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Improving Remedies at the WTO Dispute Settlement for Developing Countries

Rodrigo Alberto Vazquez Martinez

1. Introduction

Nearly two decades since its establishment on January 1, 1995, the World Trade Organization (WTO), the successor of the General Agreement on Tariffs and Trade of 1948 (GATT), is the prominent international organization serving its members as a forum for debate and decision making on the relationship between trade law and policy, on the one hand, and poverty reduction and development on the other.\(^1\)

The central pillar of the WTO's multilateral trading system is the Dispute Settlement Understanding (DSU), its most important contribution for the stability of global trade. It establishes the rules and procedures governing the

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\(^1\) The Preamble of Agreement Establishing the World Trade Organization recognizes that "relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living," as well as a "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".
settlement of disputes between WTO members. The DSU’s procedure highlights the “rule of law” by making the trading system more secure and predictable for all members.²

There is a general perception in most developed countries that the Dispute Settlement System works well.³ Thus, the assessment of the system by scholars in the developed world has been positive, praising the new system over its predecessor.⁴ It is certain that the WTO Dispute Settlement System is a success over its predecessor. Yet, it is also undisputable that there are many aspects on which the system is lacking. Thus, this article proposes an academic yet pragmatic perspective, which takes the position of developing countries at the WTO Dispute Settlement System. It examines three remedy proposals (monetary compensation, cross-retaliation and collective retaliation) in the light of the ongoing New Negotiations on the DSU and existing academic literature.

It is essential to recognize that the aim of the New Negotiations on the DSU is to improve the rules and procedures governing the settlement of disputes under the WTO regime. In other words, negotiating member states must understand and take into careful consideration the fact that the system is generally working efficiently for those members utilizing the disputes settlement procedures. The purpose of the negotiations is not to generate a radical change in the system, but to improve the current system by permitting minor changes. The fundamentals of the current system must be kept intact in order not to alter with the effectiveness and reputation of the system. In a sense, the new negotiations are to give voice to the concerns of those members who have yet to participate in the system, the majority of developing countries, in order to provide them with an incentive to settle their trade disputes at the WTO.

This article recognizes that there are some difficulties with each proposal, yet focuses on making a compatibility study of the three proposals with the current system, so as to identify which proposals positively incorporate the needs of those developing countries, while not altering with the fundamentals of the current system. This article argues that two of the three proposals, cross-retaliation and collective retaliation, do not alter with the fundamentals of the current system and incorporate the needs of developing countries. It is a pragmatic study that acknowledges that minor changes or improvements are more easily achievable if these do not disrupt the fundamentals.

This article is divided into five sections. This section one briefly presented an overview of the WTO and the purpose of the article. Section two describes the Dispute Settlement System, presents the experience of developing countries in it, and detects the current remedies’ constraints faced by them. Section three identifies the fundamentals of the current Dispute Settlement System: its relations with General International Law, the system’s objective and the

nature of its remedies. Section four examines three main proposals at the ongoing New Negotiations on the DSU: monetary compensation, cross-retaliation and collective retaliation. Finally, the conclusion section identifies cross-retaliation and collective retaliation as most effective proposals for developing countries while being compatible with the fundamentals of the current system.

2. The WTO Dispute Settlement System and Developing Countries

2.1. The System

The WTO dispute settlement process is divided into four stages: consultations; panel process, appeal; and implementation and enforcement. At the WTO, there are two types of cases that can be brought to the dispute settlement: violation complaints and non-violation nullification or impairment complaints. In both cases, the complaining party must demonstrate that a WTO obligation has been violated or undermined. Violation complaints are based on the claim that a member has a measure that violates a negotiated commitment, such as a tariff rate, or a substantive rule, such as national treatment or nondiscrimination. Non-violation complaints are not in themselves a violation of WTO rules, but nonetheless undermines or conflicts with a member’s obligations.

Consultation and mediations are a reflection of the power-based method that characterized much of the dispute settlement process under GATT. The WTO established a “rule of law” more oriented process, but retained some aspects of the old systems. Consultations and mediation are the initial step in the formal dispute settlement process in an attempt to arrive at a mutually agreeable solution. The complaining member must submit a formal request for consultation “in good faith” and it shall begin within thirty days after the receipt of the request. If an agreement cannot be reached through consultations, they may request the good offices of the WTO Director-General to act as mediator. If no mutual solution arises in the consultation stage, the complaining member has the right to request the Dispute Settlement Body (DSB) to establish a panel to hear and adjudicate the complaint.

