensated.

The remaining forms of reparation are "satisfaction" and "guarantees for non-repetition". Satisfaction, which implies that the judiciary proclaims an act to be illegal, is in the ILC Draft recommended either as a stand-alone remedy or in conjunction with other forms of reparation. As a stand-alone remedy, it would be recommended, for example, in cases of moral damage. In conjunction with other forms of reparation, satisfaction, that is an acceptance by the state author of the illegal act of the illegality of its actions, can accompany compensation. Guarantees for non-repetition in turn, entail an obligation imposed of the state author of the illegal act to avoid repeating in the future behaviour similar to that judged to be illegal. Satisfaction and guarantees for non-repetition often go hand in hand in practice.

**Countermeasures**

Of central interest to the question of remedies in the DS, is the ILC Draft’s position on appropriate countermeasures, should the adjudicating body’s ruling not be adhered to. According to the Draft, countermeasures are possible (Art. 48), provided that Art. 54 has been complied with: According to Art. 54:

\(^7\) See the Chorzow Factories judgment, Permanent Court of International Justice, Ser. A, No. 8, p. 12 (emphasis added).
«If a dispute regarding the interpretation or application of the present articles between two or more States Parties to the present articles, they shall, upon request of any of them, seek to settle it amicably by negotiation».

In the event that amicable negotiations could not produce a mutually acceptable solution, the dispute shall be referred to third party adjudication at the request of any of the parties. In cases of recalcitrance, recourse to countermeasures is lawful. Consequently, countermeasures function in the Draft as a procedural consequence of violations, in the sense that they serve to induce recalcitrant states to submit their disputes to third party adjudication. Art. 49 limits the severity of the countermeasures that might follow such adjudication:

«Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State».

This obviously raises the question of what should countermeasures be proportional to? There are several possibilities. Two of them are suggested in the text of Art. 49: (a) countermeasures should be proportional to the damage suffered; and (b) they should be proportional to the gravity of the illegal act. Unfortunately, a quantification of damages according to these two alternatives would in practice often lead to divergent results. But, as will be seen, this is not a problem within the WTO-context, since countermeasures there have to be equivalent to the inflicted damage.

To conclude, applied to a field such as international trade, the ILC Draft seems to exclude punitive damages, and to limit the ambit of remedies to the wiping out of the consequences of the illegal act: normally injured parties will have the right to request *damnum emergens* and *lucrum cessans* in addition to the obligation imposed on the violating states to immediately cease the illegal act.

### 2.2 Remedies in the GATT

Neither the General Agreement on Tariffs on Trade (GATT) nor the various side-agreements signed in the Tokyo Round (the Tokyo Round «Codes») contained any specific provisions dealing with remedies in cases of violations. This is not an anomaly. It is often the case that drafters of a treaty leave to the discretion of the adjudicating body to recommend the appropriate remedy.

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8 See Schachter (1994).
9 The ILC Draft does allow for punitive damages when international crimes are involved, which is impossible in the field of international trade.
The GATT case-law in this field up to the late 1970s was to a large extent reflected in the 1979 «Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance». The relevant passage reads:

«The aim of the CONTRACTING PARTIES has always been to secure a positive solution to the dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. 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 the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking these procedures is the possibility of suspending the application of consensus or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to the authorization by the CONTRACTING PARTIES of such measures».

The «usual GATT remedy» had in practice a mere ex nunc (i.e., prospective) function: GATT panels would either recommend the losing party to bring its measures into compliance with its obligations under the GATT or to withdraw the illegal act. However, the losing GATT contracting party could very well on its own initiative provide for a remedy with an ex tunc (i.e., retroactive) effect: For example, in a case where a quantitative restriction was found to be illegal under Art. XI GATT, the contracting party imposing that restriction could in principle revoke the measure in question as of the time that it was promulgated and reimburse all injured parties, at least to the extent that injury was quantified. No such examples are reported, however. In practice, «to bring its measures into compliance» has always been understood by GATT contracting parties to have a pure ex nunc effect. A recommendation to the effect that the author of the illegal act withdraws the illegal act can, of course, only have such an effect.

One point has to be stressed in this respect: the «usual GATT remedy» should not be equated to the «only available GATT remedy». In practice, GATT panels were not presented with demands requesting more than cessation of the illegal act, and consequently never had the opportunity to adjudicate on other forms of remedies, respecting the non ultra petita rule.

11 See Hudec (1993), which constitutes the only comprehensive study of GATT history in this respect.
After the 1979 Tokyo Round Codes one can observe a remarkable departure from the previous GATT case-law. Petersmann (1993) examines all cases in this field, and points out that on a number of occasions, GATT panels were presented with requests to the effect that illegally imposed orders (antidumping or countervailing) would be revoked and illegally perceived duties be reimbursed. Five panels, all of them dealing with antidumping/countervailing duties departed from the standard *ex nunc* remedy and recommended revocation and reimbursement of illegally imposed (in legal terminology, perceived) duties. The argument could be made that these panels took a significant step towards real *restitutio in integrum* in the GATT-context, since first they recommended revocation with retroactive effect of the illegal act (revocation of the order imposing duties), and then the elimination of consequences stemming from the proclaimed illegal act (reimbursement of duties).

Clearly, the total damage caused by the illegal imposition of antidumping duties, often differs substantially from the sum of the duties paid back. For a start, exporters often pass part of the duties on to consumers. On the other hand, exporters incur substantially more damage than what the amount of duties paid can reveal: from the day an antidumping investigation starts, there is an effect on the market. Exporters could start looking for other markets, distributors (in case of non-vertical integration) could start looking for other suppliers, and so on. However, since *restitutio in integrum* is limited to reversal of the illegal measures, and these measures have long run (if not permanent) effects, *restitutio in integrum* will typically not suffice for damages to be fully repaired. Punitive damages, on the other hand, would have more scope to achieve this, since by definition they go beyond the actual damage.

The case-law in the field of the Antidumping and Subsidies/Countervailing Agreements is a unique example in the GATT history. No such remedies have been recommended in any other area. Even in a case where the panel realized that the «usual GATT remedy» was less than satisfactory, it refrained from recommending a remedy along the lines of the remedies recommended by the panels dealing with antidumping: in a remarkable case, the United States complained that Norway, by not following the procedures in the Government Procurement Agreement (GPA) had illegally awarded to a Norwegian company the construction of a toll ring system in the city of Trondheim. The panel found that Norway indeed acted in disrespect of its international obligations. But arguing that the toll ring system was already in place by the time its decision was pronounced, the panel merely asked Norway to accept the illegality of its act and to provide guarantees for non-repetition. This case not

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12 The first panel which recommended revocation and reimbursement dealt with an illegal imposition of antidumping duties, but it was nevertheless a GATT panel, since it was established in the context of the GATT to examine the conformity of antidumping duties with the relevant GATT (Art. VI) rules, see New Zealand v Finland (the *Transformers* case), as cited in Petersmann (1993).
13 For a critique of the panel’s recommendation, see Mavroidis (1993).
only highlights panels' reluctance to follow the route with regard to remedies that has been followed in antidumping cases, but also the inherent difficulties involved in quantifying damages: in principle, any company of any GPA signatory could have won the contract, had the procedures taken place in conformity with the GPA.

