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USE OF THE WTO TRADE DISPUTE SETTLEMENT MECHANISM BY THE LATIN AMERICAN COUNTRIES - DISPELLING MYTHS AND BREAKING DOWN BARRIERS

RAÚL A. TORRES
WTO

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USE OF THE WTO TRADE DISPUTE SETTLEMENT MECHANISM BY THE LATIN AMERICAN COUNTRIES - DISPELLING MYTHS AND BREAKING DOWN BARRIERS

RAÚL A. TORRES [*]

WTO DEVELOPMENT DIVISION

Abstract: The WTO's Dispute Settlement Mechanism (DSM) has been hailed as a fundamental aspect of the Multilateral Trading System for developing countries. At the same time developing countries face many challenges to ensure their effective participation in the mechanism. This paper presents statistical evidence of how Latin-American countries have been very active in their use of the DSM, especially when their use of the mechanism is compared to their participation in world trade. This paper also analyses why, to a large extent, Latin American countries have overcome the challenges of participating in the DSM; and have done so by coming up with innovative and creative solutions, without deviating from the guidelines established by WTO rules.

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Keywords: Dispute settlement, Latin-America, participation, challenges, litigation, retaliation, consultations, negotiations, panel.

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A. INTRODUCTION

One of the Uruguay Round's greatest achievements was to ensure that the decisions of the Dispute Settlement Body (DSB) are binding on all Member countries and adopted in accordance with the principle of negative consensus. Indeed, we have moved from a series of ad hoc arbitral decisions under the GATT to a functional legal framework in which precedent is created and practices are consistent, and which can rely on a body of decisions that is without equal in international law.

The Dispute Settlement Mechanism (DSM) is particularly important for the developing countries because in a rules-based system it is not the country with the most economic clout that imposes its will on the others, but the country with the soundest legal arguments that will eventually prevail. Consequently, the Dispute Settlement Mechanism contributes to levelling the playing field, particularly for the economically and politically weakest countries. This means that the small countries can confront the big countries on an equal footing, as in the cases involving Ecuador and the European Union, or Antigua and Barbuda against the United States, or Costa Rica against the United States or even between developed countries, as in the case of New Zealand against Australia.

While the Dispute Settlement Mechanism provides the developing countries with an opportunity to seek remedies for their grievances, it also presents an enormous challenge, that of ensuring their effective participation. Since the establishment of the WTO Dispute Settlement Mechanism, we have seen a significant increase in developing country participation in comparison to GATT dispute settlement. The countries of Latin America, in particular, have become highly active participants in the DSM, and the purpose of this article is to examine their participation. We shall begin by analysing their use of the DSM in the light of their level of international trade activity, and then comment on the different challenges faced by developing countries participating in the DSM and the experience of the countries in the region with regard to those challenges.[1]

B. STATISTICAL ANALYSIS

As a starting point for analysis, it is important to look at the statistics on the use of the WTO Dispute Settlement Mechanism in its 16 years of operation. For the purpose of this analysis, we shall use the statistics compiled and maintained by the WTO Legal Affairs Division.[2] In analysing the use of the DSM, the figure on which we should focus is the number of requests for consultations. As we saw earlier, the act that formally initiates a dispute settlement procedure in the WTO is the request for consultations. To date in the WTO, 425 requests for consultations have been accepted. It should be emphasized, however, that seven of those requests were submitted by multiple complainants. For the purposes of this study, in cases where requests involve multiple complainants, each one of them will be considered to have submitted an individual request, and this brings the total number of requests for consultations to 453, as is shown in Chart 1. It can be seen from the same chart that the DSB has established 185 panels for 231 disputes[3]; those 185 panels gave rise to a total of 91 appeals.[4] The chart also reveals that peak DSM activity was achieved soon after the establishment of the system, and that with the passage of years, DSM activity has gradually declined. It is also shown that the economic crisis considered to have begun in mid-2008 has had virtually no impact on the number of disputes initiated by Members, despite predictions to the effect that the protectionist pressures

[1] For those readers unfamiliar with the WTO and its DSM I have provided an overview of the functioning of WTO's Dispute Settlement Mechanism in Appendix A to this article. This overview may prove useful in understanding the different stages of a WTO dispute settlement process and the terminology used in this article.

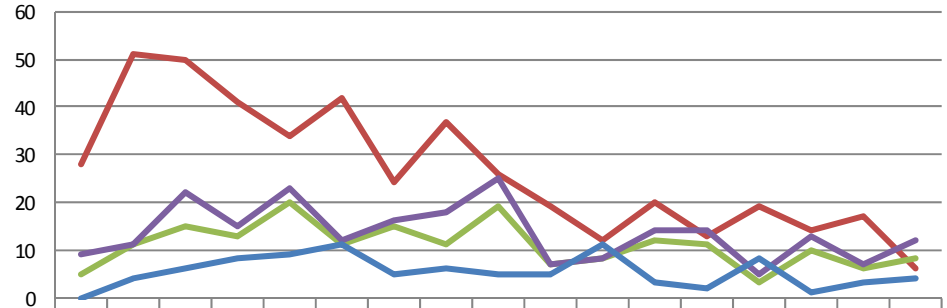
[2] Statistics may be viewed at: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

[3] In some cases several requests for consultations have been consolidated under a single panel, so that the number of consultations that have gone on to the litigation stage exceeds the actual number of panels that have been established to date.

[4] These figures do not include appeals against panel reports under Article 21.5 of the DSU. Likewise, three individual panels were combined with three other panels dealing with similar measures at the appeal stage, resulting in three appeals.

exacerbated by the crisis would result in the adoption of measures that would be challenged at multilateral level, causing an explosion in the number of WTO disputes.

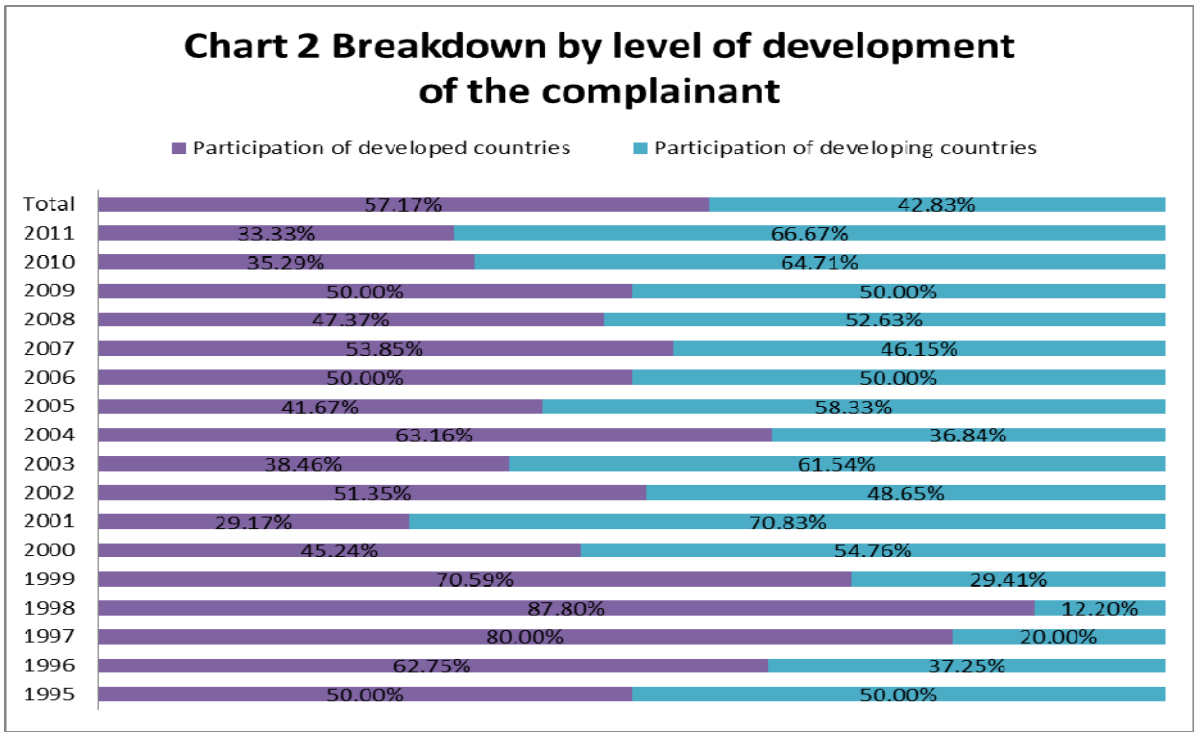
Chart 1: Consultations, Panels and Appeals

