

WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries

Background and Introduction

When the WTO came into existence formally as an institution in 1995,¹ it was a culmination of the process to institutionalize the General Agreement on Trade and Tariffs (GATT) which had been in operation since 1947. As an institution with Membership of 149 countries, the goal of the WTO is to facilitate the implementation, administration, and operation of the Multilateral Trade Agreements (MTAs); to provide a forum for negotiations among Member States; to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes, amongst others.²

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO has been touted as one of the biggest achievements of the Uruguay Round of trade negotiations.³ Its aim is to provide security and predictability to the

¹ The WTO was established by the “Marrakesh Agreement Establishing the World Trade Organisation” signed on the 15th of April 1994 (hereinafter “Marrakesh Agreement”), which was a culmination of the Uruguay Round of Trade Negotiations. There had been 7 other rounds of trade negotiations before this, all under the General Agreement on Trade & Tariffs (GATT)1947- see Raj Bhala & Kevin Kennedy *World Trade Law* (1998) 5. The GATT 1947 was just a set of rules to facilitate trade negotiations leading to tariff reductions. It was not a formal institution. The advent of the WTO in 1995 changed all that and the GATT 1947 is subsumed under GATT 1994 comprising GATT 1947, several protocols & decisions, and several Understandings. In this paper, GATT 1994 refers to the text of the GATT 1947. See generally GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts* (Geneva 1994) (hereafter ‘WTO Legal Text’).

² Art 3 of the Marrakesh Agreement deals with the functions of the WTO.

³ Quoting Dewey Ballantine LLP from “Comments Concerning Review of the Dispute Settlement Understanding of the World Trade Organization”, June 25 1998, available on <http://www.dbtrade.com/publications/wto_comments.pdf> (accessed on April 24 2006): “The United States identified the DSU as the cornerstone accomplishment of the Uruguay Round. In their testimony to Congress, Ambassadors Kantor and Yerxa both repeatedly counted the new DSU among the “most important changes” made by the Uruguay Round. See, e.g., GATT Trade Agreements):Hearing Before the House Comm. on Ways and Means, 103rd Cong. (January 26, 1994) (statement of Mickey Kantor, United States Trade Representative). Jeffrey E. Garten, Under Secretary of Commerce, hailed the improved dispute settlement mechanism as “our most important achievement.” Similarly, in the chairman’s statement from the May 5, 1995 Quad Ministerial, the DSU was described as ‘one of the crowning

multilateral trading system.⁴ The DSU recognizes that “[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements⁵ are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members”.⁶ Thus, in a situation where one Member State is aggrieved by the illegal action of another, it can bring the dispute before the Dispute Settlement Body (DSB)⁷ and avail itself of the range of available remedies. Allowing Member States to unilaterally decide that there has been a violation and to choose their remedies will only lead to chaos; therefore to a large extent, remedies are regulated by the DSB. Article 23:2 of the DSU specifically provides that; “...Members shall (a) not make a determination to the effect that a violation has occurred...except through recourse to dispute settlement...” They are therefore bound to, “(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations...”⁸

Article 3:7 of the DSU lists the alternative dispute settlement remedies. It provides that;

... [a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a

achievements of the Uruguay Round. (“*Quad’ ministers urge better service, investment rules,*” *Japan Economic Newswire* May 6, 1995).”

⁴ Art 3:2 DSU, available in the WTO Legal Text.

⁵ The ‘covered agreements’ are the annexes to the Marrakesh Agreement. Annex 1A is a compendium of the Multilateral Agreement on Trade in Goods (this covers 13 independent agreements), Annex 1B is the General Agreement on Trade in Services and Annexes, while Annex 1C is the Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁶ Article 3:3 DSU, WTO Legal Text.

⁷ According to Art 2:1 DSU, the Dispute Settlement Body is established to administer the rules and procedures under the DSU, as well as the consultation and dispute settlement provisions of the covered agreements. It has the authority to establish panels, adopt panel and appellate body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

⁸ Art 23:2 (c) DSU, WTO Legal Text.

mutually agreed solution, the first objective of the dispute settlement mechanism is usually to *secure the withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements. 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 measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of *suspending the application of concessions or other obligations* under the covered agreements *on a discriminatory basis vis-à-vis* the other Member, subject to authorization by the DSB of such measures.⁹

With all these remedies in place, the WTO dispute settlement mechanism is actively being used in the resolution of disputes among WTO Members. Despite this however, cases generally revolve around ‘the usual suspects’ i.e. the countries that have been making the most use of dispute settlement procedures under the WTO (e.g. the United States, the European Communities, Canada, and Brazil).¹⁰ It is a fact that the smaller developing countries have been sorely lacking in the WTO dispute settlement procedure.^{11,12}

⁹ Emphasis mine.

¹⁰ United States has been a complainant in 81 cases, the EC in 70 cases, Canada in 26 cases, and Brazil in 22 cases. <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> (accessed on March 23 2006).

¹¹ Taking a look at the list of respondents and complainants from the WTO website- <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>, and comparing against the list of LDCs on the UN website- <<http://www.un.org/special-rep/ohrls/ldc/list.htm>>, Bangladesh is the first and only LDC that has ever brought a complaint before the DSB; See *India- Antidumping Measure on Batteries from Bangladesh* (WT/DS306). The dispute was in relation to certain anti-dumping measures imposed by India on imports of lead acid batteries from Bangladesh. A request for consultations was brought by Bangladesh on January 28 2004. By February 20 2006, the parties informed the DSB of a mutually satisfactory solution to the matter: India had terminated the measure in contention in January 2005.

¹² Egypt and South Africa are the only two African countries to feature as main parties in WTO dispute settlement and in both cases, they have been respondents- Egypt

Various reasons have been cited for poor developing country participation in WTO dispute settlement.¹³ Bown & Hoekman adduce several reasons why there is little or no dispute settlement activity by developing countries.¹⁴ First, on the import side, potential developing country complainants are typically small consumers that are unable to affect world prices. This means that under the current “retaliation-as-compensation” approach, these countries will lack the capacity to impose the large political-economic welfare losses on potential respondent countries that would generate the internal political pressure in those countries that may be a necessary element to induce compliance with adverse DSU rulings. One other fear which is shared by developing countries is the fear of political ramifications should they engage a bigger country in dispute settlement. Many poor developing countries rely on aid from the richer countries, and so would want to avoid counter-retaliation that might affect the aid they are receiving, or disrupt existing preferential trading arrangements, if not within the WTO then elsewhere.¹⁵ Human resource constraint is also one of the reasons for developing country absence from dispute settlement. In a luncheon organized by the German Marshall Fund with the theme “Developing Countries and WTO Dispute Settlement: A Changing Relationship”, the speakers from the developing countries cited ‘lack of domestic capacity and legal

on four occasions and South Africa on 2 occasions. See <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> (accessed on March 23 2006)

¹³ Petina Gappah, “African Countries and the WTO Dispute Settlement System”, available on <http://www.tralac.org/pdf/African_Countries_and_the_WTO_Dispute_Settlement_System.rtf>; Chad P. Bown “Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders” available at <http://people.brandeis.edu/~cbown/papers/free_ride.pdf > (accessed on March 22, 2006).

¹⁴ Chad P. Bown and Bernard M. Hoekman, “WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector” (2005) 8 *Journal of International Economic Law* *JIEL* 861-890, available at <jiel.oxfordjournals.org/cgi/content/full/8/4/861>.

¹⁵ See Joost Pauwelyn, “Enforcement and Countermeasures in the WTO: Rules are Rules- Toward a More Collective Approach”, (2000) 94 *American Journal of International Law* *AJIL* 335 at 338.

sophistication’ as reasons why developing countries have not been making use of WTO dispute settlement.¹⁶

This paper argues that one of the reasons why more use is not being made of the dispute settlement process by developing countries is the inadequacy of the existing remedies, for their peculiar situation. The existing dispute settlement remedies are: withdrawal of the offending measure, compensation, and suspension of equivalent concessions i.e. retaliation.¹⁷ But it has been found that these remedies do not always meet the expectations of Members. The violating Member will not always remove the violation; Compensation is hardly ever agreed on; and Retaliation is at odds with the trade liberalization goal of the WTO and hardly benefits either party anyway. Consequently, there is an urgent need to review the existing remedies with a view to finding alternative remedies, particularly for developing countries. This paper is proposing monetary compensation as an alternative dispute settlement remedy. With the current negotiations going on as part of the Doha Round,¹⁸ the appropriate forum is available for these discussions to take place.

Part one discusses all the available WTO trade remedies according to their uses. Part two takes a look at the problems with the existing remedies. Part three introduces financial compensation as an alternative dispute settlement remedy for developing countries. Part four focuses on the key elements to be taken into consideration in negotiating financial compensation as a dispute settlement. Part five will discuss the arguments for and against this proposal. The final part summarises the discussion and looks into some

¹⁶ The German Marshall Fund Trade & Development Speaker Series: Developing Countries and WTO Dispute Settlement held on April 20 2005 in Washington DC, report available on http://www.gmfus.org/trade/event/detail.cfm?id=70&parent_type=E (accessed on April 20 2006).

¹⁷ These are provided for in Article 3:7 of the DSU and are discussed more in-depth in Part 1 of this paper.

¹⁸ The Doha Round of Negotiations was launched in November 2001 by a Ministerial Declaration (WT/MIN01/DEC/1) adopted on November 14 2001. Tagged the ‘Doha Development Agenda’, it has at its heart, the needs and interests of developing country Members of the WTO.

recommendations for attaining financial compensation as an alternative dispute settlement remedy.