To conclude:

(a) The GATT did not contain a specific provision dealing with remedies, but left it to the adjudicating bodies to recommend the appropriate remedy;

(b) GATT panels usually, at least until the end of the Tokyo Round in 1979, through their recommended remedies only aimed at securing withdrawal of the illegal act. Consequently, recommended remedies had a clear *ex nunc* effect; and

(c) Post-1979, some GATT panels in the field of the Antidumping and Subsidies /Countervailing Agreements, faced with a request to this effect, recommended remedies with *ex tunc* effect (revocation and reimbursement). However, this practice was limited to these areas.

3 REMEDIES IN THE DSU

The WTO DSU constitutes the antidote to the procedural deficiencies of conflict resolution in the GATT, in the view of many commentators. The DSU to a large extent codifies the evolution of GATT practice in the field of Arts. XXII and XXIII and includes the "Montreal rules" of 1989, which was a provisional application of Uruguay Round Agreements, as part of the Agreement on the DSU. It is a comprehensive set of rules which aims at providing predictability and legal security as far as the organization of panel and Appellate Body (AB) procedures are concerned. Another innovation is that the DSU includes specific provisions for remedies for all three types of complaints known in the WTO system.

Before examining the role of remedies in the DSU in more detail, it may be useful to provide a few statistics on the participation of developing countries in WTO disputes. Table 1 gives the number of appearances of countries as Complainants and as Respondents in disputes, until March 1999.\(^\text{14}\) As can be seen, 33 countries have appeared as Complainants and the same number have been

\(^{14}\) The data is computed using a data base maintained at the WTO.
Respondents. Hence, a vast majority of the 134 WTO Member have not been active as Complainants or Respondents.

[Tables 1a and 1b here]

A better overview may be obtained by aggregating countries into four groups: G4 (Canada, European Union, Japan, and the US), remaining OECD countries, least-developed countries (27 WTO Members using UN classification), and non-OECD countries that are not LDCs. As can be seen from Table 2, the G4 countries dominate, and the LDCs have not been active at all.

[Tables 2a and 2b here]

Of course, the fact that e.g. the G4 countries dominate in terms of numbers may, but need not, signal any bias in the DS system, since it could simply be a reflection of their larger presence in intra-WTO trade. An assessment of whether they are over-represented requires thus requires the formulation and calculation of a benchmark, of the number of disputes these countries "should have". It is beyond the scope of the present paper to attempt such an analysis.

3.1 THE REQUIREMENTS FOR SUCCESSFUL VIOLATION, NON-VIOLATION AND SITUATION COMPLAINTS

A WTO Member can claim that benefits accruing to it directly or indirectly are nullified or impaired due to three types of circumstances; these complaints are denoted violation complaints, non-violation complaints, and situation complaints. The most straightforward complaint concerns alleged violations, that is, failures of Members to carry out their obligations under the Agreement. A recent panel (Bananas) has ruled that WTO Members do not have to show trade effects as a condition for bringing forward a violation complaint; all that is required is to demonstrate that an illegality has been committed, a view which is fully in line with Public International Law, and which was upheld by the AB.\textsuperscript{15}

"We agree with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a ‘legal interest’ as a prerequisite for requesting a panel".\textsuperscript{16}

\textsuperscript{15} The ILC Draft entails the responsibility of states in case of commission of an internationally wrongful act, independently of the possible resulting damage to other states (Art. 1 of the ILC Draft). The Bananas ruling reproduced here, to a large extent crystallizes the GATT case-law in this field.

\textsuperscript{16}Panel Reports, para. 7.49.
Non-violation and situation complaints can be broader in scope and, in the case of non-violation complaints, include the application of any measure regardless of whether it conflicts with the WTO Agreement. Situation complaints are relevant with respect to any other situation. Hence, these complaints can involve acts not prohibited by the WTO Agreement but which still cause damage. Petersmann (1991) expressed doubts as to the raison d’être of situation complaints and also, based on state practice, made the point that such complaints had fallen in desuetudo. It is difficult to understand what could come under a situation complaint, taking into account that in the WTO injured parties can attack both illegal as well as legal acts, to the extent that the latter cause damage, nor is there any reported case of a situation complaint. Only once the EC threatened to submit such a case (the so-called «Japanese way of life» case), but the threat never materialized. Consequently, we will focus only on non-violation complaints where there is ample practice.

The generally stringent requirements for a non-violation complaint was illustrated by the recent Kodak/Fuji dispute, where the panel stated that:

«...both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated as an exceptional instrument of dispute settlement....The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules».

According to standing GATT case-law, three conditions have to be met for a non-violation complaint to be successful:

(a) a prior consolidated tariff commitment;

(b) a subsequent governmental action which;

(c) as a consequence negatively affects the reasonable expectations created by the consolidated tariff commitment.

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17 See Hoekman and Mavroidis (1994) at p. 137.
20 On this score, see the analysis by Petersmann (1991).
Cases dealt with under non-violation complaints have typically involved a subsidy scheme. However, the Kodak/Fuji dispute made it plain that also other governmental measures could be considered.\(^{21}\) (in the case at hand, a government-induced restrictive business practice). But the report of the panel has added one more condition to the WTO case-law in this field: non-violation complaints can only involve measures that have a continuing effect, and not measures the effects of which have ceased to exist. The latter can thus only be contested in the context of a violation complaint, where it is the violation as such that is put into question and not the resulting nullification and impairment. The panel (10.57) states:

«the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied».

This example demonstrates a crucial difference between violation and non-violation complaints: In the case of violations there is a *presumption* of nullification and impairment of benefits accruing to WTO Members any time the agreement is violated. All what is required for the Complainant is to show the existence of the violations. In the case of non-violations, on the other hand, actual nullification and impairment has to be demonstrated.

3.2 THE RESPONDENT’S OBLIGATIONS IN RESPONSE TO RECOMMENDATIONS AND SUGGESTIONS BY PANELS

The obligations of a Respondent who is found to be in breach of the WTO agreement depend on the precise ruling of the panel. In Art. 19, the DSU introduces a novelty compared to the GATT, which is the distinction between recommended and suggested remedies. Art. 19 follows a two-tier approach:

(a) It imposes an obligation on all WTO adjudicating bodies to *recommend* that the WTO Member whose measures have been found not to be in conformity with the relevant WTO rules to bring its measures into compliance with their international obligations; and

(b) It gives WTO adjudicating bodies the opportunity (but imposes no legal obligation to this effect) to *suggest* ways in which WTO Members found to violate their international obligations could bring their measures into compliance with their obligations.