The establishment of a panel initiates the formal adversarial stages of the dispute when consultations or mediations fail. A written request for a panel must demonstrate whether consultations were held, identify the

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6 Ibid., p.30.
7 General Agreement on Tariffs and Trade of 1994, Art.XXIII, Para.1.
8 Ibid., Art. XXIII, Para.1(a).
9 Ibid., Art. XXIII, Para.1(b).
11 Ibid.
12 Dispute Settlement Understanding, Art.4, Para.3.
13 Ibid.
14 Ibid., Art.5, Para.6.
15 Ibid., Art.6.
measures at issue, and provide the legal basis of the complaint. The panel is composed of three to five independent trade experts and they set a timetable for proceedings, specifying deadlines for submissions of written statements by the parties and for meetings. The involved parties may provide the panel with supplemental submissions after the first session of meetings. A second set of meetings may take place. Panels must objectively assess the facts, the legal basics of a dispute, and the applicability of the covered agreements, and make other findings and recommendations that will assist the DSB in its ruling. Panels must resolve disputes and issue a panel report within three months for cases of urgency and six months for general cases. If a panel cannot issue a report within the provided period, it submits a formal request in writing for an extension to the DSB; the extension cannot exceed nine months from the establishment of the panel. Panel reports are automatically adopted by the DSB, unless there is a negative consensus.

At the appeal stage, there is a standing panel of nine trade experts, sitting in rotations of three to hear appeals from panel decisions. An appeal is limited to questions of law, as raised and developed by the panel. However, the Appellate Body has undertaken an active role and often extends its scope to legal issues or arguments not raised by the panel because there is no remand mechanism in the WTO. It must deliver its decision within sixty days, but can take up to ninety days if it submits a request and receives an extension from the DSB. Similarly, the DSB automatically adopts and implements the Appellate Body decisions, unless there is a negative consensus.

When a panel or the Appellate Body finds a measure to be in violation of WTO rules, the offending member must bring the measure into conformity with its WTO obligations. The report may recommend ways for compliance, but the offending member retains final decision on the method. The DSB oversees the implementation, and thirty days after the adoption of the report, it must hold a meeting in which the offending party must indicate how it will implement the report within a reasonable time. The reasonable time for implementation may be reached by mutual

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16 Ibid., Art.6, Para.2.
17 Ibid., Art.8.
18 Ibid, Art.12, Para.6.
19 Ibid
20 Ibid, Art.9.
21 Ibid, Art.17, Para.1.
23 Cai, supra note 10, p.166.
24 Dispute Settlement Understanding, Art.17, Para.5.
27 Ibid
28 Ibid, Art.21, Para.3.
agreement or by arbitration. The DSB monitors the compliance, beginning with a review six months after the reasonable period of time is set and continuing until the dispute is resolved. If the parties involved in the dispute do not agree that the steps taken by the losing party constitute full compliance, a panel may be established to resolve the issue. The compliance panel’s decision may be appealed to the Appellate Body, and multiple rounds can take place.

The dispute settlement is a lengthy, systematic and “rule of law” based process aiming at resolving disputes among WTO members. However, there are instances when a member fails to bring a measure into conformity or implement the recommendations of the DSB. When this occurs, the complaining party is allowed to resort to the additional remedies; these will be discussed in detail in the following sections. This article focuses on the current remedies from the perspective of the developing countries.

2.2 Developing Countries

There are two perspectives when examining the relationship between developing countries and the Dispute Settlement System. There is the quantitative perspective regarding whether developing countries are taking part in the Dispute Settlement System. The overall high volume of cases indicates that states are using and want to use the WTO system to resolve disputes. It has been well documented that developed and developing countries are participating in the Dispute Settlement System. Under the WTO, there are no definitions of developed and developing countries: members decide for themselves whether they are developed or developing countries. Out of the 159 WTO members, more than two-thirds are developing countries. Yet despite making up the majority, most developing countries rarely participate in the Dispute Settlement System. The frequent users of the Dispute Settlement System among developing countries are large economies like the Republic of Korea, Brazil, India, South Africa and increasingly

32 Ibid.
33 Ibid., Art. 21, Para. 6.
34 Ibid., Art. 21, Para. 5.
35 Ibid.
36 Ibid., Art. 22, Para. 3.
37 McRae, supra note 4, p. 3.
41 Busch, supra note 38.
China. Therefore, developing countries that fail to initiate cases forego not only the opportunity to remedy what they suffered, but also the opportunity to set precedents for other developing countries. Thus, the costs of not participating are high, both individually and systematically.