1 Available Remedies under the WTO

The WTO is a rules-based and Member-driven organisation. By this, it means that WTO Members make rules that guide their general conduct and expect these to be followed. The WTO Agreements have made provision for various remedies to be employed under different circumstances where these rules are breached. Since this paper proposes an additional remedy to those which are already available, I would start by going through all the existing remedies under the WTO, their applicability, as well as the mechanisms for their implementation.

Remedies in the WTO are of two kinds. There are the ‘trade remedies’ which are distinct from ‘dispute settlement remedies’. The trade remedies are the antidumping duty, the countervailing duty, and safeguard actions. In the GATT 1994, Articles VI, XVI and XIX make provision for these remedies to be available to WTO Members in certain situations. These GATT provisions have all been subsequently expanded by other independent Agreements which flesh out the provisions of those articles. These are dealt with in turn.

1.1 Trade Remedies

These are remedies which a WTO Member may avail itself of without recourse to dispute settlement. These remedies provide Members with a fast and efficient means of dealing with certain breaches of WTO obligations. While they are fast and effective in most instances, by their nature, they do not and cannot solve most of the violations that occur.

1.1.1 Anti-dumping Duty

One of the WTO rules is that products from a Member are not to be ‘dumped’ onto the market of another in such a way as to cause serious injury to the domestic industry producing a like product, of the importing Member. Article VI GATT 1947 is the original provision dealing with this situation. However, in 1979, the Tokyo Round Antidumping Code was developed as a supplement to Article VI of the GATT; and now post- Uruguay

Round we have the Agreement on the Implementation of Article VI GATT (Anti-Dumping Agreement).

A product is to be considered as being ‘dumped’, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.¹⁹ Dumping is a form of unfair competition. In order to offset its harmful effects, a contracting party may remedy the situation by levying on any dumped product, an antidumping duty not greater in amount than the margin of dumping in respect of such product. The margin of dumping is arrived at by the difference between the normal value (the price of the imported product in the “ordinary course of trade” in the country of origin or export) and export price (the price of the product in the country of import)

1.1.2 Countervailing Duty

According to Article XVI of the GATT 1994, a subsidy occurs where there is any form of income or price support which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into the territory of a country. This definition of subsidy covers both export subsidies and domestic support. Subsidies are generally a breach of WTO rules. The only acceptable subsidies are those which have little or no distorting activity e.g. research grants, grants to fund disadvantaged regions within a Member State, and assistance to promote adaptation of existing facilities.²⁰ Export subsidies are expressly prohibited²¹, while domestic support is actionable if it causes serious prejudice to the interests of another Member.²²

¹⁹ Art 2:1 Agreement on Implementation of Art VI GATT (hereafter ‘Antidumping Agreement’), WTO Legal Text.

²⁰ Art. 8 Agreement on Subsidies & Countervailing Measures (hereafter ‘SCM Agreement’), WTO Legal Text.

²¹ See generally Article XVI GATT 1994; Article 3 SCM Agreement.

²² Article 5 SCM Agreement.

Different remedies are available depending on the subsidy in question and its effect. For instance, in a situation where the subsidy is causing an injury to the domestic industry and is such that can be remedied by imposing a duty, the affected country has to carry out an investigation to establish a causal link between the subsidized imports and the alleged injury. On conclusion of the investigation, a duty (countervailing duty) to offset the effect of the subsidy will be imposed until the removal of the subsidy. However in a situation where the subsidy is entirely prohibited, a Member cannot impose a duty, rather it must seek consultation and if this fails, request a Panel to decide the dispute.²³

The purpose of the countervailing duty is to protect the domestic industry from the effect of imported goods which come in cheap by virtue of the fact that they are being subsidized. While this may protect the local industry of the importing country, it does nothing to aid in their competitiveness in the world market. They would still lose their share of trade in the international market as a result of the subsidy. For instance in the *US- Subsidies on Upland Cotton* dispute,²⁴ if the West African countries had decided to investigate the alleged subsidy provided to US cotton producers and had imposed a duty accordingly, this would only aid the cotton producers within their respective countries. But in the world market, the countervailing duty would have no effect as the US cotton would be cheaper thereby creating less demand for the unsubsidized and therefore more expensive cotton from the African countries.

1.1.3 Safeguards

The third trade remedy is the use of safeguards. Unlike other WTO remedies, there need not be a breach of a WTO obligation before a Member can make use of a safeguard remedy. Known as “emergency action on imports of particular products”,²⁵ a Member may suspend or withdraw its WTO obligations (e.g. by imposing quantitative restrictions, or increasing tariffs) where a product is being imported into its territory in such quantity as to cause or threaten serious injury to its domestic market. This is an emergency action

²³ Art 4 SCM Agreement.

²⁴ Discussed in greater detail later in the paper.

²⁵ Art XIX GATT 1994.

which should be in use only as a temporary measure; and the Member applying the measure is expected to consult with the affected Member before taking action. The Agreement on Safeguards goes further to develop Article XIX of the GATT by making provisions for investigation,²⁶ the determination of serious injury,²⁷ application of safeguard measures,²⁸ and the duration of the measures.²⁹ In addition, a Member proposing to apply a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Member(s) which would be affected by such a measure.³⁰

Even though this has the potential for being a great temporary remedy, it should be remembered that safeguard measures designed to be used where there is a breach of WTO obligations. Thus, as a remedy it is not useful where there has been an actual violation of WTO obligations, making it a very limited remedy. It must be noted that before any of the above remedies can be imposed, a thorough investigation must be carried out. Failure to do this could result in a challenge of the actions through the dispute settlement mechanism, particularly with respect to antidumping duty and countervailing duty, so Members must be careful when carrying out their investigations.³¹

The above is a brief description of the WTO provisions for trade remedies. However, some remedies are only available where they have been sanctioned by the Dispute Settlement Body. These are examined in detail below.

1.2 Dispute Settlement Remedies

According to Article 3:7 of the DSU, where a matter has been successfully brought before the DSB, the recommended remedies are the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered

²⁶ Art 3 Agreement on Safeguards.

²⁷ *Id* Art 4.

²⁸ *Id* Art 5.

²⁹ *Id* Art 7.

³⁰ *Id* Art 8.

³¹ Art 17 Antidumping Agreement; Article 30 SCM Agreement.

agreements, the provision of compensation, and suspending the application of concessions or other obligations under the covered agreements.

The prescribed remedy at the determination of any dispute is the withdrawal of the offensive measure. This is the preferred solution to all disputes. The Member who is found in breach is given “a reasonable period of time” to withdraw the measure.³² So far, compliance with DSB recommendations has been very good. In a study done by Davey, there has been a successful rate of implementation of Panel/ Appellate Body reports of about 83%.³³

Where a Member refuses or is unable to remove the measure within the time prescribed, then the next best alternative is for the parties involved to negotiate compensation. Usually this takes the form of improved market access through increased concessions. If for instance country A is to withdraw a restriction on beef imports from another country, it may provide trade concessions to the tune of \$x (\$x is the value of nullification and impairment suffered by the complainant) to the affected Member basically by reducing the tariffs on other products of interest to the winning Member.

The final alternative, one which is not usually encouraged is the suspension of equivalent concessions, more commonly referred to as ‘retaliation’. In this instance, after the other two remedies have failed, then the winning Member may bring an application to suspend equivalent concessions i.e. retaliate. Application for an authorization to retaliate has to be decided by arbitration pursuant to Article 22.2 DSU. One prominent case in which this

³² Art 21:3 DSU. A reasonable period of time is not defined; but see *United States-Reformulated Gasoline Status Report by the United States* (WT/DS2/10) where a reasonable period of time was decided to be 15 months; *United States- Measures Affecting The Cross Border Supply of Gambling and Betting Services Award of the Arbitrator* (WT/DS285/13) where a reasonable amount of time was eleven months and 2 weeks.

³³ William J. Davey, “The WTO Dispute Settlement: How Have Developing Countries Fared?” Illinois Public Law and Legal Theory Research Papers Series Research Paper No. 05-17, (November 30 2005) available on <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=862804> (accessed on February 16, 2006).

happened is the *EC- Measures Concerning Meat and Meat Products (Hormones)* where the United States requested authorization from the DSB to suspend the application to the European Communities and its Member States thereof, of tariff concessions and related obligations under the GATT 1994.³⁴

2 The Problem with WTO Dispute Settlement Remedies

In order to preserve the goodwill among Member States, the first option in any dispute settlement procedure is always a request for consultations by the complaining Member. The consultation is in a bid to settle the dispute amicably without the rancour associated with formal dispute settlement. It is only when this fails that a Member may request for the establishment of a Panel with defined terms of reference.

The Panel comes to a decision based on the submission of both parties and where a violation is found, the recommended remedy is withdrawal of the violation. It is only when this is not done that the other remedies become available. Admittedly, there is usually no need to look beyond a withdrawal of the violation; most countries are willing to allow the dispute settlement process to be effective, and so they comply with the rulings of the DSB.³⁵ But this is not always the case. As an example of delay or non-compliance with Panel/ Appellate Body reports, the *United States- Measures Affecting the Cross Border Supply of Gambling and Betting Services* case between the United States and Antigua & Barbuda comes to mind.³⁶ The set deadline for the United States to

³⁴ Recourse by the United States to Article 22.2 DSU (WT/DS26/19).