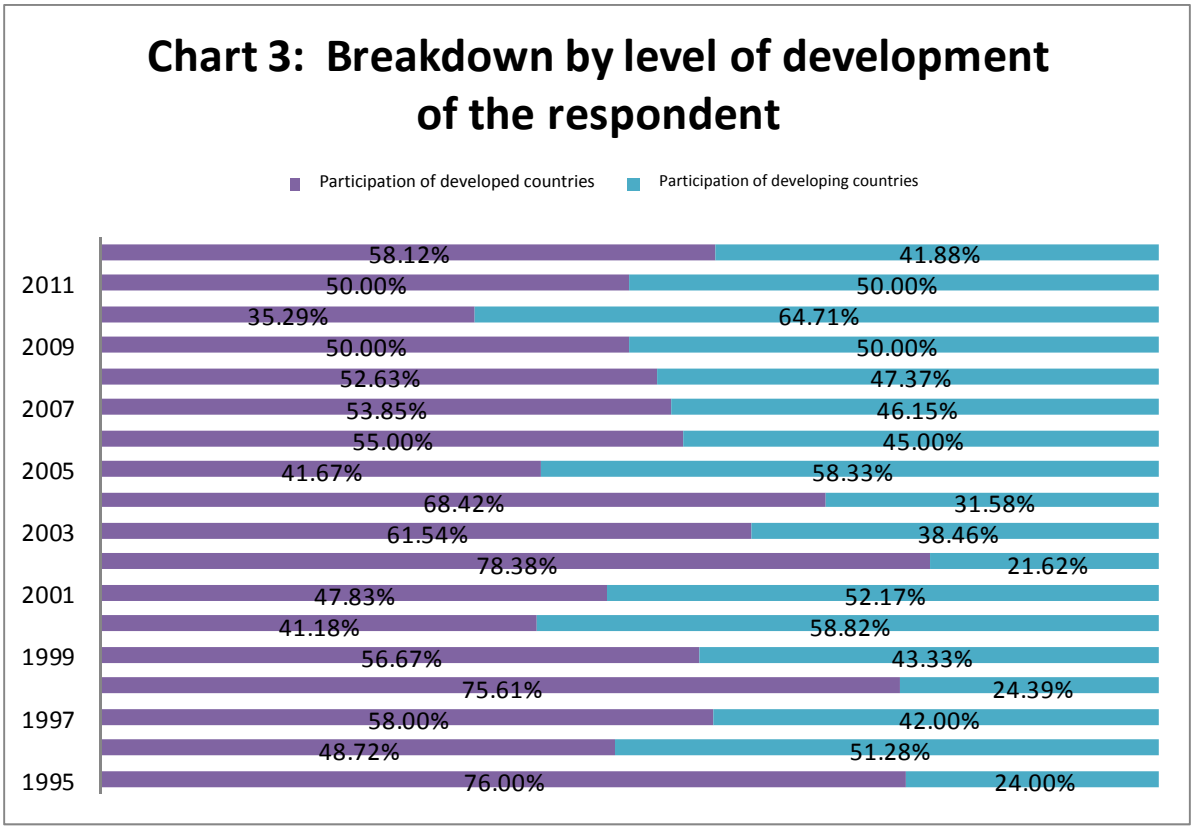


	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Consultations	28	51	50	41	34	42	24	37	26	19	12	20	13	19	14	17	6
Panels	5	11	15	13	20	11	15	11	19	7	8	12	11	3	10	6	8
Disputes covered	9	11	22	15	23	12	16	18	25	7	8	14	14	5	13	7	12
Appeals	0	4	6	8	9	11	5	6	5	5	11	3	2	8	1	3	4

Looking at the breakdown of consultations, 258 requests were made by developed countries and 194 by developing countries, resulting in a total of 57 per cent of consultations requested by developed countries and 43 per cent by developing countries. An analysis of the trends in these figures, as set out in Chart 2, shows that developing countries have increased their participation in the DSM, and that 2007 was the last year in which more consultations were requested by developed countries.

Chart 3 shows the other side of the coin, that is, the position occupied by developing countries as respondents. In this case, it is clear that the most challenges have been directed at developed countries in WTO dispute settlement proceedings. Indeed, the measures imposed by developed countries have been disputed 247 times, while the corresponding figure for the developing countries is 178. This gives a breakdown of 58 per cent for developed countries and 42 per cent for developing countries. However, an analysis of the trend in these figures appears to point to a rising proportion of cases against developing countries in recent years.





Based on an analysis of individual Members' use of the system, it is no surprise to find that the United States and the European Union are the Members that have initiated the largest number of disputes in the WTO, having submitted 97 and 84 requests for consultations, respectively. They stand far ahead of Canada, Brazil and Mexico, which have made 33, 25 and 21 requests for consultations, respectively. Table 1 gives a more complete overview of the participation of Latin American countries in the DSM, including their participation as third parties to disputes. As is illustrated by the

table, all the countries in the region have taken part in the DSM in one way or another. However, Bolivia, Cuba and Paraguay have only participated as third parties in any proceedings, never as complainants or respondents.

Table 1: Participation of Latin American countries in the DSM

Member	Complainant	Respondent	Third party
Brazil	25	14	64
Mexico	21	14	55
Argentina	15	17	31
Chile	10	13	26
Guatemala	8	2	20
Honduras	7	0	16
Colombia	5	3	29
Costa Rica	5	0	15
Panama	5	1	6
Ecuador	3	3	14
Peru	3	4	10
El Salvador	1	0	12
Nicaragua	1	2	10
Uruguay	1	1	5
Venezuela	1	2	16
Bolivia	0	0	1
Cuba	0	0	13
Dominican Republic	0	7	4
Paraguay	0	0	15
TOTAL	111	83	194

For purposes of comparison, it is important to look at the statistics for other WTO Members which have also had a high rate of participation in the DSM. As can be seen from Table 2, the United States is the country that has had the most recourse to the DSM, followed by the European Union. Compared with other developing countries, we see that the Latin American countries have been fairly active in their use of the DSM. India and China, for example, the two other main emerging countries together with Brazil, have used the mechanism 19 and eight times, respectively. Another noteworthy point is the high level of participation by Latin American countries as third parties in disputes. As will be seen below, this is a very significant indicator, since third party participation is one of the best ways of gaining familiarity with and expertise in WTO dispute proceedings.

Table 2: 14 Main users of the DSM

Member	Complainant	Respondent	Third party
United States	97	113	86
European Union	84	70	104
Canada	33	16	71
Brazil	25	14	64
Mexico	21	14	55
India	19	20	67
Argentina	15	17	31
Korea	15	14	58

Japan	14	15	106
Thailand	13	3	48
Chile	10	13	26
China	8	21	78
Guatemala	8	2	20
Australia	7	10	59

However, these absolute figures do not tell us much about Members' true level of participation relative to their share of world trade. It is normally to be expected that the more trade a Member conducts, the greater the likelihood of its exports encountering barriers that must be removed by use of the dispute settlement mechanism. In an attempt to answer the question as to whether the countries of the region are making sufficient use of the DSM in accordance with its importance to world trade, I have carried out a series of descriptive statistical studies which have yielded some interesting results. First of all, I should like to make it clear that the analysis which follows does not seek to explain why a country has used the DSM to a greater or lesser degree. Secondly, I am aware that a descriptive analysis based on such restricted variables is of limited value compared with the more complex econometric models of the kind used by Joseph François, Henrik Horn and Niklas Kaunitz in their study entitled "Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System".[5] As I have explained, the methodology used in relatively simple. Table 3 three sets out my weighted DSM utilization index, based on each individual country's share of world goods and services exports. To establish the index, I first calculated the percentage share of each country in the total number of requests for consultations, from the inception of the WTO to the present day. Next, using statistics from the WTO database on trade volumes, I calculated each country's average share of total exports by Members for the period 1995-2009.[6] I then divided the first of these two percentage figures by the second in order to obtain a weighted rate of participation in the DSM. Taking the unit (or one) as the baseline point of equilibrium, any result above one means that the country is over-represented in the number of WTO disputes, given its level of trade. On the other hand, any index below one means that the country has not initiated as many disputes as might be expected in the light of its share of global exports.

