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WTO DISPUTE SETTLEMENT SYSTEM AND IMPLEMENTATION OF DECISIONS: A DEVELOPING COUNTRY PERSPECTIVE.

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DECLARATION

No portion of the work referred to in this dissertation has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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ABSTRACT

This dissertation aims to analyse the involvement, use and special needs of Developing Countries in the World Trade Organisation Dispute Settlement System with a particular focus on the implementation of decisions. This subject will be tackled from a historical, present and prospective point of view.
This dissertation will first demonstrate the special needs of developing countries as they historically appeared through the dispute settlement' s practice and at showing what were the state of the law and developing countries expectations before the establishment of the WTO. Accordingly, a critical description and analysis of the special treatment afforded to developing countries in the WTO dispute settlement system will be provided.
We will then specifically tackle the difficulties a developing country may experience in the implementation of WTO dispute settlement findings. We will mainly observe that the solutions as to the implementation ensuing from the DSU are discriminatory in practice as they favour economically strong members.
At last, this dissertation will echo and take part in the calls for reform and analyse their potentials.

ABBREVIATIONS

AB: Appellate Body.
DC: Developing Countries.
DSB: Dispute Settlement Body.
DSM: Dispute Settlement Mechanism.
DSU: Dispute Settlement Understanding.
LDCs: Least Developed Countries.
GATT: General Agreement on Tariffs and Trade.
UNCTAD: United Nations Conference on Trade and Development.
WTO: World Trade Organisation.

INTRODUCTION

The WTO Dispute Settlement Mechanism (DSM) "is likely to be seen in the future as one of the most important, and perhaps even watershed developments of international economic relations in the twentieth century"[1]. But can this essential feature of the World Trade Organisation be an instrument of justice and development in the interests of Developing Countries (DCs)? This is the underlying question we want to address in this dissertation.

The mere fact that the World Trade Organization (WTO) is the international organisation dealing with the global rules of trade between nations seems, prima facie, to contradict the idea of a DSM promoting justice and development beyond trade interests. This is obviously not the primary goal of this organisation and the role of the DSM reflects this fact.

However, over three-quarters of WTO members are developing or least-developed countries[2] (respectively DCs and LDCs). This important weight in the WTO membership must be compared with the DCs' limited share in the global trade. Failing to translate these essential features of world trade and WTO membership in WTO agreements and DSM would be a mistake given that rich and poor countries do have some common interests in world trade.

Accordingly, many WTO agreements, including the DSM, reflect the fundamental differences that exist between developed and developing countries and provide for differential treatments.

In the WTO, as in Public International Law, there is no precise definition of the term "developing country"[3]. Accordingly, following Horn and Mavroidis, we will use this term in the conventional sense to denote a relatively poor country[4]. However, since all WTO Members can, invoking the self-election principle, declare a developing country status[5], the term will also reflect the legal sense used in the WTO Agreements, where a number of provisions refer specifically to "developing countries" and "least-developed countries". In these cases, as stated above, no precise definitions can be found in WTO agreements themselves. They refer explicitly or not to the UN classification in this regard[6].

The WTO dispute Settlement Mechanism aims to resolve trade quarrels between members. Such mechanism has always been present throughout the GATT/WTO history, although it only recently, as a result of the Uruguay Round, benefited from a genuine adjudicative

[1] J.H Jackson cited in Brewer, T. L., and Young S. International trade WTO disputes and developing countries. Journal of World Trade. ISSN 1011-6702. 1999, 33(5), 169-182, p.169.

[2] "*About 100 of the WTO's over* [sic] *14*[2] *members are developing countries. They are expected to play an increasingly important role in the WTO because of their numbers and because they are becoming more important in the global economy. The WTO agreements take account of these countries' interests in a number of ways* [emphasis added]". This share is likely to increase since most applicants to WTO membership are DCs. WTO Web site. http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm.

[3] Horn, H., and Mavroidis P. C. Remedies in the WTO Dispute Settlement System and Developing Countries. www1.worldbank.org/wbiep/trade/papers_2000/BPdisput.PDF, 1999, p.1and 2.

[4] 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. *Ibid.* See also Duk Park, Y., and Umbricht G. C. International trade WTO dispute settlement 1995-2000: a statistical analysis. Journal of International Economic Law. ISSN1369-3034. 2001, 4(1), 213-230, p.214, note 4.

[5] "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.[emphasis added]". *Ibid.*

[6] *Ibid.*, p.214, note 5.

approach, breaking with the underlying diplomatic nature of the GATT DSM. Many distinctive features relevant to the situation of DCs are significant for the settlement of disputes: the necessity to promote development through trade, the relative lack of legal expertise and financial resources, the need for settling rapidly trade-related disputes or their dependence on developed countries for example.

As part of the more general question of the treatment of developing countries in the WTO DSM, we will emphasise throughout this dissertation and specifically in chapter III the difficult question of the implementation of WTO DSM decisions from the viewpoint of developing countries. We will notably insist on the difficulties these countries may face when involved in a dispute with a developed country in the event the latter is not willing to comply with a panel or appellate body decision.

Our – relatively – narrow subject has been rarely addressed as such. This explains the heavy reliance of this dissertation on a few previous works, notably on outstanding articles by M.E. Footer, B. M. Hoekman, P. C. Mavroidis, H. Horn and K.O. Kufuor (see general bibliography[7]).

To some extent, developing countries' special needs and specific weaknesses had been taken into account throughout the GATT history (Chapter I) and were controversially translated in the new WTO DSM (Chapter II).

One highly contentious issue of the WTO DSM is the actual significance and subsequent application of WTO DSM decisions. We will notably observe in this regard that the emphasis placed on retaliation gives rise to practical difficulties for developing countries (Chapter III).

In a last chapter (Chapter IV) we will echo and take part in the calls for reform of the WTO DSM that ensue from South countries.

[7] Bibliography p.97.

CHAPTER 1: EVOLUTION OF THE TREATMENT GRANTED TO DEVELOPING COUNTRIES UNDER THE GATT DISPUTE SETTLEMENT SYSTEM.

This chapter aims at demonstrating the special needs of developing countries as they historically appeared through the dispute settlement' s practice and at showing what were the state of the law and developing countries expectations before the establishment of the WTO.

Section 1: Treatment of developing countries under the GATT dispute settlement system.

The General Agreement on Tariffs and Trade had been conceived as an international Treaty and not an institution. For this reason, no specific body designed to settle disputes between members had been provided for: dispute settlement rested on conciliation. The aim of the GATT was not to sanction against violations but rather to seek a consensus on the need to comply with the rules[8]. This left an important role for negotiation and thus the economic weight of the parties to the dispute had a problematic bearing upon the dispute settlement.

Paragraph 1: 1947- 1966: Emergence of a differential treatment in favour of developing countries.

System resting upon Article XXII and XXIII, favouring negotiation and the finding of a consensus.

The "consultation" (Article XXII) and the "nullification or impairment" (Article XXIII) provisions were originally the only GATT provisions addressing the question of dispute settlement[9].

It must be primarily noted that Article XXII and XXIII[10] did not provide for a "Dispute settlement system" as such but for a system whereby the protection of concessions could be assured[11]. Accordingly, the GATT DSM was not of judicial nature. The procedure was invokable irrespective of whether there was a breach of legal obligation. The aim of the system was to reach a consensus on the dispute through negotiation. To do so, articles XXII and XXIII provide for a two-stage procedure. The first "bilateral" stage of the procedure (Article 22) gives the parties to the dispute the opportunity to consult each other and with other contracting parties. The second stage of the procedure was multilateral. It was triggered mainly where "no satisfactory adjustment [had been] effected between the contracting parties

[8] Although several improvements were brought about under the GATT system which eventually afforded developing countries a differential treatment, dispute settlement basically rested upon conciliation. Taxil, B., *L'OMC et les pays en développement*. Montchrestien, 1998, p. 123.

[9] At this early stage, no distinction whatsoever was drawn between developing and industrialised countries.

[10] See annex p.1.

[11] Roessler, R. Colloque de Nice, La réorganisation mondiale des échanges. SFDI, Pédone, 1996, p.310.

concerned within a reasonable time […] [emphasis added].” at the first stage. The matter may then be “referred to the CONTRACTING PARTIES”.12.

As B. Taxil notes13, these articles are rather laconic, no precise procedural conditions are provided for. This procedure had been designed to be pragmatic and above all not to impose on contracting parties any legally binding obligations stricto sensu. Therefore, the GATT DSM, as conceived in 1947, left room for practical improvements14. The main shortcoming of the system which undermined its apparent simplicity was the necessity to gather all Contracting Parties to settle the dispute.

Regarding the specific situation of developing countries, it is self evident that the GATT 1947 procedure did not serve their interests: the economic weight of the parties to the disputes had a significant bearing on the negotiation process. This emphasis on negotiation was likely to lead economically strong members of the GATT to use – or abuse of – their political and economic strength to take advantage of developing countries15. This resulted in a lack of trust of developing members in the GATT DSM and, as K. O. Kufuor notes16, they filed only ten out of fifty-eight complaints from 1948 to 1966.

System similar to conciliation17 to the detriment of developing countries.

As K.R. Gupta18 points out, the procedure laid down in Article XXII and XXIII was “very similar to conciliation”: parties to the dispute tried to reach “an agreed statement of the facts and – if possible – an agreed statement of the application of the relevant GATT provisions to those facts [emphasis added].”, this statement was further submitted to the contracting parties whose role was described earlier.

This early approach of the settlement of dispute reflected the most powerful contracting parties’ will to put in place a system the aim of which was merely “to facilitate the settlement by government contracting parties to the GATT, of dispute between them regarding GATT

[12] The latter, after having investigated the matter, shall make recommendations and possibly authorise *“a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement* [emphasis added].*”* GATT 1947 Article XXIII, Kofi Oteng Kufuor notes the contracting parties authorised retaliation only once in the GATT’s history (Netherlands-measures of suspension of obligations to the United States, GATT, BISD, 1st supplement, 1953.32), International trade From the GATT to the WTO: the developing countries and the reform of the procedures for the settlement of international trade disputes. Journal of World Trade. ISSN 1011-6702. 1997, 31(5), 117-145, p.122.

[13] Taxil, B., *op.cit., supra, footnote* 8, p.124.

[14] As we will observe, practical needs for procedural improvements contributed to establish a set of rules which were codified in two texts during the Tokyo Round in 1979, Taxil, B., *op.cit., supra, footnote 8*, 1998, p.125.

[15] Kuruvila, P. E. International trade, Developing countries and the GATT/WTO dispute settlement mechanism. Journal of World Trade. ISSN 1011-6702. 1997, 31(6), 171-208, p.178. Jackson, J.H., and Davey W.J. Legal Problems of International Economic Relations: Cases, Materials and Text. American Casebook Series, West Publishing Co, 2d edition, 1986, p.1153.

[16] Kufuor, K. O., *op.cit., supra, footnote 12*, p.123.

[17] Conciliation can be defined as the appointment by the parties to an international dispute of a third party whose role is to examine every aspect of the conflicts and propose a solution.

[18] K.R.Gupta, GATT and underdeveloped countries. Atma, Ram and sons, 1976, p.267

matters [emphasis added]."19. Intergovernmental conciliation prevailed over the GATT settlement of dispute system.

Following E. Canal-Forges, we must insist on the fact that conciliation does not normally lead to a legally binding solution20. To this extent, conciliation can be opposed to judicial process in the sense that the latter binds the parties and favours the application of the rule-of-law and not the finding of a consensus the legal significance of which is dubious. Article XXII and XXIII connoted a power of negotiation, based on the economic weight of the parties to the disputes: genuine fair conciliation can only take place between parties of comparable economic power21.

B. Taxil22 insists on the fact that the conciliation approach of the GATT 1947 was not adapted to disputes between countries of unequal economic might23. Judicial remedy appears to be the only way to ensure a due process of law. At this early stage of the GATT's history, the need for a "judicialisation" of the procedure was felt by developing countries. As P.E. Kuruvila24 notes, smaller countries tend to support a legalistic system that places the emphasis on rules and under which they feel being treated more fairly. Judicialisation also allows for the development of a more consistent "jurisprudence" and provides "greater precision, predictability and stability of the GATT rules [emphasis added]."25.

Seventh session of 1953: recourse to panels of experts.

The necessity to gather all contracting parties in order to investigate and settle disputes raised evident practical difficulties. Accordingly, it was decided at the Seventh session in 1953 that the settlement of disputes should be entrusted to panels of experts.

The latter were to be composed of three to five GATT delegates, according to their individual competence and merits26. As Gupta notes27, the selected delegates were indeed

[19] Jackson, J. H. Dispute settlement and the WTO, background note for conference on developing countries and the new round multilateral of trade negotiations. Center for International Development, John F. Kennedy School of Government, http://www.ksg.harvard.edu/Trade_Workshop/jackson.pdf, 1999, p.2.

[20] Canal-Forges, E. Le système de réglement des différends de l'OMC. Revue Générale de Droit International Public. ISSN 0373-6156. 1994, 689 – 718, p. 699.

[21] Yusuf, A. Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of development needs on the Evolution of International law. Martinus Nijhoff Publishers, 1982, p.74.

[22] The first stage of the procedure – which only involved the parties to the disputes themselves- favoured the economically strong members. The same reflection can be made for the second stage of the procedure: because the power of commercial retaliation eventually determined the outcome of the dispute, only industrialised countries could have their rights respected. Taxil, B., *op. cit., supra, footnote 8*, p.130

[23] Although the comparison is of limited extent, it is interesting to note that in most countries, conciliation - like arbitration - cannot be imposed to customers as a dispute settlement mode in commercial relations with professionals. It is self-evident that customer's technical knowledge and economic power is not comparable to those of professionals. Likewise, developing countries are "*economically weaker partners*" in the international economic order and should be afforded protection in the settlement of disputes. Mukerji, A. Developing countries and the WTO: issues of implementation. Journal of World Trade. ISSN 1011-6702. 2000, 34(6), 33-74, p.65.

[17] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.178.

[25] Jackson, J. H., *op. cit., supra, footnote 19*, p. 2.

[26] Gupta, K.R., *op. cit., supra, footnote 18*, p.267.

[27] *Ibid.*

representatives of contracting parties but they acted "in their own right and [did] not simply carry out a function assigned to their delegation [emphasis added]."28.

The panel was established ad hoc for each case and was first appointed by contracting parties to investigate the case.

The two parties to the complaints29 were then heard by the panel. In the event the dispute was not settled during the deliberations, the panel deliberated in camera and ruled in the form of a draft report. The parties had the opportunity to submit comments on this report. Having considered theses comments, the panel could modify its report or simply take note of them. Although the GATT provided for a simple majority system, in practice all decisions were taken by consensus30.

The report merely consisted in recommendations which encouraged the disputant parties to settle the dispute without resorting to retaliation. "One form of the recommendation calls, in a polite way, the guilty party to withdraw the measure in question [emphasis added]."31 However, when the circumstances were serious enough, the contracting parties could authorise the aggrieved party to have recourse to retaliation.

From the perspective of developing countries, the panel system was, at least prima facie, a major improvement. The composition of panels seemed to better reflect smallest countries' interests. In addition, this system appeared to allow for a quicker settlement of disputes.

However, in practice, panel proceedings could take a long time32. More importantly, the conclusion reached did not provide developing countries with the legal certainty they had been expecting33. Finally, as we will observe further, recourse to retaliation is not an affordable option for developing countries, above all when the economy of the developing country in question mainly depends on the trade of a single product with a developed country. R. E. Hudec notes34 that developing countries lawsuits had no real force behind them because they simply do not have the market power to injure a developed country by retaliation.

K.R.Gupta35 noted in 1976 that the GATT DSM must be distinguished from a judicial apparatus on several grounds: the disputants were allowed to see and comment on the report while in process and a great deal of informal consultations were held with the disputants in order to "find out common grounds which may be acceptable by both parties [emphasis added].". This important feature, coupled with the fact that panel reports did not bind the parties to the dispute, confirms that the GATT DSM was still comparable to a conciliation process after the panel system had been created.

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[28] This brought about more independence and less passion in the treatment of disputes compared to working parties which were basically representatives of their government. This was a major improvement. A majority of panels were composed of nationals of the smallest countries. It was felt that they would be more impartial than those of the biggest countries *"whose national interests are so wide as to be affected by every event in any part of the world* [emphasis added]*." Ibid.*

[29] As well as any party having a substantial interest in the case and willing to be heard.

[30] Mukerji, A., *op. cit., supra, footnote 23*, p.64.

[31] Gupta, K.R., *op. cit., supra, footnote 18*, p.268.

[32] *Ibid.*

[33] As we observed, the panel recommendations were not legally binding and this obviously affected the poorer members of the GATT to a greater extent.

[34] Hudec, R. E. Developing countries in the GATT Legal System. Trade Policy Research Center, 1987, p.48.

[35] Gupta, K.R., *op. cit., supra, footnote 18*, p.268.

At this stage, developing countries had indeed little recourse to the DSM, the lack of trust in the system may be regarded as the main reason for this[36].

Paragraph 2: Special treatment under the pre-Tokyo Round.

The outbreak of the Uruguay complaint (1961).

In 1961, Uruguay launched a massive complaint[37] on the ground of article XXIII against fifteen developed countries, listing five hundred seventy six restrictive measures[38]. However, the complainant refused to take position on the legality of the measures at issue under the GATT[39], though requesting a ruling on this question.
This passive attitude can be analysed in the retrospect as an effort "to dramatize the GATT's ineffectiveness in protecting the legal rights of developing countries [emphasis added]."[40]. This can also be explained by the Uruguay's fear of individually provoking a developed country[41].
Although the overall outcome of the complaint was positive - some restrictive measures were removed following the complaint – Uruguay eventually took the view that GATT law was unable to protect developing countries[42], since other restrictive measures had been taken by the defendant countries during the pendency of the dispute of after it had been settled.
As we observed earlier, before the Uruguay claim in 1961, developing countries had made little use of the GATT DSM. The Uruguay case aimed at drawing developed countries' attention on the overall imbalance of benefits under the GATT[43]. Uruguay hardly obtained satisfaction from its broad-based attack[44] and this led this country, along with Brazil, to propose in 1965 a major reform of the GATT DSM.