Still, scholars praise the quality of the analysis by panels and the Appellate Body, particularly, the approach of the Appellate Body when interpreting the covered agreements. Also, the timely adoption of reports of panels and the Appellate Body by the DSB, with relatively little critical comment, suggests that the system is fulfilling its objective. On top of that, the fact that the rate of compliance is generally seen to be high is also treated as a mark of its success. In this respect, it can be seen as an effective system only for those members using the Dispute Settlement System.

There is also a qualitative perspective regarding the purpose of the WTO Dispute Settlement System for its member. This article focuses on the developing countries' experience in the system. The absence of effective remedies has generated concern among developing countries, particularly for those which have yet to participate in the WTO Dispute Settlement System.

In the case of compensation, it has been used only once since the establishment of the WTO. There are two explanations for the infrequency of its use. First, it is voluntary and must be negotiated, as explained earlier. Thus, agreement on the level and scope of compensation has proven difficult. Second, it is unclear if the country offering compensation would have to extend such benefits to other members under the most-favored-nations (MFN) principle, as required under the GATT. Due to the infrequency of its use and uncertainties, it is little more than a theoretical remedy, ineffective to all members, including developing countries.

As a result, developing countries are left with only one remedy in hand, retaliation. This remedy has been rarely used in the seventeen years since the formation of the WTO. In the cases in which developing countries used or could have used retaliation as a remedy, some constraints were identified.

In EC-Banana III, the remedy to retaliate on imports of European bananas would have been illusory. It was likely to do the Ecuadorian economy more harm than good to impose countermeasure on other imported European goods on which Ecuadorian industries and consumers depend. Doing so may have crippled segments of the Ecuadorian economy by depriving industries and consumers of critical goods and materials. As a matter of necessity, Ecuador was authorized to suspend concession on European trade on services and intellectual property under GATS and TRIPS,

A similar case, \textit{US-Upland Cotton}\footnote{\textit{US-Upland Cotton}, DS267 (2002).} highlighted the ability of larger states to functionally ignore or manipulate DSU rulings. After the DSU authorized cross-sector retaliation on the intellectual property of antiretroviral and other genetically-modified organisms, the Brazilian government decided not to act, over fears of re-retaliation.\footnote{Pavan Krishnamurthy, “Effective Enforcement: A Legalistic Analysis of WTO Dispute Settlement,” \textit{Northwestern Interdisciplinary Law Review}, Vol.5, No.1 (2012), pp.218–219.} Brazilian then-president Luis Ignacio Lula da Silva recognized the outcome of the dispute as a “symbolic victory” and a failure of justice at the WTO.\footnote{\textit{Ibid}.}

Additionally, in \textit{US-Gambling}\footnote{\textit{US-Gambling}, DS285 (2003).} the Appellate Body ruled in favor of Antigua and Barbuda and determined the annual level of nullification or impairments of benefits. However, it never requested the authorization, most probably because there was never intent to retaliate, due to fears of re-retaliation. Due to its fragile economy, it has been difficult for Antigua and Barbuda’s policy makers to prioritize WTO engagement, especially considering that retaliation was never a consideration. The withdrawal of commitments by Antigua and Barbuda probably could not have had much impact on the economy of the United States, while the situation could have had a devastating impact on its economy.\footnote{Krishnamurthy, \textit{supra} note 53, p.219.} This case not only exposes the ability of developed countries to effectively ignore dispute settlement rulings, but also affirms that only developed countries have this ability. In addition, there are also other cases involving developing countries, in which compliance proceedings have been completed with findings of non-compliance, such as in \textit{EC-Bed Linen} and \textit{Canada-Aircraft}.\footnote{World Trade Organization, “Dispute Settlement: The Disputes,” at <http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm> (accessed on January 13, 2013); India in \textit{EC-Bed Linen}, DS141 (1998) and Brazil in \textit{Canada-Aircraft}, DS70 (1997).}

Even though resort to retaliation is quite rare, it serves primarily as a threatening tool.\footnote{Cai, \textit{supra} note 10, p.175.} The significance of retaliation is to have it as a bargaining chip to enforce implementation. Thus, for it to be useful as a threat, the level of retaliation needs to be threatening enough to have persuasive power. The above cases show a clear pattern of constraints faced by developing countries when trying to make use of the existing remedies. Thus, it could be concluded that both remedies, compensation and retaliation, are ineffective for most developing countries when trying to have their rights respected in the WTO Dispute Settlement System.

From a \textit{quantitative} perspective, the system seems to work effectively for those participating members. However, from a \textit{qualitative} perspective, it is clear that the WTO Dispute Settlement Systems is not doing what it was
set up to do for its developing country members. The current remedies under the DSU are clearly ineffective for the majority of developing countries when providing security, predictability and most importantly, compliance inducement.