Table 3: Participation of Latin American countries in the DSM weighted by share of total exports

Member	Consultations requested	Percentage of disputes per year	Average share of exports	Participation rate
Honduras	7	1.55	0.04	37.45
Guatemala	8	1.77	0.05	34.78
Nicaragua	1	0.22	0.01	15.38
Costa Rica	5	1.10	0.09	12.76
Panama	5	1.10	0.10	10.96
Argentina	15	3.31	0.41	8.02
Ecuador	3	0.66	0.09	7.59
Chile	10	2.21	0.35	6.28
Brazil	25	5.52	0.97	5.71
El Salvador	1	0.22	0.04	5.57
Colombia	5	1.10	0.20	5.42

[5] Joseph François, Henrik Horn and Niklas Kaunitz (2008) "Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System", ICTSD Issue Paper No. 6.

[6] I used statistics up to 2009 because those for 2010 are not yet available. I acknowledge that there is a lack of congruence between the periods covered by the statistics on participation in the DSM and those on share of world trade. However, I do not think that this handicaps the analysis, since any variation in the rates obtaining from one year to the next is small and what concerns me above all is to observe the average overall share of world trade attributable to a Member over an extended period of time.

Peru	3	0.66	0.14	4.77
Uruguay	1	0.22	0.05	4.58
Mexico	21	4.64	1.91	2.43
Venezuela	1	0.22	0.39	0.56

The results obtained from the analysis are highly interesting. In the first place, it is found that Honduras and Guatemala have a rate of participation in the DSM that is much higher than their share of total Members' exports. In horse racing jargon, it could be said that these countries have moved up in class. The only country in the region that has clearly lagged behind in its use of the DSM, given its level of exports, is Venezuela, despite the fact that - to use another horse racing metaphor - it came out of the starting gate strongly, having been the first country to succeed in establishing a panel under the WTO dispute settlement system. Mexico is another interesting case: despite being the main exporter in the region and despite having requested a total of 21 consultations, its level of participation in the DSM is fairly low. For purposes of comparison, I have included in Appendix B a table showing all the Members that have requested consultations. It should be noted that the data on participation in disputes do not exactly coincide with those given in Table 3, since I deemed it necessary in the Appendix B Table to adjust the weighting of participation in disputes on the basis of the length of WTO membership. I did not consider this correction to be necessary in the case of the Latin American countries, since all of them are either original Members or acceded to the WTO at a date very close to its establishment.

One of the limitations of the methodology applied before is that it does not yield results for those countries which have not initiated disputes up to the present time. Four countries in the region are in this position, namely, Bolivia, Cuba, Paraguay and the Dominican Republic. For these countries, I carried out a hypothetical exercise, arbitrarily assigning a dispute to each of them in order to apply the methodology described above. The result of this exercise enables me to ascertain whether these four countries, which have never initiated a dispute, might have been expected, given their level of exports, to initiate at least one dispute. The results are set forth in Table 4.

Table 4: Hypothetical exercise for countries that have not requested consultations

Member	Consultations requested (hypothetical)	Percentage of disputes per year	Average share of exports	Rate of participation
Bolivia	1	0.22	0.02	9.06
Paraguay	1	0.22	0.05	4.89
Cuba	1	0.22	0.06	3.53
Dominican Republic	1	0.22	0.09	2.36

The results show that, given their level of exports, it is only natural that Bolivia, Cuba, Paraguay and the Dominican Republic have not initiated any WTO dispute settlement proceedings. It should, however, be pointed out that there is a considerable difference between the position of the Dominican Republic and that of Bolivia which has a much smaller share of world trade.

The analysis conducted in Tables 3 and 4 leads to the conclusion that, at least as far as Latin America is concerned, it is not true to say that the developing countries do not participate sufficiently in the dispute settlement mechanism. Let us now look at the other side of the coin, with the Latin American countries as respondents in the DSM. To that end, we shall use a methodology similar to the one applied earlier, but in this case the comparator will be WTO Members' share of imports of goods and services. It was shown in Table 1 that the countries of the region that have had the most proceedings brought against them under the DSM are Argentina, with 17 requests for consultations, followed by Brazil and Mexico, with 14 requests for consultations each. However, if

the number of requests for consultations is weighted by the level of imports, we find that the overall situation changes somewhat, as is shown in Table 5.

Table 5: Participation of Latin American countries as respondents in the DSM

Member	Requests for consultations	Percentage of disputes per year	Average share of imports	Rate of participation
Nicaragua	2	0.47	0.03	17.36
Dominican Republic	7	1.65	0.11	14.83
Argentina	17	4.00	0.37	10.76
Chile	13	3.06	0.31	9.84
Ecuador	3	0.71	0.09	7.70
Peru	4	0.94	0.14	6.60
Guatemala	2	0.47	0.08	5.94
Uruguay	1	0.24	0.05	4.76
Brazil	14	3.29	0.95	3.46
Colombia	3	0.71	0.23	3.13
Panama	1	0.24	0.10	2.26
Venezuela	2	0.47	0.27	1.74
Mexico	14	3.29	2.00	1.64

We see in this case that, although only two disputes have been initiated against Nicaragua, it is the country that has been subject to the most challenges in the region, relative to its level of imports. The Dominican Republic has likewise been subject to a high level of requests for consultations compared with its level of imports.[7] Venezuela and Mexico again close out the table, having been subject to a relatively low level of requests for consultations compared with their level of imports. However, since all the indices for the countries in the region are above the unit rate, it may be concluded that all countries have received more requests for consultations than might be expected in the light of their share of world imports.

The six countries of the region that have received no requests for consultations are Costa Rica, Cuba, El Salvador, Paraguay, Bolivia and Honduras. For these countries I propose a similar exercise to the one carried out for countries that have requested no consultations in the WTO. I have assigned a request for consultations to each of these countries for purposes of comparison with their share of world imports. In this case, the exercise would provide an answer to the question as to whether it is normal for these countries not to have received a request for consultations, given their level of imports.

[7] It is important to clarify that, in the case of the Dominican Republic, four of the consultations requested related to a single safeguard measure imposed on polypropylene bags and tubular fabric. Four countries in the region, El Salvador, Honduras, Guatemala and Costa Rica, requested consultations with the Dominican Republic. The matter is currently being considered by a single panel dealing with the four disputes.

Table 6: Hypothetical exercise for countries that have received no requests for consultations

Member	Requests for consultations	Percentage of disputes per year	Average share of imports	Rate of participation
Bolivia	1	0.24	0.03	8.62
Paraguay	1	0.24	0.05	4.75
Honduras	1	0.24	0.05	4.35
El Salvador	1	0.24	0.07	3.61
Cuba	1	0.24	0.07	3.49
Costa Rica	1	0.24	0.09	2.59

As all the results for rates of participation are above the unit level, it may be concluded that, in the light of the level of imports, it is normal for the countries in Table 6 not to have received requests for consultations. It should, however, be pointed out that those countries that are closer to unit could more logically be expected to have received requests for consultations in the WTO, given their greater share of world imports.

Following a statistical analysis, it can be concluded that the participation of Latin American countries in the DSM, as both complainants and respondents, is in many cases above what might be expected to be their share of world trade. This suggests that the Latin American countries have largely succeeded in overcoming what are generally perceived as obstacles to developing country participation in the DSM. These obstacles are analysed in the next section of this study.

C. ANALYSIS OF THE OBSTACLES TO DEVELOPING COUNTRY PARTICIPATION IN THE DSM

This section has three objectives: first, to identify from the existing literature the real or perceived obstacles to developing country participation in the DSM; second, to examine whether, with particular emphasis on the situation of the Latin American countries, those obstacles are still restricting countries' capacity to benefit from the DSM; third, to ascertain what kind of proposals have been put forward in the context of the Dispute Settlement Understanding (DSU) review negotiations to help developing countries overcome these obstacles. On the third point, it should be noted that, although the DSU review negotiations do not form part of the Doha Round single undertaking, it is in fact difficult to conceive of a conclusion to the negotiations in that area unless a partial result at least is achieved in the negotiating topics of the Round.