[36] T.R.A.D.E. Working paper: issues regarding the review of the WTO dispute settlement mechanism. http://www.southcentre.org/publications/trade/dispute.pdf, 1999, p.10.

[37] Uruguayan recourse to Article XXIII, BISD 115/95.

[38] T.R.A.D.E. , *op. cit., supra, footnote 36*, p.10.

[39] Hudec, R. E., *op. cit., supra, footnote 34*, p.11.

[40] *Ibid*., p.47.

[41] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.190.

[42] Hudec, R. E., *op. cit., supra, footnote 34*, p.49.

[43] The DSM was felt to play an important role in this disequilibrium. Among the main concerns of developing countries was their *"demand* […] *for better level of compliance by developed countries* [emphasis added]." as well as a demand for improved compliance in agricultural trade and the complaint about the damage to existing commercial interests from the EC common Agricultural Policy. Hudec, R. E., *op. cit., supra, footnote 34*, p.32.

[44] Gupta, K.R., *op. cit., supra, footnote 18*, p.273. and Yusuf, A, *op. cit., supra, footnote 21*, p.73.

1965: Brazil and Uruguay proposals.

In 1965, Brazil and Uruguay proposed a reform of Article XXIII of the GATT. The contemplated amendment mainly touched upon four major developing countries' concerns.
(i) Article XXII should provide developing countries with the option of employing additional measures (including greater technical assistance and that third party be permitted to prosecute GATT related complaints on their behalf[45]).
(ii) A financial compensation on mutually acceptable terms should be paid in case of violations of the GATT by developed countries[46], where it is established that the measure at issue has an adverse effect on the trade of the developing country.
(iii) The possibility for developing countries to be released from their obligations under the GATT towards a developed country whose restrictive measures have impaired their import capacity.
(iv) Where a developed country has not complied with a panel recommendation within a certain time limit, the possibility of a collective action in order to obtain compliance should be provided for.
What must first be pointed out is that the brazil and Uruguay proposed reform did not aim at improving the overall GATT DSM but at establishing a preferential treatment within this system in favour of developing countries. The need for a realistic distinction[47], considering developing countries' specific needs and possible use of the DSS had been definitely established, although, as we will see, the Brazil and Uruguay proposal led to a modest change. The proposed reform indeed aspired to alleviate the unequal economic relationship between North and South which was felt to be reflected in the GATT DSM' functioning. One major concern was to imagine new remedies in favour of developing countries in order to compensate their inability to retaliate against a developed country. Financial compensation was seen to be the best option[48]. This proposal was rejected on the ground that granting the aggrieved party a right to financial compensation would undermine the defendant state's sovereignty 49. The report of the Ad Hoc Committee on legal amendments also shows that the possibility of a financial compensation was rejected on the ground that "it would be impossible to evaluate the loss occurred by a contracting party in its export opportunities in money term [..] [emphasis added]."50.
Likewise, the right for developing countries to be released from their obligations under certain circumstances was considered as excessive[51]. However the Brazil and Uruguay plan did have

[45] Kufuor, K. O., *op. cit., supra, footnote 12*, p.123.

[46] Gupta, K.R., *op. cit., supra, footnote 18*, p.273.

[47] To this extent, the Brazil and Uruguay plan broke up with the idea that the GATT DSS could offer developing countries the same remedies as for their developed counterparts. It was felt among developing countries that the "spirit" of the GATT DSM had to be changed: no substantial improvement could have been brought about within the limit of a GATT DSS treating in the same way underdeveloped and industrialised countries. This claim for distinction was strongly advocated in the proposed reform, as most provisions envisaged the case where a developing country is involved in a dispute with a developing country.

[48] Kufuor, K. O., *op. cit., supra, footnote 12*, p.123.

[49] Taxil, B., *op. cit., supra, footnote 8*, 1998, p.133.

[50] Cited in Gupta, K.R., *op. cit., supra, footnote 18*, p.273.

[51] Taxil, B., *op. cit., supra, footnote 8*, p.133.

a certain legislative impact in the form of the inclusion of part IV in the GATT and the adoption of the 1966 Procedures.

Inclusion of part IV in the GATT and 1966 Procedures: consideration of developing countries specific needs.

When the Brazil and Uruguay proposals were put forward, the GATT DSM merely consisted in the "consultation" and the "nullification or impairment" provisions described above which were indeed common to all contracting parties. The first attempt to take in consideration developing countries' particular position as to the GATT DSM was the inclusion of Part IV[52] (TRADE AND DEVELOPMENT) which added to the GATT agreement Article XXXVI, XXXVII and XXXVIII[53].

The latter laid down general commitments[54] made by developed countries towards their underdeveloped counterparts. Although it does not regard the settlement of disputes it is worthy noting that, as P. E. Kuruvila notes[55], the inclusion of Part IV constituted a first step, though rather timid, towards the recognition of a special status for developing countries in the GATT DSM.

The next major improvement ensued from the 1966 procedures[56] which are considered as the political and legal response to the Brazil and Uruguay proposals[57]. The 1966 procedures[58] mainly consists in four provisions which only apply to complaints by underdeveloped countries against developed countries.

First of all, as a result of the 1966 procedures, it must be noted that the panel shall "take due account of all the circumstances and considerations relating to the application of the measures complained of and their impact on the trade and economic development of affected contracting parties [emphasis added]."[59]. This provision was designed to call upon panels to take account of the economic dimension of the case besides its purely legal implications[60].

[52] See DSU Article 3(12), annex p.18.

[53] These articles are not directly related to the dispute settlement. They are mainly designed to encourage collaboration between developed and less developed contracting parties in order to foster development. However, Article XXXVII (2) put in place a consultation procedure which is to be undertaken "[W]*henever it is considered that effect is not being given to any of the provisions*" [emphasis added]. set out in Article XXXVII (1). See also Kuruvila, P. E., *op. cit., supra, footnote 15*, p.172.

[54] As regards the reduction and elimination of barriers to products currently or potentially of particular export interest for developing countries, customs duties or non-tariff import barriers, fiscal measures and general policy.

[55] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.172 and 191.

[56] Conciliation procedure under Article XIII, GATT C.P. Dec. (5 April 1966), 23 sess., 14th Supplement BISD (1967) 18.

[57] Kufuor, K. O., *op. cit., supra, footnote 12*, p.123. and Taxil, B. , *op.cit., supra, footnote 8*, p.133.

[58] Which are still in force today.

[59] Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 6.

[60] In that sense, the new rule represented a political and legal recognition of the unequal economic relationship between developed and underdeveloped countries. It ensues from this provision that panels cannot rule on a restrictive measure or practice applied by an industrialised country in a purely legalistic way. Such a restrictive measure is more likely to affect countries than developed countries and this must be taken into account. To this extent, the 1966 procedures broke up with the idea of a uniform DSS. This also responded to a certain extent to the developing countries' campaign (subsequently to the Uruguay complaint) which "[…] *aimed at securing more pragmatic decisions evaluating the economic justification for various restrictions and pointing out ways the restrictions might be reduced."* [emphasis added]. Hudec, R. E., *op. cit., supra, footnote 34*, p.247.

The fact that the economic - and not simply legal - implications of the measure at issue was to be taken into account as a major element in the panel ruling was a real improvement[61].

Another important improvement contained in the 1966 procedures was the possibility for developing countries involved in a dispute with their developed counterparts to have recourse to the good offices of the Director-General of the GATT[62]. This can be done in the case that bilateral negotiations fail. In order to assist the Director-General in his task, he is granted access to all information related to the dispute. This is necessary since he is to be closely involved in the negotiations[63]. To do so, he can consult with the contracting parties concerned or with any other sources he finds appropriate (other contracting parties, intergovernmental organisations).

In order to highlight the GATT DSM' deficiencies and to take account of developing countries concerns, the Director-General was to "bring the matter to the attention of the contracting parties [emphasis added]." at the request of any of the countries involved, in the case that no satisfactory solution is reached after two months[64].

Two further provisions contained in the 1966 procedures dealt with the question of delays in the dispute settlement process.

(i) A panel of experts is to be appointed forthwith upon receipt of the report of the Directorate-General[65]. This panel is to reach its decision and submit its recommendation to the GATT Council for review and appropriate action within sixty days[66].

(ii) The question of the implementation of panels rulings was also tackled by the 1966 Decisions. Precise time frames were established in this purpose, regarding both the information on the action taken by the respondent and the practical implementation of the recommendation itself.

The GATT Council or the contracting parties is to be informed by the country to which the recommendation was made of its action following the panel's ruling within ninety days from the decision of the relevant authority (contracting parties or Council)[67]. If this report shows

[61] But on the other hand, this confirmed that the GATT approach of the DSS was not of legalistic – or judicial – nature. At this stage, a certain "conciliation atmosphere" still prevailed over the GATT DSM.

[62] *" If consultations between a less developed contracting party and a developed contracting party in any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less developed contracting party complaining of the measure may refer the matter which is the subject of consultation to the Director General so that, acting in an* ex officio *capacity he may use his good offices with a view to facilitating a solution*" [emphasis added]., Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 1.

[63] Kufuor, K. O., *op. cit., supra, footnote 12*, p.124.

[64] Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 4.

[65] "*Upon receipt of the report, the CONTRACTING PARTIES or council shall forthwith appoint a panel of experts to examine the matter with a view to recommending appropriate solutions. The members of the panel shall act in a personal capacity and shall be appointed in consultation with, and with the approval of, the contracting parties concerned*" [emphasis added]., Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 5.

[66] "*The panel shall, within a period of sixty days from the date he matter was referred to it submit its findings and recommendations to the CONTRACTING PARTIES s or to the Council, for consideration and decision. Where the matter is referred to the council, it may, in accordance with rule 8 of the Intercessional Procedures adopted by the CONTRACTING PARTIES s at their thirteenth session, address its recommendation directly to the interested contracting parties and concurrently report to the CONTRACTING PARTIES*" [emphasis added]. Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 7.

[67] "*Within a period of ninety days from the date of the decision of the CONTRACTING PARTIES or the Council, the contracting party to which a recommendation is directed shall report to the CONTRACTING PARTIES or the Council on the action taken by it in pursuance of the decision*", [emphasis added]. Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 8.

that the respondent did not fully complied with the recommendation within the ninety days time frame and if "the circumstances are serious enough to justify such action", the affected contracting party may be authorised to suspend any concession[68] "in regard of the contracting party causing the damage [emphasis added]."[69].

1967 Self standing panel procedure.

The 1966 Procedures were followed by further efforts to improve the developing countries' position. In 1967, the Contracting Parties agreed to create a "self-starting"[70] or "self standing" panel procedure the aim of which was to "examine problems relating to the quantitative restrictions maintained by developed contracting parties on industrial products of particular interest to developing countries with a view to an early removal of these restrictions [emphasis added]."[71]. However, this procedure, as the wording of the decision suggests[72], was not automatic and no legal obligations bound the contracting parties in this regard. As a consequence, developing countries considered that bilateral negotiations were preferable and resisted the creation of these panels[73]. An important concern for them already expressed on the occasion of the Brazil-Uruguay proposals - was that panels be automatically set up, without the need to request so. Such "panels would either be instantly seized of any issue that fell under their jurisdiction, or could probe to find out if the developed contracting parties were in breach of their GATT obligations [emphasis added]."[74]. The idea behind automatic panels was that the GATT would assume the role of an Attorney General and in so doing, relieving developing countries from a certain burden in the prosecution and conferring more strength to the complaint.

1970 Conditional automatic panel.

This idea was revived in 1970, as regards developed countries' obligations pursuant to Part IV. According to the proposal, panels were to review developed countries' compliance on that matter. The Contracting Parties adopted this project[75] but while the proposal aimed to render

[68] Although these provisions did address the question of delays in the implementation, the question as to how developing countries could actually obtain satisfaction in the case the respondent does not comply with the ruling was set aside or, at the very least, was not grasped in a realistic way. As a matter of fact, a few developing countries can actually afford to suspend concessions as regards their developed counterparts.

[69] *"If on examination of this report it is found a contracting party to which a recommendation has been directed has not complied in full with the relevant recommendation of the CONTRACTING PARTIES or the Council nullified or impaired, and that the circumstances are serious enough to justify such action, the CONTRACTING PARTIES may authorise the affected contracting party or parties to suspend, in regard to the contracting party causing the damage, application of any concession or any other obligation under the GENERAL AGREEMENT whose suspension is considered warranted, taking account of the circumstances."* [emphasis added]. Decision of 5 April 1966, BISD 14th Supplement (1967) 18, paragraph 9.

[70] Kufuor, K. O., *op. cit., supra, footnote 12*, p.126.

[71] GATT, BISD, 15th Supplement, (1967) 67, Section C(c).

[72] *"panels of governmental experts may be established"* [emphasis added]. GATT, BISD, 15th Supplement, (1967) 67, Section C(c). Kufuor, K. O., *op. cit., supra, footnote 12*, p.126.

[73] Kufuor, K. O., *Ibid*., p.126-127 and Yusuf, A., *op.cit., supra, footnote 21*, p.76.

[74] Kufuor, K. O., *op. cit., supra, footnote 12*, p.126-127.

[75] Consultation Concerning the Implementation of provisions of part IV, BISD, 18th supplement, (1970) 61.

this procedure automatic, the decision made it conditional on the agreement of the affected government and thus undermined to a great extent the potential of the reform.

1971: "Group of Three" proposal.

The idea of establishing automatic panels was temporally abandoned in 1971 in favour of the proposal of the Delegation of Trinidad and Tobago to create a "Group of Three"76. This Group of Three was to be composed of the respective chairmen of the GATT's three main entities: the Contracting Parties, the Council and the Committee on Trade and Development. Its role was to identify specific cases of unfair trade restrictions and accordingly, "present proposals in regard to concrete action that might be taken to deal with trade problems of developing countries [emphasis added]."77

Before being suspended in 197478, the Group of Three issued three reports in which it highlighted several unjustified trade barriers of some developed countries and recommended their elimination79. Following these reports, five developed countries withdrew some of the restrictions at issue. As A. Yusuf80 notes, the last report of the Group of Three contained expressions of disappointment as to the success of their job.

As we have observed, the period from 1966 and 1978 (end of the Tokyo Round) did see important improvements of the GATT DSM as regards developing countries. However we noted that their practical success was questionable, as these improvements, mainly because of a certain resistance on the part of developed Contracting Parties, did not tackle developing countries' underlying concerns as to the GATT DSM. As a consequence, as K. O. Kufuor points out, in the period between the adoption of the 1966 Procedures and 1978, there was only a slight percentage increase in the use of the DSM by developing countries compared to the 1948-1966 period81.

Paragraph 3: Special treatment afforded to developing countries from the Tokyo Round to 1994.

The decade of the 1970s saw an overhaul and rebuilding of the GATT legal system82 The Tokyo Round negotiations led to a codified, better structured DSS in the form of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance83.

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[76] Yusuf, A., *op. cit., supra, footnote 21*, p.76.

[77] GATT BISD, 18th Supplement, 1971, p.64, 65 and 70.

[78] In order to avoid duplication with the Tokyo Round Negotiations. Hudec, R. E., *op. cit., supra, footnote 34*, p.284.

[79] Yusuf, A., *op. cit., supra, footnote 21*, p.76.

[80] *Ibid*., p.283, 284 and 285.

[81] Developing countries filed 12 percent of the cases between 1948 and 1966 and 16 percent of the cases from 1966 and 1978. This shows that developing countries did not consider the GATT DSM as being able to overcome the unequal economic relationship between underdeveloped and industrial member states or to take into account their specific needs. Kufuor, K. O., *op. cit., supra, footnote 12*, p.128.

[82] Hudec, R. E., *op. cit., supra, footnote 34*, p.13.

[83] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210. Annex p.3.

In addition a legal office was finally created at this occasion, addressing to some extent the developing countries' calls for an institutional reform and for legal assistance[84].

Description of 1979 Understanding regarding Notification, Consultation, dispute settlement and Surveillance.

As regards the interests of developing countries, only a few genuine improvements can be found within the 1979 Understanding.

First of all, the latter reaffirmed the availability of the 1966 Procedures and stated in a rather vague manner that special attention should be given by contracting parties to the particular problems and interests of developing countries during the consultations[85]. The 1979 understanding also addresses the question of the risk of hostile retaliation by developed country members in the case their underdeveloped counterparts filed a case against them[86]. This was a developing countries' major fear which was to some extent allayed by the reform[87].

One of the most significant concessions to developing countries, although not mentioned as such[88], was that any contracting party having a substantial interest in a panel[89], proceeding could have its interests heard by the panel.

In addition, paragraph 6(iii) of the Understanding gave a legal recognition to the practice of appointing a panellist from developing countries in the case the dispute was between an industrialised and an underdeveloped country[90].

The panel was given the right to consult with any individual or body it would deem appropriate to seek information and technical advice[91]. This constituted a step in the direction of a role for third parties, although it was dependant on the will of the panels and not on contracting parties as developing countries had wished[92].

The Contracting Parties also agreed to "conduct a regular and systematic review of the developments in the trading system with regard to matters affecting the interests of developing countries [emphasis added]."[93]

Finally, "[t]he technical assistance services of the GATT Secretariat [could], at the request of a less developed contracting party, assist it in connection with matters dealt with in [the 1979] understanding [emphasis added]. "[94]

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[84] Kufuor, K. O., *op. cit., supra, footnote 12*, p.129.

[85] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210, paragraph 5. Annex p.4.

[86] See 1979 understanding paragraph 9, Annex p.4.

[87] Kufuor, K. O., *op. cit., supra, footnote 12*, p.129.

[88] Kufuor, K. O., *Ibid*., p.129.

[89] This phrase was notably designed to encourage developing countries third parties to put forward their interests.

[90] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.173, see Annex p.11.

[91] See 1979 understanding reproduced in Annexp.3, paragraph 15.

[92] Kufuor, K. O., *op. cit., supra, footnote 12*, p.128 and 129.

[93] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210, paragraph 24, Annex p.7.

[94] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210, paragraph 25, Annex p.8.

Compared with the 1966 Procedures and the subsequent developments of 1967, 1970 and 1971, one may take the view that the 1979 Understanding constituted a certain improvement. First, the latter gave a legal response to developing countries' concerns as to the finding of the violation. The extensive investigation of trade flows[95] the finding of the violation implies cannot practically be afforded by developing countries because of an evident lack of resources. The systematic review, as well as the technical assistance granted to the less developed nations under the 1979 Understanding constituted important developments in this regard.