\(^{21}\) For a more extensive discussion of this, see Hoekman and Mavroidis (1994).
Art. 19 DSU deviates from the ILC Draft in the sense that withdrawal of the illegal act cannot be recommended without a prior specific request to this end. When limiting themselves to recommendations, WTO adjudicating bodies give ample discretion to the losing party.\textsuperscript{22} WTO Members are then, in principle, free to adopt any conduct they deem necessary in order to bring their measures in conformity with their international obligations. The only limits imposed on their discretion are those stemming from the principle of good faith: Members whose measures are found to be inconsistent with their WTO obligations, must at any rate withdraw these particular measures and not repeat them again.

The standard approach by panels in practice has indeed been to limit their verdicts to recommendations: only in two cases have panels gone further than this. On those two occasions, panels respectively recommended withdrawal of the illegal act with an undeniable \textit{ex nunc} effect in one case, and with a potentially \textit{ex tunc} effect in the other.\textsuperscript{23} So far a remedies issue has not arisen before the AB.

In case a panel instead of recommending were to \textit{suggest} something specific, would the Respondent have to follow the panel’s suggestion? For instance, in one of the two cases where this has occurred, the «United States - Restrictions on Imports of Cotton and Manmade Fibre Underwear» case, the panel stated:

«We, consequently, \textit{recommend} that the DSB requests the United States to bring the measure challenged by Costa Rica into compliance with US obligations under the ATC. We find that such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States. We further \textit{suggest} that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by \textit{immediately withdrawing} the restriction imposed by the measure».\textsuperscript{24}

The panel here suggested a particular remedy to the losing party, namely the withdrawal of the illegal act, and the Respondent did implement the panel’s suggestion.

\textsuperscript{22} See Hoekman and Mavroidis (1996).
\textsuperscript{23} In the Guatemala case the panel suggested that Guatemala revoke the AD duty imposed. Revocation is in principle distinguished from withdrawal in that the latter has an undeniable \textit{ex nunc} effect whereas the former should be acknowledged an \textit{ex tunc} effect.
\textsuperscript{24} WTO document WT/DS24/R of 8 November 1996; italics added.
It is clear that panels’ suggestions are not binding in the case of non-violation complaints. Art. 26.1(c) DSU, which addresses suggestions by panels in the realm non-violation complaints, states that «...such suggestions shall not be binding upon the parties to the dispute».

But, arguments can be made in both directions concerning the Respondent’s obligation to follow the panel’s suggestions in case of violation complaints. One the one hand, according to the text of Art. 19 DSU, the WTO adjudicating bodies may «suggest ways in which the Member concerned could implement the recommendations» (italics added). The word «could» seems to suggest that the panels’ suggestions are not binding upon WTO Members and that, consequently, concerned Members can always look for appropriate solutions other than the suggestions advanced by panels: in other words, there could be ways not included in the panels’ suggestions that could, if adopted, ensure compatibility with the multilateral rules. It should be noted, however, that even if such a conclusion were warranted, panels’ suggestions are not void of legal consequences: were the concerned Member to follow the panel’s suggestions, it would have to be deemed to have brought its measures into compliance with its obligations under the WTO. More generally, a suggestion by a panel creates an irrefutable presumption of legality for any subsequent action within its ambit.25

On the other hand, a contextual argument can be made to the effect that panels’ suggestions are binding in the case of violation complaints. In the realm of non-violation complaints, the DSU explicitly states that panels’ suggestions are not binding upon the parties to a dispute, while in the realm of violation complaints no such provision exists. A contrario therefore, one could conclude that in the case of violation complaints, suggestions are binding upon parties.

**Implications for developing countries**

At least two observations can be made concerning developing country aspects of the above issues. First, one should in general expect it to be much more difficult to identify situations in which justified non-violation complaints could be made, and to pursue such cases legally, as compared to violation complaints. Hence, it seems as if the possibility of pursuing non-violation complaints is mainly open to countries with significant legal human capital.

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Secondly, it might be argued that the very nature of the current functioning of the WTO dispute settlement system favours a practice whereby panels stick to rather «innocent» recommendations instead of potentially «provocative» suggestions. Panels, contrary to the AB, lack a permanent composition, and are in the overwhelming majority of cases selected by the parties to the dispute. Hence, the choice of panelists is the outcome of a diplomatic process. One could imagine at least three broad groups from which panelists could be chosen: (a) government officials, such as diplomats and officials in trade ministries; (b) lawyers in the public or private sector; and (c) academics in relevant fields. In practice, there is a strong domination by the first category. Diplomatic and pragmatic considerations are naturally more prevalent in the minds of governmental panelists, and such considerations generally disfavour remedies that might «rock the boat». And the boat is in this context easily rocked. For instance, it is clear that the major players in the trading scene are prime users of the antidumping instrument, and thus dislike the remedies recommended by the GATT panels in the antidumping/countervailing duty context before the entry into force of the WTO. A recommendation against a major player to bring its measures into compliance may in itself, from a diplomat’s point of view, be enough of an intrusion into its sovereignty. Hence, the fact that panel compositions tend to reflect diplomatic considerations, is probably largely responsible for the fact that panels have almost never gone further than to recommendations. It seems reasonable to assume that the resulting vagueness in rulings, in areas such as e.g. anti-dumping, has been to the detriment of developing countries, since they are typically the victims, rather than users, of the antidumping instrument.

3.3 WHEN HAS A LOSING RESPONDING COUNTRY FULFILLED ITS OBLIGATIONS?

The DS system has to deal with adjudication at two levels. First, the initial stage where it rules on the illegality of a measure pointed at in the request for the establishment of a panel. Secondly, in case it finds the measure to be illegal, it will have to judge, in case of disagreement between the parties to the dispute, whether the Respondent’s corrective actions are appropriate. The DSU has a potentially serious weakness with regard to the latter task, since it enables a losing recalcitrant Respondent to avoid withdrawing an illegal measure for an extended period of time, if not indefinitely.