3. The Fundamentals of the WTO Dispute Settlement System

3.1 WTO Dispute Settlement and General International Law

Under customary international law, special rules allow states to contract out from certain areas of international law in order to regulate relationships among them. This has been codified by the International Law Commission as the principle of lex specialis in Article 55 of the Draft Articles on State Responsibility. The idea under this principle is that a specific set of rules has priority over a general set of rules because the specific set is supposed to be an elaboration of the more general set. In other words, special rules prevail over the general rules.

Thus, the DSU rules, including the rules relating to the consequences of breaches of the WTO rules, are a special set of rules and therefore constitute a system of lex specialis they exclude the application of the general principles of international law to the extent provided for by the special, self-contained regime of the DSU. Hence, the fundamentals, the objective of the WTO Dispute Settlement System and the nature of its remedies shall be exclusively established upon the rules and principles prescribed under the DSU.

3.2 Objective of the Dispute Settlement System

The Dispute Settlement System under the WTO significantly differs from its predecessor under the GATT in many positive aspects. For instance, the system under the DSU is compulsory and binding, cannot be blocked, has a defined timeline, more fully articulated process, and includes an appellate process as described earlier.

One important difference is that under the GATT the objective of the Dispute Settlement System was never articulated. However, the DSU describes the objective of the system as to “provide security and predictability to the multilateral trading system”, which “serves to preserve the rights and obligations of members under the covered agreements and to clarify the existing provisions of those agreements”. Furthermore, “promptness in resolving disputes” is identified as a further objective of the Dispute Settlement System: the rest of the DSU sets out the process.

The objective of the Dispute Settlement System, under Article 3 of the DSU, is to provide security and predictability, protect rights and obligations, and clarify the provisions of the agreements. It is an orderly mechanism for deciding whether a member has complied with its obligation under the covered agreements, and if a member is found

61 McRae, supra note 4, p.4.
62 General Agreement on Tariffs and Trade of 1948, Art. XXII-XXIII. All about process, nothing about objectives.
63 Dispute Settlement Understanding, Art.3, Para.2
64 Ibid.
65 Ibid, Art.3, Para.3.
to be in breach, to “bring the measure into conformity” with the relevant agreement.\textsuperscript{69} In other words, one main objective is to remove the offending measure by \textit{inducing compliance}.

3.3 Nature of the WTO Remedies

There are currently three remedies under the DSU: cessation, compensation and retaliation.\textsuperscript{67} The two latter remedies are only applicable if cessation does not occur, and they are temporary measures designed to deal with delay of cessation.

Cessation of the offending measure is the ideal result in any WTO dispute.\textsuperscript{68} The losing parties in the WTO dispute must bring the offending measure into compliance with WTO obligations within a reasonable period of time.\textsuperscript{69} In the WTO context, the injured member receives no compensation for lost revenues, profits, or trade volume. This remedy has no punitive element and it does no more than restore the \textit{status quo ante}.\textsuperscript{70} When a member fails to comply with a ruling, there is the possibility for compensation or retaliation.\textsuperscript{71} Under the DSU, compensation is not the payment of monetary damages, as the term would ordinarily imply. Rather, it is the granting of additional trade benefits to the injured member.\textsuperscript{72} It is a voluntary arrangement in which both parties negotiate to develop a mutually acceptable compensation.\textsuperscript{73}

If the reasonable period of time for compliance has lapsed and the members to the dispute cannot agree on compensation, then the injured member may seek authorization from the DSB to retaliate in order to temporarily revoke trade concessions granted to the violating member.\textsuperscript{74} Retaliation must be specifically requested and can be used only by members directly involved in the dispute as complainants and interested third parties.\textsuperscript{75} Any retaliation under the DSU should be initially in the same sector in the same agreement.\textsuperscript{76} If this is not practicable or effective, then the retaliation may be in a different sector in the same agreement,\textsuperscript{77} or subsequently, if still unfeasible, under a different agreement,\textsuperscript{78} which is known as cross-retaliation. The level of retaliation authorized by the DSB must be equivalent to the harm suffered by the injured member.\textsuperscript{79} The remedy is only prospective, and it extends forward only for the period