³⁵ DG Supachai Panitchpakdi on March 11 2005 in a speech marking 10 years of the WTO stated as follows, “This system [dispute settlement] has largely been successful because WTO member governments have been prepared to implement Panel and Appellate Body rulings and to bring their laws and regulations into conformity with WTO rules should a Panel decision go against them”,. The full text of the speech is available on <http://www.wto.org/english/news_e/spsp_e/spsp35_e.htm> (accessed on April 24 2006).

³⁶ Antigua & Barbuda had requested a Panel on June 12 2003 to protest the action of United States authorities which affected the cross-border supply of gambling and betting services contrary to the schedule of commitments under GATS. It was decided by the Panel and upheld by the Appellate Body that the United States measures were inconsistent with its GATS obligations and that it had breached its National Treatment

comply was April 3, 2006. The deadline passed without the United States complying with the ruling.³⁷ What kind of action Antigua & Barbuda will take remains to be seen.

Even where there is some semblance of compliance, the question is to what extent there is compliance. There is usually a need for compliance-monitoring, for which there is no formal WTO apparatus.³⁸ It is therefore left to the winning party to monitor the compliance. It is not always to be taken for granted that a losing party will implement a ruling to the full extent possible. Therefore, it falls on the winning party to follow the measures taken by the losing party in order to ensure that the ruling is adequately followed. This is usually a time and resource consuming responsibility. Where it is a developing country that has just won a challenge, it will definitely be more difficult for it to monitor compliance. Besides, even where there is full compliance, this does not remedy the harm that had already been done.

Where there is no removal of the offensive measure then there comes a need for an alternative remedy. According to Article 22:1 DSU, “[c]ompensation...is a temporary measure available in the event that recommendations and rulings are not implemented within a reasonable period of time....[c]ompensation is *voluntary* and if granted shall be consistent with the covered agreements.” Compensation in WTO parlance does not mean monetary damages the way it is understood in most legal systems. Instead, compensation is taken to mean that the losing party grants increased concessions i.e. increased market access to the winning party. The increased market access does not have to be in the same sector as that leading to the dispute.³⁹

obligation. Through arbitration it was decided that the deadline for compliance was April 3 2006. See the Appellate Body Report at WT/DS285/AB/R.

³⁷ The United States has not started the process of amending the necessary legislation, and at this time the deadline is past with still no action by the United States. In a status report (WT/DS285/15/Ad1) circulated by the United States delegation to the Chairman of the DSB dated April 11 2006, the United States claimed that it is in compliance with the recommendations and rulings of the DSB because its existing criminal statutes prohibit interstate transmission of gambling.

³⁸ This is regardless of Art 21:6 of the DSU that says the DSB is to keep under surveillance the implementation of the ruling.

³⁹ Art 22:3 of the DSU.

Compensation is the least used WTO trade remedy to date.⁴⁰ There is only one reported case of compensation post-dispute settlement.⁴¹ There are several possible explanations for this. One of the main problems with compensation is that it is voluntary. What this means is that it is up to the losing party to offer compensation which is acceptable to the winner. A Member that has refused to remove the inconsistent measure could dig in its heels and offer terms which are obviously unacceptable to the winning party. Again, by the provisions of Article 22, compensation is to be “consistent with the covered agreements”. WTO negotiating history shows that WTO pillars like the Most Favoured Nation Treatment (MFN) must be followed in the application of compensatory measures.⁴² In other words, where a party goes through the entire process of securing a positive ruling from the DSB, the remedy which it receives from the process is to be enjoyed by all the Members of the WTO. This reeks of unfairness and is probably one of the more compelling reasons why compensation is not usually resorted to. It is unusual that a party would not mind going through the entire dispute settlement process and then have to share its spoils with every other Member.

Apart from the fact that the MFN principle⁴³ has to be followed in providing compensation, the DSU has another provision that makes it obligatory to make the measures resulting from negotiations on compensation generally applicable. Article 3:5 DSU states that “... [a]ll solutions to matters formally raised under the consultation and

⁴⁰ A look at the list of all WTO cases and their status reflects this. See http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#top (accessed on March 23 2006).

⁴¹ It was in *Japan- Taxes on Alcoholic Beverages* (WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R) that compensation was used for the first time in WTO dispute settlement. As compensation for the delay in implementing the recommendation of the DSB, Japan agreed with the United States to apply reduced tariff rates and in some cases zero tariffs on specific items. Subsequently, similar agreements were reached with the European Communities and Canada to receive at least comparable tariff concessions as that granted to the United States.

⁴² Negotiating Group on Dispute Settlement- Dispute Settlement Proposal MTN.GNG/NG13/W/30 10 October 1988: “Where applied, compensation shall be on a most-favoured nation basis and shall be aimed at the restoration of the proper balance between the rights and obligations of all Contracting Parties”.

⁴³ See *infra* note 115.

dispute settlement provisions... shall not nullify or impair benefits accruing to any Member under those agreements...”. Giving increased concessions to one Member even though compensatory, nullifies benefits to the other Members. ‘Nullification’ according to GATT Article XXIII occurs in any of the following situations:

- The failure of a contracting party to carry out its obligations,
- The application by any other contracting party of any measure, whether or not it conflicts with the provisions of the Agreement, and
- The existence of any other situation.

Providing compensatory trade concessions to one country without extending same to other Members could be argued to be a nullification of the benefits accruing to other Members, even though the measure is not contrary to any provision of the covered agreements. To make the point clearer, if after a dispute settlement case, the two parties agree that compensation should take the form of reduced tariffs on a particular product coming from the winning party’s country, what this means is that other countries exporting those same products to the losing party still pay the old higher tariff which would mean that their goods would be more expensive (thus leading to lower profits) than those coming from the winning party. This is therefore a nullification of benefits accruing to them.

It is more likely that where the recommendation of the DSB is not carried out, suspension of concessions will be resorted to. In order to this, there must be a “request for authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements”.⁴⁴ Where the parties cannot reach an agreement as to the level of suspension of concessions, arbitration is resorted to, to determine the amount of nullification or impairment suffered by the Member.⁴⁵ When this process is completed, the winning Member may retaliate by imposing tariffs on a particular sector until the offensive measure is withdrawn. The reason ‘retaliation’ is most often resorted to is it is not a voluntary measure and it is not

⁴⁴ Art 22:2 DSU

⁴⁵ Art 22:6 DSU.

dependent on the Member in breach. It is a unilateral action taken by the winning Member, which makes it easier to accomplish. It is also a better way to ensure compliance with a ruling.

Retaliation however has its disadvantages. One major problem with it is that it is usually another sector which is suffers the retaliatory action, and not the sector in which there was a violation in the first place.⁴⁶ For instance in the *EC- Measures Concerning Meat and Meat Products (Hormones)* case,⁴⁷ the U.S retaliated on confectionaries, flowers, vegetables etc., and so these other producers in the EU had to pay for the harm caused by the ban on hormone treated beef from the U.S. By increasing the tariffs on particular products, the opportunity cost of the benefit derived is too high. Increasing tariffs necessarily means increasing the domestic prices of the goods. This makes them more unaffordable, therefore reducing the quantity coming on, and eventually harming the economy. It is a typical case of “biting one’s nose to spite the face”. Finally, retaliation goes against the underlying objective of the WTO system which is generally to promote rather than restrict international trade.⁴⁸

For smaller developing countries, the effect of its retaliatory action may not be felt especially where the violator is a Member with whom it has minimal trading relations. Retaliatory actions are limited to suspension of concessions by the complainant within its territory, and cannot be applied outside its borders.⁴⁹

⁴⁶ Art 22:7 DSU: “The arbitrator acting pursuant to paragraph 6 *shall not examine the nature of the concessions or other obligations to be suspended* but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment & the parties shall accept the arbitrator's decision as final... The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator...”

⁴⁷ WT/DS138.

⁴⁸ Report by the Consultative Board to the Director-General Supachai Panitchpakdi- The Future of the WTO: Addressing Institutional Challenges in the New Millenium (hereafter ‘Sutherland Report’) par 240.

⁴⁹ As part of the discussions on possible areas of reform of the DSU, it has been suggested that a provision should be made whereby Members can transfer its retaliatory rights to an interested Member where it is unable to obtain compensation or disinclined to

The time span for resolving disputes is another crucial point which diminishes the gains of dispute settlement remedies. The dispute settlement process even with its merits is far from being perfect. From the time when a Member requests consultation up until the time when the measure is withdrawn, the period of time which has elapsed is anything from 1-3 years.⁵⁰ There is bound to be a huge amount of lost trade which must have occurred within that time and for which there is no remedy because WTO remedies are prospective in nature.⁵¹

What is more, the existing remedies offer no relief to those actually injured i.e. the producers and exporters carrying out the actual trading activities. The way the WTO dispute settlement works is that it is only governments that can bring an action and not the individual traders.⁵² Therefore, unless the offending measure is withdrawn, no other remedy will alleviate the harm done to the traders. Whatever remedy is applied does not benefit the particularly affected parties. It is either that some other parties benefit, or the government revenue is increased. Until the dispute settlement process makes provision

exercise retaliatory right. In exchange a benefit possibly a cash payment would be negotiated at a level not exceeding the authorized level of suspension. Such a situation would particularly benefit small economies if they can trade retaliatory rights with larger countries that can deal a more decisive blow on the violator through the suspension of concessions. See "Trade and Development: The Doha Development Agenda" World Trade Report 2003 p177, available on <http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr03_chap2b_e.pdf> (accessed on April 28 2006).

⁵⁰ The various time lines provided for in the various stages of dispute settlement in the DSU reflect this: 60 days for consultation, 6-9 months for panel deliberation, 60-90 days for Appellate Body deliberations, up to 15 months as a reasonable period for implementation of the ruling.