The second type of adjudication is relatively straightforward in the case where the WTO adjudicating body provide suggestions in its report, and such suggestions are seen as binding: in this case it only remains to verify that the suggestions are implemented. However, if suggestions are not interpreted as binding (and as a consequence are not followed), or if only recommendations have been made, the second type of adjudication becomes significantly more involved. To start with, if the parties to a dispute cannot agree on when an illegal measure should be withdrawn, DSU Art. 21.3(c)
provides that the «reasonable period of time to implement panel or Appellate Body reports should not exceed 15 months from the date of the adoption of a panel or Appellate Body report». On three occasions so far, has the appointed arbitrator understood the 15 months period as an unconditional right at the disposal of the defendant. As pointed out above, if a panel report is limited to recommendations (or if it contains suggestions, but these are not binding), the Respondent has full discretion to choose what it deems to be appropriate to bring its measures into compliance with its WTO obligations. Thus, after up to 15 months the Respondent may undertake essentially «cosmetic» changes to its measure (how «cosmetic» these changes can be is an open issue). If there is then disagreement between the parties as to the adequacy of the implementing measures, the complaining party can request a panel (if possible, the original panel) to pronounce on this issue (Art. 21.5 DSU).

A cynical mind could therefore imagine an infinite series of panels dealing with essentially the same issue, that is whether the suggested implementing measure is adequate. The Respondent country effectively obstructs recourse to countermeasures by the complaining country any time it does something to meet the panel’s recommendation to bring its their measures into compliance with its WTO obligations. If this something is not deemed to be adequate by the Complainant, then all the latter can do is to request a panel (if possible, the original one) to pronounce on the adequacy/inadequacy of this something. However, the Complainant can not obtain authorization to adopt countermeasures, since it is not the same dispute anymore, in the sense that a different measure than the one attacked before the original panel is now under scrutiny. Countermeasures can be used only when the Respondent remains passive. It seems that one of the few possible ways to limit the problems stemming from this vicious circle is for complaining parties to request a specific remedy. In such cases, panels will always have to pronounce on the requested remedy and motivate why they accept or reject it.

This issue is vividly illustrated in the Bananas dispute opposing the EC and the United States. The AB report condemned the EC bananas policy and requested the EC to bring their measures into compliance with their obligations. As a result, the EC made some changes to its policy, but the United States alleged that the implementing actions were inadequate and that the policy was still at odds with the EC’s obligations under the WTO. Since there was disagreement between the parties to the dispute as to the adequacy of the implementing action, a panel was established to decide the issue. At this stage, the parties could no longer agree on the interpretation of the DSU. According to the EC,

26 The only limit being of course, the principle of good faith. However, since there is no WTO case-law in this respect, it is difficult to delineate with precision the limits imposed to state discretion by the good faith principle.
a finding by a panel that the implementing action is inadequate must precede a request to adopt countermeasures. The United States however, proposed an acontextual interpretation of the deadlines during which countermeasures can be adopted, and requested the panel to also rule on whether the proposed countermeasures by the US were equivalent with the damage the US suffered from the EC bananas policy. Furthermore, the United States imposed countermeasures (to be repaid if the US lost the case, as the US have claimed) even before the panel had pronounced on the equivalence of the US proposed countermeasures. This experience shows that the existing system does not adequately deal with a situation where the losing party makes only « cosmetic » changes (regardless of whether in this particular case the EC implementing actions were adequate or not, something which at the moment of writing has not been established by the panel).

**Implications for developing countries**

The above-mentioned possibility of avoiding implementation of adopted panel or AB reports is in principle equally open to all Members. However, when doing this, a country effectively moves the conflict outside the legal framework of the WTO and its system of conflict resolution, and into the area of international politics. It seems safe to assume that many, if not most, developing countries have nothing to gain from such a move, while major players in international politics may find this option less unattractive, and perhaps occasionally even desirable.

3.4 **COUNTERMEASURES WHEN A LOSING RESPONDING COUNTRY DOES NOT FULFIL ITS OBLIGATIONS**

In the event that the losing party has not implemented the report within the reasonable period, the complaining party can request and be authorized to suspend concessions. As an alternative, compensation may be granted to the complaining party. Compensation however, requires agreement of both parties.

Suspension of concessions is the WTO term for countermeasures. They must be "equivalent to the level of nullification or impairment" (Art. 22.4 DSU) and are seen (as is compensation) as an interim measure pending implementation of the report, since "full implementation of a recommendation to bring a measure into conformity with the covered agreements" is always preferred (Art. 22.1 DSU). Suspension of concessions is therefore the *ultima ratio* to guarantee that legality has been respected in the WTO.
The withdrawal of concessions may in principle serve at least three purposes: *prevent continued losses* for the Complainant, *induce changes* in the Respondent current behavior, and *deter* unlawful behavior in the first place. Hence, while the first purpose takes the actions of the Respondent for given, the second and third purposes are meant to affect the behavior of (potential) Respondents.

3.4.1 Withdrawal of concessions to prevent continued losses

As noted above, the DS does not enable panels to recommend compensation to be paid to a Complainant for losses already incurred due to an illegality, with some exceptions. However, when the illegality may continue in the future, it allows countries to withdraw concessions. Such a withdrawal may, depending on circumstances, serve to partially compensate the Complainant. There are at least two reasons why a government might perceive a unilateral increase in a trade barrier as beneficial. First, the government might see domestic political gains to be had from higher protection. Secondly, there are circumstances under which even a welfare maximizing government might find protection attractive, for instance when this would yield terms-of-trade gains, along the lines of the «monopoly tariff» argument, or would enhance the competitive position of domestic firms vis-à-vis foreign competitors, as highlighted in the "strategic trade policy" literature.27 Hence, a withdrawal of concessions would in such cases serve to partially (but not fully) compensate the Complainant. On the other hand, there is a presumption that trade barriers are costly to the country imposing them, at least from a welfare point of view. When this is the case, the withdrawal of concessions *adds* to the loss already incurred by the Complainant because of the illegality committed by the Respondent.

Implications for developing countries

The question of whether or not the DS is structured to the disadvantage of developing countries with regard to the withdrawal of concessions-remedy, largely seems to hinge on whether concessions are costly or not. A withdrawal of concessions of a given magnitude in terms of trade value, which is beneficial to the Complainant, should be of more value from a welfare point of view to a small/poor country, than to a richer/larger country, all else equal. For instance, the withdrawal would give rise to a proportionally larger gain in national income of the former. Conversely, if the withdrawal of concessions reduces the Complainant’s welfare, as seems likely, then it will be more

27 It appears as if the common argument against unilateral reductions of trade barriers, that it amounts to giving away "bargaining chips" which could be used in order to get better access to export markets, is not valid in this context. The concession only applies to the Respondent, and would hardly be relevant in a new round of negotiations, should the responding country refuse to change its behavior.
costly to the poorer country. The withdrawal must then be seen as an investment necessary in order to change the behavior of the Respondent, a cost which is larger to the poorer/smaller country than to the richer/larger country.

Another difference arises if countries start from different level of trade barriers. If the withdrawal of a concession is costly, then it seems reasonable to assume that when comparing two otherwise identical countries, the withdrawal will be more costly to the country with the higher trade barrier. Thus, if in one country the withdrawal reduces imports from $600 to $500 million, while in another country imports fall from $100 million to nil, then one should from an economic point of view expect the loss to be felt more severely in the latter country, since the consumption or production that is hindered by the withdrawal, should be expected to yield higher surplus (to be more valuable). Hence, to the extent that developing countries have higher barriers to trade, there may be an argument to be made for why they should suffer more in welfare terms from a withdrawal of concessions of a given size.