\begin{itemize}
  \item \textsuperscript{66} Ibid, Art. 19.
  \item \textsuperscript{67} Ibid, Art. 3, Para. 7.
  \item \textsuperscript{68} Ibid.
  \item \textsuperscript{69} Ibid, Art. 19, Para. 1 and Art. 21, Para. 3.
  \item \textsuperscript{70} Cai, \textit{supra} note 10, p. 171.
  \item \textsuperscript{71} Dispute Settlement Understanding, Art. 19.
  \item \textsuperscript{72} Ibid, Art. 22, Para. 2-3.
  \item \textsuperscript{73} Ibid, Art. 22, Para. 1.
  \item \textsuperscript{74} Ibid, Art. 22, Para. 2.
  \item \textsuperscript{75} Ibid.
  \item \textsuperscript{76} Ibid, Art. 22, Para. 3(a).
  \item \textsuperscript{77} Ibid, Art. 22, Para. 3(b).
  \item \textsuperscript{78} Ibid, Art. 22, Para. 3(c).
  \item \textsuperscript{79} Ibid, Art. 22, Para. 4.
\end{itemize}
of time authorized for the recouping of equivalent harm. Thus, it does not possess retroactive effect, since it does not cover the period in which the offending measure was in place or even for the duration of the disputes between the parties.\(^8\)

These two remedies are meant to be temporary, with a view to inducing the violating member to bring its measures and laws into compliance with WTO rules.\(^8\) The focus of compensation and retaliation is on inducing compliance; not punishing the violating member. Thus, it can be concluded that the nature of the remedies is non-punitive.

4. New Negotiations on the Dispute Settlement Understanding

There has been extensive literature written by scholars on the operation of the WTO Dispute Settlement System since its establishment. There is a wide range of arguments and proposals to reform and strengthen the WTO dispute settlement. On top of that, a review of the DSU was launched in 2001 based on an Uruguay Round Ministerial Decision; and it became part of the Doha Round agenda, although it is not formally part of the single undertaking. These negotiations take place in special sessions of the DSB, and they are known as the New Negotiations on the DSU. Members agreed to negotiate to improve and clarify the rules and procedures governing the settlement of WTO disputes under the DSU.\(^8\)

Today, the work of the New Negotiations on the DSU continues slowly on the basis of the Chair's text of July 2008, with the aim of developing areas of convergence towards an agreement. In 2011, eight meetings were held over the course of the year. The work was conducted at group meetings, in various formats, depending on the subject discussed.\(^8\) The Chair of the New Negotiations on the DSU identified twelve thematic issues: third party rights, panel composition, remand, mutually agreed solutions, strictly confidential information, sequencing, post-retaliation, transparency and amicus curiae briefs, timeframes, developing country interests, flexibility and member control, and effective compliance.\(^8\) Additionally, the Chair's text of July 2008 offers a general overview of his reflections on the state-of-play on the various issues under negotiation and identifies possible ways for future work.

On the other hand, scholars have attempted to explain why developing countries do not actively invoke the DSU and the literature on this topic is extensive.\(^8\) However, five distinctive reasons have been identified within the

\(^8\) McRae, supra note 4, p.8.

\(^8\) Ibid.

\(^8\) World Trade Organization, WTO Annual Report 2012 (WTO Secretariat, 2012), p.34.

\(^8\) Ibid.

\(^8\) Report by the Chairman to the Trade Negotiations Committee, TN/DS/25 (2011).

existing literature: lack of market share and ability to affect world markets; fear of non-WTO or extralegal retaliation by more powerful trading partners; costs and resources constraints; lack of legal capacity and expertise; and the inequality in the effectiveness of remedies.86 The first four reasons are characterized as facts or status based reasons. Yet, the fifth reason, the inequality in the effectiveness of remedies, is primarily a legal problem.87

The issue of effectiveness of remedies for developing countries is under the mandate of effective compliance within the New Negotiation on the DSU. This issue is of importance to developing country members as it was previously identified in the cases in which the application of remedies was illusionary. The remedies under the DSU do not provide security, predictability, and compliance inducement for developing countries when faced against stronger members.

Several proposals seek to promote prompt and effective compliance by strengthening the remedies available under Article 22 of the DSU. There are three main proposals identified by the Chair: monetary compensation, collective retaliation and cross-retaliation.88 The Chair emphasized that much work remained to be done to complete the consideration of all issues and to reach an agreement.89 The following compatibility study of each of the three identified remedy proposals is made from the perspective of developing countries while taking into account the fundamentals of the current system.