In addition, after the 1979 Understanding, developing countries were assured to get to be heard by a panel where at least one panellist from a developing country would be present.

However, with regard to the previous practice[96] and the fact that a retrograde approach was adopted by reiterating the 1966 procedures, we may consider, following P. E Kuruvila[97], that the 1979 Procedure did not add much to developing countries' rights as to the GATT DSM and that it deprived them from the special and differential treatment they enjoyed by universalising the privileges they enjoyed under the 1966 procedures.

1982 Declaration.

The 1982 declaration on dispute settlement procedures adopted at the Thirty-Eighth Session[98] noted that room was left for general further improvements under the GATT DSM and Contracting Parties agreed upon several measures designed to facilitate and accelerate the DSM[99]. These developments did not directly address the particular situation of developing countries[100].

1989 Improvements.

The 1989 Improvements[101] were of certain significance for developing countries because they constituted an interesting step towards the judicialisation of the procedure: the Contracting Parties agreed to lay down the obligation to notify to the Council mutually agreed solutions to disputes raised under GATT 1947 Article XXII and XXIII[102] in order to ensure their GATT consistency. The significance of such provision was twofold. First, by reviewing the GATT consistency of agreed solutions (including though arbitration settlement), the 1989 Improvements brought about a security for developing country, ensuring that the solution reached did not merely rest on the agreement itself and thus "lessening the impact of any

[95] Jackson, J.H., and Davey W.J. , *op.cit., supra, footnote 15*, p.1153.

[96] The 1979 Understanding has been described as "*a restatement of existing practice*". *Ibid.*

[97] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.173.

[98] Declaration of 29 November 1982, reprinted in GATT, BISD, 29th Supplement (1983) 9.

[99] Kufuor, K. O., *op. cit., supra, footnote 12*, p.130.

[100] However, expediting the findings of panels and the consideration of panel reports as well as acknowledging the need for institutional reform was of certain significance for developing countries. Kufuor, K. O., *Ibid.*

[101] GATT BISD, 36th Supplement (1989) 61.

[102] "*Mutually agreed solutions to matters formally raised under GATT 1947 Article XXII and XXIII, as well as arbitration awards within GATT, must be notified to the Council where any contracting party may raise any point relating thereto.*" [emphasis added]. GATT BISD, 36th Supplement (1989) 61, paragraph B(1).

power disparities between developed and developing country parties to a dispute [emphasis added]."103
In addition, the 1989 Improvements contained provisions regarding the technical assistance to be provided to contracting parties to the dispute and particularly to developing countries104.
Finally, the question of time frames in the dispute resolution procedure was clarified105 as regards the period for negotiations and consultations prior to the establishment of a panel106.

Section 2: Critical analysis of the Treatment of developing countries under the GATT dispute settlement system.

Although the period between the adoption of the 1979 Understanding and the WTO DSU saw a significant increase in the number of complaints filed by developing countries, this cannot be explained solely by the series of alterations made to the GATT DSM107. As a matter of fact, despite several reforms, the GATT DSM basically remained a negotiation-based procedure favouring the most powerful countries.

Paragraph 1: GATT dispute settlement system defects.

The GATT DSM's shortcomings we want to address here had obviously a bearing on any disputes. However, they were likely to constitute a more serious impediment for developing countries as they suffer from a more fragile position in the negotiation process the GATT DSM amounted to.

The panels procedure in question.

The main deficiency to be noted in the GATT DSM was that it remained a consensus-based system implying a negotiation process108 despite numerous reforms. The Council took decisions on the basis of consensus of all the Contracting Parties at every stage of the procedure (establishment of the panel and terms of reference, selection of panellists and

[103] Kufuor, K. O., *op. cit., supra, footnote 12*, p.130.

[104] See 1989 Improvement, paragraph H(1), supra note 101.

[105] See 1989 Improvement, paragraph C(1), supra note 101.

[106] A question that had remained unclear after the 1979 Understanding. Kufuor, K. O., *op. cit., supra, footnote 12*, p.131.

[107] From 1979 to the advent of the WTO Understanding, 25 percent of the cases were filed by developing countries, against 16 percent from 1966 to 1978 and 12 percent From 1948 to 1966.However, it can be argued that "*the fundamental changes in comparative advantages in world trade, part of the structural shift in the world economy of the 1970s was a very important cause, possibly the most basic of all reasons for this increased willingness by the developing contracting parties to file complaints under the GATT 1947 dispute settlement mechanism* [emphasis added]. Kufuor, K. O., *op. cit., supra, footnote 12*, p.131.

[108] See Jackson, J.H., and Davey W.J., *op. cit., supra, footnote 15*, p.126., Roessler, R., *op.cit., supra, footnote 11*, p.315. Juillard, P., and Carreau D. Droit international économique. 4th edition, LGDJ, 1998, p.70.

eventually adoption of panel rulings). Consequently, any contracting party could hinder the DSM process109.

The establishment of the panel was left to the discretionary competence of the GATT Council. Despite the developing countries' attempt to obtain a right to be automatically heard by a panel, such right was not granted under the GATT 1947. Furthermore no time frame was provided for the establishment of the panel and the Council was virtually able to postpone the procedure indefinitely110.

Finally, the neutrality of the panellist had also been questioned. The 1979 Understanding addressed this concern by specifying that panellist shall sit as private persons and shall not be under the influence of their own government. However, this is a very subjective notion that can hardly be defined or delimited with precision111.

Legal significance of panels reports and issue of implementation.

In the case the panel report was adopted, the question of its legal significance remained. As we previously observed, the aim of the DSM was not to uphold the GATT law but to reach a consensus on its application112. It follows that, self evidently, panels recommendations were not mandatory for the losing party: the entire procedure rested upon the disputants' good faith113. If the disagreement between the parties lasted, the intervention of the panel was actually pointless, as a contracting party could block the implementation of the panel ruling114.

A good example of the issue arising from the lack of binding obligation of panel rulings is the 1983 Nicaragua/United States case115. Nicaragua initiated a complaint against the United States, alleging that the US decision to reduce the amount of Nicaraguan sugar allowed to be imported violated the GATT rules on the administration of quotas116. Although the panel did rule in favour of Nicaragua, the US indicated that they were not willing to change its practice. The only way for Nicaragua to obtain some sort of compensation would have been to retaliate against the United States, that is to impose restrictions on imports from this country. However, as J.H. Jackson and W.J. Davey note117, this would have been contrary to Nicaragua's best interests and this measure would not have had any noticeable impact on the

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109 "*This meant that the defendant had a virtual right to veto every step of the process, from the appointment of a panel to the adoption of the panel's legal ruling and the authorization of trade sanctions for noncompliance.*" [emphasis added]. Hudec, R. E., *op. cit., supra, footnote 34*, p.9.

110 See Taxil, B , *op.cit., supra, footnote 8*, p.127-128. or Kuruvila, P. E. , *op.cit., supra, footnote 15*, p.177. This latter commentator evokes the pharmaceutical case brought by Brazil against the United States in which the establishment of the panel was blocked by the U.S., leading to the parties' mutual withdrawal of the case. Brazil v. US - Quality Standards For Grapes (1988), GATT L/6324.

111 Taxil, B., *op. cit., supra, footnote 8*, p.128, note 10.

112 Although the 1989 Improvements constituted an important step towards the judicialisation of the system.

113 Taxil, B., *op. cit., supra, footnote 8*, p.129.

114 *"In essence the principle of State sovereignty was very much a characteristic of inter-contracting party relations. Not surprisingly therefore, any inquisitorial measure that suggested subjecting a contracting party further to the controlling discipline of the GATT was likely to be challenge and thus, most probably, would fail*[emphasis added]. *"*. Kufuor, K. O., *op. cit., supra, footnote 12*, p.127.

115 GATT BISD 67 (1985).

116 Jackson, J.H., and Davey W.J., *op. cit., supra, footnote 15*, p.1153 and 916.

117 Jackson, J.H., and Davey W.J., *Ibid*., p.1154.

US economy. The economic threat that is implied in retaliation cannot be seriously employed by developing countries against major industrialised countries as an effective substitute for compensation118.

Lack of compensation and sanctions.

Neither the GATT nor the various side-agreements signed during the Tokyo Round contained any specific provisions dealing with remedies in cases of violations119. The relevant passage in the 1979 procedures demonstrates a clear unwillingness on the part of the Contracting Parties to resort to compensation to the detriment of an agreed solution120. Remedies, under GATT Practice had a mere 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 […] [emphasis added]."121

Likewise, no sanctions were provided for apart from the possible recourse to retaliation. The latter is not an option for developing countries because of their limited economic weight (see above). In addition, despite the fact that this measure would favour the smallest countries, no collective sanctions were available under the GATT122.

It is self-evident that this state of the law did not suit developing countries' interests. As we previously noted, developing countries cannot afford to seek compensation though a mere negotiation process lacking genuine legal remedies. The lack of compensation123 and the absence of sanctions under the GATT 1947 demonstrate if necessary that the DSM was not of judicial nature124.

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118 "[…] *complaints by a small nation against a large one probably have little effect insofar as they depend on sanctions.*" [emphasis added]. Jackson, J.H., and Davey W., *ibid*., p.352.

119 This was left to the discretion of the adjudicating body to recommend the appropriate remedy. Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.7.

120 "*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.*" [emphasis added]. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210.

121 "[…] *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*". [emphasis added]. Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.7.

122 Individual sanctions through retaliation were originally preferred since the role of the GATT was not to uphold the law through a collective sanction process: bilateral re-establishment of nullified or impaired concessions was felt to be the best solution. See Taxil, B, *op.cit., supra, footnote 8*, p.131 and 132, citing Canal-Forges, E. L'institution de la conciliation dans le cadre du GATT. Bruylant, Bruxelles, 1993, p.76.

123 However it must be noted that "*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.*" [emphasis added], Horn, H., and Mavroidis P. C., *op.cit., supra, footnote 3*, p.10.

124 Juillard, P., and Carreau D., *op. cit., supra, footnote 108*, p.70.

Problem of the cost of the procedure and technical and legal knowledge.

The cost and the legal and technical knowledge the GATT DSM procedure implied had always been a major concern for developing countries125. To some extent this question had been addressed throughout the GATT history through the provision of the good offices of the Director-General (1966 procedures), the technical assistance brought about by the 1979 Understanding (and reiterated by the 1989 Improvements) or the systematic review of the developments in the trading system which could help developing countries in the investigation of GATT violations at their detriment. However, as we observed, these developments did not significantly change the developing countries' practice as to the GATT DSM126.

Paragraph 2: Developing countries' expectations and criticisms as to the dispute settlement system before the Uruguay Round.

This paragraph is based on the USITC report127, "Review of the effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements" as studied by K.O. Kufuor128.This report provides a clear insight into the developing Countries' concerns and expectations before the Uruguay Round was launched in 1986 following the Punta del Este Ministerial meeting.

First, developing countries expressed their concerns about the legal and technical knowledge the GATT DSM procedure implied, insisting on the fact that they lacked competent and experienced personnel able to deal with GATT 1947 matters or conduct disputes. Developing "in house" expertise or buying competence in foreign countries is self evidently difficult because of their shortage of resources.

Second, developing countries argued that they suffered from delays in the GATT DSM procedures (in appointing a panel, in the panel's consideration of the case and caused by the failure of the GATT Council to adopt the report129). In particular they highlighted the fact that, since the procedure did not have any suspensory effect, the harmful practice would keep damaging their economy during a long time period.

The third concern expressed related to the unequal economic relationship between developing and developed members that could have a bearing on the dispute's outcome. It was notably argued by developing countries that a claim against an industrialised member would lead to reduction of their benefits under the generalised system of preferences or through other

[125] We will study this question in more details Chapter 2, Section 2, Paragraph 3.

[126] For instance, P.E Kuruvila notes that the good offices of the Director General under the 1966 procedure had been invoked in only three instances in the GATT *in* International trade, Developing countries and the GATT/WTO dispute settlement mechanism. Journal of World Trade. ISSN 1011-6702.1997, 31(6), 171-208, p.172 and 173, note 10.

[127] United States International Trade Commission, Review of the effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements, 1985. Cited in Kufuor, K. O., *op. cit., supra, footnote 12*, p.119.

[128] Kufuor, K. O., *op. cit., supra, footnote 12*, p.119.

[129] See Kufuor, K. O., *Ibid*., p.119, note 12.citing Davey, W. J. Dispute Settlement in GATT, 11 Fordham International Law Journal, 51, 83-84, 1987.

retaliatory measures. They also highlighted the fact that developed countries could afford to hinder or even frustrate the procedure at any stage.

A fourth criticism put forward by developing members was that "[...] instead of developed countries compliance with the terms of a panel decision, the developing countries may be forced to agree to, or readily accept, voluntary export restraints, or other non GATT measures sought by larger members [emphasis added]130". As result, developing members could hardly obtain real satisfaction through the GATT DSM, whatever its outcome was.

A fifth opinion expressed by developing members regarded the fundamental maladjustment of the DSM which placed great emphasis on retaliation. This question will be the subject of a complete analysis in Chapter III.

The sixth concern put forward by developing countries was that the lack of unity among them was a major hindrance in their use of the GATT DSM. Although developing countries face in general the same impediments in their use of the DSM, divisions must be drawn among them according to their political and economic interests that make them more or less willing (or simply able) to use the DSM. The idea was that collective action beyond their division could overcome the underlying unequal economic relationship between them and industrialised members.

Finally, it was argued that terms of reference for the panels was not useful or necessary because of the difficulty to reach an agreement notably on the substantive provisions to be considered. It was felt that standard terms of reference would be more preferable.

In light of these arguments, we see that developing countries expectations as to the Uruguay Round were great. The improvement of the DSM was a major concern for negotiators and we will observe that although the WTO DSM did give a response to some of the developing countries' concerns, certain major questions have not been properly addressed.

[130] Kufuor, K. O., *Ibid*., p.121.

CHAPTER 2: GENERAL DIFFERENTIAL TREATMENT GRANTED TO DEVELOPING COUNTRIES UNDER THE WTO DISPUTE SETTLEMENT SYTEM.

This chapter will provide a critical description and analysis of the special treatment afforded to developing countries in the WTO dispute settlement system, with reference to the WTO case law and practice. We will exclude the question of the implementation of decisions which will be the subject of chapter III.

Section 1: Existence and affirmation of a differential treatment.

Paragraph 1: The WTO understanding on rules and procedures governing the settlement of disputes.

GATT "acquis" and innovations.

As K.O. Kufuor notes131, the WTO DSU is "a mix of the codification of past measures on dispute settlement, institutional reform and new stipulations [emphasis added]" through which the developing countries' interests have been extensively dealt with.
Most commentators take the view that the WTO DSU constitutes a significant improvement compared to the GATT system132. From the perspective of developing countries, two major developments are particularly relevant: the relative judicialisation of the procedure and the definite WTO position against unilateralism and in favour of multilateralism133. In addition, the WTO DSU reiterated and reinforced the need to provide special and differential treatment in favour of developing countries.
It must be first noted that the major improvement brought about by the Uruguay Round from the viewpoint of developing countries was the judicialisation of the DSM134, providing more security and predictability in the settlement of disputes135. This was first achieved through the creation of two permanent bodies, the Dispute Settlement Body (DSB) and the Appellate

[131] Kufuor, K. O., *op.cit., supra, footnote 12*, p.132. See also Safadi, R. and Laird S. The Uruguay Round Agreement: Impact on Developing Countries. World Development. ISSN 0305-750X. 1996, 24(7), 1223-1242, p.1238.

[132] See for example Rom, M. Some early reflections on the Uruguay Round Agreement as seen from the viewpoint of a developing country. Journal of World Trade. ISSN 1011-6702. 1994, 28(6), 5-30, p.20. Lacarte-Muro, J., and Gappah P. International trade Developing countries and the WTO legal and dispute settlement system: a view from the bench. Journal of International Economic Law. ISSN1369-3034. 2000, 3(3), 395-401, p.395. Taxil, B., *op. cit., supra, footnote 8*, p.135.

[133] Rom, M., *op. cit., supra, footnote 132*, p.20 and 21. Mukerji, A. , *op.cit., supra, footnote 23*, p.68.

[134] J. Davey considers that the DSU *"is a very strong option toward a juridical approach (though there are still in the DSU pieces of language that refer to an alternative or diplomatic negotiating approach)*,[emphasis added]." Cited in Reed, P. C. Process, Compliance and Implementation issues in WTO Dispute settlement. American Society of International Law Proceedings. ISSN 0272-5037. 1997, April 9-12, 277-288, p.278.

[135] See T.R.A.D.E. , *op.cit., supra, footnote*, p.4 and DSU Article 3(2) (annex p.16).

Body (AB)136 and further through the improvement of the procedure itself137. The latter mainly refers to the negative consensus rule and the provision of precise time frames at every stage of the procedure138.
The WTO legal position against unilateralism is particularly essential for developing members139 whose fear of unilateral determination of violations or suspension of concessions was somewhat alleviated140.
Although the differential treatment provided for DCs in the DSU can be criticised on many grounds, one must admit that the overall improvement of the procedure has had a positive impact on the DCs' participation in the DSM. The first four years of the existence of WTO saw an increase of about thirty percent of the total complaints by DCs, as compared with their overall participation in the GATT history141.
The differential treatment presently granted to DCs consists in the codification of past measures, a few new provisions and the 1966 Procedures.

Particular treatment for the "least developed countries".

This further distinction among developing countries had already been recognised during the Tokyo Round. The least-developed countries' campaign for special treatment during the Uruguay Round led to a materialisation of this distinction under the WTO DSU142. The crucial question remains of the definition of the term itself. No serious effort was made during the Uruguay Round to determine criteria in this regard, despite the fact that least-developed countries raised this question during the negotiations143. Accordingly, the United Nations' list of least developed countries will be referred to in order to give effect to the special treatment granted by the WTO DSU144. This UN list contains today forty-eight countries, thirty of which belong to the WTO145. Their identification is based on general (GDP per capita, the share of industries in the GDP and the illiteracy rate) and more specific criteria146. Their situation as to the WTO DSM is dealt with in Articles 24(1) and 24(2) of the DSU. As a general principle, least developed countries should be given special consideration "at all

[136] Which particularly deals with the objectives of DCs. Kufuor, K. O., *op.cit., supra, footnote 12*, p.136.