3.4.2 Withdrawal of concessions to induce changes in behavior

An important rationale for the possibility for countries to withdraw concessions is that this threat may discourage unlawful behavior in the first place. In order to see the role of remedies in this respect from a developing country point of view, it is useful to first consider their role as deterrence in a multilateral trade agreement at a more abstract level.

A characteristic feature of trade policy interventions in the form of e.g. tariffs or non-tariff barriers to trade, is that they tend to hurt trading partners more than they benefit the governments undertaking the interventions. Governments may therefore find themselves in a situation where they are all hurt by the existence of trade barriers, despite the fact that these barriers were all rationally imposed by governments promoting their self-interest. As a result, they could all gain from a joint reduction in these barriers. The difficulty of escaping this undesirable situation is that governments may have incentives to not live up to promises to adhere to an agreement on trade liberalisation – this is of course the classical Prisoners’ Dilemma type situation. Note that this picture does not hinge on the assumption that governments seek to maximize social welfare, even though it would definitely fit into such a framework. Also governments that are solely motivated by political-economy type considerations may find themselves in this type of Prisoners’ Dilemma situation, even though free trade may or may not be preferred to this situation.28

28 See e.g. Bagwell and Staiger (1997).
One way of avoiding such a dilemma would exist if governments could commit themselves to deliver sufficiently severe punishments, should a trading partner commit something unlawful, since these punishments could then be made sufficiently severe so that temporary gains from illegalities are not worthwhile. However, for the threat of counter-measures against cheaters to have this desired effect, the parties must believe that they would be invoked in case someone is cheating, and this in turn requires that those to deliver the punishments find this to be in their interest, should the agreement call upon them to so. But, why would the punishment be delivered if this is costly to the country affected? A distinguishing feature of the WTO Agreement is that there is no outside force that is willing or able to carry out the enforcement, should a deviation occur – there is no "policeman", despite what seems to be a popular belief to the contrary. Instead, it is for the Members themselves to devise methods for dealing with potential violators.

The only punishment available within the WTO agreement is the withdrawal of concessions. However, such withdrawals are rather narrow in several respects. First, the withdrawal of concessions is normally intended to be undertaken by the Complainant alone. While this is natural with regard to the first purpose of withdrawals – to prevent further losses for the Complainant – it restricts the effectiveness of the withdrawal with regard to the purpose of inducing the Respondent to change its behavior, and to deter unlawful acts.

Secondly, the DSU does not only rule out explicit countermeasures by third parties, but also fails to provide the Complainant with any means to enforce the ruling alone. First, from a practical point of view it might seem far-fetched to point out the fact that the DS system does not supply the Complainant with physical force to aid the Complainant ensure compliance with DS rulings. However, it is not self-evident \textit{a priori} why such competence could not be extended to a multilateral trade organization (even though there are obviously numerous practical problems). For instance, in a federation of states such as the United States the federal government has the competence to ultimately use force, should an individual state harm another state sufficiently severely. Hence, the Union is held together by force, just as it was formed through force. Secondly, the DS does not provide any financial support to a Complainant that undertakes costly countermeasures. This lack of support is far from self-evident. One could easily imagine that the agreement would ensure that a Complainant would get financial compensation from the rest of the membership, or perhaps through funds jointly collected by the membership. If such compensation became significant, it might yield incentives for Complainants to pursue recalcitrant Respondents, and this may contribute to reduce the risk that countermeasures have to be used.
A third restriction on countermeasures is, as discussed above, the fact that the DSU allows the Complainant only to take countermeasures that are "equivalent to the level of nullification or impairment" (Art. 22.4 DSU). There is still no case law with regard to the interpretation of "equivalent". As was pointed out, however, there is no room for punitive damages in the WTO legal system. The DS thus does not allow for countermeasures that are strong enough to be deterrent by themselves. Thus, to the extent that countermeasures that are strong enough to be deterring, this must either be a « coincidence », with awarded damages perceived by potential authors of illegal acts to be too high for illegalities to be worthwhile, or the deterrence stems from other costs to these authors, in e.g. the political sphere.

Given the fact that the DSU does not allow for particularly strong countermeasures against violators, one may ask what is the role of the DS at all? This is an intricate issue. There are only a few economic studies which rigorously seek to analyze the role of the DS system. We therefore have to rely largely on our intuition, as opposed to e.g. stricter economic or legal reasoning.

A major difficulty facing any study of the impact of the DS system is to identify its main features, since this requires a description of the counterfactual situation where there is no DSU. One possibility would be to view the GATT as the benchmark., but we are not aware of any study which rigorously seeks to analyze the difference between the DSU and the GATT. Another possibility would be a situation where there is no system for conflict resolution at all in the WTO. It is perhaps tempting to assume that in such a case the Members would find themselves back in the Prisoners' Dilemma type of situation. However, some form of implicit cooperation could still exist due to the repeated character of the interaction. A third possibility would be to take the alternative to the DSU to be the Prisoners' Dilemma type situation. Of course, the relevant alternative depends on the exact question at stake.

A central problem for an agreement such as the WTO, which for various reasons is phrased only in general terms, such as the requirement for national and most-favored nation treatment, is to determine whether any particular behavior amounts to an illegality. In order to maintain the agreement it is important for the Members to have a way to do this. The Members have agreed to let

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29 It is interesting to note that in the GATT regime the term used in the place of "equivalent" was "appropriate". There is only one reported case where recourse to countermeasures was envisaged (Netherlands Action Under Article XXIII:2 to Suspend Obligations to the United States, L/61 adopted on 8 November 1952, IS/62. In this case, the CONTRACTING PARTIES based the authorized level of countermeasures on calculations of the damage caused to the Netherlands. See also the discussion in the Analytical Index on “United States – Taxes on Petroleum and Certain Imported Substances”, C/M220, p. 36, C/M/224, p. 17 and Spec. (88) 48.

30 This literature includes studies by Bütler and Hauser (1998) and Kovenock and Thursby (1992) in addition to the papers mentioned below; see Staiger (1995) for a survey of this literature.
the ruling of the DS provide the answer in case of conflicts. Thus, there is one aspect of the DS which
in principle could equally well be performed through any mutually agreed way of finding a solution,
say, the flipping of a coin, provided that Members agreed beforehand to let their conflicts be resolved
this way.\footnote{There are many instances outside the WTO where the flipping of a coin, or something similar, is used to
adjudicate. For instance, in football it is used to decide the direction in which teams are to attack in the two
halves. The randomness is perhaps to some extent desirable in itself. But, it is also a means of achieving what
is considered a mutually agreed "fair" outcome, a "level playing field".}

Of course, the DS does substantially more than only pilot the conflicting parties to a solution,
since while the flipping of a coin yields a verdict which is independent of the underlying facts in a
case, the DS actually creates a link between the behavior of Respondents and its rulings. The
importance of this aspect of its function, which is the one normally emphasized, hinges crucially on
whether countries actually see lost cases in the DS as costly, however. If countries do not really care
about rulings, since they are not enforced, the legal quality of the rulings is irrelevant.