Regarding the first objective, the article by Hunter Nottage entitled "Developing Countries in the WTO Dispute Settlement System" is a particularly useful guide to the real or perceived obstacles.[8] In that article, and in other relevant literature, six obstacles are identified: lack of expertise in WTO law; identification and communication of trade barriers to the government; fear of political or economic pressure on the part of respondent Members; duration of proceedings; commitments covering part of developing country trade that are not enforceable in the WTO; and inability to enforce DSB recommendations.

1. Lack of expertise or capacity to litigate in the WTO

The first obstacle concerns the lack of expertise or capacity for WTO litigation. Owing to the complexity of the procedure and the possibility of it having to encompass various stages, initiating a WTO dispute is a costly exercise in terms of both time and money. For the United States and the European Union, given the number of cases in which they are involved as complainants and respondents, the development of domestic legal expertise to engage in WTO litigation is a worthwhile investment. Even so, both countries frequently recruit external advisors to support them in the most

[8] Hunter Nottage (2009) "Developing Countries in the WTO Dispute Settlement System", GEG Working Paper 2009/47.

complex disputes. The development of such domestic expertise would probably not be very profitable for developing countries, including those most active in the DSM, given the great difficulty of predicting the number of cases that may arise in a specific period.

In order to remedy this lack of domestic expertise, most developing countries find themselves obliged to hire external counsel. Most of the law firms with experience of WTO litigation are international firms which follow their customary practise of charging by the hour for their services. This practice also creates a high level of uncertainty about the amount to be paid at the end of the process. Various commentators have estimated that the costs of initiating a dispute of medium complexity in the WTO, involving a sequence of consultations and panel and appeal proceedings, are in the region of US$500,000.[9] These are fairly large amounts for the limited budgets of the countries in the region. Although the industry or producers concerned may help to cover these costs to a greater or lesser extent, it is clear that the industries of the region do not handle the same revenue volumes as industries in developed countries. In some cases, it is practically impossible to envisage how certain sectors made up of mostly small and medium-sized enterprises could achieve the level of organization necessary to help cover the cost of a WTO dispute.

Two instruments are currently available for the purpose of somewhat alleviating this lack of capacity on the part of developing countries. The first is the rule under Article 27.2 of the DSU which provides that the WTO Secretariat may make experts available to developing countries to provide "legal advice and assistance in respect of dispute settlement", however, the fact that this same rule requires that the Secretariat expert should maintain his impartiality considerably limits the scope of the assistance which may be provided. This means that the assistance to be provided will not be very effective in dealing with the problem of lack of capacity.

Secondly, there is the Advisory Centre on WTO Law (ACWL) which was established in 2001 to provide legal support to developing countries in their WTO activities, mainly, but not limited to, dispute settlement. The ACWL provides dispute settlement services at rates much lower than those of private law firms, and it also applies a cost ceiling. To qualify for these services, developing countries must be members of the ACWL and pay a single contribution calculated on the basis of their share of world trade. ACWL services are invoiced by the hour, at a rate which varies in accordance with the member's category. However, as was mentioned earlier, the total amount of the service is limited to CHF 276,696 for category A members, CHF 207,522 for category B and CHF 138,348 for category C. The ACWL currently has 14 Latin American members: Colombia, Uruguay and Venezuela in category B; and Bolivia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Peru in category C. In cases where a conflict of interest prevents the ACWL from providing its services, for example when both the respondent and the complainant are members of the ACWL, the dispute may be referred to a private law firm which will apply the same rates for its services as the ACWL. In regional terms, Latin America has the most members on the ACWL, and it is perhaps no coincidence that it is one of the most active regions in the DSU framework.

In the context of the DSU review negotiations, some proposals have been made for addressing the lack of resources as a barrier to DSM access. A number of developing countries have proposed the creation of a Dispute Settlement Fund for developing countries. It has also been proposed to introduce a system of payment of litigation costs for developing countries that prevail in a dispute.[10] The proponents (supporters) of these two proposals have recently pooled their efforts and suggest that the payment of litigation costs should only be agreed in cases where access to the Dispute Settlement Fund is not possible. The only Latin American country included in the groups making these

[9] See Nottage, in the article cited above, and also H. Nordström and G. Shaffer (2007), "Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure", ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2.

[10] Report by the Chairman of the Special Session of the DSB to the Trade Negotiations Committee (TNC), 21 April 2011, TN/D/25, page A-40.

proposals[11] is Cuba. It would appear that the other Latin American countries are on the whole satisfied with the ACWL as a means of addressing DSU access. It is true that the relationship between the proposed Dispute Settlement Fund and the ACWL is one of the topics identified as needing clarification in the discussions on this proposal.

Another negotiating topic that can be seen as serving to increase dispute settlement capacity in developing countries concerns the improvement of third party rights. In this connection, it is considered that an increase in third party participation at all stages of the DSM strengthens the possibility of using that means to acquire experience and legal expertise in the WTO. It is not surprising that three Latin American countries, Argentina, Brazil and Mexico, form part of the original group of proponents of improved third party rights. As was pointed out earlier, the Latin American countries have participated actively as third parties in the DSU.

In conclusion, the lack of WTO litigation capacity has been addressed in various ways and, in the case of the Latin American countries at least, would appear to have been overcome to different degrees. It is, however, perceived by many developing countries as a major obstacle to DSM access, as is shown by a number of recent studies based on surveys.[12]

2. Identification and communication of trade barriers to the government

A frequently heard refrain in the WTO runs: "*It is not governments that engage in trade, but the private sector*". There is no denying the truth of this statement, as no one is better placed to identify the existence of a trade barrier than the aggrieved exporter. However, only governments can activate the DSM in the WTO. The problem, then, concerns how to ensure that the government is made aware of the measure constituting a trade barrier and is able to assess whether it is in violation of WTO agreements. In the developed countries, there are formal mechanisms enabling exporters to draw their authorities' attention to the existence of another country's measure hindering access to its market. The authorities will then carry out an investigation to determine whether the measure in question is in violation of the commitments undertaken by the country imposing the measure, and whether it has had an adverse impact on trade. The two classic examples of this type of mechanism are: Section 301 of the Trade Act of 1974 in the United States and the European Union's Trade Barriers Regulation.

The Latin American countries do not possess this type of formal mechanism. That having been said, it is important to comment on the experience of Brazil which has invested considerable resources and restructured its institutions to meet the challenges of full participation in the WTO. Brazil's mechanism for enabling the private sector to inform the Government of measures obstructing trade is an informal but nonetheless effective one. The mechanism is based on the interaction between three bodies: the Chamber of Foreign Trade (CAMEX), the *Conselho Consultivo do Sector Privado* (Private Sector Consultative Council) (Conex) and the *Coordenação-Geral de Contenciosos* (General Dispute Settlement Unit) (CGC) in the Ministry of Foreign Affairs (MRE). CAMEX is an inter-ministerial advisory body which coordinates and formulates Brazil's foreign trade policy. The interface between CAMEX and the private sector is conducted through the 20 representatives of Conex participating in its work. Any exporters faced with a trade barrier may draw it to the attention of the CGC. If the CGC considers that a claim before the WTO could be successful, the MRE may submit the matter to CAMEX. Once the positions of the various public and private actors have been heard within CAMEX, it will decide whether the possibly WTO-inconsistent measures are to be referred to the CGC which will initiate proceedings in the WTO.[13] If the CGC brings the case before

[11] In the case of the Dispute Settlement Fund the proponent is the African Group, and in the case of the payment of litigation costs, the proponents are India, Pakistan, Cuba, Egypt and Malaysia.

[12] See Marc L. Busch, Eric Reinhardt and Gregory Shaffer (2009), "Does legal capacity matter? A survey of WTO Members", World Trade Review, 8:4, pages 559-577.

[13] Welber Barral (2007), "*Solução de Controvérsias na Organização Mundial do Comércio"*, Brasilia, pp. 40-41.

the WTO, the private sector remains fully involved and provides effective support to the Government in developing legal arguments and providing factual evidence.[14]

Given that solutions to this problem should for the most part be sought within the domestic regulatory framework, there are currently no proposals for addressing it directly in the WTO negotiations. It should also be pointed out that the ACWL has helped to relieve the problem somewhat through its method of operation. For ACWL members - as for all LDC members or observers in the WTO - legal opinions outside a dispute settlement procedure are issued free of charge. Thus, the most important requirement for the private sector of an ACWL member country is to identify the trade barrier and communicate it to the government through its mission in Geneva. The Geneva Mission, for its part, will then request the ACWL to issue a legal opinion on the position of the measure in the WTO legal framework and the appropriateness of initiating dispute settlement proceedings. At the same time, one should not disregard the participation of civil society in the identification of trade barriers and the development of arguments which may lead to WTO dispute settlement proceedings. Various NGOs such as Oxfam, the International Centre for Trade and Sustainable Development (ICTSD), Ideas Centre and regional organizations have developed the capacity to analyse situations in the light of the rules contained in the agreements and to advise developing countries on WTO activities, including the DSM.