⁵¹ By saying that dispute settlement remedies are prospective, it means that they are essentially 'forward looking'. By 'forward looking', it means that remedies do not become applicable and calculable until a ruling is eventually handed down, whatever the remedy may be. In other words, there is no remedy for the harm that has already taken place. It is only ongoing harm (where there is refusal of compliance) that can be remedied.

⁵² The WTO is made up of Member States; therefore it is these Members that can access the dispute settlement process. However, the actual traders can lobby their governments to institute an action on their behalf.

for private party rights to participate,⁵³ some way has to be found to compensate the individuals who actually lose by the application of the WTO inconsistent measure.

The problem with dispute remedies can be seen in several cases that have come to dispute settlement. In the case of *EC- Regime for the Importation, Sale and Distribution of Bananas*,⁵⁴ after obtaining a ruling which the European Communities did not comply with, Ecuador requested authorization by the DSB to suspend concessions or other obligations to the European Communities under the TRIPS Agreement, the GATS and GATT 1994 in an amount of US\$450m. This request was granted although the level was reduced to US\$210m. Even though the violation was in the goods sector under the GATT, Ecuador had to request retaliation on other sectors under other Agreements because suspension in the goods sector was “not practicable or effective”. The problem was with bananas, yet the EC sectors which would be punished for this were the intellectual property and wholesale trade services sectors.

The Arbitrators in that case recognized that;⁵⁵

Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sector and/or under all agreements mentioned above combined.

⁵³ Under the International Centre on the Settlement of Investment disputes (ICSID) Convention however, a private investor may bring an action against its host State. This is one area in international law where private parties are allowed to bring cases against sovereign States. The Appellate Body in *US- Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) allowed limited participation of non-governmental parties through the use of amicus curiae briefs. These briefs are persuasive only and not binding.

⁵⁴ WT/DS27.

⁵⁵ *European Communities- Regime for the Importation, Sale and Distribution of Bananas- Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (WT/DS27/ARB/ECU)

Apart from the fact that other sectors in the EC would have to pay the price for banana violations, the banana exporters in Ecuador are not any better off by their government retaliating against the EC in the area of TRIPS and GATS. The only effect is that there might be a restoration of the balance of concessions between the two countries, but this in itself is not sufficient because the effect is in a different area.

This same situation has arisen in the *US- Gambling*⁵⁶ case in which Antigua & Barbuda won its case against the U.S. The U.S did not comply with the ruling, which means that Antigua & Barbuda will be left to come up with creative means to get back at the United States. Even if it succeeds in doing so, the trade relations between the U.S. and Antigua & Barbuda are not sufficient for Antigua & Barbuda to substantially threaten the United States.⁵⁷ The point is this: Something needs to be done urgently to address these imbalances which make it difficult for developing countries to derive any benefits from WTO dispute settlement, even where they have taken the step of bringing the case before the DSB.

3 Financial Compensation as an Alternative Dispute Settlement Remedy

3.1 *The Aim of Monetary Compensation*

Simply put, financial compensation should be considered as an alternative dispute settlement remedy for those Members of the WTO for whom the other remedies are not viable alternatives i.e. low-income countries. That being said, the purpose of monetary compensation is a key factor in deciding its characteristics. It will also determine the success of the remedy. As a remedy, what gap will financial compensation be filling? Should it be solely to compensate for the loss which a Member has suffered as a result of a violation? Should it be to punish the wrongdoer? Should it serve as a deterrent? Or

⁵⁶ See *supra* note 37.

⁵⁷ The Foreign Trade Statistics as prepared by the United States Census Bureau shows that there was a balance of trade between the US and Antigua to the tune of \$185.5m, and in 2004 the balance of trade was \$121.3 available on <<http://www.census.gov/foreign-trade/balance/c2484.html>> (accessed on April 25, 2006)

should it be to remedy a trade distortion? Understanding the purpose of monetary compensation will go a long way in garnering support for it and making it effective.

Financial compensation as a remedy is not an end in itself. It is important to clarify that removal of the violation is always the preferred option in any dispute settlement cases. This is because it is important to maintain the certainty of the trading arrangements and the agreements which each Member has bound itself to. Firstly, financial compensation would act retroactively providing a remedy for an economy that suffers for the time that an offending measure is in place.⁵⁸ Second, it is a remedy that should confer a benefit on countries that are not able to derive the benefits from ‘retaliation’; there should still be some way in which they can derive benefits from the dispute settlement system.

So far, the proposals for monetary compensation state suggest that its aim is to provide reparation for damages caused.⁵⁹ Financial compensation must be structured in such a way that the sum compensates the recipient i.e. the low- income country for harm suffered. While it could be argued that this does not necessarily stop the violation, at least it puts the other country in a better off position than if there was no monetary compensation, and the violation was still not removed. Without financial compensation, if there was no removal of the violation, the winning party would most probably have to resort to retaliation. As stated earlier, retaliation does not solve the problem for most of these low-income countries. Therefore, a monetary pay-off would remove the need to resort to retaliation compulsorily even though this would not provide any benefits.

Monetary compensation should also serve as a compliance-inducing mechanism. If the total figure is stiff enough, this should motivate the violator to bring its measures into conformity with the DSB ruling as quickly as possible so as to reduce the money it would have to keep paying. Thus, compensation should be calculated in such a way that not only is the complainant compensated for the harm suffered, but the violator should be put

⁵⁸ This is against the usual prospective nature of WTO remedies. See supra note 52.

⁵⁹ See for e.g. Marco Bronckers and Naboth van den Broek “Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement”, (2005) 8 JIEL 101-126 at 124.

in a position where it would be pressed to comply with the recommendation of the Panel/Appellate Body.

3.2 Tracing the Origin of the Clamour for Monetary Compensation⁶⁰

In 1965, an effort was made by GATT developing countries to add monetary compensation to the list of dispute settlement remedies by proposing that monetary damages to be paid to developing countries injured by GATT-illegal trade restrictions. The theory of the developing country proposal for monetary compensation was that GATT-illegal trade restrictions caused serious harms to the fragile economies of developing countries. The developing countries argued that the prospective remedies were not enough to remedy the harm already done. Instead, they proposed, developing countries should be entitled to collect retroactive damages in the form of money awards. The money damages proposal was advocated strenuously through a long series of committee meetings. Developed countries opposed the proposal with equal conviction. At that time, they felt that money damages were simply not possible.⁶¹ The proposals were however not adopted. They also proposed adding sterner sanctions for developing country complaints e.g. monetary damages and collective trade sanctions. South Africa and Brazil were the earliest proponents of this remedy.⁶²

In November 1984, a proposal in this regard was put before the Council by Nicaragua, that in the case of a matter raised by a less-developed contracting party, the recommendations of the Contracting Parties may include measures of compensation for

⁶⁰ The terms “monetary compensation” and “financial compensation” are used interchangeably throughout this paper.

⁶¹ Robert E. Hudec, “Broadening the Scope of Remedies in WTO Dispute Settlement”, available at <<http://www.worldtradelaw.net/articles/hudecremedies.pdf>>, (accessed on April 27 2006). The proposals are contained in the GATT document series COM.TD/F/W.1 (April 27 1965); COM.TD/F/W.4 (October 11 1965).

⁶² Robert E. Hudec *Enforcing International Trade Law- The Evolution of the Modern GATT Legal System* (1993) 34.

injury caused if the circumstances are serious enough to justify such measures.⁶³ As part of the negotiations leading to the establishment of the WTO, the case for monetary compensation was suggested quite a number of times. For instance, in the DSU negotiating sessions, it was proposed as part of special and differential treatment that "at the request of a less-developed contracting party which has only limited retaliatory power vis-à-vis major trading partners, panel reports may include an appropriate recommendation on the amount of compensation due in case the main panel findings are not implemented by a developed contracting party within such time-limit".⁶⁴ The proponent of this suggestion argued that "also developed contracting parties could request a GATT panel to include into the panel report a recommendation on the amount of compensation due in case the main panel findings were not implemented".⁶⁵

The calls for monetary compensation have not diminished with time. In the current negotiations on the Dispute Settlement Understanding under the Doha Round,⁶⁶ the Least Developed Countries (LDC) group has continued the push for monetary compensation. In the LDC proposal,⁶⁷ it was stated that; "...[a] strong case of monetary compensation can be made. This remedy is important for developing and least developed countries, and for any economy that suffers for the time that an offending measure remains in place."

The suggestions of financial compensation as an alternative remedy have gone beyond proposals from poor developing countries. Apparently, the WTO hierarchy has taken note of the possibility of financial compensation as a remedy. In June 2003, the then Director-General of the WTO, Supachai Panitchpakdi commissioned a consultative board of eight eminent persons to look at the state of the WTO as an institution, to study and clarify the institutional challenges that the system faced and to consider how the WTO could be

⁶³ Negotiating Group on Dispute Settlement: Communication from Nicaragua. MTN.GNG/NG13/W/15 (November 6 1987).

⁶⁴ MTN.GNG/NG13/W/19, p.6, para.3b.

⁶⁵ "Negotiating Group on Dispute Settlement Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System"- MTN.GNG/NG13/W/27 (30 June 1988), available on <<http://www.worldtradelaw.net/history/urdsu/urdsu.htm>> (accessed on February 28, 2006).

⁶⁶ The Doha Round which is known as the 'Doha Development Round' was launched in Doha, Qatar in 2001.