Among the formal analyses of aspects of dispute settlements is the study by Maggi (1996)
which highlights the \textit{multilateral} character of the DS system. The benchmark is hence not the
absence of a system of dispute settlement, but a situation in which countries have to enforce their
agreements unilaterally. A basic idea is that DS system provides for third country participation in
punishment of illegalities. If there are “power imbalances” in the sense that countries stand
differently much to lose from going back to the Prisoners’ Dilemma situation, then countries can
contribute relatively more to the punishment of those authors of illegalities which they stand less to
lose from punishing. Hence, certain countries can be seen as having particular "advantages" in the
punishment of certain other countries. Intuitively, if the agreement permits countries to redistribute
the responsibility for punishments so that they are delivered by those who can undertake them
particularly "cheaply", then the system can muster harsher punishments against defectors, and
consequently liberalization can go further.

While Maggi (1996) provides what is possibly the closest formal analysis of the views
expressed here, we are still somewhat skeptical concerning the extent to which it is descriptive of the
current DS system. As pointed out, a weakness of the current DSU is exactly that it does \textit{not}
explicitly allow for third parties to participate in the enforcement. Of course, there are other means
through which third parties can participate, by taking measures in other areas than in the trade field.
However, we are not convinced that this would be done on a systematic fashion, should the situation
arise. Instead, we take Maggi’s description to indicate a desirable direction in which the system might develop.

A second study of particular relevance to the issues at stake here, is that by Ludema (1990), even though it is somewhat difficult to explain without recourse to some basic game-theoretic concepts.32 The essential idea, applied to the DS, is roughly as follows: the DS system opens a door for bilateral negotiations should a conflict arise, and in these negotiations the parties can alternate in making offers and responding to offers. Since both parties are aware of the fact that such negotiations may last indefinitely unless they both are willing to make certain sacrifices, they will quickly reach a solution should a conflict threaten to arise. On the other hand, absent the DSU, the parties are more “distant” when formulating their strategies for the interaction, and this makes threats of more severe punishments for illegalities more credible. The role of the DSU is thus to make conflicts less dangerous, since it provides for a way of resolving conflicts in a “civilized manner”. The interesting consequence of this is to make the threat of conflicts less deterrent, and thus to reduce the incentives for Members to avoid conflicts.

A third study of particular interest to our concern, is that by Hungerford (1991), who applies a "Green and Porter model" to the trade context. In this model two countries choose both tariffs and non-tariff barriers (NTBs) during an indefinite sequence of periods. The level of tariffs are readily observable by both countries, and they can also enforce an agreement on tariffs through some exogenous force. However, the countries can not observe the level of non-tariff barriers imposed by their respective partner. Hungerford (1991) assumes that countries can observe their terms-of-trade (t-of-t), but that these are not only influenced by the NTBs, but also by unobservable temporary external random events, such as changes in preferences, and technologies. Hence, if faced with bad t-of-t in some period, a country could not tell whether this is the result of a beggar-thy-neighbor policy by the partner, or just an unfortunate random event.

Due to the unobservable nature of the NTBs, countries can not form an explicit agreement to reduce these barriers, since it can not be directly monitored. However, when the parties interact repeatedly, they can nevertheless reach a better outcome than a Prisoners' Dilemma situation, along similar lines to those discussed above. The complicating factor here, however, is the fact that they can not observe directly whether the partner fulfils its part of the agreement. Instead, countries have to rely on some other indicator of the partner's actions – the terms of trade. The equilibrium, absent a DS system, will then be such that when one country suffers a particularly bad t-of-t, it will have to

32 In terms of game theory parlour, Ludema (1990) compares a renegotiation-proof (a la Pearce) equilibrium to a subgame-perfect equilibrium.
punish the partner by increasing its observable tariff temporarily. Why? Because if it did not do so systematically, there would be incentives for the partner to pursue a beggar-thy-neighbor policy. Over time one would thus witness periods where countries trade "peacefully", but now and then there would be occasional outbursts of temporary "trade wars" after which the situation would return to "normal" again. These outbursts are costly to the countries, but are necessary in order to keep them from cheating on the agreement.

Then, what might be the role of a DS system? Suppose the agreement on tariffs required countries to undertake a costly investigation to look into the reasons for the shift in t-of-t, before withdrawing concessions. If such an investigation fully revealed the reason for the t-of-t change, all "unnecessary" punishments could be avoided. The gains would have to be set against the cost of the system. At the other extreme, if nothing more is learnt through such investigations, the DS system would make the enforcement of the cooperative implicit agreement on NTBs more costly, and would thus weaken the system. The conclusion is hence that a non-informative DS system is not only directly costly in terms of administration, widely interpreted, but may also have indirect costs through the weakening of the disciplining forces in trade agreements. But, a DS system which actually provides information about countries’ trade policies may help members avoid unwarranted periods of punishments.

Implications for developing countries

While the literature referred to above highlights what seems to be important aspects of the DSU, it is not as readily applicable to the question of developing country interests with the DSU. However, the above-mentioned limitations on countermeasures in the DS are likely to have important consequences for developing countries. First, the limited availability of countermeasures limits the effective scope of liberalization, since the further it would go, the more tempting for members to cheat, and thus the stronger the countermeasures that are needed to enforce the agreement. Therefore, the fact that third parties are restricted from participating in countermeasures, that the DS does not provide Complainants with financial or other support to deal with a recalcitrant Respondent, and that punitive damages can not be awarded, severely limits the extent of multilateral trade liberalization that can be achieved. As a result, countries have to seek other means of integration. Two prominent forms, which presumably have been of more benefit to industrialized than to developing countries, are Regional Trading Agreements and Mutual Recognition Agreements. It deserves to be emphasized that in the integration scheme which probably has gone the farthest in this respect – the European Community (EC) – the enforcement by the Commission, the international “policeman”, is of central
importance: the institutional setting of the EC is markedly different from that of other comparable schemes in that the initiative to further integration as well as the monitoring of compliance rests with a supranational « watchdog », the Commission, and not with the participants. Economic studies of the EC integration process often stress the importance of the contribution of the Commission.\textsuperscript{33}