The identification and communication of trade barriers to the government continues to be a genuine problem for most countries in the region. However, informal institutional mechanisms of the kind in place in Brazil can do much to ease its negative effects. Brazil's experience shows the importance of opening channels of communication between the private sector and governments in order to promote full participation in the multilateral trading system and in the DSM in particular.

3. Fear of political or economic pressures on the part of respondent Members

Another obstacle frequently cited by developing countries is the fear of political and economic reprisals on the part of respondent countries, especially if they have a higher level of development and are major trading partners or aid donors. This fear of reprisals appears to have been overcome some time ago in the countries of the region. Indeed, since they first started instituting proceedings, the Latin American countries have shown little reticence in challenging the large countries. For example, the first cases involving the region included the dispute between Venezuela and the United States over gasoline, Costa Rica against the United States on underwear; and Ecuador, Guatemala, Honduras and Mexico against the European Union in the bananas case. It is true that the countries of the region are much less dependent on aid provided by the developed countries than are the African countries. However, it is important in any case to note that the attitude of countries involved in WTO proceedings has always been fairly mature and requests for consultations have never been considered a hostile act warranting any type of reprisals.

It is again interesting to analyse the actions of Brazil which has used the DSM not only tactically for the defence of specific exports, but also strategically to support its negotiating positions. One example of this is the famous cotton case against United States agricultural subsidies. It is no secret that the original subject of the dispute was soya, not cotton, soya being a product in which Brazil has an enormous export interest, while its interest in cotton is not so strong. However, Brazil's main objective was not limited to defending its cotton or soya exports. Rather, it was concerned mainly with attacking US agricultural subsidies which are a central issue in the Doha Round negotiations. At the end of the 1990s, following the Asian financial crisis, the prices of many commodities plummeted. This forced a number of countries to adopt producer support measures.

[14] For a more thorough discussion on the operation of foreign trade institutions in Brazil see: Daniel Arbix (2009) *"Contenciosos Brasileiros na Organização Mundial do Comércio* (OMC): *Pauta Comercial, Política e Instituições, Contexto Internacional"*, Vol. 30, No. 3, set/dez 2008; and Gregory Shaffer, Michelle Ratton and Babara Rosenberg (2010), "Winning at the WTO: the development of a trade policy community within Brazil", in "Dispute Settlement at the WTO", Cambridge University Press.

The United States adopted the 2002 Farm Act which provided, *inter alia*, for the payment of emergency subsidies, triggered when prices fell below a certain level. These were known as "counter-cyclical payments". These subsidies, which exceeded WTO bound levels, had a negative impact on agricultural prices in the world market, including soya and cotton prices. However, at the time when Brazil was preparing to raise the subject in the WTO, the price of soya began to rise, causing a decline in the subsidies paid to US producers. As a result, Brazil focused its attention on another product, cotton, despite its not being as important an export product as soya. In seeking to win the cotton case, Brazil substantially increased its political influence in the WTO negotiations, so much so that it is today one of the main actors at the WTO, together with the United States, the European Union, India, and China.

Judging by the experience of the Latin American countries in the DSM, the possibility of economic or political retaliation would appear to be a perceived rather than a real obstacle. In any event, it is difficult to assess in the absence of information on the content of bilateral consultations, meetings and contacts, which remain confidential.

4. Duration of the proceedings

The length of proceedings is one of those topics on which developing countries tend to be ambivalent. On the one hand, several developing countries complain that the proceedings provided for in the DSU are very lengthy and do not offer an expeditious solution to the problems encountered by exporters. At the same time, many developing countries argue that their lack of litigation capacity necessarily lengthens each stage of the process. Article 3.3 of the DSU recognises the systemic importance of the prompt and effective settlement of a dispute. The time periods provided for in the DSU are fairly short compared with other international and domestic judicial procedures. If the different time frames provided for in the DSU are added together, it will be seen that a dispute settlement procedure should normally cover a period of about 15 months from the request for consultations to the report of the Appellate Body. To this should be added ten months, which is the average duration of the "reasonable period of time" for the implementation of recommendations.[15] In other words, in order to achieve satisfaction, i.e. a remedy against a WTO-inconsistent measure, a complainant has to wait for at least a little more than two years, not counting the possibility of compliance proceedings under Article 21.5 of the DSU, which could add a couple of years more.

The average length of proceedings up to now has exceeded the periods provided for in the DSU, especially during the panel stage. In my experience, there are two situations that contribute to the lengthening of the periods provided for in the DSU. First, there are situations where, especially in legally and politically complex cases, the parties suspend the proceedings and seek to achieve a negotiated settlement, which, as we noted earlier, is always preferable. The second situation is one where either the panel or one or more of the parties work in different official languages, requiring more time for the translation of documents. The second situation is fairly common in cases involving Latin American countries, given their preference for working in Spanish. In fact there have been cases where, although both parties are Spanish-speaking, the responding party has insisted on including English-speaking experts on the panel as a means of lengthening the proceedings by adding time for translation.

In the DSU review negotiations, a number of proposals have been made to reduce the length of proceedings. First of all, it is proposed to reduce to 30 days, instead of the current 60 days, the minimum consultation period before a panel can be requested, provided that the 60-day period can be maintained when the respondent is a developing country.[16] It remains, however, to be determined whether the 60-day period is to be maintained only when the complainant is a developed country or also when the complainant is a developing country.

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[15] See http://www.worldtradelaw.net/dsc/database/implementaverage.asp.

[16] Report by the Chairman of the Special Session of the Dispute Settlement Body to the Trade Negotiations Committee (TNC), 21 April 2011, TN/DS/25, page A-39.

Another proposal for shortening time frames at different stages of the dispute settlement procedure concerns the establishment of the panel. Currently, as was explained above, the establishment of a panel usually requires two meetings of the DSB, since the responding party may refuse its establishment at the first meeting at which it is requested. The proposal under discussion in the negotiations is to establish the panel at the first DSB meeting at which the request is considered. As in the previous case, consideration is being given to the possibility of offering flexibilities if the respondent is a developing country.[17]

Regarding the time frames for the presentation of parties' submissions, several developing countries have asked to be given additional time at this stage.[18] It has also been proposed that, when determining the reasonable period of time for implementation under Article 21.3(c) of the DSU, the arbitrators should take into account the particular situation of developing countries.[19]

The problem of the time required to obtain satisfaction under WTO procedures is compounded by the fact that the remedies provided for are only prospective. This means that the injury that may be caused to the exporter continues during the proceedings and it is not possible, even if the case is won, for the DSB to order the payment of indemnification or compensation for the injury caused. This is an area in which, despite the existence of consensus in academic circles on the need for improvement, no proposals have been made to tackle the problem head-on.

How big an obstacle the length of DSM proceedings will be depends on the prism through which it is viewed: for the complainant the proceedings are very lengthy to allow for a timely and satisfactory outcome; and for the respondent they are too short to allow for the preparation of a good defence. That is why it is difficult to reach a conclusion as to whether it is a real or a perceived problem. In any event, the Latin American countries have again found creative solutions that contribute to easing the problem. One example is the use by Colombia of the good offices of the Director-General in the bananas case.

The understandings signed between the European Union and Ecuador[20], and between the European Union and the United States[21], together with the waiver from Article I of the GATT agreed in Doha[22], were meant to end the long-standing dispute on bananas by 1 January 2006. However, the new banana import regime adopted by the European Union in 2005 - 2006 was deemed by Colombia to be still inconsistent with WTO rules. Consequently, in March 2007 Colombia again requested consultations with the European Union.[23,24] The major new development in this case was that, in case the consultations proved unsuccessful, Colombia invoked Article 3.12 of the DSU and a decision of 5 April 1966[25], which provide for the use of the good offices of the Director-General. The reason given for relying on this alternative dispute settlement procedure is that it could result in the more rapid settlement of a matter that had been the subject of long-running proceedings at the WTO.

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[17] Ibid.