[137] "[…] *though there are still in the DSU pieces of language that refer to an alternative or diplomatic negotiating approach* [emphasis added]". William J. Davey in Reed, P. C, *op. cit., supra, footnote 134*, p.278.

[138] In this regard, P.E. Kuruvila notes that the length of the procedure was a serious hindrance to the participation of DCs in the DSM, for example in the case Brazil v. US (1998) (GATT L/6386) where the blockage of the procedure by the US eventually led to the withdrawal of the case. Kuruvila, P. E., *op. cit., supra, footnote 15*, p.177.

[139] Mukerji, A., *op. cit., supra, footnote 23*, p.68.

[140] We will discuss this question in details in chapter III.

[141] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.179.

[142] Kohona, P.T.B. Dispute resolution under the World Trade Organisation: an overview. Journal of World Trade. ISSN 1011-6702.1994, 28(2), 23-47, p.32.

[143] Kohona, P.T.B., *Ibid*.p.33.

[144] Kohona, P.T.B., *Ibid*.

[145] "*Nine additional least-developed countries are in the process of accession to the WTO.*" "*There are no WTO definitions of "developed" or "developing" countries. Developing countries in the WTO are designated on the basis of self-selection although this is not necessarily automatically accepted in all WTO bodies*". WTO website: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

[146] Juillard, P., and Carreau D., *op. cit., supra, footnote 108*, p.22.

stages of the determination of the causes of a dispute and of dispute settlement procedure [emphasis added] ". In addition, "members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member [emphasis added] " or "in asking for compensation or seeking authorisation to suspend the application of concessions or other obligations pursuant to these procedures [emphasis added] ". Finally, paragraph 2 provides for the possibility for least-developed countries to benefit from the Director-General or the Chairman of the DSB "good offices, conciliation and mediation with a view to assisting the parties to settle the dispute [emphasis added]".
It must be noted that to date, no least-developed country has been involved in a WTO dispute neither as a respondent nor as a complainant[147].

Paragraph 2: General improvements concerning all members but having a bearing on developing countries' use of the dispute settlement system.

Negative consensus rule.

A consensus-based approach still prevails over the WTO[148]. However, "[…] a negative consensus approach will apply [to the WTO DSM]: a consensus will be needed in order to halt the proceedings from advancing at any stage of the formal dispute settlement procedures [emphasis added]"[149]. This is a major improvement since the need to reach a consensus at every stage of the procedure was a major impediment in the use of the DSM, above all for developing countries[150]. The direct consequence of this development is the practical automaticity of the procedure: the possibility to reach a consensus against the establishment of a panel (DSU Article 6), the adoption of the report (DSU Article 16.4) or the authorisation to suspend concessions (DSU Article 22.6) is de facto impossible[151]. Thus no blockage can hinder the procedure[152].
This possibility to frustrate the procedure was a major concern for developing countries and was one of the main elements that explained the developing countries' lack of trust in the system. Although this development benefits any contracting party, it has a great impact on the situation of complainant developing countries: the automaticity of the procedure and the adoption of panels give them more weight in the negotiation process, even against developed countries.

[147] Footer, M. E. Developing country practice in the matter of WTO dispute settlement. Journal of World Trade. ISSN 1011-6702. 2001, 35(1), 55-98, p.73.

[148] WTO Agreement, Article IX, footnote 1.

[149] Developing countries and the Uruguay Round: an overview. Committee on Trade and Development, Seventy-Seventh Session, 21 and 25 November 1994, Note by the Secretariat - 10 November 1994, http://www.wto.org/english/docs_e/legal_e/ldc2_512.htm

[150] Safadi, R. and Laird S., *op. cit., supra, footnote 131*, p.175.

[151] Taxil, B., *op. cit., supra, footnote 8*, p.138. This amounts to granting an automatic right to a panel to any member.

[152] "*Because there can be no blocking, it is virtually automatic that the results of a panel report will be adopted*.[emphasis added]" William J. Davey in Reed, P. C., *op.cit., supra, footnote 134*, p.278. See also Parlin, C. C. WTO Dispute Settlement: Are Sufficient Ressources Being Devoted to Enable the System to Function Effectively. International Lawyer. ISSN 0020-7810. 1998, Fall, 863-870, p.867.

Stricter time frames.

Although efforts had been made throughout the GATT history in order to establish efficient time limits, they often lacked precision and as we observed, the procedure could last indefinitely, endangering the situation of complainant developing countries, since the procedure did not have any suspensory effect. The WTO DSU provides for tight and precise time limits at every stage of the procedure[153]. It must be noted that, according to Article 3.12 of the DSU, DCs are granted the right to invoke the 1966 procedures when involved in a dispute as a complainant against a developed country. This notably entails the right to benefit from the tight time limit of sixty days for the panel to issue the report (1966 procedures paragraph 7). However, Article 3.12 further states that with the agreement of the complainant party, that time frame may be extended by the panel if it felt that this time frame is insufficient[154].
The overall procedure cannot last more than two years and a half, this may seem very long but this constitutes a considerable improvement[155].

Third party rights.

As seen previously, third parties rights had been addressed in the 1979 Understanding which provided that any WTO member having a substantial interest in a dispute could ask to be heard by the panel. The WTO DSU extended this right following suggestions made by certain developing countries[156]. Their interests in such provisions are twofold. First, granting to third parties rights as to the DSM amounts to foster transparency in the treatment of disputes[157]. Second, this indeed ensures that third parties' interests are preserved. In general, involving third parties in the DSM encourages multilateralism and thus the judicialisation of the system.
Pursuant to the WTO DSU (article 10): "the interests of the parties to a dispute […] shall be fully taken into account during the panel process [emphasis added] " and "Any Member having a substantial interest in a matter before a panel […] shall have an opportunity to be heard by the panel and to make written submissions to the panel. [emphasis added]".
However, we will observe further that third parties' interests have not been comprehensively dealt with and that the WTO DSU does not add much to the GATT system in this regard.

[153] For the consultation phase, see Article 4.3 (annex p.19.), for the procedure before panels, see article 7 and 12 (annex respectively p.23. and 28.)

[154] We will observe that this provision does not go without problems.

[155] Taxil, B., *op. cit., supra, footnote 8*, p.139-140. See also Hoekman, B. M., and Mavroidis P. C. Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries. http://www2.cid.harvard.edu/cidtrade/Issues/hoekman.pdf, 1999, p.16.

[156] Among them were Mexico and Jamaica. The former, arguing that the lack of third party intervention favoured bilateralism to the detriment of multilateralism in the settlement of disputes, advocated that the WTO DSU should provide third parties with substantial rights. The latter suggested that third parties' rights be expanded to "grey areas" which would be examined by the Negotiating Group on dispute Settlement with a view to providing third parties with the right to initiate action in such cases. Kufuor, K.O., *op.cit., supra, footnote 12*, p. 137 and 138.

[157] Kufuor, K. O., *Ibid*.p.137.

Possible recourse to arbitration.

Article 25 of the DSU provides for the possibility to have recourse to arbitration as an alternative mode of dispute settlement, subject to the agreement of the parties which must be notified to the Contracting Parties. It is difficult to assess the significance of this provision for developing countries. On the one hand, one can consider that this possible recourse to arbitration serves their interests because this procedure leads to a legally binding solution[158]. As we previously stated, this is of crucial importance for developing countries since the legal significance of panel reports is still dubious under the WTO DSU. One the other hand, as E. Canal-Forges points out[159], it is difficult to assess whether this summary procedure would be attractive in practice for WTO members mainly because of its lack of precision and its generality.
However, the fact that this procedure is legally binding is a crucial asset for developing countries. In addition, as G. Burdeau argues[160], political and commercial consideration may interfere with the conciliation procedure under the DSM that are less likely to play a role in an arbitration process. For this reason, we believe that the arbitration procedure could be of interest for developing countries.

Terms of reference.

The WTO DSU formalised a practice developed under the GATT whereby panels used standard terms of reference to settle disputes[161]. However, as a prerequisite, parties could object and issue responses before the terms of reference were adopted and this could delay the whole DS process to the detriment of developing countries.
In order to break up with this practice, the WTO DSU virtually imposes terms of reference on parties to the disputes (Article 7.1 - annex p.23.) unless all the parties agree on different terms of reference.

Paragraph 3: Description of the differential treatment at the different stages of the procedure.

Legal assistance to developing countries.

Under Article 27 of the DSU (see annex p.48), the secretariat is responsible for assisting Members in general in respect of dispute settlement at their request, but this article further states that "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

[158] Taxil, B., *op. cit., supra, footnote 8*, p.140.

[159] Canal-Forges, E., *op. cit., supra, footnote 20*, p.705.

[160] Burdeau, G. la diversification des procédures de règlement des différends. Actualités des conflits internationaux, Paris , Pedone, 1993, p. 166. cited in Taxil, B., *op. cit., supra, footnote 8*, p.141, note 32.

[161] Kufuor, K. O., *op. cit., supra, footnote 12*, p.134.

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 [emphasis added]". This legal assistance has been practically supplied by two former counsellors of the GATT WTO legal Affairs Division, on a part-time basis[162]. The recent creation of the Advisory Centre on WTO Law under the WTO auspices may bring about new developments in this area.

Possible recourse to the 1966 Procedures.

The first aspect of the special treatment granted to DCs is the possibility to opt for the 1966 procedures[163] as an alternative to the provisions contained in Article 4,5,6 and 12 of the WTO Understanding (see annex p.19/21/22/28.) in the event a complaint is brought by a DC member against a developed member. (Article 3.12 - annex p.18.). This possible alternative was added at the insistence of DCs which argued that rolling back this concession would be inappropriate[164].
In the following description of the DCs' special treatment as regards the DSM, we will make constant reference to this possible option, bearing in mind that, as Article 3.12 states in fine, in the event of a conflict between the rules and procedures of article 1, 5, 6 and 12 of the DSU and the corresponding rules of the 1966 procedures, the latter take precedence[165].

Consultation phase.

At this stage, Article 4.10 of the DSU (see annex p.20.) states that special attention should be given to the particular problems and interests of developing countries. This provision gave rise to a complaint from Chile against the European Communities during a DSB meeting, on the ground that its request for consultations with the European Communities "had been disregarded by the Communities thus discriminating and impairing chile's interests [...] [emphasis added]"[166]
Specific provisions grant special treatment to LDCs at the consultation phase (as seen earlier).
Opting for the 1966 Procedures entails the right to call on the good offices of the director General, acting ex officio as mediator/conciliator where consultations following a complaint

[162] Footer, M. E., *op. cit., supra, footnote 147*, p.74.

[163] Besides these articles, the rest of the DSU provisions would apply to such complaint, including those related to implementation and suspension of concessions. Kohona, P.T.B. , *op.cit., supra, footnote 142*, p.32. See also Kufuor, K. O., *op. cit., supra, footnote 12*, p.133. and Qureshi, A.H. the World Trade Organisation: Implementing International Trade Norms. Melland Schill Studies in International Law, Manchester University Press, Manchester and New York, 1996, p.142.

[164] Kohona, P.T.B., *Ibid*, p.32.

[165] Kohona, P.T.B., *Ibid*, p.61.

[166] Minutes of Meeting of the DSB, 27 September 1995, WTO Document WT/DSB/M/7 (27 October 1995, cited by Footer, M. E., *op.cit., supra, footnote 147*, p.66 and note 49.

by a DC had an unsuccessful outcome[167]. This right had been used five times under GATT law and only from 1977[168].
Another provision that deals with DCs 'special rights at this stage is Article 12.10 that regards timeframes for consultations. This Article allows the parties to the dispute to agree to extend the timeframes for consultations as set out in Articles 4.7 and 4.8 of the DSU. However, this is limited to the case where a DC is defendant. It is also provided for the possibility for the Chairman of the DSB to step in and decide on any further time extension in the case the relevant time has elapsed and the parties to the dispute cannot agree on whether the consultations have concluded[169].

Panels phase.

As seen earlier, panels are established quasi automatically and according to precise timeframes: this amounts to a provision in favour of developing countries.
First, as regards the composition of panels, DCs are granted the right to be heard by a panel where at least one of the three members is from a DC, in the case a dispute is raised between a DC and a developed country (DSU Article 8.10)[170].
Second, "[…] 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 [emphasis added]" (article 12.10), in the interests of a due process and fairness[171]. In the EC-Banana III case[172] ACP countries acting as third parties argued that they had not been given enough time to prepare their argumentation, notably in breach of Article 12.10. However the panel did not address the issue as this Article is specifically concerned with cases wherein a DC is defendant and not third party[173].
This provision gave ground to a complaint on the part of India against the United States[174]. India requested that it be granted additional time to prepare its first written submission on the ground of several factual elements related to a recent change of government[175] but the United States opposed this request. However, the Panel agreed to grant a ten-day extension of

[167] Footer, M. E., *op. cit., supra, footnote 147*, p.66.

[168] M.E. Footer points out that, in two recorded cases, this procedure eventually led to the establishment of a panel: 1986 Mexico/United States, 1992 Columbia, Costa Rica, Guatemala, Nicaragua and Venezuela/ European Communities. Footer, M. E., *Ibid*, p.62, note 32.

[169] This recalls the 1966 procedures section 4 and 5. *Ibid*, p.66.

[170] M.E. Footer notes that by the end of 1998, sixteen of the twenty panels involving a DC had included panellists from a DC. Footer, M. E., *Ibid.* , p.67.

[171]. "[…] *the time periods for submission of material are normally agreed by consensus among the disputing parties* [emphasis added]". T.R.A.D.E., *op. cit., supra, footnote 36*, p.28.

[172] *European Communities - Regime for Importation, Sale and Distribution of Bananas*. WTO Document WT/DS/R/USA 22 May 1997(Panel Report), paragraph 5.1 cited in Footer, M. E., *op. cit., supra, footnote 147*, p. 67.

[173] Footer, M. E., *Ibid.* , p.67.

[174] India -Quantitative Restrictions on Imports of Agricultural, textile and Industrial Products, complaint by the United States WTO Document WT/DS90/R, 6 April 1999 (panel Report).

[175] The case was of systemic importance, covered a wide range of issues and the dispute occurred at a time when the new government had not been sworn in and the post of Attorney General had not yet been filed. Footer, M. E. , *op.cit., supra, footnote 147*, p.68.

time, with regard to the administrative reorganisation taking place in India at the time of the dispute[176].

Finally, pursuant to Article 12.11, in a dispute involving a DC, either as respondent or complainant, the panel's report must explicitly indicate the form in which account has been taken of relevant provisions on special treatment. Generally, this provision has been complied with to the extent that whenever a DC Member has invoked a provision relevant to their special treatment, the panel's response is made in the report[177].

In the case a DC is complainant, the option for the 1966 Procedures implies that if the parties to the dispute fail to settle their dispute through the good offices of the Director General after a period of two months, the latter shall submit a report on action taken by him, together with all background information to the WTO members (paragraph 5 of the 1966 Procedures)[178]. As M.E. Footer notes, this amounts to the establishment of a panel by the Contracting Parties[179].

It must be noted that no differential treatment is granted for the appeal phase.

We will study the differential treatment accorded to DCs as regards the implementation of panels and AB reports in chapter III.

Section 2: Critical analysis of the WTO DSM from the perspective of developing countries.

Paragraph 1: Conservative approach: differential treatment mainly resting upon on 1966 procedure.

Aside from the general improvements and innovations of the system evoked earlier, the novelty of the special treatment granted to DCs must be questioned. As P.E Kuruvila points out[180], the WTO DSU provisions in this regard are a mere reiteration of the 1966 Procedures and 1979 Understanding (see table next page[181]).

We may add that the WTO Understanding also restates some of the provisions of the 1989 improvements[182]. The table[183] illustrates in a striking way the clear stagnation of the special treatment accorded to DCs.

[176] Footer, M. E., *Ibid*.

[177] T.R.A.D.E. , op.cit., supra, footnote 36, p.28.

[178] Footer, M. E., *op. cit., supra, footnote 147*, p.62.

[179] *Ibid.*

[180] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.174.

[181] This table is based on that conceived by P. E. Kuruvila, *Ibid*, p.175.

[182] Namely those on perishable goods already mentioned at Paragraph C(4) of the 1989 Improvements. Kufuor, K. O., *op. cit., supra, footnote 12*, p.133.

[183] Conceived by Kuruvila, P. E., *op. cit., supra, footnote 15*, p.175.

DEVELOPING COUNTRIES' SPECIAL TREATMENT THROUGHOUT THE GATT/WTO HISTORY

GATT			
Provisions	WTO	1966 Procedure	1979 Understanding
Recognition of special status	Article 4.10	Preamble	Paragraph 5
Alternate choice of law	1966 Procedure	----	----
Extension of time limit for panel establishment	Article 12.10	Paragraph 4	----
Panellist from a developing country	Article8.10	---	Annex,,Paragraph 6(ii)
Indication of preferential treatment in panel report	Article 12.11	Paragraph 6	---
Special attention to the interests during surveillance of implementation	Articles 21.2 and 21.7	Paragraph 10	Paragraph 23
Impact of the measures complained of on the economy	Article21.8	---	Paragraph 21
Technical assistance from Secretariat	Article 27	---	Paragraph 25
Special procedure for least developed members	Article 24	---	---
Special attention to interests during regular review by Contracting Parties	---	---	Paragraph 24

Paragraph 2: Governments as filters 184.

Under the WTO DSM, only governments have legal standing and accordingly, industries must petition their government if they wish to have their interests defended185. This is particularly problematic from the viewpoint of DCs.

The relative weakness of their economy makes them more dependent on foreign trading partners and there is a need for governments to monitor trade relationships – and private industries' complaints – in a manner that is beneficial for the whole nation. Consequently, it is felt that bringing private claims may endanger their economy and even have detrimental consequences in non-trade areas186.