4.1 Monetary Compensation

Monetary compensation in a response to a breach of WTO law is one of the main remedies proposals discussed at the New Negotiations on the DSU. This idea is not new; reparation by governments of injury for which they can be held responsible is part of general international public law.90 There are also examples of this in the trade area, in particular, bilateral trade agreements. For instance, Free Trade Agreements (FTA) between the US and Australia, Chile and Singapore, as well as the DR-CAFTA91 permits fines (monetary compensation) when intellectual property rights are violated.92 Furthermore, it was originally proposed in the GATT in 1966, but it did not encounter sufficient support.93


86 Bronckers and Van den Broek, supra note 51, pp.104-105.
87 Cai, supra note 10, p.156.
88 Report by the Chairman to the Trade Negotiations Committee, supra note 84.
89 Ibid.
90 See Draft Articles on Responsibility of States for Internationally Wrongful Acts.
91 Dominican Republic-Central America Free Trade Agreement, composed by the United States and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Dominican Republic.
93 Bronckers and Van den Broek, supra note 51, p.110.
Under the new negotiations, Mexico, Ecuador, the African Group and the Least Developed Countries (LDC) Group have proposed monetary compensation as an effective remedy.\(^9^8\) The core of the proposals is to make the WTO Dispute Settlement System more accessible to developing countries currently lacking incentives to bring complaints to the WTO.

There are two views with regard to the possible recipients of monetary compensation, available on the basis of Special and Differential Treatment to developing countries, or available to all WTO members. The LDC Group proposed that it should be available only in successful cases by developing countries against developed countries. The African Group supports either\(^9^9\) to make it available to all members as a general feature, or only available to developing countries under the Special and Differential Treatment.\(^1^0^0\) Furthermore, Mexico suggested that it should be the default remedy for developing countries, but with the possibility for developed countries if so agreed.\(^1^0^1\)

From the academic perspective, several persuasive advantages supporting this proposal have been identified by Bronckers and Van den Broek. First, it was argued that the obligation to pay monetary compensation is not trade restrictive. There will be no need to shoot oneself in the foot by the member imposing the measure. Second, monetary compensation provides redress to the member affected by the illegal WTO measure which will constitute partial reparation. Third, it will work as well, and sometimes even better, to induce compliance. In particular, it would be more effective than the current remedies when utilized by developing countries against noncomplying developed countries. Lastly, it is in line with international law. The International Law Commission’s Draft Articles on State Responsibility recognized compliance inducement and instruments aimed at full reparation. In other words, under general public international law, an unlawful act calls for two reactions; compliance or reparation for remedial purposes.\(^1^0^2\) Thus, monetary compensation seems to be a valid remedy proposal and it seems to be supported by states practice, general international law and WTO members.

However, there are some systematic concerns whether the current system is ready for such remedies. It is not clear that the proposal of monetary compensation is compatible with the system’s objective and nature of remedies identified earlier. They seem to run counter to the fundamentals. The aim of the system is not to compensate but to re-establish the distribution of expectations due to the fact that obligations under the WTO are owed to all members. This last point will be elaborated in the examination of the last proposal. Furthermore, monetary compensation has a less compliance-inducing effect, since it might allow rich members to buy themselves out of a violation, thus, a potential for a perverse effect of increasing noncompliance. The commentaries of the International Law Commission on the Draft Articles on Responsibility of States for Internationally Wrongful Acts recognize that the general concept of compensation is not punitive.\(^1^0^3\) It also recognizes that the main function of monetary compensation is to address the

\(^{9^8}\) Proposal by the LDC Group, TN/DS/W/17 (2002); Proposal by Mexico, TN/DS/W/24 (2002); Proposal by Ecuador, TN/DS/W/33 (2003); and Proposal by the African Group, TN/DS/W/42 (2003).

\(^{9^9}\) Proposal by the African Group, TN/DS/W/42 (2003).

\(^{1^0^0}\) Proposal by Mexico, TN/DS/W/23 (2002).

\(^{9^9}\) Bronckers and Van den Broek, supra note 51, pp.109-111.

losses incurred as a result of the unlawful measure and to offset the damage suffered. Nevertheless, monetary compensation will possess a *punitive* nature if introduced into the current Dispute Settlement System, so as to force a member to provide for a financial payment for its unlawful behavior. The general concept of compensation under the Draft Articles on Responsibility of States for Internationally Wrongful Acts runs counter to the WTO dispute settlement *fundamentals*. The main function of compensation under the DSU is to induce compliance and not to offset the damage suffered. The inconsistency with the Draft Articles on Responsibility of States for Internationally Wrongful Acts is acceptable because the DSU established a *lex specialis* system that is legally binding to all its members, whereas the Draft Articles on Responsibility of States for Internationally Wrongful Acts are nonbinding.