[18] Ibid.

[19] Ibid, page A-41.

[20] Contained in the document entitled "European Communities - Regime for the Importation, Sale and Distribution of Bananas, Understanding on Bananas between Ecuador and the European Communities", WT/DS27/60, G/C/W/274.

[21] Contained in the document entitled "European Communities - Regime for the Importation, Sale and Distribution of Bananas, Communication from the United States". WT/DS27/59, G/C/W/270.

[22] Contained in the document entitled "European Communities - The ACP-EC Partnership Agreement, Decision of 14 November 2001," WT/MIN(01)/15.

[23] European Communities - Regime for the Importation of Bananas - Request for Consultations by Colombia, WT/DS361/1, G/L/818, 26 March 2007.

[24] Shortly afterwards, Panama also requested consultations with the European Union on the banana import regime, on the basis of arguments similar to those used by Colombia. European Communities - Regime for the Importation of Bananas, Request for Consultations by Panama, WT/DS364/1, G/L/822, 27 June 2007.

[25] BISD 14S/18-20.

In fact, when the consultations failed, the matter was referred to the Director-General on 2 November 2007.[26] In their communications with the Director-General the parties to the dispute expressed their strong preference for a negotiated settlement rather than judicial proceedings. The good offices of the Director-General were conducted in the form of a number of formal and informal meetings between the parties and with the Director-General. On a parallel track, the Director General also held meetings in which third parties were involved, including other MFN banana exporters, banana producers from the ACP countries and other producers and importers. In July 2009, the Director-General circulated a draft agreement in an effort to facilitate a settlement. On 15 December 2009, the parties finally achieved a settlement which resulted in two agreements between the European Union and the Latin American banana exporters, and between the European Union and the United States. The agreement with the Latin American countries, known as the "Geneva Agreement on Trade in Bananas,"[27] was communicated to the General Council, which took note of it at its meeting on 17 and 18 December 2009.

The entire process of good offices lasted a little longer than two years, that is to say, a period similar to what would have been taken by a panel together with a related appeal procedure. However, the achievement of a negotiated settlement to a dispute obviates the need for the entire process of compliance with DSB recommendations, making it much more efficient.

5. Commitments covering part of developing country trade are not enforceable in the WTO

One of the topics covered by Hunter Nottage in his article, which I consider particularly pertinent, concerns the fact that a high proportion of developing country trade with developed countries is conducted under preferential rules that are not covered by the WTO DSM.[28] Likewise, a good deal of intra-regional trade in Latin America, and increasingly with the United States, is conducted under regional agreements which have their own dispute settlement mechanisms. Only the DSM permits enforcement of obligations undertaken in the WTO framework, that is, those contained in the WTO agreements and in the schedules of concessions on goods and services of each Member. Unilateral preferences, whether they are covered by waivers or by the WTO Enabling Clause, are not enforceable commitments under the DSM.

Various countries in the region benefit from preferential access to developed country markets under the Generalized System of Preferences (GSP). Some countries are also eligible for benefits under the Andean Trade Preferences Act (ATPA). That is the situation regarding unilateral preferences. In addition, there are a number of free trade agreements with the United States and the European Union, under which the countries of the region are bound by commitments that are not enforceable through the DSM. Examples include the North American Free Trade Agreement (NAFTA), the Dominican Republic - Central America Free Trade Agreement (DR-CAFTA), bilateral free trade agreements between the United States, Chile and Peru (and possibly Colombia in the near future), and the European Union agreements with CARIFORUM, Chile and Mexico. This means that there is a fairly large flow of trade under these preferential arrangements.

A developed country may decide to exclude certain products from its GSP list, to raise the preferential tariff, to impose quantitative restrictions on preferential imports or to apply stricter rules of origin. Although these measures could seriously affect the trade of developing countries, the latter are not entitled to use the DSM to bring about changes in the measure that would guarantee the continuity of market access. This situation obviously constitutes an important constraint on the use that can be made of the DSM by developing countries.

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[26] On 14 December 2007 in the case of Panama.
[27] WT/L/784.
[28] Nottage (2009), op. cit.

One possible explanation for the relatively low participation of Mexico in the WTO mechanism[29] is the fact that a large proportion of its exports are directed to the United States.[30] Since NAFTA has its own dispute settlement mechanisms, which even include WTO-specific topics, such as anti-dumping, it is possible for most of the disputes that could be generated between Mexico and the United States to be handled within NAFTA and not reach the WTO.[31] The existence of effective alternative forums for the settlement of disputes with major trading partners may relieve some of the pressure on the WTO DSM.

6. Inability to enforce DSB recommendations

One of the obstacles that has received the most attention in academic circles and discussions within the WTO has been the alleged inability of developing countries to enforce compliance with DSB recommendations. As was explained earlier, the main tool provided by the DSU for a complaining Member to ensure that the losing respondent complies with the recommendations contained in the panel report and brings its measure into conformity is through the suspension of equivalent measures, better known as retaliation or reprisals. However, when there is a substantial difference in size between the economy of the developing country and that of the losing country, the effectiveness of retaliation as an instrument of pressure to enforce compliance is questionable.

In his article, Hunter Nottage provides a good summary of the theoretical shortcomings of the WTO retaliation rules as a means to enforce compliance when there is an asymmetry in the market size of the developing country and the non-complying Member. First, sanctions imposed by a developing country with a small domestic market are unlikely to impose sufficient economic or political losses within larger non-complying Members to generate the requisite pressure to induce compliance. Second, the suspension of concessions, which in many cases means the raising of trade barriers such as tariffs, may be more detrimental to the Member that raises them than to the Member against which they are raised. In his view, however, these theoretical shortcomings do not undermine the value of the dispute settlement system for developing countries as practice demonstrates high rates of compliance even when there the complainant is a small or developing country.[32]

Indeed, the record of compliance with DSB recommendations under the WTO DSM is fairly good. Since the establishment of the WTO, there have been only 19 arbitral decisions under Article 22.6 of the DSU establishing the level of suspension of concessions, and 17 authorizations by the DSB for measures of retaliation.[33] The countries of the region, including the English-speaking Caribbean, have been involved in six of the nine cases - counted in terms of the number of WTO-inconsistent measures - in which retaliation has been authorized. It is worth taking a more detailed look at three of these cases, which have received fairly wide press coverage. The first case in which a Latin American country was placed in the situation of requesting authorization for the imposition of retaliatory measures was the dispute between Ecuador and the European Union concerning bananas. Antigua and Barbuda was also placed in this situation in the Internet gambling case against the United States. Finally, Brazil also sought to apply retaliatory measures in the cotton case against the United States. What these three cases have in common is not so much that they pitted developing against developed countries, but that all three concerned trade measures or regimes of high

[29] See Table 3 above.

[30] The magazine *The Economist* reports that in 2000 89 per cent of Mexico's exports went to the United States, although this figure may have dropped to 78 per cent this year. *The Economist*, Making the desert bloom, 27 August-2 September 2011.

[31] Even so, 10 of the 21 consultations requested by Mexico under the WTO DSM were against the United States, this shows that on some issues the WTO's DSM may offer some advantages over NAFTA's.

[32] Nottage (2009), op. cit.

[33] It should be pointed out that these 19 cases relate to only nine separate measures. For example, the "Byrd Amendment" of the United States was the subject of eight authorizations for retaliation, one for each of the complaining countries. This gives an actual total of ten cases in which such measures were authorized.

political sensitivity which are supported by a large - or at least politically influential - proportion of stakeholders in the countries applying them.

In my view, therefore, the lack of compliance with DSB recommendations is a reflection not so much of the parties involved in the dispute but of the nature of the dispute itself. I would argue that, in the three above-mentioned cases, the effectiveness of retaliation did not influence the decision of the losing Member as to whether or not to comply with the recommendations. To substantiate this point, I propose analysing the eventual outcome of these disputes. In the banana case involving Ecuador, after many years of negotiation an agreement was reached between the Latin American producers and the European Union. The agreement became possible only after the European Union made substantial progress in the negotiations with the ACP countries on the signature of Economic Partnership Agreements (EPAs). The EPAs constitute a radical change in trade relations between the European countries and their former colonies, transforming previously unilateral preferences into reciprocal preferences. In the case of Antigua and Barbuda, the United States ultimately used the flexibilities provided in the General Agreement on Trade in Services (GATS) to renegotiate and modify its commitments. At no time did the United States envisage changing its policy of not authorizing its citizens to engage in Internet gambling, this being a highly sensitive topic which also has a bearing on the relationship between the states and the Federal Government, as set forth in the Constitution. I strongly suspect that in the Internet gambling case the outcome of the dispute would have been the same even if you had a coalition of the largest traders in the WTO bring the case against the United States. The high political cost of changing US laws and regulations on gambling outweighed the relatively low cost of renegotiating a commitment under the GATS.