However, certain scholars take the view that DCs should claim the right for direct participation by private parties in the DS process187. From the strict perspective of DCs, K.O. Kufuor puts forward two reasons why private parties should be allowed to take part in the DSM 188. This author first argues that private participation could help challenge protectionist policies in industrialised countries since developing states may not be willing to do so for the reasons exposed above. Second, providing private parties with the right to bring claims before

[184] Rosas, A. Implementation and enforcement of WTO Dispute Settlement Findings: An EU Perspective. Journal of International Economic Law. ISSN1369-3034. 2001, 4(1), 131-144, p.135 and 139. see also Hoekman, B. M., and Mavroidis P. C. WTO Dispute Settlement, Transparency and Surveillance.http://www1.worldbank.org/wbiep/trade/papers_2000/dispute_settlement.pdf, 1999, p.4.

[185] Hoekman, B. M., and Mavroidis P. C., *Ibid*, p.4.

[186] Hoekman, B. M., and Mavroidis P. C., *Ibid*

[187] See Kufuor, K. O., *op. cit., supra, footnote 12*, referring to Shell, G.R. Trade Legalism and International Relations Theory: An analysis of the World Trade Organization. Duke Law Journal. 1995, p.829.

[188] Kufuor, K. O., *Ibid.* , p.143-144.

the WTO would "depoliticize" minor trade disputes, as the latter are more likely to involve the smallest countries.

Other scholars such as Levy and Srinivasa189 take the view that the governmental filter is beneficial on the whole and that the privatisation of the WTO DSS would endanger national welfare in DCs for the reasons exposed above.

Paragraph 3: Lack of financial and human resources.

"[...] [I]t is worrisome that [DCs] feel that resource and monetary constraints preclude their full use of the system. As long as they feel that way, the long-term credibility of the WTO is at risk. The system will survive and flourish only if all (or at least a vast majority) of its Members feel that they have the ability to adequately protect their WTO rights.[emphasis added]"190

One must not underestimate the importance of the cost as a major impediment to the developing countries' access to the WTO DSS191. As A. Mukerji notes192, finding the necessary financial resources is a real challenge for developing countries: only a few WTO DSU specialists are present in developing countries and the cost of hiring specialists193 abroad is prohibitive. Scarcity of national administrative resources to identify and prepare cases is also a major constraint194.

As seen above, Art. 27.2 of the DSU provides for technical assistance to DCs in the context of the DSM. However, as P. C. Mavroidis and H. Horn demonstrate195 the technical assistance granted is both quantitatively and qualitatively inadequate. First, the staff dedicated to this task (two experts in the field working part time and two junior staff members) is by far insufficient compared to the number of disputes. This forces them to resort to costly private expertise. A second important defect of the system of assistance is the fact that it can only be

189 Levy, P. and Srinivasan T.N. Regionalism and the (Dis)advantages of the Dispute Settlement Access. American Economic Review. 1996, May. As cited by Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 184*, p.4.

190 Parlin, C.C. Operation of Consultations, Deterrence and Mediation. Law and Policy in International Business. ISSN 0023-9208. 2000, Spring, 565-572, p.572, see also Pearlman, J. C. Participation by Private Counsel in the World Trade Organization Dispute Settlement Proceedings. Law and Policy in International Business. ISSN 0023-9208. 1999, Winter, 399-415, p.405.

191 It is worth noting that for instance the fact that consultations are held in Geneva, which implies additional costs in the procedure, was the subject of a complaint by Pakistan. *Pakistan - Patent Protection for Pharmaceutical and Agricultural Products*, WTO Document WT/DS36. Cited in Footer, M. E., *op.cit., supra, footnote 147*, p.66-67. See also Jackson, J. H., *op. cit., supra, footnote 19*, p.6. For a general study on the subject see Pearlman, J. C., *op.cit., supra, footnote 190*, Winter, page. 399-415.

192 Mukerji, A. *op. cit., supra, footnote 23*, p. 69.

193 As B. M. Hoekman and P. C. Mavroidis note, Until *EC - Bananas III* countries were impeded from bringing non-government, private legal counsel before the panel, but an Appellate Body decision to allow representation by private lawyers removed this constraint as far as the Appellate Body was concerned. A subsequent panel then decided there were no provisions in the WTO or the DSU that prevented a WTO member from determining the composition of its delegation to panel meetings, Hoekman, B. M., and Mavroidis P. C. , *op.cit., supra, footnote 184*, p.7.

194 Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 184,* p.7. See also Horn and Mavroidis who take the view that the lack of financial and legal expertise may be even more serious in a non-violation case Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.15.

195 Horn, H., and Mavroidis P. C., *Ibid*, p.28.

supplied after a WTO Member has decided to submit a dispute to the DSM196, although the finding of the violation or the impairing practice itself requires as much legal expertise as the procedure itself.

It is interesting to note that certain law firms based in Geneva, being aware of these problems, offer free initial assistance to developing countries. In January 2000 a law firm "launched a free advice service for LDCs under which individual countries can receive up to 40 hours a year of free advice on WTO issues [emphasis added]."197. The practice in industrialised countries whereby the costs of the dispute are met either directly by the affected industry or through a complex form of subsidies to the government concerned198 cannot be followed in developing countries. This is self evidently because of the lack of resources of the affected industries which are in most cases composed of small and medium undertakings.

The cost problem is indeed more serious where a dispute is raised between a developing country and an industrialised power199. There would necessarily be a disequilibrium in the legal expertise that can be afforded by the parties to the dispute200.

As part of the question of the cost of hiring foreign legal experts, the question of the co-ordination with such lawyers remains. A few of them are familiar with "the nuances of general policies and practices of many developing countries [emphasis added]."201. As we will see, this calls both for the development of in-house expertise and for adapted legal assistance to developing countries. The recent establishment of the Advisory Centre on WTO law is, in this regard, a remarkable initiative.

Finally developing countries face the problem of the lack of resources to transfer to the WTO DSM as an institution202. As C.C. Parlin shows, this undermines the efficiency and the credibility of the system203

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196 See also Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 155*, 1999, p.17.

197 AITIC (Agency for International Trade and Cooperation), Improving Developing Country Access to the Dispute Settlement Mechanism of the WTO 2000. http://www.acici.org/aitic/documents/Reports/report6ang.html, 2000.

198 Mukerji, A., *op. cit., supra, footnote 23*, p. 69.

199 This was for instance the case in the "*Gasoline*" affair involving Brazil, Venezuela and the United States, WTO DSB Report WT/DS2/AB/ R, 29 April 1996.

200 " *In many cases,* [in developing counties] *there is literally no one who can be reassigned to a dispute settlement-related function because no one in the government has the necessary background. Dedication, intelligence, and hard work abound* [...] *can compensate for lack of expertise in many respects. However, in disputes with trained experts from developed countries, the lack of experience frequently cannot be overcome; thus, the "fight" is not fair*. [emphasis added]" Parlin, C. C., *op. cit., supra, footnote 190*, p.868.

201 Mukerji, A., *op. cit., supra, footnote 23*, p. 69.

202 "*Developing country Members […] are not devoting sufficient resources to dispute settlement, principally because they do not have a sufficient number of WTO experts. The Secretariat and developed country Members have the capacity to shift resources if needed to satisfy greater dispute settlement demands. Developing country Members, however, have few, if any, resources to transfer. For these Members to utilize the WTO dispute settlement system effectively they must significantly increase the number of people in their government and the private sector who have expertise in the WTO agreements and WTO dispute settlement procedures.*[emphasis added]" Parlin, C. C., *op. cit., supra, footnote 190*, p.863.

203 Parlin, C. C. *Ibid*, p.863.

Paragraph 4: Inefficacy of the treatment of Least Developed Countries.

The differential treatment granted to LDCs may be considered as the only genuine innovation under the WTO DSU[204]. However, one can question the efficacy of this regime.
Least developed countries, among developing countries are self evidently more likely to suffer from their feeble position in the dispute settlement and the WTO's willingness to provide them with special rights in this regard is an important improvement. However, we take the view that this special treatment is not likely to offer least-developed counties a more favourable position in practice.
As a matter of fact no LDCs have had recourse to the WTO DSM so far[205]. It is thus difficult to have a practical view on the question. However, this special treatment can be criticised on two main grounds. First, it is difficult to imagine how developed countries will practically have to comply with their obligations under article 24(1) as no precision is provided for regarding the due restraint they shall exercise. Their obligations are laid down in such a vague way that it will be difficult to assess their compliance
Second, Article 24(2) does not add anything to the situation of least-developed countries that is not already granted to all members as a general principle: Article 5 of the DSU (annex p.21) states that "Good offices, conciliation or mediation may be requested at any time by any party to a dispute [emphasis added]". Article 24(2) actually grants least-developed countries a right that any party is afforded. The impact of such provision is thus extremely limited.

Paragraph 5: The adjudicative nature of the DSM in question.

Under the present WTO DSM, does, as certain commentators suggest, "right perseveres over might [emphasis added]?"[206]. With the shift from the GATT's diplomatic model of dispute settlement to the WTO's judicial model[207], developing-country Members have, for the first time, begun to use the dispute settlement process regularly."[208] As C.C Parlin observes, "[t]he smaller countries are participating, both voluntarily as complainant and involuntarily as respondent, in a way that was not imaginable prior to the Uruguay Round [emphasis added]"[209].
However, although one must admit that the WTO DSM follows a judicial model, one can raise the question as to whether the WTO DSM is actually a judicial procedure. Several authors take the view that the present system was not fully conceived as a judicial model, because of the lack of political will on the developed countries' part[210]. Consequently, this

[204] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.174.

[205] Duk Park, Y., and Umbricht G. C *op. cit., supra, footnote 4*, p.215.

[206] Lacarte-Muro, J., and Gappah P *op. cit., supra, footnote 132*, p.401.

[207] Such an approach is characterised in many features of the WTO DSM: the use of *shall* in the DSU which suggests the compulsory character of the procedure, tighter timeframes, , the creation of the DSB and the AB, or the general integration of the system. It must also be noted that the conciliation procedure, though not adjudicative in nature, has been improved by the automaticity of the establishment of the panel. Kuruvila, P. E *op. cit., supra, footnote 15*, p.175-177.

[208] Parlin, C. C., *op. cit., supra, footnote 190*, p.867.

[209] Remarks by C. Christopher Parlin in Reed, P. C., *op. cit., supra, footnote 134*, p.286.

[210] *"They do not, nor were they intended to, establish a comprehensive legal system with an independent judiciary* [emphasis added]". Wilson, S. B. Can the WTO Dispute settlement Body be a judicial tribunal rather

system has been described as a "quasi-adjudicative system"211. Although the procedure itself officially constrains disputants, the significance of the procedure and especially of the panel ruling remains unclear212.

The special treatment afforded to DCs has been the subject of criticisms in this regard. Most provisions are actually difficult to enforce because of their lack of precision. They have been described as hortatory in nature213. It is particularly interesting to note that many provisions related to the differential treatment have not been used by DCs. This shows the DCs' lack of trust in the legal significance and in the practical impact these provisions may have. To date, for example, no recourse has been made of the 1966 Procedures under the WTO. Similarly, DCs have not resorted to Article 4.10 (special attention during consultations) because of its declaratory nature and the absence of implementation modalities214.

The most obvious evidence of the ambiguity of the legal significance of panels and AB rulings is the idea of judicial restraint215 present in the DSU as laid down notably in Article 3.12 (annex p.18) which states "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreement [emphasis added]" The judicial restraint echoes the underlying diplomatic origins of the WTO DSM and considerably limits the possible impact and legal reasoning of panels' rulings. For instance, J.H. Jackson notes that the AB seems to demonstrate considerable deference to national governments' decision making216. Besides this limitation, the legal reasoning and the scope of the law are somewhat affected by the fact that judicial restraint implies that questions are tackled by panels and AB as far as they are strictly necessary for bringing the dispute to a positive conclusion217.

This judicial restraint does not affect the DSM procedure itself since the latter is dominated by a formal adjudicative approach. Yet, it may limit the scope of legal reasoning and as we will see, the remaining diplomatic approach considerably affects the condition of enforcement of panels' rulings.

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than a diplomatic club. Law and Policy in International Business. ISSN 0023-9208. 2000, Spring, 779-781, p.780.

211 Wilson, S. B., *Ibid.*

212 *"The objective of the DSU is to obtain a positive solution to a dispute, and the use of the DSU is not as "a contentious act", but a "good faith attempt" to resolve any dispute* [emphasis added]". Mukerji, A., *op. cit., supra, footnote 23*.

213 Qureshi, A.H., *op. cit., supra, footnote 163*, p.143.

214 The same reflection can be made on Articles 12.10 and 12.11. T.R.A.D.E., *op. cit., supra, footnote 36*, p.18 and 19.

215 For further developments on the subject, see Jackson, J.H. The Jurisprudence of GATT and the WTO. Cambridge University Press, 2000, p.186.

216 Jackson, J.H. *Ibid.*, p.186. following the same idea see Wilson, S. B, stating that "*Ultimately, a WTO panel is not going to be able to dictate to the U.S. Congress how, or whether, it writes or rewrites U.S. law* [emphasis added]". Wilson, S. B, *op. cit., supra, footnote 210*, p.780. See also Rosas, A. who points out that panels and AB refrain themselves from suggesting ways in which the losing party should implement the recommendations is "*explained by the fact that Members are not to keen on receiving instructions on how to implement nationally a finding of non-compliance* […] [emphasis added]" Rosas, A. *op. cit., supra, footnote 184*, p.134.

217 T.R.A.D.E., *op. cit., supra, footnote 36*, p.7. The South Centre referred here to the *case United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Complaint by India (WT/DS33), where the AB refused to address a question raised by India.

CHAPTER 3: ISSUES ARISING FROM THE IMPLEMENTATION OF WTO DISPUTE SETTLEMENT FINDINGS FOR DEVELOPING COUNTRIES.

This chapter specifically tackles the difficulties a developing country may experience in the implementation of WTO DSM's findings. We will mainly observe that the solutions as to the implementation ensuing from the DSU are discriminatory in practice as they favour economically strong members.

Section 1: General remarks on the dispute settlement system of implementation from the viewpoint of developing countries.

The WTO DSU contains a more legalistic approach of the implementation of decision notably through the provisions of timeframes. However, although the WTO DSU favours DCs' trust that large developed countries will abide by the decisions of the new WTO dispute settlement[218], we will see that it still takes considerable courage and political will for DCs to commence a dispute against an industrialised Member States[219]. This is because the WTO DSU does not afford incontestable guarantees to complainants that the losing party will abide by the panel or AB's rulings. The fact for a DC to bring a case against an industrialised country implies the risk of being involved in a long process, the outcome of which is far from being certain.

Paragraph 1: Description of the general system of implementation under the WTO DSU.

It has been contended that the rules of implementation ensuing from the WTO DSM are "a leap forward towards ensuring the adjudicative nature of the WTO DSM and thereby making it a more attractive to developing countries [emphasis added]"[220]. It is true that the WTO DSM provides for more adjudicative rules of implementation, notably through more precise timeframes and surveillance. However, we will observe that although the implementation follows to some extent a judicial model, implementation, above all qualitatively still rests on the willingness of the respondent to comply and that the WTO DSM does not offer incontestable safeguards to DCs in this regard.

In the case a panel or the AB has concluded that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with the agreement[221]. In this regard, a novelty was introduced by the WTO DSU since

[218] Bierman, L. [reviewing the book] Trade Policies and Developing Nations. By Anne O. Krueger. Washington. The Brookings Institution, 1995. Northwestern Journal of International Law and Business. ISSN 0196-3228. 1996, Spring, 547-552, p.552.

[219] Parlin, C. C., *op. cit., supra, footnote 152*, p.868.

[220] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.176.

[221] Rosas, A., *op. cit., supra, footnote 184*, p.134.

panels and AB have the possibility to suggest ways in which the losing party could implement the recommendations 222.
The legal significance of such suggestions is questionable. They seem to be compulsory only for violations complaints and constitute a mere suggestion as such in all other cases (non-violation and situation complaints)223. Further, this possibility is not very often used in practice224. Panels and AB are traditionally reluctant to do so since such "suggestions" may amount in practice to an interference within a member state's sovereignty225. For these reasons, panels usually "stick to rather innocent recommendations [emphasis added]"226.
Facing such rulings, the defendant has three choices within the present system227:
- (1) Compliance with the WTO ruling.
- (2) Maintenance of its illegal practice while compensating the losing party for its loss.
- (3) Complete disregard228.

If the respondent country chooses to comply with the panel or AB ruling, it is offered a hierarchy of four methods of implementation by Article 3.7 of the DSU (see annex p.17)229 :
- (1) A mutually acceptable solution between the parties to the dispute, which is clearly promoted in the DSU as the best possible option.
- (2) The withdrawal of the measure concerned.
- (3) If the latter is impracticable, the parties should agree on compensation "as a temporary measure".
- (4) As a last resort the possibility of suspending the application of concessions or other obligations, subject to the authorisation of the DSB.

WTO members remain free to choose the way in which they will bring the domestic measure at issue into compliance230. However, they must indicate this method231.
In the event the losing party has remained passive after the panel or AB ruling and if after twenty days from the expiration of a reasonable period of time (fifteen months), the parties have not reached an agreement on compensation, the complainant can request the DSB to suspend concessions. This action shall be made pursuant to Article 22. 3 (see annex p.40)232:

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[222] Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.12.

[223] *Ibid, p. 14.*

[224] Rosas, A., *op. cit., supra, footnote 184*, p.134. and *Ibid.*

[225] "[...] *members are not too keen on receiving instructions on how to implement nationally a finding of non-compliance* [...] [emphasis added]" Rosas, A., *Ibid.* , p.134.

[226] Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.12.

[227] Brimeyer, B. L. Bananas, Beef, and Compliance in the World Trade Organisation: The inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations. Minnesota Journal of Global Trade, 2001, Winter, 133-168, p.165.

[228] It was the case in the *EC-Bananas III* case which involved DCs and developed countries. Brimeyer, B. L., *Ibid*., p.165.

[229] Rosas, A., *op. cit., supra, footnote 184*, p.135 and 136.

[230] Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.14. These commentators add that the only limit being is the principle of good faith: member states must at any rate withdraw the measure and not repeat them again

[231] Footer, M. E., *op. cit., supra, footnote 147*, p.69.

[232] Reif, T. and Florestal M. Revenge Of The Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding. International Lawyer. ISSN 0020-7810. 1998, Fall, 755-788, p.764.

the complainant should seek to suspend concessions with regard to the same sector as that in which the panel or AB decision has found a violation or other nullification or impairment[233]. If this is not possible, the suspension of concession should be made in another sector within the same agreement and if this is not feasible either, under another agreement.