⁶⁷ "Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group"- World Trade Organisation TN/DS/W/17.

reinforced and equipped to meet them.⁶⁸ In its report, the consultative board recognized that the language of the DSU is not 100% explicitly clear that withdrawal of the offensive measure is a mandatory obligation.⁶⁹ This in turn leads to a situation where alternative measures must be resorted to since retaliation as a remedy goes against the underlying objective of the WTO system generally to promote rather than restrict international trade.

According to the board, one proposed solution is to allow monetary compensation from the party required to comply with a dispute settlement report, to substitute for compensatory market access measures by the winning aggrieved disputant. The report is a bit guarded in its recommendation however and suggests that, “some experimentation in this regard could be useful, but great care must be exercised to be sure that monetary compensation is only a temporary fallback approach pending full compliance, otherwise the ‘buy-out’ problems will occur”.⁷⁰ According to the board, for poorer WTO Members, especially the least-developed countries with their narrow participation in world trade, the ‘buy-out’ attitude could nullify the value of their pursuing dispute settlement cases.

3.3 Beneficiaries of Monetary Compensation

One recurring theme in the calls for monetary compensation as seen from the above is that the beneficiaries should typically be least developed countries or poor developing countries. To date, only one least developed country Member of the WTO has sought to resolve a trade dispute through the WTO dispute settlement process by bringing a complaint.⁷¹ According to the LDC group, this is not because these countries have no concerns worth referring to the DSB, but rather due to the structural and other difficulties posed by the system.⁷² Perhaps a record of the usage of dispute settlement will give an

⁶⁸ The report of the consultative board is known as the Sutherland Report and the full text is available on http://www.wto.org/English/thewto_e/10anniv_e/future_wto_e.pdf (accessed on February 2, 2006).

⁶⁹ Sutherland Report para 241.

⁷⁰ *Id* para 243.

⁷¹ *See supra* note 11.

⁷² *See supra* note 68.

insight into why the calls are from this particular group. Typically, they are the ones who have been lagging behind in making use of the WTO dispute settlement mechanism.

The following table shows WTO complaints grouped by income classification^{73, 74}:

<p>Total Number of Complaints under the DSU</p> <p>335</p>

<p>Number of Complainants by income classification, by year</p>
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High Income		Upper Middle Income		Lower Middle Income		Low Income	
Year	Complainants	Year	Complainants	Year	Complainants	Year	Complainants
2005	4	2005	4	2005	2	2005	1
2004	15	2003	8	2004	1	2004	3
2003	11	2002	12	2003	6	2003	1
2002	20	2001	11	2002	3	2002	2
2001	5	2000	12	2001	6	2001	2
2000	17	1999	6	2000	5	2000	3
1999	23	1998	4	1999	2	1999	2

⁷³ The table classifies complaining and responding parties in WTO disputes by the income level of their economy. The classifications are based on data and terminology from the World Bank. A country's classification is based on the World Bank classification for that country in the year in which the complaint was brought.

⁷⁴ WorldTradeLaw.net LLC.

1998	33	1997	6	1997	2	1998	4
1997	42	1996	5	1996	6	1996	4
1996	30	1995	7	1995	4	1995	2
1995	15						

An attempt was made by two African LDCs to make use of the dispute settlement mechanism in the *United States- Subsidies on Upland Cotton Dispute*⁷⁵ case. This case brought to the fore, the challenges faced by LDCs in dispute settlement and raised all over again the need for monetary compensation for poor countries. On February 6 2003, Brazil requested the establishment of a Panel on the grounds that the U.S was in violation of Articles 5(c), 6.3(b), (c) and (d), 3.1(a) (including item (j) of the Illustrative List of Export Subsidies in Annex I), 3.1(b), and 3.2 of the SCM Agreement; Articles 3.3, 7.1, 8, 9.1 and 10.1 of the Agreement on Agriculture; and Article III:4 of GATT 1994. Brazil was of the view that the U.S statutes, regulations, and administrative procedures listed above were inconsistent with these provisions as such and as applied. Two least developing countries, Chad and Benin Republic, participated as third parties in the case. The Panel held, and the Appellate Body upheld its decision that the U.S was indeed in violation of its WTO obligations.

Cotton accounts for approximately 40% of export earnings in Benin, and 30% in Chad and Mali.⁷⁶ According to a report, American subsidies cost Africans \$301m in 2001: Mali lost 1.7% of its GDP, and 8% from its exports earnings, similarly Burkina Faso lost 1% of its GDP and 12% of its export income, while Benin lost 1.4% of its GDP and 9%

⁷⁵ WT/DS267/AB/R.

⁷⁶ “Cotton and Developing Countries: A Case Study in Policy Incoherence” prepared by the World Bank Group and available at <<http://siteresources.worldbank.org/INTRANETTRADE/Resources/TradeNote10.pdf>>

of its export income.⁷⁷ So much damage had been done to African cotton- producing economies as a result of the United States' export subsidies and domestic support for its upland cotton farmers, yet none of them took the initiative to bring a complaint against the United States. It was not until Brazil brought a complaint that Chad and Benin joined the dispute, and only as third parties.

While the dispute on the US cotton subsidies was going on however, Benin, Burkina Faso, Chad and Mali had prepared a joint proposal on a sectoral initiative on cotton.⁷⁸ Their proposals were based on the fact that African cotton producers take huge losses on their cotton because certain Member countries of the WTO continue to apply support measures that distort global market prices and African countries cannot compete in giving the same level support to their cotton producers. Their proposal therefore is that all kinds of support should be eliminated and compensation provided until the support is eliminated. Subsequently, they proposed monetary compensation as one of their focal points after discarding retaliation and increased concessions as being inapplicable or ineffective. What this means is that the countries who prepared the joint proposal considered financial compensation to be a just remedy for the harm they have suffered. It is possible therefore that if financial compensation had been an available remedy in dispute settlement, these countries could have initiated a complaint.

Their proposal⁷⁹ among other things, calls for:

- A transitional measure in the form of financial compensation for cotton-producing LDCs to offset the injury caused by the support for production and export;
- Such financial compensation should be calculated in proportion to the subsidies granted by countries which support their cotton production, taking into account

⁷⁷ World Trade Net Newsletter, Vol. 4 No. 6 (June 2003), available on <http://www.intracen.org/worldtradenet/docs/whatsnew/newsletters_2003/newslettervol4no6.pdf> (accessed on March 3, 2006).

⁷⁸ “WTO Negotiations on Agriculture: Poverty Reduction: Sectoral Initiative in Favour of Cotton”- TN/AG/GEN/4 (16 May 2003). This proposal was written by Benin Republic, Burkina Faso, Chad, and Mali under the umbrella of the African, Caribbean, and Pacific (ACP) on the WTO negotiations on the cotton sector.

⁷⁹ *Id* para 38.

the direct and indirect effects of support for cotton production on the economies of LDCs;

- The compensation should be sufficiently high to constitute an additional incentive to decrease or phase out subsidies as soon as possible, but this compensation will decrease (terminate) as and when the subsidies are reduced (abolished).

3.4 Precedents for Monetary Compensation

Monetary compensation in international trade agreements is not a novel idea. There are in existence, international trade agreements that make provision for financial compensation as a dispute settlement remedy. Under the United States-Chile Free Trade Agreement, provision is made for financial compensation. The FTA permits monetary assessments to be substituted for retaliation in normal trade barrier cases.⁸⁰ If the parties are unable to agree on an amount, the amount of monetary assessment is set at 50% of the level of nullification or impairment determined by the panel.⁸¹

Even under the WTO, there is one instance where financial compensation has been used to settle a dispute. In *United States- Section 110(5) of US Copyright Act*,⁸² the EC contended that Section 110(5) of the US Copyright Act which permits, under certain conditions, the playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee, is inconsistent with US obligations under Article 9(1) of the TRIPS Agreement, which requires Members to comply with Articles 1-21 of the Berne Convention. The Panel report which was adopted on July 27 2000, found that indeed the United States had acted contrary to its obligations under TRIPS and it did not fall under any of the exemptions provided for under TRIPS.

As a result of discussions to find a mutually acceptable resolution of the dispute, the United States and the European Communities agreed pursuant to Article 25 of the DSU to enter into arbitration in order to determine the level of nullification or impairment of

⁸⁰ United States-Chile Free Trade Agreement Art 22.15 par 5.

⁸¹ *Id.*

⁸² WT/DS160.

benefits caused by section 110(5)(B) of the US Copyright Act. After the arbitration, the parties reached a temporary resolution of the dispute, which arrangement covered the period through 20 December 2004. The terms of the arrangement were as follows:⁸³

1. The United States would make a lump-sum payment in the amount of \$3.3 million to a fund to be set up by performing rights societies in the European Communities for the provision of general assistance to their members and the promotion of authors' rights.

2. The Payment would serve as a mutually satisfactory temporary arrangement regarding the dispute, for the three-year period commencing 21 December 2001.

4 Negotiating Monetary Compensation

Under the original GATT 1947, there was no provision for any kind of compensation in the case of a refusal to withdraw an inconsistent measure. The only applicable remedy was 'retaliation' after authorization had been given.⁸⁴

Compensation as a remedy was developed under the WTO, and was reflected in the DSU. Let us take a look at what the DSU says about compensation: "[i]f the Member fails to bring the measure found to be inconsistent with a covered agreement into compliance...such Member...shall enter into negotiations... with a view to developing mutually acceptable compensation." It states further that "...[c]ompensation is voluntary and, if granted, shall be consistent with the covered agreements." There is no specification in the DSU as to what mutually acceptable compensation entails. WTO jurisprudence has it however that compensation should take the form of increased concessions.⁸⁵ Various factors must be taken into consideration in developing monetary

⁸³ *US- Section 110(5) of the US Copyright Act- Notification of a Mutually Satisfactory Temporary Arrangement (WT/DS160/23).*

⁸⁴ Art XXIII:2 GATT 1947 provides that "...[i]f the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize 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 as they determine to be appropriate in the circumstances..."