The cotton case involving Brazil also deserves more detailed consideration. In August 2009, arbitral awards were issued authorizing Brazil to take retaliatory measures calculated on the basis of a formula yielding an annual amount that varies according to the amount of the subsidies granted by the United States. The arbitrators also agreed that Brazil could make use of "cross-retaliation", that is, suspend concessions under other agreements, including in particular the GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), when the annual amount authorized for retaliatory measures exceeded a certain level.

Following a round of consultations and internal hearings, in March 2010 Brazil announced its planned package of retaliatory measures, including tariff increases on 102 imports from the United States, which would enter into force within 30 days. Brazil also announced plans to suspend the protection of United States intellectual property rights. At the beginning of April, Brazil notified the WTO that it would delay the entry into force of the measures because it had entered into negotiations with the United States to resolve the dispute.

A short time later, the parties adopted a Memorandum of Understanding (MOU). In exchange for Brazil's undertaking not to impose retaliatory measures, the United States agreed: (i) to make certain (unspecified) changes in the operation of its Export Credit Guarantee Programme; and (ii) to establish an annual fund of US$147 million to finance technical assistance and build capacity in Brazil's cotton sector, pending approval by the United States of its next Farm Bill or the achievement of a mutually agreed solution to the dispute with Brazil. The MOU also provides that *the Fund may also be used for "activities related to international cooperation in the cotton sector in sub-Saharan Africa, in MERCOSUR member and associate member countries, in Haiti, or in any other developing country as the parties may agree"*. The United States also undertakes to reassess certain sanitary measures affecting imports of meat from Brazil. A Framework Agreement containing certain parameters for discussion on the programmes of domestic support and export financing was also notified to the WTO in August 2010. It includes a clarification to the effect that it does not constitute a mutually agreed settlement of the dispute.

In this case, it is noted that the retaliatory measures had a much more definite effect mainly because of the threat of measures that would authorize the Brazilian pharmaceutical industry to

produce copies of drugs patented by United States firms without having to pay royalties. Even so, however, compliance with the Panel's recommendations was not secured; if anything, what was achieved was a solution not provided for in the DSU. This experience, together with the high number of cases in which there has been compliance with panel recommendations, shows: firstly, that in most cases Members tend to comply with DSB recommendations without considering the possibility of suffering retaliation; and secondly, that there is a minority of cases in which the political cost of compliance is so high that the country prefers to endure retaliation or to find an alternative arrangement.

As was pointed out earlier, the issue of compliance with recommendations has received a good deal of attention in the context of the negotiations. There are currently two proposals designed primarily to improve the position of developing countries in cases where recourse to retaliation is necessary. The first provides for a collective requirement of compliance with recommendations in cases where the respondents are developing countries. The second provides that, in cases where the complainant is a developing country, it may automatically have recourse to retaliation without having to give specific justification as to why same-sector or same-agreement retaliation is not practicable or effective[34,35] Another proposal under discussion concerns the possibility of obtaining compensation and suspension of concessions or other obligations in order to cover nullification or impairment of benefits suffered during the reasonable period of time.[36] A further proposal has recently been circulated informally by Cuba, which provides for administrative measures against those Members that have not complied with DSB recommendations, of a nature similar to the measures taken against Members that do not pay their contributions to the WTO budget. Such measures could even extend to the suspension of Members' decision-making rights in the DSB.

In conclusion, the impossibility of enforcing compliance with WTO recommendations is a largely theoretical obstacle, as has been demonstrated in practice by the high level of compliance manifested up to now in the DSM. Nevertheless, the theoretical reasons for this obstacle have a solid basis and there is only a small step between theory and practice in this case. For this reason, it is necessary to remain vigilant and to continue the work undertaken in the negotiations with a view to limiting the theoretical reasons that could give rise to this obstacle.[37]

D. CONCLUSION

As is clear from the statistical analysis, the rate of participation in the DSM by Latin American countries has been higher than that of other developing countries and higher, too, than their relative weight in world trade. The countries of the region have also found ways to overcome the commonly identified obstacles and impediments to developing countries' participation in the DSM. Brazil in particular has successfully used dispute settlement to support its negotiating positions. This nevertheless required a major effort in terms of training and institutional reform to meet these challenges. In order to maximize the benefits of participation in the DSM, it is necessary to develop internal mechanisms that enable the private sector to inform the government of the trade barriers it encounters, with a view to assessing whether WTO proceedings are advisable. Attention should also be paid to export flows to developed trading partners, especially those that enter the countries concerned on a preferential basis. Ideally, bound MFN tariffs should be increasingly brought into line, as far as possible, with preferential tariffs, so as to achieve de facto elimination of preferences. This would ensure a higher degree of predictability in trade with developed countries,

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[34] Report by the Chairman of the Special Session of the DSB to the Trade Negotiations Committee (TNC), 21 April 2011, TN/DS/25, page A-43.

[35] The first proposal was originally made by the African Group, and the second proposal is made by India, Pakistan, Cuba, Egypt and Malaysia.

[36] Ibid. It is important to note that since the beginning of the negotiations, Mexico has been very active in the discussions on compliance with recommendations.

[37] Hunter Nottage, in the article cited above, reaches a similar conclusion.

but has the disadvantage of levelling expert competition with the other counties not benefiting from the preference.

An important truth demonstrated in this article is that the Latin American countries are not just unquestioning followers of trends in the use of the DSM. On the contrary, the countries of the region are at the forefront in finding solutions and devising creative arguments, without ever deviating from the guidelines established by WTO rules. This enables Latin America to make full use of the tools offered by the multilateral trading system to defend their export markets, which are of crucial importance in their efforts to achieve development through economic growth.

APPENDIX A

OVERVIEW OF THE WTOS DISPUTE SETTLEMENT MECHANISM

All dispute settlement proceedings at the WTO begin with an initial phase involving consultations, as stipulated in Articles XXII and XXIII of the GATT 1994 and Article 4 of the DSU. This reflects the wish of Members to begin by exhausting the avenue of negotiation as a means of resolving a dispute before resorting to adjudication by a third party, namely the panel. Consultations also enable parties to the dispute to familiarize themselves with the facts and the legal arguments used by both sides, because the request for consultations has to identify the measure at issue and the rules that are considered to have been violated. A negotiated solution remains possible throughout the process, even once the panel has been established or once the panel report has been issued. Parties may also have recourse to the good offices of the Director-General or to mediation at any time during the dispute.

If the consultations fail to settle the problem within 60 days of the request for consultations, the requesting party may ask the DSB to establish a panel. A request for the establishment of a panel may also be made if the consultations have not been entered into within a period of 30 days after receipt of the request for consultations or if ten days have elapsed without a response from the party to which the request for consultations was addressed. The DSB must establish the panel no later than the second time that the request appears on the agenda of a DSB meeting. Since a DSB meeting may be especially convened within 15 days following the request for the establishment of a panel, unless the requesting party agrees otherwise, the period of consultations should not exceed 90 days. They may in fact be of indefinite duration as long as the parties agree that it is still possible to find a negotiated settlement to the dispute, and they could involve several meetings.

Once the DSB has decided to establish a panel, the process enters one of the most critical stages which will have an impact on the proceedings as a whole and their result: namely the selection of the persons composing the panel. The three panellists are chosen either by the parties on the basis of names put forward by the WTO Secretariat, or if there is no agreement on the panellists within 20 days after the establishment of the panel, the responding party may ask that the selection be made by the Director-General, who shall do so within ten days. Unless the parties to the dispute agree on the terms of reference of the panel within a period of 20 days, the standard terms of reference set forth in Article 7.1 of the DSU shall be applied. It is important to note that the terms of reference of the panel include the examination of the obligations of parties under the WTO Agreements, but not international obligations that may have been assumed by the parties under other treaties. No obligation assumed outside the scope of the WTO Agreements supersedes the obligations assumed under those Agreements.