From an effectiveness and pragmatic point of view, the monetary compensation proposal seems to raise the following concerns. First, monetary damages are difficult to calculate, and very high amounts would have the character of fines. Although monetary compensation is common in dispute settlement cases between a state and an investor, this is because of the nature of the disputes. It is easier to calculate the damage suffered by an investor than to calculate the damage suffered by a whole market or industry, which would be the case in the WTO due to the nature of its dispute settlement. Second, monetary compensation under the WTO are unenforceable, a member depends on the cooperation of the non-complying country to collect the compensation due to its voluntary nature, whereas retaliation is enforceable upon authorization from the DSB. The introduction of a compulsory monetary compensation into the Dispute Settlement System could run counter to its *fundamentals* because it possesses a *punitive* element. It places great focus on forcing members to provide for a financial payment in order to offset the damage suffered, rather than to induce them to cease their unlawful behavior. Third, monetary compensation may not reach the rightful recipients because under general international law a sovereign state has the full discretion to decide if and how the monetary compensation should be distributed. Thus, the main purpose of the monetary compensation proposal, to provide redress to the injured within a state, will never be guaranteed and thus proves ineffective to its purpose. Lastly, developing countries are most likely not to be able to afford monetary compensation, thus, creating another problem for these members; and it would be unlikely that developed countries would be willing to be subject to monetary compensation by all developing countries, without having the right to claim the same from any of them in the case that it will be only applicable for the benefit of developing countries.

4.2 Cross-Retaliation

The principle of cross-retaliation already exists under DSU and it requires the authorization of the DSB for its application. The general proposal under consideration is to make cross-retaliation available to developing country defendants without requiring specific justification why same-sector and same-agreement retaliation is not practicable or

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103 Dispute Settlement Understanding, Art.22, Para.3.
effective; in other words, to make cross-retaliation automatic for developing countries.\textsuperscript{104} Several members recognize the challenges for smaller economies to retaliate effectively against larger trading partners; yet, this concern is not limited to cases against developed countries, since it could also arise when both parties to a case are developing countries.\textsuperscript{105} India proposes to make easier the utilization of cross-retaliation when the complaining party is a developing country and the counterpart is a developed country.\textsuperscript{106}

Plasai argues that cross-retaliation is a useful tool for ensuring effective remedies against noncompliance, and thus it should be maintained.\textsuperscript{107} He adds that WTO members have different trade patterns for both goods and services and that it is not always possible to retaliate within the same sector or under the same agreement. Ecuador has more than proven this point in the \textit{EC–Bananas III case}.\textsuperscript{108}

Cross-retaliation has some merits for developing countries. For instance, it could be a tool to increase the enforcement power of members with smaller sized economies. Plasai argues that developing countries in particular have the need to be able to pose a credible threat when implementing retaliations authorized by the DSB.\textsuperscript{109} Thus, one way to strengthen the enforcement power of developing countries is to make conditions for authorizing cross-retaliation less strict. It is also believed that, although suspensions across sectors or across agreements are the exception and do not become a rule, allowing developing countries easier access to cross-retaliation will enhance their ability to induce compliance by developed countries.\textsuperscript{110}

Plasai suggests that when a developing country prevails as a complainant, it should be able to obtain authorization to retaliate across sectors and across agreements without having to satisfy the conditions set forth under the DSU.\textsuperscript{111} He adds that there should be a presumption under the DSU that a developing country has difficulties in the context of suspension of concessions or other obligations, and that it is not practicable or effective for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment within the same sector or under the same agreement. In addition, the DSU permits a prevailing party to request the right to retaliate across sectors or across agreements, but the latter is allowed only when circumstances are serious enough.\textsuperscript{112} Therefore, it is believed that developing countries should be exempted from the requirement that “circumstances must be serious enough” under the DSU.\textsuperscript{113} Plasai also suggest that a developing country should be allowed, as a general rule and if

\textsuperscript{104} Report by the Chairman to the Trade Negotiations Committee, \textit{supra} note 84.

\textsuperscript{105} \textit{Ibid.}

\textsuperscript{106} Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, TN/DSW/W/47 (2003).


\textsuperscript{108} EC–Bananas III, \textit{supra} note 50.

\textsuperscript{109} Plasai, \textit{supra} note 107, p.45.


\textsuperscript{111} Plasai, \textit{supra} note 107, p.45.

\textsuperscript{112} Dispute Settlement Understanding, Art.22, Para.3.

\textsuperscript{113} \textit{Ibid.}
required by the circumstances, to suspend concessions or other obligations in the same sector or under the same agreement to cover only part of the amount of the nullification or impairment, while the residual amount could be subject of suspension in another sector or under another covered agreement.