⁸⁵ Joel P. Trachtman, "Building the WTO Cathedral" (February 17, 2006) 8, available at Social Sciences Research Network: <<http://ssrn.com/abstract=815844>>.

compensation as a remedy. How these issues will be dealt with to a large extent will determine the success of the measure.

4.1 Key Elements of Financial Compensation

4.1.1 Amendment of the DSU to Accommodate Financial Compensation

To determine how financial compensation would work, it is important to establish whether there is a provision for it under the DSU. If there is no provision for financial compensation, it means an amendment of the DSU is necessary. To become enforceable there must be a provision in the text of the DSU that could be understood to provide for financial compensation. From the content of the DSU, there is nothing that precludes compensation from being financial provided that “it is voluntary and consistent with the covered agreements”. However, an amendment of the DSU would be necessary to make explicit provision for financial compensation in the event of non-compliance with the DSB ruling.⁸⁶

Making financial compensation an alternative remedy has to start with defining clearly what ‘compensation’ is under the DSU. Currently, there is no definition of compensation. Compensation must be defined explicitly to include the provision of additional concessions and/or financial compensation. The clause could read like this: “compensation includes but is not limited to monetary compensation”.⁸⁷

The next stage in the amendment of the DSU to accommodate financial compensation is redefining ‘voluntary’. Looking at the current provisions, what does it mean for compensation to be voluntary and consistent with the covered agreements? By voluntary, it means that no party can compel the other to give or to accept compensation. One party may offer compensation as a possible remedy but the other party is not bound to accept it. It therefore leaves an escape route for the parties, thus making it a very unreliable remedy. There are two alternative ways of solving the issue of voluntariness. One is that

⁸⁶ Marco Bronckers & Naboth van den Broek (2005).

⁸⁷ The LDC proposal suggests that “there is a need to clarify that compensation should not take the form of an enhanced market access if this will prejudice other Members and that monetary compensation is to be preferred.”

the term voluntary should be deleted totally from Article 22:1 of the DSU, like the LDC proposal states,⁸⁸ in order to reduce the freedom in it and to make it mandatory. On the other hand, ‘voluntary’ could be qualified instead of being deleted. Since the purpose of financial compensation is to benefit poor developing countries, then the voluntariness should be left to the complainant and not to the respondent i.e. the complainant should have the option of deciding whether it wants financial compensation or not.

The DSU provides further that compensation must be “consistent with the covered agreements”. This is a very wide provision and can be interpreted in various ways but basically it means that compensation must not go against the spirit of the WTO agreements in general. Tentatively, this phrase has been considered to mean that compensation must be provided on an MFN basis.⁸⁹ The MFN principle is one of the pillars of the WTO.⁹⁰ However, providing monetary compensation is not “an advantage, favour, or immunity” which must be immediately and unconditionally granted to every Member in the areas of custom duties and rules relating to importation and exportation. Therefore by providing that financial compensation is to be consistent with the covered agreements, this does not thereby imply that it is to be provided on an MFN basis. There will therefore be no need to amend the DSU to remove that phrase.

4.1.2 Monetary Compensation as Special and Differential (S&D) Treatment

A recurring theme throughout the WTO covered agreements is the need to take into account the special needs of its least developed Members.⁹¹ As a result of this, there are

⁸⁸ See *supra* note 68.

⁸⁹ See Australia’s submission during the DSB Special Session on the review of the DSU, held on March 14, 2002. A report of the meeting is provided by the Third World Network and is available on <<http://www.twinside.org.sg/title/twe276b.htm>> (accessed on April 28 2006); see also Joost Pauwelyn (2000) AJIL 343.

⁹⁰ See *infra* note 115. The other pillars are Market Access Commitments- Article II GATT 1947 provides that each contracting party is to afford treatment no less favourable than that which it has bound, to the commerce of the other contracting parties; and National Treatment- Article III GATT 1947 provides that the products of the territory of any contracting party shall not be subject to treatment different from that applied to like domestic products; and Market Access Commitments.

⁹¹ The preamble to the Marrakesh Agreement Establishing the World Trade Organisation recognizes that; “...[t]here is need for positive efforts designed to ensure that developing countries, and especially the

various provisions through all the covered agreements which are for the benefit of the less developed Members of the WTO only. This treatment of less developed country Members of the WTO is known as ‘special and differential treatment’.⁹²

The DSU also has provisions regarding least developed Members.⁹³ Least developed country Members are by virtue of that fact, entitled to special considerations which are not available to the other Members. Advantage should be taken of this fact. To make financial compensation an effective remedy for poor WTO Members, it should fall under S&D treatment so that it is only this category of countries that can have access to whatever provisions are applicable here. Not only should it be negotiated under S&D treatment, it should be phrased differently from the general S&D treatment provisions. For once, there must be phrased in a way that makes it a mandatory obligation. Typical special and differential treatment provisions under the WTO are not binding. They are only best endeavour provisions which developed countries are encouraged to apply,⁹⁴ and for which there is no remedy for failure to apply S&D treatment.

4.1.3 Calculation of Compensation

The factors to be considered in calculating financial compensation need to be contemplated. Article 22:4 of the DSU provides that “[t]he level of the suspension of

least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”.

⁹² In the recent Ministerial Meeting of the WTO in Hong Kong in 2005, par 35 of the Ministerial Declaration specifies that all S&D treatment provisions are an integral part of the WTO agreement and that its provisions must be reviewed with a view to strengthening them and making them more precise, effective and operational. Par 36 states in part that “[w]e take note of the work done on the Agreement-specific proposals, especially the five LDC proposals...” One of these proposals is that making a case for monetary compensation.

⁹³ Art 24:1 of the DSU provides for special procedures involving least developed country Members thus; “[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members...”

⁹⁴ For instance, Art XXXVI GATT 1994 deals generally with provisions to aid the less-developed Members. Para 8 provides that “[t]he adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly”. That clause is phrased so loosely and makes no compelling demands of the more developed Members.

concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification of impairment”. This same formula can be applied in calculating the value of financial compensation. The nullification or impairment suffered by the complainant should include actual losses as well as consequential losses.⁹⁵ The amount should be calculated from the time the inconsistent measure was put into operation until the removal of the measure. Using this method would fulfill the aim of monetary compensation which is to fully compensate the complainant for the loss suffered as a result of the violation of WTO obligations by the respondent, and to act as a retrospective remedy.

In the draft decision concerning measures in favour of cotton,⁹⁶ WTO Members proposed to establish a transitional financial compensation mechanism in favour of the cotton-exporting LDCs affected by subsidies. The draft contained factors to be included in calculating compensation: Starting on 1 January 2004, and until the domestic support measures and subsidies granted to the production and export of cotton have been totally dismantled, Members that have granted these subsidies will be called upon to grant financial compensation equivalent to the amount of the loss in export revenue suffered by the LDCs affected by these subsidies. The annual amount of compensation to be paid shall correspond to the estimated losses suffered, calculated on the basis of the statistics supplied by the International Cotton Advisory Committee (ICAC). The amount of the overall financial compensation to be paid shall be adjusted in proportion to the subsidy reduction efforts of the countries contributing to the compensation fund. The compensation granted to the LDCs shall be calculated in proportion to their respective shares in the production and export of cotton.

⁹⁵ In actions for breach of contract, compensatory damages are calculated using actual damages, consequential damages as well as incidental damages. The actual damage is the amount incurred as a result of the inconsistent measure e.g. through increased tariffs or additional expenses met in order to meet standards. Consequential damage would be the amount of trade which is lost because of the measures e.g. if less quantity of a product is exported as a result of the increase in cost, resulting in reduced profits.

⁹⁶ “Draft Decision Concerning Specific Measures in Favour of Cotton with a View to Poverty Alleviation: Communication from Benin, Burkina Faso, Chad and Mali” (22 August 2003) WT/GC/W/511.

4.1.4 Procedural Issues

Some aspects relating to the procedure also need to be discussed. One of these issues relates to timing. There needs to be established a time frame for when the request for financial compensation will first be made. Financial compensation becomes an alternative remedy where there is a refusal to comply with a ruling. A complainant who has won a dispute does not automatically become entitled to financial compensation once the decision is made in its favour. It is only after the time determined to be a reasonable time for compliance with a ruling has elapsed that a request for financial compensation can be made. As long as the ruling is complied with, there will be no requirement of financial compensation. In the absence of this, just as in the case of retaliation, there will need to be an arbitration proceeding to determine the amount of financial compensation. This leads to the issue of who decides on whether financial compensation is to be paid. Since financial compensation is a special remedy, the winning party should be allowed to decide whether it wants compensation in the form of additional concessions, suspension of equivalent concessions, or financial compensation.

5 The Debate on Monetary Compensation

Like any new proposal, concerns have been raised on the practicality of such a measure and the modalities of its application. In discussing these issues, it should be borne in mind that monetary compensation, like the present system of compensation does not replace the obligation to comply with the DSB ruling. It is only supposed to be a temporary measure until the violation is removed, and to compensate for the damage already suffered while the violation was in place.

5.1 *Thorny issues in monetary compensation*⁹⁷

Eligibility Requirements: Issues surrounding eligibility for the use of financial compensation are likely to be potential problems of the remedy. Is monetary compensation to be made generally applicable? Who can demand it and against whom?