Each panel adopts its own rules of procedure based on the DSU and the timetable for the proceedings, after having consulted the parties. Panel procedures consist of the presentation of written submissions by the parties and the holding of meetings with the panel. The first step in the panel procedure is the presentation of the initial written submission by the complaining parties. Two to three weeks later, the responding party presents its first written submission. The panel has to hold at least two meetings with the parties; the first of these occurs one to two weeks after receipt of the first written submissions. The panel is also required to meet the third parties if there are any, and the latter are requested to present their submissions during that first meeting.

The written replies shall be submitted two to three weeks after the first meeting with the panel, which shall schedule a second meeting two to four weeks after receiving the written replies. The panel shall subsequently draw up and circulate to the parties to the dispute a draft "descriptive part" of the report.

Each report is divided into two main sections: the "descriptive part" setting out the arguments of fact and of law put forward by the parties, as well as the description of the facts of the case, and the

"findings" in which the panel decides on the merits of the arguments put forward and makes its recommendation. The recommendation in most cases will be limited to requesting the DSB to call on the offending country to bring its measure into conformity with the agreements. The parties have two weeks to make comments on the draft descriptive part. After this first partial review of the report, the panel has between two and four weeks to submit an "interim report" to the parties; this interim report will become final if none of the parties requests that it be reconsidered.

The interim review stage gives the parties to the dispute the opportunity to make comments on specific aspects of the interim report; such comments must be dealt with in the final report. The total duration of the interim review is one month and one week. Once the final panel report has been prepared, it is submitted to the parties to the dispute, and three weeks later circulated to the Members of the DSB. The total period between establishment of the Panel and its report to Members must not exceed nine months.

Following circulation of the report, it is adopted by the DSB within a maximum of 60 days, unless one of the parties notifies its decision to appeal or the DSB decides not to adopt the report. The mechanism for adoption is one of the most significant changes compared with the previous WTO dispute settlement system. The adoption of the panel's report is based on the principle of negative consensus, that is to say that the report will be adopted unless there is a consensus among Members against its adoption. In this way, the possibility for the losing party in the dispute to block adoption of the report is eliminated. The same adoption mechanism is also used when an Appellate Body (AB) report is adopted, in which case, both the latter report and the panel report as amended by the AB report are adopted simultaneously.

The appellate review is a remedy available only to the parties to the dispute and may not be requested by a third party. Once the intention to appeal has been notified to the DSB, the appellant has ten days to submit its statement of appeal to the AB. The statement shall contain the grounds of the appeal, specifying the errors on points of law contained in the final report of the panel and the arguments and supporting arguments. The appellee may, five days after receipt of the statement of appeal, present a submission rebutting the claims made by the appellant. At the same time, other parties to the case have 15 days from the date of the announcement of the appeal, to appeal in turn the decision of the panel and to submit their statement of appeal to the AB; the same right is available to the appellee, which may have an interest in appealing other matters not raised in the original appeal.

As in most civil law systems of judicial review, the appeal must be limited to questions of law; the establishment of the facts in the dispute is thus reserved to the panel. There may be some question as to the value of the somewhat artificial transfer of a domestic civil law concept to the international legal sphere. This is particularly relevant in the context of an international trade dispute in which it is difficult to distinguish questions of fact from questions of law, owing to the dual nature of an inconsistent measure as a fact giving rise to the dispute and, at the same time, as a reflection of a legal interpretation of the content of the agreements.

The working procedures for the appellate review also provide for the participation of third parties which must also have participated in the previous stage of the proceedings. Provision is likewise made for an oral hearing of the parties five days after receipt of the letter of opposition. The final report of the Appellate Body should normally be circulated 60 days after the notice of appeal but, unlike in the case of the panel reports, there is no procedure enabling the parties to take cognizance of and comment on the report. The AB report must be adopted 30 days after its circulation, on the basis of the same principle of negative consensus used by the DSB:

Once the panel report or AB report has been adopted, the implementation phase of the recommendations is initiated, if the panel has found that the measure challenged is inconsistent with the obligations laid down in the agreements. The mechanism for determining the "reasonable period of time" for implementation of the recommendation is an inherently complex one. The "reasonable period of time" may be:

(i) A period of time proposed by the aggrieved party and approved by consensus by the DSB;
(ii) a period mutually agreed by the parties; or
(iii) a period decided by an arbitrator.

In every case, the interpretation made under Article 21.3 of the DSU has been that the reasonable period of time must be no longer than 15 months from the adoption of the report.

In the majority of the cases the Member found to be in breach of its WTO obligations would have made efforts to bring the aggrieving measure into conformity, including by adopting new measure, prior to the expiry of the reasonable period of time. If the Member that has prevailed in the dispute still is of the view that the changes to the aggrieving measure, or the measure that replaced it, are still in breach of WTO obligations it may request the establishment of a panel under Article 21.5 of the DSU to rule on whether the Member found to be in breach has implemented the DSB recommendations. If the losing party is found to still be in breach of its obligations or has failed comply with the recommendations within the reasonable period of time, the aggrieved party may request compensation or, if this is not granted, suspend concessions to the recalcitrant party. Any countervailing or retaliatory measure has trade restrictive effects, and for that reason, in the WTO framework, such measures are temporary and have the objective of promoting implementation of the recommendation contained in the final report. The WTO mechanism for the suspension of concessions has also been automated and the aggrieved party will be authorized to take retaliatory measures unless there is a consensus to the contrary. The most interesting aspect of the current system is that a suspension of concessions is not limited to the sector or agreement concerned by the offending measure. Indeed, Article 22.3 of the DSU establishes a hierarchy of authorized retaliatory measures in the same sector, in another sector under the same agreement, or under another agreement. Such "cross-retaliation" may be invoked in cases where the aggrieved party does not deem it sufficient or effective to suspend concessions in the same sector or another sector successively, and considers that the circumstances are serious enough. The sectors and level of the suspension of the concessions is determined by the complaining party. However, if the Member who has been found in violation believes that the level of retaliation exceeds the level of nullification and impairment, or that cross retaliation was not correctly applied it may refer the issue to arbitration under Article 22.6 of the DSU.

APPENDIX B

Table 7: Member's participation as complainants in the DSM weighted by their share of total exports

Member	Consultations	Weighted participation in disputes per year	Average share of exports	Rate of participation
Antigua and Barbuda	1	0.21	0.01	39.43
Honduras	7	1.48	0.04	35.81
Guatemala	8	1.69	0.05	33.26
Moldova	1	0.34	0.01	28.23
Nicaragua	1	0.21	0.01	14.70
Costa Rica	5	1.06	0.09	12.20
Panama	5	1.06	0.10	10.48
Argentina	15	3.17	0.41	7.67
Ecuador	3	0.63	0.09	7.25
Ukraine	2	2.25	0.32	6.95
Chile	10	2.11	0.35	6.01
New Zealand	7	1.48	0.25	5.93
Brazil	25	5.28	0.97	5.46
El Salvador	1	0.21	0.04	5.33
Colombia	5	1.06	0.20	5.18
Peru	3	0.63	0.14	4.56
Pakistan	3	0.63	0.14	4.51
Uruguay	1	0.21	0.05	4.38
India	19	4.01	1.02	3.92
Viet Nam	1	0.84	0.26	3.31
Sri Lanka	1	0.21	0.07	2.94
Bangladesh	1	0.21	0.08	2.57
Philippines	5	1.06	0.41	2.56
Thailand	13	2.74	1.08	2.55
Mexico	21	4.43	1.91	2.32
United States	97	20.47	10.16	2.01
Hungary	5	1.06	0.52	2.01
Canada	33	6.96	3.57	1.95
Australia	7	1.48	1.14	1.30
Indonesia	5	1.06	0.84	1.26
Korea	15	3.17	2.62	1.21
Norway	4	0.84	1.02	0.83
Chinese Taipei	3	1.13	1.92	0.59
China	8	3.00	5.21	0.58
Turkey	2	0.42	0.78	0.54
Venezuela	1	0.21	0.39	0.54

Member	Consultations	Weighted participation in disputes per year	Average share of exports	Rate of participation
Switzerland	4	0.84	1.74	0.49
Japan	14	2.95	6.08	0.49
European Union	84	17.73	41.71	0.43
Malaysia	1	0.21	1.34	0.16
Singapore	1	0.21	2.36	0.09
Hong Kong, China	1	0.21	3.02	0.07