Paragraph 2: Critical analysis of the particular treatment afforded to developing countries.

- Article 21.2 Particular attention to matters affecting the interests of developing countries in the surveillance of implementation of recommendations and rulings

According to Article 21.2. (Particular attention to matters affecting the interests of developing countries in the surveillance of implementation of recommendations and rulings - annex p.37), particular attention should be paid to matters affecting the interests of developing countries. The first striking feature of this provision is indeed its imprecision. It could be addressed to any organ of the DSM whose role deals with the implementation or the surveillance, that is the panel, the DSB or the AB[234]. The verb "should" indicates a desirable, but not mandatory task[235] and the method to be used is not specified. H. Horn and P. C. Mavroidis take the view that the DSB or panels could simply discharge their obligations in this regard by adding a few paragraph to their rulings or spending "a few more minutes" on the case[236].

In addition, it is interesting to note that Article 21.2 is not applied by panels when dealing with recourses under Article 21.5 of the DSU, that is in the event that there is a disagreement between the parties as regards the adequacy of the implementation. This worrisome situation, which directly echoes the hortatory character of article 21.2, was illustrated in two cases.

For example, in the EC-Bananas III case[237], at the request of Ecuador, the panel was reconvened under Article 21.5, on the ground that the EC implementation was inconsistent with the panel ruling. Ecuador asked the panel to make specific recommendations and suggestions as to how the EC could bring its regime for importation of bananas into compliance.[238]. The EC made a separate request for the original panel to be reconvened, on the ground of Article 21.5 of the DSU[239]. In both cases, although Ecuador was a DC and the EC could have sought to defend the interests of bananas-producing DCs (ACP countries), neither panel showed any special and differential treatment[240].

[233] *Ibid.*

[234] See Footer, M. E., *op.cit., supra, footnote 147*, p.70. and Article 21.3 of the DSU (annex p.37).

[235] "[…] *rather hortatory* […] [emphasis added] ". T.R.A.D.E., *op.cit., supra, footnote 36*, p.20.

[236] Horn, H., and Mavroidis P. C., *op.cit., supra, footnote 3*, p.27.

[237] Request of 18 December 1998 by Ecuador, WTO Document WT/DS27/41. Footer, M. E., *op. cit., supra, footnote 147*, p.72.

[238] *Ibid.*, p.73.

[239] *Ibid.*

[240] *Ibid.*

- Article 21.7 and 21.8 of the DSU.

Article 21.7 and Article 21.8 - which were taken from the 1979 Understanding241 - (annex p.39) - requires the DSB to consider what further action it might take which would be appropriate to the circumstances when a matter dealing with the implementation is raised by a DC. More specifically, Article 21.8 obliges the DSB, when considering such action, to take into account its potential impact on the economy of the DC. These provisions are important because they deal with a DC's major concern and seem to contain binding obligations242. However, one can address the same criticism as for Article 21.2, namely the lack of specific terms243. Moreover, "there is no way to ensure that such treatment is accorded to developing countries in practice [emphasis added]"244.

Another important concern is the fact that action pursuant to article 21.7 and 21.8 is to be taken by the DSB and to do so, a consensus must be reached.

The question of the preferential treatment was addressed in three cases which notably deal with the period of time to be granted to DCs for the implementation of panels and AB rulings. In the EC - Bananas III case245, four of the complainants (namely Ecuador, Guatemala, Honduras and Mexico) along with the United States, had recourse to arbitration under Article 21.3(c) in order to determine the "reasonable period of time" for the EU to comply with the panel's ruling246. These developing countries argued that special attention should be paid to their interests, on the ground of Articles 21.2, 21.7 and 21.8 of the DSU247. M. E. footer notes that this request had no impact whatsoever on the arbitrator's decision, since he was not convinced that particular circumstances should be taken into account to justify a period shorter than the fifteen months contained in Article 21.3(c) and ruled that the EU had fifteen months and seven days for implementation248.

The question of DC's special treatment with regard to the implementation of decisions was also addressed in the case of Indonesia- Certain Measures Affecting the Automobile Industry (Indonesia-Automobiles) 249. In July 1998, Indonesia requested an additional nine months in order to implement the panel ruling, arguing that its car industry was in need of structural adjustments250. Although the arbitrator refused to take into account this argument, he considered that particular attention should be paid to Indonesian interests, pursuant to Article

241 T.R.A.D.E., *op. cit., supra, footnote 36*, p.21. and *Ibid*., p.69.

242 Contrary to Article 21.2, the verb "*shall*" is used.

243 Footer, M. E., op. cit., supra, footnote 147, p.72.

244 "General Comments with respect to the Dispute Settlement understanding" Cited in Secretariat Note 2000, *Ibid*., p.69, note 66.

245 Request of 17 November 1997 by Ecuador, Guatemala, Honduras, Mexico and the United States. WTO Document WT/DS27/13, G/L/209 (20 November 1997), *Ibid*., p.70.

246 *Ibid.*

247 *Ibid.*

248 *Ibid.*

249 Indonesia- Certain Measures Affecting the Automobile Industry (Indonesia-Automobiles).WTO Documents WT/DS54/R (Complaint by the European Communities), WT/DS55/R and WT/DS64/R (Complaint by Japan), WT/DS59/R (Complaint by the United States), (report of the panel), (2 July 1998), adopted on 23 July 1998. *Ibid.*

250 Footer, M. E., op. cit., supra, footnote 147, p.71.

21.2 of the DSU. Accordingly, he accorded Indonesia an additional period of 6 months to implement the panel ruling, with reference to the difficult economic situation of this country251.
A third case can be referred to which also deals with the implementation of a panel ruling by a DC. In India-Quantitative Restrictions on Agricultural, Textile and Industrial Products252, the Panel had anticipated the difficulties India may face in the implementation of the panel recommendations and decided to suggest ways in which this country should implement the decision, according to the faculty offered to panels and AB by Article 19.1 (see annex p.36)253. The panel considered that the period of 15 months was merely an indication, not a rule, and thus that an extension of this timeframe would be possible. It further decided that any Article 21.3 arbitration should respect the principle of special and differential treatment and the necessity to pay particular attention to DCs' interests254.

Paragraph 3: Importance of retaliation in the WTO DSU.

In order to fully understand the difficulties DCs may face as regards the WTO DSM, the importance that retaliation is to play in the system must be emphasised.
WTO-sanctioned retaliation is presented by the DSU as a last resort in the adjudication system255 as well as an interim measure until full compliance has been reached256. Although the counter-measures foreseen by the DSU are WTO-sanctioned retaliatory measures, as opposed to purely unilateral retaliation, they are fundamentally instruments of economic might.

Retaliation, that is the suspension of concession and other obligations, can be authorised by the DSB only if the respondent remains passive. As an alternative, compensation may be granted, if both parties agree257. Pursuant to Article 22.4 (see annex p.42), they shall be equivalent to the level of the nullification or impairment.
This measure is designed to prevent continued losses, to induce change and to deter unlawful behaviour258.
Retaliation may play a central role in the WTO DSM259 because it is designed to act as the ultimate safeguard for complainants willing to obtain satisfaction. Since blockage can no

[251] *Ibid.*, p.70.

[252] *India-Quantitative Restrictions on Agricultural, Textile and Industrial Products*, Complaint by the United States, WTO Document WT/DS90/R (6 April 1999) (panel) and AB-1999-3, WTO Document WT/DS90/AB/R(23 August 1999) (Appellate Body), adopted on 22 September 1999, *Ibid.* p.71.

[253] *Ibid.*

[254] *Ibid.*

[255] "[...] *the Ultima ratio to guarantee that legality has been respected* [...] [emphasis added]". Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.18.

[256] Reif, T. and Florestal M., *op. cit., supra, footnote 232*, p.764.

[257] Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.18.

[258] *Ibid.*

[259] "[...] *the system essentially relies on the capacity of the parties to the dispute to suspend concessions or obligations* [...] [emphasis added]" Qureshi, A.H., *op. cit., supra, footnote 163*, p.143.

longer be used by reluctant respondents, avoiding compliance is "the only option" left to them. Moreover, certain countries have a record of non-compliance, such as the European Union260.

Section 2: Shortcomings of the existing system of implementation.

Paragraph 1: Is retaliation really an option for developing countries?

As seen above, retaliation is an instrument of economic power to be used ultimately against a reluctant respondent. The threat and effectiveness that counter-measures represent highly depend on the existence and repartition of concessions between the countries involved in the dispute261 as well as the quality of the concessions themselves262. Here lies the deep unfairness of the system. Self-evidently, there is only a limited threat and economic impact in a DC raising import barriers against a developed country263.

To fully understand the importance of the question, we have to bear in mind that about two third of DCs' complaints have been against developed countries264, mainly the EU and US. Accordingly, it is self-evident that DCs, in the event that the respondent does not abide by panels or AB decisions, will have to envisage retaliation against a DC in two third of the cases.

The DCs' ability to retaliate against more powerful member states was indeed already questioned under the GATT rules. In essence, the WTO DSU does not bring about new solutions for DCs in this regard, although they opposed WTO-sanctioned retaliation during the Uruguay Round negotiations265.

Besides the fact that retaliation by a DC against a developed country can hardly have an impact or represent a serious threat, we must bear in mind that suspensions of concession have a commercial and welfare cost that can hardly be afforded by DCs266. Retaliation can be analysed as a necessary investment in order to change the behaviour of the respondent267. The cost of this investment is different depending on the level of trade barriers: the withdrawal of concessions is more costly to countries with high trade barriers, which is more likely to be the case in DCs268.

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260 Brewer, T. L., and Young S., *op. cit., supra, footnote 1*, p.172.

261 In DCs, trade barriers are normally higher than in developed countries. Similarly, the former often receive concessions from the latter, but not vice-versa. Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 184*, p.15

262 Qureshi, A.H., *op. cit., supra, footnote 163*, p.143.

263 Hoekman, and Mavroidis P. C., *op. cit., supra, footnote 184.*, p.6.

264 Brewer, T. L., and Young S., *op. cit., supra, footnote 1*, p.172.

265 *Ibid.*

266 "*A basic problem with retaliation is that it involves raising barriers to trade, which is generally detrimental to the interests of the country that does so, and to world welfare more generally.* [emphasis added] "Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184.*, p.7.

267 Horn, H., and Mavroidis P. C. *Ibid*., p.19.

268 Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.19.

At last, DCs generally do not risk retaliation for fear of subsequent actions the developed country might take[269].

An important case were the question of DC retaliation was recently addressed is the EC – bananas III affair[270].

This controversial case involved two sets of developing countries, both exporting bananas to the European communities[271]. After a single market to unify policies on bananas had been established in the EC (1993), the US, along with several Central American bananas producers, brought a complaint against the EC. These countries argued that their market access was being denied by the preferential access granted by the EC to former European colonies (ACP countries)[272]. This regime imposed restriction on bananas' imports on a discriminatory basis. The issues raised were particularly sensitive because any sudden removal of ACP countries' preferential access to the EC market would have seriously disrupted the economies and societies of these countries[273].

Initial consultation failed and the report eventually reached which "condemned" the EC was not adopted because of the blockage of the respondent. A case brought by Caribbean countries was similarly blocked.

Under the WTO (in 1996), the dispute was raised by Ecuador, Guatemala, Honduras, Mexico and the US against the EU's regime for the importation, sale and distribution of bananas, which was alleged to be inconsistent with various provisions of the WTO[274].

The panel found in May 1997 that the EC regime was inconsistent with the provisions of the WTO and the EC was asked to reform its regime by 1st January 1999[275]. An appeal was then filed by the EU. The AB largely upheld the panel decision. However, the EU refused to disclose any details on its implementation plan and decided to maintain some trade preferences in its Bananas regime[276]. The US, Honduras, Guatemala, Ecuador and Mexico requested an arbitration in November 1997 and the arbitrator held that the EC would have fifteen months and one week to implement the WTO decision and bring the regime into compliance[277]. In 1998, the Union adopted a proposal to modify its bananas regime which was found by the complainants just as discriminatory as the previous system[278]. This new regime was brought before the WTO panel and the US declared that retaliation would be applied from March if no substantial changes were done[279]. The EU responded that that it would agree on a panel only if the US withdrew its threat of sanction[280]. Dissatisfied with the EC's implementation, the complaining countries brought the matter again before the WTO in

[269] As notably Pr. Stephen Young declares.

[270] WTO DSB Report WT/DS27/AB/R, 9 September 1997. For a detailed account of the "*bananas war*", see Brimeyer, B. L., *op. cit., supra, footnote 127*, p.147-155.

[271] Mukerji, A., *op.cit., supra, footnote 23*, p.66.

[272] *Ibid.*

[273] *Ibid.*, p.67.

[274] Mukerji, A., *op. cit., supra, footnote 23*, p.66.

[275] *Ibid.p.67*

[276] Brimeyer, B. L., *op. cit., supra, footnote 227*, p.149-150.

[277] *Ibid.* p.150

[278] *Ibid.*

[279] *Ibid.*

[280] *Ibid.*, p.151

January 1999, which found that the reformed regime did not meet the WTO requirements[281]. The US requested the WTO to suspend its concessions to imports from the EC worth $ 520 millions as a compensation for the EC denial of market access. The WTO approved the request but reduced the amount of the suspension of concessions[282].
More interestingly, Ecuador, a DC, eventually requested that the DSB authorise the suspension of concessions to the EC equal to the level of nullification and impairment that is $ 201.6 million, pursuant to Article 22.7 of the DSU. On 18 May 2000, the DSB issued such authorisation as requested[283]. "Ecuador (i) [took] note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004; (ii) upon implementation of the new import regime, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$ 201.6 million per year vis-à-vis the EC will be terminated [...] [emphasis added][284]". By this date we will be able to assess what impact may the Ecuadorian retaliation have had on the EU economy.

Paragraph 2: The question of compensation.

Since "[...] violations of the WTO are disproportionately burdensome for [DCs] given the fragility of many of their export industries and the fact that their export base is generally much less diversified than in high income countries. [emphasis added]"[285], a cost-benefit analysis may deter DCs from commencing a dispute. It has been consequently argued that obtaining compensation is more important to DCs than for developed countries[286]. The possibility to obtain compensation for damages already occurred or during the pendency of the dispute is definitely of judicial nature and refers to a "binding obligation approach". This is thus a highly controversial question because this touches upon WTO member states' sovereignty. For this reason, a mechanism providing for financial compensation is not likely to be set up.
Article 22.2 of the DSU (see annex p.39 - 40) provides that in the event that the respondent has not implemented the panel or AB ruling within a reasonable period of time, the complainant may seek compensation and request the losing party to enter into consultation with a view to developing mutually acceptable compensation[287]. If no agreement on compensation has been reached after twenty days from the expiration of the reasonable period of time, retaliation can be requested.
Indeed, in the field of compensation, DCs suffer less from their lack of economic and political power than for retaliation and accordingly, an effective and efficient mechanism for compensation could represent a formidable alternative to the system of retaliation. Unfortunately, it ensues from Article 22.1 of the DSU (see annex p.39) that compensation is a temporary measure, that is never to be preferred to full implementation, and more importantly

[281] Mukerji, A., *op. cit., supra, footnote 23*, p.67.

[282] Mukerji, A., *Ibid.*, p.67.

[283] WTO Website. Overview of the state-of-play of WTO disputes. [Last updated 13.07.01.] http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc, p.6.

[284] *Ibid.*, p.5 and 6.

[285] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184* , p.13.

[286] Moreover, the perspective of obtaining compensation would help attract private expertise. *Ibid*.

[287] Reif, T. and Florestal M., *op. cit., supra, footnote 232*, p.760.

from the viewpoint of DCs, voluntary. As seen above, compensation rests on the willingness of the respondent to negotiate. In this voluntary nature lies the principal drawback of the system[288], above all for DCs. At last, The WTO DSU does not enable panels to prescribe compensation for losses already occurred[289]

During the Uruguay Round negotiations, certain DCs underlined the importance of compensation in the event of a developed country violating their GATT obligations in the detriment of DCs[290]. In particular, Nicaragua and Korea put forward their concerns in this regard. Nicaragua notably argued that the Contracting parties recommendations should include compensatory measures[291]. The korean proposal contained a similar request. This country proposed that the panel report include recommendations on measures and compensation to be awarded for failure to implement Council decision, in disputes involving developed and DCs[292].

These proposals show that the possibility to obtain compensation is a legitimate and important concern for DCs. They demonstrate that the system ensuing from the WTO DSU in this regard is not satisfactory because of the lack of involvement of panels, DSB and AB in the determination of compensation and above all due to its voluntary character.

The absence of provisions for compensation for export loss during the pendency of the dispute[293] is also particularly worrisome for DCs for whom the cost of commencing a dispute is a serious hindrance. Indeed, because of their rather narrow export base, they can suffer heavy trade losses during the course of the dispute[294]. This is even more serious when we consider the fact that the procedure - as we have seen in the EC-Bananas III case - can still last almost indefinitely.

[288] Kufuor, K. O., *op. cit., supra, footnote 12*, p.140.

[289] With some exceptions. Horn, H., and Mavroidis P. C., *op.cit., supra, footnote 3*, p.18.

[290] Kufuor, K. O., *op. cit., supra, footnote 12*., p.139.

[291] This proposal also included suggestions that the Contracting Parties' decision be implemented in ninety days and put forward the idea that the Contracting Parties could consider other measures than suspension of concessions in case of failure to implement recommendations. Kufuor, K. O. , *op.cit., supra, footnote 12*, p.139.

[292] *Ibid.*

[293] T.R.A.D.E., *op. cit., supra, footnote 36*, p.31.

[294] The South Centre even takes the view that the market may be lost permanently to competitors and substitute products. *Ibid.*, p.31.

Paragraph 3: The questionable legal significance of the system of implementation and of panels findings.

- "Compensate or obey?"295

As part of the general question of their legal effect, AB or panel reports raise the more specific issue as to whether the international law obligation deriving from them gives the option either to compensate with trade and other measures or to fully abide by panels or AB rulings296. In J.H. Jackson's words: does the WTO DSM give the choice 'to compensate or obey"?