⁹⁷ See generally Marco Bronckers and Naboth van den Broek (2005).

It is suggested that at its inception, it should be available at the request of low income Members, because these are the Members who feel the impact of trade violations more, and for whom trade retaliation will not be a viable option.⁹⁸ This then raises the question of the classification of low income countries. The United Nations has a classification of countries according to development levels, while the World Bank also has its own classification according to income levels. It would be important to resolve which of these classifications would be ideal in determining the eligibility for financial compensation. A re-classification could even be done for these purposes. My suggestion is that the classification can be done according to the share of world trade of each Member. The WTO has trade statistics for each of its Members. A threshold should be established according to volume of trade and any Member which falls below this threshold should be eligible for financial compensation as an alternative remedy. Using the same logic therefore, financial compensation will be available against every Member that does not fall within this threshold. In other words, once a Member is not determined to be eligible for financial compensation, it becomes liable to pay financial compensation where the circumstances warrant it.

The remedy should only be applicable by this group and not against them. The whole purpose of financial compensation right now is for disadvantaged countries to have an alternative remedy available to them. It would defeat this purpose if a remedy which is supposed to be for their benefit is used against them. Consequently, only poor WTO Members should be able to request for financial compensation, and they should only be able to request this against the richer Members and not against one another. Where there is a dispute among amongst the beneficiaries of financial compensation, then they should resort to the traditional remedy of retaliation where there is refusal to comply with a ruling. It should be remembered that the problem of retaliation is mostly felt where the parties are unequal trading partners. But where the parties are in the same economic category, then retaliation will be more of a threat since the impact will be felt by the violator/respondent and will cause it to comply with the ruling as quickly as possible.

⁹⁸ See discussion earlier on the problems with the existing dispute settlement remedies.

Multiple Party Pay-off: The questions that arise here deal with the requirement of monetary compensation in a situation where the claim is brought by more than one party. Is every complainant entitled to financial compensation? What happens in a case where some of the complainants are small economies, and the rest are not? What is the position of parties who join the action as third parties? Are they also going to be entitled to the monetary compensation?

Firstly, to be entitled to a remedy, a party has to be a complainant and not merely a third party. As it stands at present and unless their rights are reviewed, third parties would have no claim to financial compensation. Although Article 22 of the DSU⁹⁹ does not speak expressly of the ‘complainant’, but rather a party “invoking” the dispute settlement procedures, for textual and contextual reasons it cannot be suggested that third parties invoke such procedures. The fact that Article 10 of the DSU allows any WTO Member having a substantial interest in a matter before a Panel (i.e. third parties) and having notified its interest to the DSB at the time of the establishment of the Panel, to be given an opportunity to be heard by the Panel by making written submissions does not mean, however, that third parties thereby “invoked” the dispute settlement procedures. Third parties are merely invited to present their views during a special session of the first substantive meeting and their written submissions are attached to, the Panel’s report. When participating in the proceedings only as interested parties, third parties ‘by-pass’ this essential component of the dispute settlement procedures i.e. accessing remedies.¹⁰⁰ Therefore, they may only benefit in a systemic manner from the outcome of a Panel decision where a Respondent does implement a Panel’s recommendations and rulings. This is because the corrected measure will usually be of general application and thus may be directly beneficial to Third Parties. Co-complainants should however be entitled to financial compensation since they all ‘invoked’ the dispute settlement process.

⁹⁹ Art 22 deals with compensation and suspension of concessions.

¹⁰⁰ As a third party in *United States- Section 110(5) of US Copyright Act* see *supra* note 83, Australia was a third party but was not eligible for the compensation arrangement between the EC and the US. In the requests for the composition of an arbitral panel to determine the level of concessions, Australia was explicitly excluded from the proceedings.

To determine what parties will be entitled to financial compensation where there is a varied mix of complainants, the eligibility requirements as suggested above can be resorted to. Any complainant which is not entitled to financial compensation still has the other dispute settlement remedies available to it.

Enforceability: Limao & Saggi¹⁰¹ are of the opinion that the major problem facing the implementation of a dispute remedy based on financial compensation is its enforcement.¹⁰² Even after making a provision for financial compensation in the DSU and the DSB has authorized the payment of compensation, it would be of no consequence if violators refuse to pay the remedy and there is no means to ensure compliance. The success of the remedy will depend on its enforcement. Ultimately, the violating country has to agree to pay the fine, unlike in the case of retaliation where the violating country is not the deciding factor. Presently under the WTO, there are no compliance-inducing mechanisms, which is why retaliation is the remedy most resorted to where there is a refusal to comply with a ruling.¹⁰³

Although there is no reason to conclude that there will not be compliance, as there has been a good record so far of compliance with DSB recommendations,¹⁰⁴ one suggestion is that a system can be established whereby each Member posts a bond of a given amount, as part of its Membership commitments, with the understanding that its bond

¹⁰¹ Nuno Limao & Kamal Saggi, “Tariff Retaliation versus Financial Compensation in the Enforcement of International Trade Agreements”, (2006) available at <<http://faculty.smu.edu/ksaggi/LIMAO-SAGGI.pdf>>

¹⁰² It should be stated at this point that this problem is not peculiar to enforcement in cases where financial compensation is the required remedy. There are generally no enforcement provisions under the DSU. Thus finding a means of enforcing the remedy of financial compensation should begin with finding means of enforcing DSB rulings generally. For a discussion on enforcement of WTO rules and dispute settlement reports generally, see Joost Pauwelyn (2000).

¹⁰³ Retaliation does not require any action on the part of the respondent, and no permission is sought from it. Once a respondent does not comply with a ruling, then the complainant can go ahead to arbitration to determine the level of suspension of concessions.

¹⁰⁴ See *supra* note 34.

will be used to pay a fine where there is a ruling to that effect.¹⁰⁵ These bonds will be posted in an escrow account so that it does not remain under the control of the Member which posts it. A system has to be devised as to the ratio of each Member's bond. I would suggest that the system of Membership contributions should also be followed here. The budget of the WTO is derived by contributions from its Members.¹⁰⁶ These contributions are determined according to each Member's percentage share of international trade, based on trade in goods, services, and intellectual property.¹⁰⁷ Thus, the ratio of each Member's bond should be determined according to this system.¹⁰⁸ Of course the beneficiaries of financial compensation would not be required to post bonds. The purpose of the bonds is strictly to pay financial compensation should such a situation arise and since financial compensation is not an optional remedy against its proposed beneficiaries, there will be no need for them to post any bond. This leaves the issue of what happens where the amount determined as compensation exceeds the amount which has been placed as a bond or a situation where the amount posted as bond has been exhausted and there is a need to pay compensation. One suggestion is that the amount outstanding should be added to the contribution of that Member. The amount outstanding as financial compensation can be added up to the contribution of such a Member.

Another way to ensure compliance is by making a rule that where there is refusal to pay compensation, then the Member state will no longer have the right to use the dispute settlement process against any other Member.

Valuation problems: Another concrete problem which has been associated with compensation is the valuation of the amount of the compensation. Should compensation

¹⁰⁵ See *supra* note 102.

¹⁰⁶ Art VII: 2(a) of the Marrakesh Agreement. Para 4 states in particular that “[e]ach Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.”

¹⁰⁷ See “The WTO”, a portal on the WTO website which provides information about the WTO. <http://www.wto.org/english/thewto_e/secre_e/contrib05_e.htm>

¹⁰⁸ The baseline figure is something that has to be worked out by economists. My suggestion only deals with the proportion of each Member's bond in relation to the other Members.

equal lost trade volumes only, or lost trade volumes as well as lost profits?¹⁰⁹ From what time should the amount of the compensation begin to be computed? Bronckers & van den Broek argue that for monetary compensation not to end up being high amounts similar to a fine, either lost trade volumes or lost profits should be used as the measure of calculation.¹¹⁰ What this means is that only the effective losses should be computed and not the potential gains that have been nullified and impaired.

In my opinion however, both factors should be taken into account in computing the total figure.¹¹¹ Provided punitive damages are not included, it is not enough of a reason to state that because the amount will be too high, both indices should not be used. In normal business disputes, damages are calculated by including actual damages, consequential damages, and incidental damages (this is as distinct from punitive damages, which is an additional amount imposed to punish the offender for its action). This should be taken into consideration by a Member that refuses to remove the offending measure, and then it is up to it decide whether it is more worthwhile to keep the violation and pay the compensation instead. This could help to achieve one aim of financial compensation which is to induce compliance.

The tendency of buy-out of obligations: One of the major objections to monetary compensation is that it would allow governments to buy-out of their obligations by providing monetary compensation. This is a possibility whereby instead of removing the violation, a Member would opt to pay whatever amount is estimated as monetary compensation. If this happens, it could favour the rich and powerful countries which can afford buy outs while retaining measures that harm and distort trade in a manner inconsistent with the rules of the system. In turn, this will diminish the extent to which

¹⁰⁹ In *European Communities- Regime for the Importation, Sale and Distribution of Bananas- Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (WT/DS27/ARB), when determining the level of suspension of concessions, the Panel rejected the attempts to calculate losses in terms of lost profits. It defined the harm as lost exports of wholesale services from the United States to the European Communities.

¹¹⁰ Marco Bronckers & Naboth van den Broek (2005).