Secondly, when enforcement means provided through the DS are weak, countries have to rely on other means to enforce the agreement. There is then a strong presumption that countries that are "strong" in the sense of being able to impose significant losses on trading partners at relatively low costs for themselves, are better off in such a system. Again, developing countries are at a disadvantage, when considering the trade arena. These countries are often dependent on the countries to which they export for foreign aid, and are also politically and sometimes military dependent on them.\textsuperscript{34}

An example can serve to illustrate this point: as a result of a conflict between the EC and Ivory Coast, the EC is authorized to impose countermeasures. Consequently, they impose a premium on exports of coffee from Ivory Coast which practically excludes Ivory Coast coffee from the EC market. Imagine however, that the result of the dispute went the other way and that Ivory Coast was authorized to impose countermeasures: The Ivory Coast imposes a premium against exports of cars from the EC practically making it impossible for EC cars to penetrate the Ivory Coast market. Surely, the two countermeasures are not equally effective means to deter violations. For instance, it would intuitively appear as if it would be more difficult for the Ivory Coast to find other buyers of its coffee, than it would be for the EC to find other buyers of the cars that are hindered to enter the Ivory Coast market. This could simply reflect the fact that it is likely to be easier to find markets in which demand is strong at the moment if selling in many different markets. It may also reflect different marketing skills in the EC than in the Ivory Coast.

Finally, there is yet another common asymmetry between developed and developing countries, which is the fact that the latter often receive tariff preferences from developed countries, but not vice versa. Since these preferences can be unilaterally withdrawn by the importing developed countries, it might appear as if they could be a source of leverage for the latter. However, while such withdrawal indeed can be used to punish an exporting developing country for e.g. raising an issue in

\textsuperscript{33} See, for example, Sapir et al (1995).
\textsuperscript{34} Yet another aspect is highlighted by Kennan and Riezman (1988), who show that when two countries can influence terms-of-trade, the larger country is likely to gain from moving from free trade to a tariff war (static Nash equilibrium). However, since the imposition of an illegal trade barrier and the consequent withdrawal of concessions, do normally not amount to a step back from free trade, but from a situation where countries
the DS, it should be noted that to the extent it is only the preference which is withdrawn, strictly speaking the result is not to undo the gains from the agreement for the exporter, but only the more favorable treatment. However, to the extent that the exporter is in competition with other developing countries which receive preferences, it may still be a potent weapon.

3.5 PROVISIONS IN THE DSU THAT SPECIFICALLY CONCERN DEVELOPING COUNTRIES

The picture painted above, even if not entirely clear, suggests certain shortcomings of the DS, shortcomings that tend to be detrimental to the interests of developing countries. However, against this picture must be set the fact that the DSU contains a series of provisions directly referring to developing countries. Although not remedies-specific, these provisions do have an impact on the way developing countries will behave in the context of the DSU, in that they allow for different treatment of developing countries in the DS process.

A common feature of all these provisions is that they acknowledge the fact that developing countries are in one way or the other in a different position compared to their developed counterparts with regard to dispute settlement in the WTO. But they lack provisions that would have any more significant effect of tilting the balance more in favour of developing countries. Two examples can help illustrate this point:

(a) When it comes to implementation, Art. 21.7 and 21.8 DSU acknowledge that developing countries’ interests should be taken into account. How exactly this is to be done, is not specified, however. For example, the Dispute Settlement Body (DSB) can discharge its obligations by adding a few more minutes to its routine discussions whenever in the context of a requested implementation developing countries’ interests are affected. By the same token, panels can add a few paragraphs to their findings in this perspective without in practice modifying the situation in favour of developing countries;

(b) Art. 27.2 DSU is intended to ensure that technical assistance will be given to developing countries in the context of DS. But, the technical assistance granted is both quantitatively and qualitatively inadequate. First, so far the WTO has put at the disposal of developing countries only two experts in the field working part time and two junior staff members to help these countries with their disputes. Taking into account the number of disputes where developing countries are implicated, the above mentioned resources are simply inadequate. Instead, developing countries are often forced entertain various forms of permitted trade barriers, it is not entirely straightforward to apply their result to the
to rely on private lawyers, the costs of which should not be underestimated. It deserves to be noted
that following the AB report on *Bananas*, legal representation by private lawyers is not at odds with
the WTO DS. The legal experts provided by the WTO under Art. 27.2 DSU have not yet represented
their « clients » before the WTO adjudicating bodies, however. Indeed, it is questionable how they
could do this, since on the one hand they are requested to advice their clients but on the other they
have to, according to their mandate, remain objective.\footnote{This is probably the only case of judicial assistance where a requirement to be objective, albeit imprecise in
the Agreement, is imposed on attorneys.}

Another weakness of the current system for technical assistance under Art. 27.2 DSU, is the
fact that such assistance can only be provided after a WTO Member has decided to submit a dispute
to the DS. However, what is at least as important in practice is to be able to evaluate which practices
are inconsistent and choose among them those that might be « winning » cases. This requires
expertise at the level of the national administrations, and developing countries are clearly
inadequately equipped to handle this. Consequently, as a result of the design of Art. 27.2 DSU,
technical assistance is more often used when developing countries act as Respondents (where the
initiative to submit lies with the other party), rather than when they act as Complainants.

3.6 REMEDY-RELATED PROVISIONS IN OTHER AGREEMENTS THAN THE DSU THAT ARE OF
PARTICULAR INTEREST TO DEVELOPING COUNTRIES

The Art. 19 DSU statement that panels and the AB are free to make recommendations and
suggestions, apply as long as covered Agreements do not specify differently. There are several such
insertions in other Agreements which are of particular interest to developing countries. All such
provisions reflect so-called special and differential treatment. Although not directly relevant to the
regulation of remedies, they do have an impact on the issue.

*WTO Agreement on Antidumping*

Among WTO Agreements, it is worth presenting in brief the relevant provisions of the
Antidumping Agreement (AD) which is often used against developing countries. The WTO AD
Agreement contains standard of judicial review which is very novel from the point of view of
international practice, and which unambiguously favours the WTO Member imposing AD duties.
Experts in the field have already persuasively demonstrated why this standard, which promotes

\footnote{issue at stake here, even though it is clearly of interest.}
«permissible interpretations», is impermissible itself viewed from a Public International Law angle.\textsuperscript{36} It can be added that the very relaxed standard of review incorporated in Art. 17.6 of the WTO Agreement on AD, coupled with a remedy which in practice does not go beyond the recommendation-stage, makes it quite unlikely to persecute arguably illegal AD. As a result, AD is one of the tools used most systematically for protectionist purposes, and often by industrialized countries toward developing countries.