Fundamentally, the public international legal "obligation" deriving from the WTO DSM rests upon voluntary compliance and the WTO DSM does not enjoy the kind of monopoly of force sovereign states enjoy297. However, international law has important real effects. Their applicability depends on the approach to the legal effect of a dispute settlement process that governs in the different member states298. What is the extent of the legal obligation which arises from the WTO DSM that member states agreed on? As a matter of fact there is no definite answer to be found in the WTO DSU itself.

As observed before, compensation and retaliation are not presented in the WTO DSU as alternatives to full compliance but merely as temporary measures299, in the event for example that the immediate withdrawal is impracticable. The DSU clearly shows a preference for an obligation to perform the panel recommendations300. The question whether it is a binding obligation is in practice left to the domestic tradition of the various member states in this regard301. Although, theoretically, panels and AB decisions are binding in the international law and traditional sense, practically this obligation to comply can be meaningless302.

From the viewpoint of DCs, it is self-evident that what is needed is performance and not compensatory measures. The latter can keep DCs in a state of dependence when the compensating party is a developed commercial partner. Moreover, should the DC be heavily dependent upon the industrialised country, compensatory measures could induce a dangerous unpredictability and fragility in the complainant's economy.

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[295] Jackson, J. H. Editorial Comments: The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation. American Journal of International Law. ISSN 0002-9300. 1997, p.60-64, p. 60.

[296] Jackson, J. H., *op. cit., supra, footnote 295*, p. 60.

[297] *Ibid.*

[298] In Common law countries, traditionally there is no "*direct application*" or "*direct effect doctrine*" *Ibid*., p. 61.

[299] Although some argued that they were alternative options. *Ibid*., p. 62.

[300] *Ibid.* , p. 63.

[301] On the importance of strengthening national mechanisms to enforce WTO commitments see Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 155*, p.23.

[302] According to Jackson, J. H., *op. cit., supra, footnote 295*, p. 63-64.

- Lack of precise framework for the implementation.

We observed that panels do not often use their ability to suggest the manner in which the losing party should implement the ruling. It has been argued that they normally stick to rather innocent recommendations as the outcome of a diplomatic process303. This can be explained by the fact that panels are often composed of governmental members who are mainly concerned with diplomatic and pragmatic considerations304. In absence of any suggestions and as far as they may represent an "obligation", parties are basically free to choose the method to be used in order to bring the measure at issue into compliance305.

Here lies an important issue that considerably undermines the legal significance of panels and AB findings. In absence of precise requirements, the respondent remains free to hinder the procedure and postpone implementation by undertaking unsatisfactory cosmetic changes (as seen in the EC-Bananas III case)306. This obliges the aggrieved party to request another panel and effectively obstructs recourse to retaliation: as long as the losing party undertakes changes, even inadequate, the complainant cannot be authorised to resort to counter-measures307.

Although this possibility to avoid implementation is problematic for all WTO members, this is obviously more worrisome for DCs:

On the one hand, self-evidently, they cannot afford to wait for the implementation of the panel or AB ruling because of the weakness and dependence of their economy.

On the other hand, more importantly, the respondent country can effectively move the conflict outside the legal framework of the WTO and its system of conflict resolution, into the area of international politics when it refuses compliance308. As seen earlier, DCs lack the political and economic might that gives weight in international politics and diplomatic negotiations whereas developed countries may find this move "less unattractive and even desirable [emphasis added]"309.

303 Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.15.

304 *Ibid.*.

305 See for example Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 184*, p.5.

306 Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.16. See also Brimeyer, B. L, *op.cit., supra, footnote 227*, p.165. Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 155*, p.8.

307 Retaliation can only be used when the respondent remains passive. Horn, H., and Mavroidis P. C. *Ibid.*, p.16.

308 Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.17.

309 *Ibid.*

CHAPTER 4: PROPOSALS FOR REFORM OF THE WTO DISPUTE SETTLEMENT SYSTEM.

This chapter aims at echoing the calls for reform on the part of developing countries and at analysing their potentials and interest. It is notably based on the South Centre Trade Related Agenda, Development and Equity working paper "Issues regarding the review of the WTO dispute settlement mechanism." (see general bibliography). This paper seems to reflect DCs expectations and calls for reforms as regards the WTO DSM.

Section 1: Proposal regarding access to the dispute settlement mechanism

Access to the DSM is first concerned with the asymmetric distribution of financial resources and technical and legal knowledge between DCs and their more affluent counterparts as well as the status of third parties in the procedure as well as the difficult question of private parties legal standing.

Paragraph 1: Improvements related to DCs' access to the DSM.

Reforms in this regard deal with the upstream stage of the procedure, that is the identification and preparation of potential cases310.
The question of the legal access to the DSM refers directly to the unequal repartition of legal knowledge and experience among WTO members311. We insisted on this question earlier, stating that this issue should be treated as a serious impediment. Assistance from the WTO and from individual developed countries is indeed seen as the best possible response312. This has been done through the WTO Training Division313.and certain developed countries have traditionally provided assistance to developing countries in this regard314. Technical assistance activities and programmes have also been undertaken by other international organisations (such as UNCTAD, International Trade Centre and the World Bank)315. However, it has been contented that this assistance is not capable of fulfilling DCs' needs316.
Pursuant to Article 27.2 of the DSU qualified legal experts from the WTO technical co-operation have been made available, either from internal WTO services or from former staffers of the Legal Division. It appears that this technical assistance failed to reach its objective. According to DCs, this does not question the competence or the willingness of the

[310] See Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.8.

[311] "[...] *the lack of experience frequently cannot be overcome; thus, the "fight" is not fair. In the long term this problem can be rectified by training*.[emphasis added]" Parlin, C. C., *op.cit., supra, footnote 152*, p.868.

[312] As stated earlier, the lack of human and financial resources is even more serious in a non-violation or situation case. Brewer, T. L., and Young S., *op. cit., supra, footnote 1* p.15.

[313] Which conducts courses for low and mid-level officials of developing-countries' governments Parlin, C. C., *op. cit., supra, footnote 152*, p.869.

[314] Such as Canada, the Nordics, and Switzerland. Parlin, C. C., *Ibid*., p.869.

[315] Footer, M. E., *op. cit., supra, footnote 147*, p.87.

[316] Parlin, C. C., *op.cit., supra, footnote 152*, p.869

staff but is explained by the fact that this aid cannot replace that of a private counsellors317 as well as by budgetary difficulties318.
For this reason, DCs have to resort to outside private counsels. They recently pressed and gained the right to be represented by private legal counsel in panel hearings as well as before the AB.319.
An interesting step towards a more equal repartition of knowledge was taken with the creation of the Advisory Centre on WTO Law320. The objective of this organisation is to321 :
- provide training on WTO law through regular seminars,
- give legal advice,
- support legal proceedings in WTO matters and,
- provide internships for officials dealing with WTO legal issues to its DC members and all LDCs.

Can this Advisory Centre, jointly created on the initiative of some DCs with the support of certain developed countries, replace the assistance of private law firms? It appears that the Centre will have a limited staff and should have as its long-term objective the training of in-house staff 322. It is too early to assess its role since the Centre started its activities in spring 2001.
However, one can see in the creation of the Advisory Centre a direct response to the failure of the legal assistance provided by the WTO itself, notably under Article 27.2 of the DSU323.
The main impediment in this regard is not the willingness to provide assistance but mainly budgetary constraints. Accordingly, for the WTO DSM to be a genuine instrument of justice, it is necessary to re-think the way resources are distributed and most developed countries' contribution in this regard. Ensuring equal access to the WTO DSM and above all equal opportunities implies financial reforms324, such as those proposed by Pakistan, Turkey and Venezuela which aimed at ensuring the better use of Article 27.2 of the DSU325: Those proposals consisted in326 :
- increasing the secretariat budget so as to hire full-time consultants and to upgrade the posts of legal officers so that experienced lawyer could be hired,
- setting up an independent legal unit within the Secretariat, staffed with legal advisors,

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317 The WTO counsellor "[...] *merely provided technical assistance on a narrow range of issues, frequently doing no more than critiquing possible arguments or defenses and providing basic advice about the course of WTO dispute proceedings. Is it fair to expect more? No. The "expert" was never intended to be the WTO equivalent of a public defender--an advocate assigned by the WTO*. [emphasis added]". Parlin, C. C., *op.cit., supra, footnote 152*, p.869

318 Footer, M. E., *op. cit., supra, footnote 147*, p.87.

319 ACP countries did so as third parties in the *EC Bananas* dispute. Parlin, C. C. , *op.cit., supra, footnote 152*, p.870. See also Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.7. See also Lacarte-Muro, J., and Gappah P., *op. cit., supra, footnote 132*, p.398.

320 Duk Park, Y., and Umbricht G. C., *op. cit., supra, footnote 4*, p.213.

321 Footer, M. E., *op. cit., supra, footnote 147*, p.89.

322 AITIC, *op. cit., supra, footnote 197.*

323 Footer, M. E., *op. cit., supra, footnote 147*, p.89.

324 This is the first concern expressed in this regard by the South Centre. T.R.A.D.E., *op.cit., supra, footnote 36*, p.29.

325 Footer, M. E., *op. cit., supra, footnote 147*, p.88 and 89.

326 As listed by M.E. Footer, Footer, M. E., *Ibid.*, p.88.

- re-considering the application of the concept of neutrality in relation to legal assistance under Article 27.2 of the DSU,
- and establishing a trust fund to finance strategic alliances with lawyers' offices or private firms in order to expand the scope of consultancy and advisory services available to DC members.

Reforms in relation to legal and technical assistance should pursue a threefold objective to ensure equal access to the WTO DSM.
Firstly, Article 27.2 of the DSU should be given an effective and efficient dimension. The legal assistance foreseen by this Article has the advantage to be directly integrated in the DSU and more particularly in the framework of the DCs' special treatment. More resources should be made available, notably by developed countries, in order to provide immediate short-term assistance to DCs involved in a dispute. Not to encroach on the Advisory Centre's role, Article 27.2 assistance could be limited to purely technical and procedural matters. Indeed, on these issues, the neutrality of WTO staff would be less questionable[327]. Moreover there would be no question whether this help should be made available before or after a case has been brought[328]
Secondly, outside assistance should be provided in order to deal with the commercial and legal issues as such involved in the disputes. Outside help is necessary in this regard given that WTO advisers are self evidently not the best placed to provide such assistance. What is needed here is an efficient substitute for private counsels. Ideally, the Advisory Centre could fulfil this duty if more - notably developed - countries contributed financially to the running of the Centre[329]. At last it is necessary that this assistance be provided even before a case is brought, in order to determine whether the practices at issue are inconsistent and assess whether they may give rise to a winning case[330].
Thirdly, the latter should be able to provide training and internships for DCs' officials. This is a long-term scheme which is essential to ensure eventually genuine equal access to the WTO DSM.

Paragraph 2: Clarification of the rights of third parties[331].

It has been contended by some commentators that one solution to the lack of economic weight of DCs would notably be to clarify and extend third parties' rights[332].
This is particularly relevant as regards retaliation. We observed that individually, DCs are placed in a difficult situation of dependence and weakness in relation to their more affluent commercial partners. DCs can rarely afford to retaliate, either for pure commercial reason or for fear of sanctions. The fact that the DSU rules out explicit countermeasures by third

[327] The impartiality of WTO legal experts is an important concern for DCs,. See for example T.R.A.D.E., *op.cit., supra, footnote 36*, p.30.

[328] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.10.

[329] To date, major developed countries (US, EU, Canada) have refrained from supporting the advisory centre. Hoekman, B. M., and Mavroidis P. C., *Ibid*., p.10.

[330] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.10.

[331] T.R.A.D.E., *op. cit., supra, footnote 36*, p.32.

[332] At least implicitly in Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.21.

parties[333] may be seen as an obstacle to effective retaliation[334]. Moreover, this prevents DCs from defending collectively their interests although collaboration in this regard is sometimes necessary to counterbalance developed countries' economic weight[335]. Although one have to admit that indirect or direct retaliation on behalf of another member state is a dangerous and can hardly be organised legally, the DSU should provide for such a possibility, under the framework of the differential treatment. Such retaliation would self-evidently confer weight to DCs' complaints. This type of retaliation should only be based on the third parties commercial interests, which should be common with those of the primary complainant, and indeed subject to the DSB authorisation.

Clarification of third parties rights can also serve DCs' interests in more procedural matters. In the EC-Banana III case, the ACP countries sought and obtained an enhanced role as third parties to the disputes[336]. Pursuant to paragraph 6 of Appendix 3 of the DSU, third parties can present their views during a session of the first substantive meeting of the panel, provided they have a substantial interest in the matter (Article 10 of the DSU - see annex p.27). However, in this affair, after having consulted the different parties, the panel decided to allow the third parties to attend the second substantive meeting of the panel, that is with the complainant and respondent present and to accord them the right to make a brief statement during this second meeting[337]. This decision was notably justified by the important economic effect the disputed EC regime had on certain third parties[338]. However it was made clear that this does not constitute a binding precedent[339].

It is difficult to determine to what extent third parties' procedural rights should be enhanced, however one must admit that clarification, at the very least, is needed in this regard. We believe that this right to attend more panels than foreseen and to submit observations should be the subject of a provision in the DSU. Such "extended" rights could promote a certain cohesion and solidarity among DCs[340] and give them more political weight in the dispute. However, as in the EC - Banana III case, this possibility should be limited to cases where the economy of the third parties concerned is substantially affected.

At last, third parties should in all cases be somehow kept informed of the development of the dispute, again if they have a substantial interest in it[341].

[333] Qureshi, A.H., *op. cit., supra, footnote 163*, p.144.

[334] Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.21.

[335] DCs' ability and necessity to collaborate in order to defend their common interests could notably be seen in the "*Banana III case*" where 24 third parties - DCs or LDCs - intervened in the proceedings. See for example Footer, M. E., *op. cit., supra, footnote 147*, p.92.

[336] Footer, M. E., *op. cit., supra, footnote 147*, p.92.

[337] Footer, M. E. *Ibid*., p.93.

[338] *Ibid.*

[339] *Ibid*., p.94.

[340] Although these extended rights should also be accorded to developed countries under the same conditions.

[341] T.R.A.D.E., *op. cit., supra, footnote 36*, p.32. The South Centre also puts forward a proposal aiming at eliminating the requirement of "trade" interests for developing countries that wish to join in consultations under article 4.11. Although this idea is interesting in the sense that it would encourage the "participation" of DCs, it is difficult to imagine what would be their interest if not trade-related. They could perhaps stand as "observers" under an "experience-building scheme".

Paragraph 3: Private parties' legal standing.

The involvement of private parties in the WTO DSM has mainly consisted in convincing their government to bring a case before the WTO[342], given that private parties do not have legal standing before the WTO DSM.

We showed in Chapter II that there may be good reasons to prevent private parties from standing before the WTO (such as the need for governments, notably in DCs, to monitor trade relationships – and thus private industries' complaints – in a manner that is beneficial for the whole nation) as well as arguments in favour of such private participation. In this regard, several commentators, such as K.O. Kufuor[343], argues that private participation could first help challenge protectionist policies in industrialised countries and that providing private parties with the right to bring claims before the WTO would "depoliticize" minor trade disputes, as the latter are more likely to involve the smallest countries. Accordingly, it is contended that the privatisation of the WTO DSM would be beneficial to DCs[344].

We believe that private parties should be able to bring cases before the WTO because they are the first actors of international trade. In addition, private participants' legal standing before the WTO adjudicative process is basically a trans-national economic human right which should be safeguarded as such.

The legitimate concerns of DCs as regards the safeguard of their interests could easily be alleviated by establishing a procedure whereby private parties would have to obtain the authorisation of their government to stand before the WTO. This authorisation approach would give governments the ability to reinforce and develop their defensive policy in a coherent way with regard to their economy. This limit to the right of individuals would be justified by the necessity for the government to protect national welfare.

Section 2: Proposed procedural improvements[345].

Paragraph 1: Adjustment of time-frames.

It has been contended that the present overall period of thirty months can be too long for complainant DCs "as they have considerably less capacity to absorb the adverse effects of measures taken against them [emphasis added]"[346] The South Centre suggests that the recourse to the relevant provisions of the 1966 Procedures in this regard be made mandatory in lieu of articles 4, 5, 6 and 12, in all cases brought by a DC against a developed country[347].

We believe however that the length of the procedure would not raise such issue if the possibility of compensation during the pendency of the dispute were provided for. It is not

[342] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.4 and 8.

[343] Kufuor, K. O., *op. cit., supra, footnote 12*, p.143-144.

[344] Kufuor, K. O., *Ibid.*, p.143. See also Hoekman, B. M., and Mavroidis P. C, *op. cit., supra, footnote 155*, p.33.

[345] The titles of this section are directly taken from the South Centre proposals T.R.A.D.E., *op. cit., supra, footnote 36*, p.30 and 31.

[346] *Ibid.*, p.30.

[347] *Ibid.*

realistic to envisage a shorter procedure under the framework of the present DSU, given the fact that precise and tight timeframes are provided at every stage of the procedure.
Following a proposal by India, M.E. Footer shows that the problem of the length -and cost - of the procedure for DCs could be tackled through a distinction between "small" and "more substantial" claims, and therefore by introducing a "light" dispute settlement procedure, in cases involving less than US $ 1 million of exports348. This procedure would involve a single panellist and would last up to three months349. Indeed such system would directly benefit smaller countries which are more likely to bring "small" cases. The proposal from India suggests methods to determine such claims. The level of trade flows could be based on the value of imports of the market at issue and the total market size of the DC350.
This truly innovative procedure would certainly render the recourse to the WTO less costly, shorter and thus more attractive to DCs. It would amount to a truly differential treatment.

Paragraph 2: Provision of compensation for loss during the pendency of the dispute

We have insisted throughout this dissertation on the importance of such compensation. Two types of compensation could be envisaged: compensatory measures such as envisaged by the DSU and financial compensation. The former has the advantage to be less sensitive, the respondent's sovereignty being somewhat more preserved in that case. However, the idea of financial compensation, above all during the pendency of the dispute, would certainly be very controversial and opposed by most countries.

Paragraph 3: Operationalization of all provisions regarding special and differential treatment.