¹¹¹ See my argument under ‘calculation of compensation’.

companies, trading and investing, can rely on the rules to provide market predictability.¹¹²

While it is a real possibility that there would be a buy-out of obligations, it should be remembered that payment of monetary compensation does not remove the obligation to remove the violation. The violator still has the obligation of bringing its measures into conformity with its obligations. Therefore, like the present system of compensation, monetary compensation is only temporary until the violation is removed. And for the length of time while the payments are being made, the pay-offs are likely to be more beneficial to a poor country than a situation where it will be forced to raise tariffs in the quest for retaliation which would be of less benefit to it. Even with a ‘buy-out’ of obligations by the richer countries, financial compensation would solve the problem of a lack of an effective remedy for poor developing countries.

Violation of MFN Principle: If there is one thing that the WTO protects jealously, it is the maintenance of equity in the trading system. The preamble of GATT 1994 states in part that its objectives are attained “...by entering into reciprocal and mutually advantageous arrangements directed to ...*the elimination of discriminatory treatment in international commerce*”.¹¹³ This provision alludes to the MFN principle.¹¹⁴

It has been argued that the payment of financial compensation amounts to a violation of the MFN principle and may diminish the rights of Members other than the complainant.¹¹⁵ This argument is neither here nor there. The payment of financial compensation does not fall under any of the criteria leading to the application of MFN

¹¹² Par 242 Sutherland Report.

¹¹³ Emphasis mine.

¹¹⁴ Art I:1 of the GATT provides that “[w]ith respect to customs duties of any kind ..., and with respect to all rules and formalities in connection with importation and exportation, any advantage favour privilege or immunity granted by any contracting party to any product originating in or destined for another country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.

¹¹⁵ Bernard O’Connor & Margareta Djordjevic, “Practical Aspects of Monetary Compensation: The US- Copyright Case” (2005)8 JIEL 127.

rules. The MFN principle applies to “customs duties of any kind and rules and formalities in connection with importation and exportation.” The payment of a sum of money as compensation is neither a custom duty nor a rule relating to importation and exportation, which could confer an advantage on one country to the detriment of all others. So, the contention that financial compensation will violate MFN is not valid.

Sharing of receipts of compensation: Another issue that has been raised in monetary compensation is the way the receipts are going to be disbursed. I submit however that this is not one of the staking points of the negotiations on monetary compensation. The government that brings the case is left to decide what it does with the money. It is not up to the losing Member, or the DSB to determine what is to be done with the money.¹¹⁶ The WTO is not a development organization. If it were, then maybe it would concern itself with what is done with the proceeds.

Although the above issues are matters that must be dealt with in relation to financial compensation, there a lot of things to be said for financial compensation as a remedy. Below are some of the more compelling arguments in support of monetary compensation.

5.2 Arguments for monetary compensation

Greater participation of developing countries: We should not forget that the entire idea of monetary compensation is to provide an alternative remedy for poor developing countries so that they can make better use of the dispute settlement process. The idea has been generated particularly from the low-income countries who have been absent in the dispute settlement process at the WTO, and have cited the inadequacy of remedies as one of the reasons for their lack of participation. With this remedy in place, hopefully there will be increased appearances in dispute settlement made by the smaller countries.

¹¹⁶ Part of the provisions of the draft decision concerning specific measures in favour of cotton (*supra* note 97) was that “...the management of financial compensations would be the joint responsibility of the producers’ associations in the countries affected and the competent national structures...”

Compliance-inducing Effect: Because of the nature of monetary compensation, it is likely that it will induce better compliance with the ruling of the DSB. If the amount of the compensation is stiff enough (for instance if multiple parties are to be paid and it is a continuous payment until the violation is removed), it might make the country opt to remove the violation rather than pay the large sum of money. Besides, in the case of developing countries, this will probably be a better tool for inducing compliance than the current instruments of compensation and retaliation.

Non- trade restrictive: In line with the WTO objective of facilitating trade among its Members, monetary compensation is not trade restrictive. This is because there is no requirement of trade rebalancing either through the provision of additional concessions or the suspension of equivalent concessions. All that is involved is making a sum of money available and normal trading activities continue uninterrupted. Of course, the fact that the violation was not removed still remains and that in itself is a disruption, but it should be noted however that this particular disruption remains whichever remedy is applied, once there is no compliance with the ruling. The objective should then be to minimize the disruptions in the system. What retaliation does is to restrict trade to a certain level, whereas financial compensation could avoid this situation. In addition, monetary compensation does not distort bound trading obligations.

Appropriate apportioning of benefits and burden: Unlike the current system of compensation and retaliation, monetary compensation does not involve a wrong allocation of benefits and burden. In other words, there is no situation whereby one sector which did not have anything to do with the violation in the first place derives the benefits as per the current system of compensation; or where a sector which is not the subject of the dispute bears the burden as in the current form of retaliation. The proceeds from the compensation could then, if put to good use by the government, be used to ameliorate the losses suffered by the particular sector affected by the violation. Hence, the loser becomes the beneficiary. This option is not available under the current system of compensation.

Conclusion and Recommendations

While there is much to be said about the WTO remedies, there remains much to be done particularly with respect to developing countries. In this paper, I have tried to show why the poorer Members of the WTO have not been making use of the dispute settlement mechanism. Also, I discussed why the present remedies are not sufficient to address all the problems that may arise as a result of one Member's violation of its obligations, especially with regard to developing countries which lack retaliatory capacity.

It is in the light of these problems that financial compensation becomes a viable alternative dispute settlement remedy. In proposing financial compensation as a remedy, the following are my suggestions as to how it can be successfully negotiated, and the issues that have to be resolved before it can become a reality. These include:

- Amendment of the DSU: To give it the force of law, the DSU needs to be amended to ensure that financial compensation is a recognized remedy available under all the covered agreements. The developing country group needs to ensure that financial compensation remains on the negotiating table. Since this present round of negotiating is a development round, there is a good chance that if they press their demands and are prepared to make some concessions, it could become a reality.
- Eligibility requirements: For starters, only LDCs or poor developing country Members should be able to request financial compensation and they should only be able to request this against the developed countries and not against one another;
- Procedural issues: Since the primary dispute settlement remedy is withdrawal of the offensive measure, it is not up to the Panel/Appellate Body Members to order the payment of financial compensation. It is only where the violator has refused to comply with the ruling that the case for financial compensation is heard separately.
- Calculation of the compensation: Like in the case of retaliation, there should be an arbitral proceeding to determine the amount that should be paid as compensation.

the figure should be calculated based on the amount of lost trade as well as lost profits starting from the time when the violation began up until it is removed. A time limit should be provided for its payment i.e. until there is compliance with the DSB ruling.

- Enforcement of the remedy: To ensure that a decision imposing financial compensation is followed, the use of bonds is worth exploring. Also, preventing a Member from using the dispute settlement mechanism where it has refused to pay financial compensation is likely to be an effective means of ensuring compliance.

Several points should be taken from the *US Copyright* case in future deliberations on financial compensation:¹¹⁷

- One, it shows that financial compensation under the WTO is possible. Even with all the objections which have been raised as to the possibility of using financial compensation, the fact that there is an example shows that there is a way of resolving whatever difficulties there might be in resolving financial compensation.
- Two, it shows that there is a way to calculate financial compensation. In this case, an arbitration proceeding was set up to determine the level of nullification and impairment suffered by the EC as a result of the U.S legislation.¹¹⁸ It was this figure that was then used as the amount to be paid by the U.S.
- Three, it shows that it is indeed not impossible that countries would be willing to pay compensation. At the time of this payment, compensation was voluntary and still the US opted to pay compensation while it was still in the process of bringing its law into conformity with its WTO obligation.
- Four, it shows that compensation is a temporary measure that does not remove the obligation to remove the violation. It will be noticed that there was a time span for the payment of this compensation. It was expected that the dispute would still be resolved, and that the payment of compensation was a ‘mutually satisfactory

¹¹⁷ See *supra* note 83.

¹¹⁸ US- Section 110(5) of the US Copyright Act- Award of the Arbitrator (WT/DS160/ARB25/1).

- temporary* arrangement'. Even if there were no resolution of the dispute, this problem would apply with all the other remedies. In any case, even retaliation is supposed to be a temporary measure until the violation is removed.¹¹⁹ Therefore, also financial compensation would remain in place until the violation is removed.
- Finally, it shows that payment of monetary compensation is not a breach of the MFN principle. Throughout the period while the negotiations were going on as to reaching a mutually satisfactory arrangement, Australia which was a third party in the proceeding kept on insisting that whatever solution was reached must be applied on an MFN basis.¹²⁰ While this would have been the case if the compensation was in the form of concessions, it did not hold where it became obvious that the compensation would be monetary. This goes to show that where financial compensation is the agreed remedy, MFN would not apply. It also supports the case that third parties are not entitled to financial compensation, or indeed to any remedy.¹²¹

In the end, whether or not financial compensation becomes a reality depends on whether makers of such statements as the following will pay more than lip service to their statements: “[t]he EU is also concerned by the difficulties that developing countries face in participating actively in the dispute settlement system. Within the framework of the negotiations on DSU, the EU is therefore in favour of initiatives aimed at granting to developing countries a better access to the system and providing them with the necessary training and technical assistance”.¹²²

¹¹⁹ Art 22:8 DSU.

¹²⁰ Australia’s position was that there ought to be a clarification of the provisions of the DSU to the effect that all compensation arrangements must be available to all Members on a non-discriminatory basis and that arbitration may be used to determine the appropriate level of nullification or impairment.

¹²¹ The exception is of course if the measure is withdrawn in which case the benefit is enjoyed generally, or where the compensation is not financial in which case it has to be applied on an MFN basis.

¹²² <http://www.europa.eu.int/comm/trade/issues/respectrules/dispute/index_en.htm>

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