\textit{WTO Agreement on Government Procurement}

The GPA goes in the opposite direction. This is an area where the interests of the major players are not to protect, as in the case of AD, but to open up markets. It contains two very notable innovations. First, it contains a provision (Art. XX, “Challenge procedures”) for quick relief, according to which private parties can require domestic courts to rule on whether procurements have been done according to the rules of the GPA. The intention is clearly to avoid repetitions of the Trondheim experiences (see above), where a construction was already in place when it was ruled that the procurement had not been performed in a correct manner. The second innovation is that parties to the GPA are explicitly enabled to request panels to allow them to negotiate remedies that go beyond the list of Art. 19 DSU, that is, remedies that could include e.g. monetary payments. And here is the trick: one could well expect that parties to a dispute could explicitly request a suggestion from the panel. This is not the case though. The drafters of the relevant GPA article apparently did not wish to grant panels that much liberty (with the eventual possibility of spillovers in other than the GPA agreements) and preferred to keep the «suggestion» at the bilateral level.\textsuperscript{37} The only limit in such bilateral solutions is that imposed by Arts.3.5 and 3.6 DSU, that is all bilaterally reached solutions must be consistent with the WTO rules and must be notified to the WTO.\textsuperscript{38} This Plurilateral Agreement is however, for the time being of less immediate relevance to developing countries, since they are not signatories. It is interesting to note though that in the context of this Agreement, developed countries implicitly agree that the current drafting of Art. 19 DSU may not always sufficiently address implementation concerns.

In the case of both these Agreements it is clear that the innovations referred to, which affect the scope of the DS, politically benefit the major players. From the point of view of social welfare the

\textsuperscript{36} See Croley and Jackson (1996), and Palmeter (1995).
\textsuperscript{37} This argument has been made in Hoekman and Mavroidis (1997).
restriction of the DS with regard to AD is often to the detriment of exporting countries, and most likely also the importing countries. The innovations in the case of the GPA clearly benefits exporters, and may or may not benefit the procuring country, even though there is a rather strong presumption that on average there are benefits also to the procurer.

4 CONCLUDING COMMENTS

In the above we have pointed to certain general weaknesses in the DSU with regard to remedies. It is yet too early to judge whether they are serious enough to significantly affect the working of the DS system. Hudec (1993) studied the implementation record of panel reports in the GATT-era, and concluded that the GATT record is rather satisfactory. There is perhaps no reason to assume that the WTO record will be any worse. One interpretation of the fact that no recourse has been made to countermeasures so far, with the exception of the US in the ongoing Banana case and a dispute in 1995 between the US and Japan concerning cars, is indeed that explicit and implicit remedies in the system are perceived as potent enough to prevent Respondents from obstructing rulings. Needless to say, it could also be taken to indicate a complete lack of faith in the value or effectiveness of remedies.

With regard to the extent to which the DS system takes care of developing country interests, there seems to be two different sets of features of the system to distinguish between. There are a number of provisions in the DSU with the expressed purpose of strengthening developing country positions. Most of these are not very far-reaching, however. On the other hand, there are inherent features of the system, such as the fact that Complainants are unsupported in battles against recalcitrant Respondents, as well as DSU-related insertions into other Agreements, that seem to tilt the system in favor of economically and politically stronger countries. It is obviously almost impossible to quantify these effects in anything like a rigorous manner. Our intuition is that the latter forces dominate the former.

The existing form of judicial assistance for developing countries is provided for in DSU Art. 27.2. By its design, this provision is likely to be of help mainly when developing countries are responding to a claim rather than when they want to take the initiative and bring forward a claim. This is so, since in the latter case, the WTO Member concerned must have already formed a legal opinion about a specific controversial situation before contacting the WTO experts. This is presumably a main reason why the Art. 27.2 facility is used in practice more often when developing

38 It is a transparency requirement to notify all solutions reached at the bilateral level so that third parties can check the consistency of bilateral solutions with the multilateral rules.
countries are Respondents.

In order to induce enhanced participation of developing countries in the DSU, it seems necessary that some local expertise is developed. For example, the EU and the US bureaucracies count sizeable teams of world trade experts who continuously assess whether actions by a foreign WTO Member constitute violations of WTO law. The flow of information is of course facilitated by the fact that both the EU (and its Members) and the US have commercial delegations around the world.

It is unrealistic to suggest that individual developing countries should emulate the EU and US example at any larger scale. What might be possible, though would be some form of exchange of information between developing countries. If for example, India develops a full-fledged delegation in Brussels, whereas South Africa is more focused on the US market and establishes delegation there, cooperation between the two delegations could be mutually beneficial. A more far-reaching proposal would be the establishment of a developing country, trade policy "watch-dog” that would aim at detecting illegalities affecting developing country commercial interests. Perhaps UNCTAD could play a role here, if equipped with sufficient expertise?

In sum:

(i) as is often emphasised in the policy debate, there is a need to ensure better professional representation of legal interests of developing countries before the WTO adjudicating bodies;

(ii) but, it seems to us that an even more serious weakness of the current system might be the lack of in-house expertise concerning trade law in developing country administrations (the detection of illegalities);

(iii) any proposed new system must be politically robust, in the sense that a well-functioning system of this type may not only be viewed upon positively by major players, and it must also be able to handle disputes between developing countries.

Finally, an aspect of the WTO DS that has not been touched upon above, but that may have different implications for industrialized and developing countries, is the fact that the WTO is a contract between governments which directly affects private parties, but only governments have locus standi before WTO panels. Therefore, only disputes that pass the «government filter» will be submitted to the WTO. For instance, when faced with arguably WTO inconsistent legislations in an
export market which «mirror» its own legislation, a government might prefer not to bring the case to the WTO, and it may also for other reasons choose not to pursue cases which could/should be pursued. The working of this «filter» is thus central the effect of the DS for different countries. This raises in turn the difficult but central question of whether there are systematic differences between rich and poor countries in the extent to which governments represent broad national interests (social welfare considerations).
ANNEX: PROVISIONS IN THE DSU WHICH EXPLICITLY REFER TO DEVELOPING COUNTRIES

General Provisions: Article 3:12

"Notwithstanding Article 3:11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail."

Consultations: Article 4.10

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

Composition of Panels, Art. 8.10:

«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 panelist from a developing country Member.»

Panel Procedures: Article 12.10

"In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in Article 4:7 and 4:8. 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 Article 20:1 and of Article 21:4 are not affected by any action pursuant to this paragraph.”

Panel Procedures: Article 12.11

"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."

Surveillance of Implementation of Recommendations and Rulings: Article 21.2

"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."

Surveillance of Implementation of Recommendations and Rulings: Article 21.7

"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."

Surveillance of Implementation of Recommendations and Rulings: Article 21.8

"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."

Special Procedures Involving Least-Developed Members: Article 24.1
"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."

Special Procedures Involving Least-Developed Members: Article 24:2

"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."

Responsibilities of the Secretariat: Article 27.2

"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."
REFERENCES


Table 1a: No. of appearances as Complainant

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