What is at issue here is the implementation and practical impact of the differential treatment. We observed that DCs do not have often recourse to the relevant provisions of the DSU in this regard and that some of them have never been resorted to. We also pointed out that their lack of precision deters DCs from using them.
What is missing in most provisions of the special treatment is an implementation mechanism or framework to give them a practical dimension. A more positive and dynamic approach should be followed in this regard.
The South Centre provides some examples of such approach: for instance, the "special attention" mentioned in article 4.10 could be interpreted in such a way that fully takes into account DC's financial constraints in the consultation process. This would imply for example that the consultations initiated by a developed country be held in a convenient place for DCs351.
The question remains as to whether such approach should be encouraged and demanded through practice or be the subject of a reform. Given that many provisions of the differential treatment lack implementation framework and practical significance, a reform providing

[348] Footer, M. E., *op. cit., supra, footnote 147*, p.97.
[349] Footer, M. E., *op. cit., supra, footnote 147*, p.97.
[350] For more details see Footer, M. E., *Ibid.*, p.98.
[351] T.R.A.D.E., *op. cit., supra, footnote 36*, p.31 and 32.

specific details could better guarantee that DCs' interests are fully taken into account in practice. In addition, since most of these provisions are a mere reiteration of previous rules, there is a need to re-think this treatment from a more innovative and practical perspective.
Outside the scope of their special treatment, DCs should press for panels and AB to use their faculty to make specific suggestions as to the method to be used in the implementation, in order to avoid strategies of avoidance by developed countries[352].

Paragraph 4: Deterrence against misuse of the dispute settlement process.

The potential misuse hinted at here is indeed that of developed countries against DCs. The South Centre argues that due to asymmetric political powers and economic capacities, developed countries may bring more claims than DCs[353], even on frivolous grounds[354]. It is true that cases brought by industrialised countries against DCs, above all on frivolous grounds, represent a certain danger for the latter economies.
The South Centre puts forward two proposals in this regard.
First, the complainant developed country should be asked to pay for the cost of the procedure incurred by the DC, if the case brought by the former is not maintained by the AB[355]. This idea is absolutely legitimate for any complainant and is applied in any national forum and arbitral awards.
Second, the complainant could "be prohibited from bringing cases against a DC once a case on similar grounds involving the same DC has been decided by a panel/ [AB]. [emphasis added]"[356].
This latter proposal is more controversial. Such prohibition could lead to unfair situations. Given the complexity of the measures and practices that are the subject of international disputes under the WTO, it would be extremely difficult to determine whether repeated complaints are actually brought on exactly the same grounds or even on frivolous grounds. Besides this, such prohibition should not be part of a special treatment in favour of DCs but should touch upon any member: the fact that DCs can more easily afford to bring repeated cases - or on frivolous ground - cannot justify a discriminatory prohibition.

[352] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 155*, p.28.

[353] The South Centre hints at two cases here: EC against India - *Patent protection for Pharmaceutical and Agricultural Products* WT/D579 and EC against Argentina - *Measures affecting Textiles and Clothing* WT/D577 where repeated complaints were brought on the same grounds. T.R.A.D.E., *op. cit., supra, footnote 36*, p.32.

[354] T.R.A.D.E., op. cit., supra, footnote 36, p.32.

[355] T.R.A.D.E., *op. cit., supra, footnote 36*, p.32.

[356] *Ibid.*

Section 3: Proposals regarding specifically the issue of the implementation of WTO dispute settlement findings.

Paragraph 1: Reconsidering retaliation.

- Retaliation by developing countries.

As T. Brewer and S. Young show[357], although a multilateral retaliation system represented an attractive alternative to the unilateral system, DCs opposed this idea during the Uruguay Round negotiations. Indeed, such retaliation was not credible for a developing country[358]: raising trade barriers would have little effect on a developed economy and this action may damage the DC's national welfare[359]. This is mainly explained by the situation of relative weakness and dependence DCs are placed in regarding their developed commercial partners.
Two kinds of solutions may be envisaged.
Retaliation is opposed by DCs because such action implies to have recourse to economic strength and practically set aside legal means[360]. This clearly shows that retaliation is inequitable in nature An attractive solution would be for DCs to build economic strength by bringing multiple complaints against a developed nation[361]. This could lead to multiple retaliation in case of non-compliance and possibly represent a more important threat. This is not always possible. First because this action would imply for DCs to have common economic interests and common trade relationships with a developed country. however, this possibility can occur, as shown for example in the EC-Banana III case[362]. Moreover, even in a case of multiple complaint, it is doubtful whether they would risk retaliation for fear of subsequent actions the developed country might take[363].
Another solution would be to re-think the WTO-sanctioned retaliation and set up a system whereby "[...] non-implementation of panel recommendations would be punished by withdrawal of market access commitments by all WTO members. [emphasis added]"[364]. This possibility has been rejected so far, since raising barriers to trade is felt to be detrimental to trade and to world welfare more generally[365]. However, this would definitely enhance the credibility of the threat of retaliation[366]. In order to confer effectiveness and deterrence to

[357] Brewer, T. L., and Young S., *op. cit., supra, footnote 1*, p.172.

[358] *Ibid.*

[359] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.6.

[360] Although the WTO DSU provides for a WTO-sanctioned retaliation.

[361] See for example Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 155*, p.10.

[362] As a general rule, it is self-evident that multiple complaints by DCs would increase their leverage with developed country respondents. Brewer, T. L., and Young S., *op. cit., supra, footnote 1*, p.172.

[363] As Stephen Young declares.

[364] This idea is still being suggested, notably by economists, but have been rejected so far. Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.6 and 7. See also Hoekman, B. M., and Mavroidis P. C. , *op.cit., supra, footnote 155*, p.10.

[365] Hoekman, B. M., and Mavroidis P. C., *Ibid.*, p.6 and 7.

[366] Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 155*, 1999, p.10.

DC retaliation, such countries should be authorised to suspend concessions against developed countries beyond the level of the nullification or impairment and not merely at an equivalent level as prescribed in Article 22.4 (see annex p.42)[367].
Some authors take the view that the practical impact of retaliation and the limited practical possibility to resort to it for DCs make it a wrongful solution as such[368]. Besides the fact that developing countries cannot commercially afford to raise trade barriers, having recourse to such solution is "generally detrimental to the country that does so [...] [emphasis added]"[369]. This is notably because retaliation is fundamentally a unilateral action against multilateralism and raising trade barriers goes precisely against the goals of the WTO. What could both preserve the interests of world trade and of DCs would be to provide for the possibility to re-negotiate concessions[370] as a last resort to a dispute failing to lead to an unacceptable solution. However, negotiation implies the "game" of the economic weight of the parties to the dispute. Therefore, this solution could be contemplated for DCs only if it were to be conducted through a strict, precise and transparent framework, under the WTO's auspices, in order to ensure the overall fairness of the process.
In a more extreme approach, one could suggest to authorise retaliation only between countries of comparable economic strength. However, this would imply a more precise and detailed classification of WTO members and to provide for more efficient remedies when DCs bring cases against developed countries when the latter are reluctant to comply with the panel recommendations.
At last, since proportionally, retaliation is more costly for DCs than for developed countries, the WTO should provide DC complainants that undertake costly counter-measures with financial support[371].

- Retaliation against developing countries.

This question had been already addressed under the GATT system, where no effective mechanism was provided to prevent developed countries from taking hostile or at least unauthorised retaliatory action against DCs[372]. It is self-evident that DCs would suffer more than developed countries from such actions. Indeed, the clear WTO DSU position against unilateralism and in favour of multilateralism[373] should have implied the provision of specific protective mechanism in this regard. This was not the case. However, it has been argued that given the general improvement of the DSM, disputes initiated to counter such action should provide effective solution[374].
It is true that the WTO DSU gives any member the possibility to bring a case without the risk of blockage. Nevertheless, we observed that the WTO DSM does not offer in practice

[367] This would confer a punitive and deterrent nature to DC retaliation. Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.20.
[368] Hoekman, B. M., and Mavroidis P. C., *op. cit., supra, footnote 184*, p.6 and 7.
[369] *Ibid.*
[370] *Ibid.*, p.7.
[371] Horn, H., and Mavroidis P. C., *op. cit., supra, footnote 3*, p.20.
[372] See Kuruvila, P. E., *op. cit., supra, footnote 15*, p.200.
[373] Mukerji, A., *op. cit., supra, footnote 23*, p.70.
[374] Kuruvila, P. E., *op. cit., supra, footnote 15*, p.201.

possibilities of compensation. As a matter of fact, when effected, arbitrary retaliation against DCs may have a direct and immediate impact on a DC's economy. This happened in the past in two cases involving the United States and Brazil.

In the first case (Informatics Disputes[375]), the US initiated unilaterally a Section 301 proceeding against Brazil whose intellectual property and investment regime was considered to be restrictive[376]. This procedure could have led to a total trade loss of US $ 105 millions. Brazil resorted to the 1966 procedures and the case was eventually settled[377].

In the second case (Pharmaceuticals retaliation[378]), in response to Brazil's refusal to grant patent protection to pharmaceuticals and fine chemical, the US increased its tariffs on Brazilian products to a hundred percent[379]. Consequently, Brazil brought a case against the US, arguing that the US action was contrary to Article 1(1) and 2 of the GATT[380]. A panel was established but Brazil withdrew its complaint after the US had withdrawn their retaliatory measure[381].

If no specific mechanism were provided in order to protect DCs from unauthorised retaliation by developed countries under the framework of the special treatment, the WTO DSM should afford the possibility to be compensated in order to counter the immediate impact retaliatory action may have on a relatively weak economy.

Paragraph 2: Reconsidering the length of the implementation.

We observed that the DSU (Article 21.3c- see annex p.37) provides that the reasonable period of time to implement of panel or AB decision should not exceed fifteen months from the date of the adoption of the panel or AB report[382]. After this period has expired, the complainant can request another panel if there is a disagreement on the manner the losing party has implemented the recommendations. From the strict viewpoint of DCs, this is at the same time a long and short timeframe, depending on their status in the dispute.

As defendant DCs, fifteen months is a rather short period of time and the South Centre suggests that this period should be doubled[383]. Should the period of time be extended in favour of DCs under the framework of their differential treatment? Ideally, in DCs as in industrialised countries, it virtually takes the same political willingness, domestic structures and procedures to bring a legal system into compliance. However, DCs is characterised by their relative weakness and dependence. Those factors render transition more complicated and risky. For this reason, it seems that the 15 months period should be extended, in order to take into account the economic difficulties the change may incur. Moreover in practice, this period

[375] Hudec, R. E., *op. cit., supra, footnote 155*, p.553, note 10. Cited in Kuruvila, P. E., *op. cit., supra, footnote 15*, p.201.

[376] *Ibid.*

[377] *Ibid.*

[378] Hudec, R. E. Enforcing International Trade Law: The evolution of the modern GATT Legal System. Butterworth Legal Publishers, 1993, p.571, note 10. Cited in Kuruvila, P. E. *Ibid.*

[379] *Ibid.*

[380] *Ibid*

[381] *Ibid.*

[382] Gleason, C. B and Walther P. D. The WTO Implementation Procedures: A System in Need of Reform. Law and Policy in International Business. ISSN 0023-9208. 2000, Spring, 709-736, p.714.

[383] T.R.A.D.E., *op. cit., supra, footnote 36*, p.28.

of time should be adapted to a certain extent to circumstances, including political, under the framework of the special attention to be paid to DCs' interests. Such consideration was shown by panels in the past384. However the WTO DSU does not definitely guarantee that this period of time will be adapted. Certain scholars take the view that this adaptation is necessary in the interests of DCs385. The general hortatory character386 of the special treatment is questioned here.

For complainant DCs, the fifteen months period seems prima facie to be a realistic timeframe. However, although we may consider that this period of time is satisfactory legally, we saw that in practice, the fifteen-month period can easily be extended when a country is unwilling to comply and undertake unsatisfactory cosmetic changes387 to postpone the procedure. This is a very complex issue because in practice, after a report has been adopted, compliance rests on the will of the losing party and can hardly be obtained under a legal framework. As H. Horn and P.C. Mavroidis show, when a losing party is reluctant to comply and avoid implementation it "effectively moves the conflict outside the legal framework of the WTO and its system of conflict resolution, and into the area of international politics [emphasis added]"388. Under these circumstances, the provision of a strict or stricter timeframe for implementation is actually meaningless without strict remedies.

Practically, in order to prevent "strategies of avoidance", DCs should systematically request specific suggestions from the panel or AB389.

Paragraph 3: Reconsidering the possibility of compensation.

The whole question of compensation should be re-thought in order to fully take into account the interests of DCs. The practical possibility to obtain compensation is absolutely essential for these countries because it represents a satisfying alternative to retaliation whose credibility as to DCs can seriously be questioned.

As we saw earlier, Remedies proposed by panels rarely involve compensation390 and the WTO DSU does not enable panels to prescribe compensation for losses already occurred391. This is not surprising since Article 22.2 (see annex p.39) provides for a voluntary compensation. This voluntary character and the fact that no compensation is provided for losses already occurred goes definitely against the idea that the WTO DSM is an adjudicative procedure.

Calls for reform in this regard should press for a more important involvement of panels in the determination of compensation which should not be left to the willingness of the losing party, when the latter is a developed country and the complainant a DC. Above all this determination should take into account the losses already occurred and not be the subject of a

[384] See cases referred to p. 64 and 65.

[385] See Jackson, J. H., *op.cit., supra, footnote 19*, p.7.

[386] Qureshi, A.H., *op.cit., supra, footnote 163*, p.143.

[387] Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 184*, p.16.

[388] Horn, H., and Mavroidis P. C., *op.cit., supra, footnote 3*, p.17.

[389] Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 184*, p.5.

[390] Hoekman, B. M., and Mavroidis P. C., *op.cit., supra, footnote 155*, p.6 and 7.

[391] Horn, H., and Mavroidis P. C., *op.cit., supra, footnote 3*, p.18.

negotiation where DCs have no political weight. Panels should be competent to assess and require compensation.

The idea of financial compensation is controversial and would be opposed by many WTO members392. However some scholars press for the establishment of a mechanism of monetary damages for DCs393.

At last, as seen earlier, the absence of provisions for compensation for export loss during the pendency of the dispute394 can seriously deter DCs from engaging in a WTO dispute settlement The South Centre argues that Article 22 of the DSU should be expanded to permit compensation for the loss suffered by DCs during the pendency of the dispute against a developed country395.

[392] Hoekman, B. M., and Mavroidis P. C., *op .cit., supra, footnote 184*, p.13.

[393] See for example Hoekman, B. M., and Mavroidis P. C., *Ibid*. or Footer, M. E, *op.cit., supra, footnote 147*, p.98.

[394] T.R.A.D.E., *op .cit., supra, footnote 36*, p.31.

[395] Ibid

CONCLUSION

"[...] [I]t is unrealistic to expect that the DSU will generate outcomes that will be balanced and equitable from the perspective of the South. Except with respect to matters of process, the DSU itself can hardly become "development-friendly". [emphasis added]" 396. Throughout this dissertation, we have addressed many aspects of the involvement of DCs in the DSM following a judgmental approach, with a view to assessing whether the adjudication process of the WTO could act as an instrument of justice and development in favour of DCs.

It appears that the DSM cannot presently play such a role.

The legal and practical significance of the special treatment granted to DCs, as well as the political willingness to set up a truly preferential system can be questioned on many grounds. The retrograde approach followed by the WTO DSM and the lack of implementation procedures have contributed in its relative failure.

However, judging by use made of the WTO DSM so far, it is clear that the DSU represents a significant development: in the three years since the WTO began to function, there were almost as many cases subject to dispute settlement as there were in the fifty years of the GATT's existence397. Similarly, DCs' participation has increased of about thirty percent of the total complaints by DCs, as compared with their overall participation in the GATT history398.

This involvement of DCs is likely to become more important in the next few years since many DCs, notably sub-Saharan African, enjoy longer transitional periods to fully implement the WTO Agreements399.

Nevertheless, as we previously observed, this cannot be fully explained by the treatment granted to DCs by the WTO DSM. These countries have mainly benefited from general improvements, such as the relative judicialisation of the procedure.

We can thus conclude that, on the whole, the DSU represents a certain success but that the special treatment itself failed to reach its goals.

The DCs's situation as regards the implementation of decisions is particularly worrisome. This specific issue reveals the underlying problem of the system, that is the fragility of the adjudicative dimension that can be set aside in favour of diplomacy whenever a member is not willing to abide by the decisions. This move is a developed countries' privilege which exposes the profound ambivalence of the system. Beyond its apparent adjudicative nature, the WTO DSM can dangerously be turned into a "diplomatic club"400 wherein DCs are in a very fragile position.

This specific feature which ensures flexibility and preserves the Member States' sovereignty has been described as "the genius of the GATT/WTO system", where " [...] there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement [...] no jailhouse, no bail bondsmen, no blue helmets, no truncheon or tear gas [emphasis

396 T.R.A.D.E., op.cit., supra, footnote 36, p.35.

397 *Ibid*., p.33.

398 Kuruvila, P. E., *op.cit., supra, footnote 15*, p.179.

399 Footer, M. E, *op.cit., supra, footnote 147*, p.59. The least-developed of them have until 1 January 2005.

400 Wilson, S. B., *op. cit., supra footnote 210*, p.779.

added]"401. Unfortunately, this is exactly what is, in essence, needed by DCs: a truly judicial mechanism. The latter will never be fully set up at the international economic level not to undermine Member States' sovereignty.

What hopes are left to DCs ?

As we observed earlier, it appears that the special treatment could constitute an efficient system if it were duly applied, in a dynamic and effective way. This prospect is not unrealistic.

At last, many possible reforms that we evoked in this dissertation amount to "positive action" or "positive discrimination". This idea, borrowed from social law, could be of significance in the WTO as far as it could be applied in the context of trade relationships between sovereign states. Beyond the differential treatment controversially afforded to DCs, the legal recognition by WTO Agreements of underlying weaknesses and practical difficulties faced by DCs in international trade relationships should lead to a genuine positive preferential treatment under the DSM.

[401] Judith Bello, cited in Jackson, J.H., op. cit., supra footnote 295, p.61

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ANNEX

1/ Article XXII and XXIII of the GATT
2/ 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance
3/ WTO Understanding On Rules An Procedures Governing The Settlement of Disputes

Those documents are availables on the W.T.O. website (http://www.wto.org).