Some scholars support the idea that the WTO should also provide a more flexible right for developing countries, as compared to developed countries, to retaliate across sectors and agreements, as proposed by India.\textsuperscript{114} Qasim argues that it is a feasible change because the DSU already provides for a method of cross-retaliation, and that it only requires the application of less stringent standards for developing countries.\textsuperscript{115} Nevertheless, it is necessary to acknowledge that the introduction of this proposal to make it available only to developing countries could touch upon the fundamentals of the Dispute Settlement System, because it will provide developing countries with more tools than developed countries, which could be considered to be one-sided and going beyond the already provided Special and Differential Treatment, and Part IV of the GATT. Therefore, it is not essential to make automatic cross-retaliation exclusively available to developing countries. It could be available to all members including developed countries. Whether it is available to developed countries or not, will not have any major consequences on the system, since they do not experience retaliation problems as compared to developing countries because they possess large and diversified markets to effectively retaliate.

The proposal seems to be compatible with the dispute settlement’s objective, because it could provide the compliance inducement effect pursued by developing countries; and it is in line with the nature of the current system’s remedies, since it already exists via a non-automatic process that only provides flexibility to the application of reports from DSB and the Appellate Body; thus not possessing any punitive element. Nevertheless, it is important to acknowledge that, even when developing countries had the authorization for cross-retaliation, it did not provide them with compliance inducement due to its inapplicability. As previously examined, this was the case in the EC-Bananas III, US-Upland Cotton and US-Gambling disputes. As a result, one might argue that, only adding a collective element to cross-retaliation, as to permit collective cross-retaliation, might produce the compliance inducement effect pursued by developing countries, which leads to the examination of the collective retaliation proposal.

4.3 Collective Retaliation

The proposal for collective retaliation advocates the idea of having several WTO members support the complainant in its retaliation against the non-complying member. This proposal was also proposed under the GATT system in 1965 as part of a proposal by developing countries.\textsuperscript{116} They argued that bilateral retaliation is unfair and ineffective for developing countries, and instead supported collective retaliation since it would yield more results as it would have a greater impact on a violating member. Yet, the initiative was unsuccessful due to the lack of political support from developed countries.\textsuperscript{117}

\textsuperscript{114} Qasim, supra note 110.

\textsuperscript{115} Ibid.


\textsuperscript{117} Ibid.
This proposal has been revived under the New Negotiations on the DSU. Several WTO members are proponents of this idea. The African Group reiterated that the current retaliation system is not practical for individual developing country members against developed country members.118 Their proposal authorizes all WTO members to retaliate collectively against a developed country that adopts measures in violation of WTO obligations against a developing country. The LDC Group proposal also seeks the multilateralism of the right and responsibility to enforce the recommendation of the DSB.119 It is presented as an automatic remedy, under the Special and Differential Treatment principle, for cases in which a developing or a LDC member is successfully authorized to retaliate. Mexico proposes to eliminate cross-retaliation and suggests the inclusion of a collective retaliation system available to all members instead.120 It proposes that the right to suspend concessions or other obligations become transferable to one or more members, and that the retaliation remain in force until its level becomes equivalent to the level of the nullification or impairment.121

The concept of measures taken by states other than an injured state is not an alien concept to international law. The International Law Commission’s Draft Articles on State Responsibility prescribes a general principle regarding “measures taken by states other than an injured state”.122 It entitles any state to invoke the responsibility of another state and to take lawful measures against the violating state to ensure cessation of the breach in the interest of the beneficiaries of the obligation breached. Regarding the application of countermeasures, the Draft Articles on State Responsibility focuses only on countermeasures taken by injured states. However, the International Law Commission recognizes occasions that have emerged in practice of countermeasures taken by states other than the injured state.123 Although the Draft Articles on Responsibility of States for Internationally Wrongful Acts does not regulate the taking of countermeasures by states other than the injured state, it does not prejudice the right of any state to take lawful measures against a state to ensure cessation of the breach in the interest of the injured state or the beneficiaries of the obligation breached.124 Most importantly, the International Law Commission identifies that the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary125; and it welcomes the further development of international law on the matter.126 Lastly, the word selection of “lawful measures” rather than “countermeasures” was to not prejudice any position concerning measures taken by states other than the injured state in response to breaches of obligations for the protection of the collective interest, thus “lawful measures” include “countermeasures”.127

119 Proposal by the LDC Group, TN/DS/W/17 (2002).
120 Plass, supra note 107, p.35.
123 International Law Commission, supra note 98, p.129.
124 Ibid.
126 International Law Commission, supra note 98, p.139.
127 Ibid.
Furthermore, under the UN Charter, the Security Council is entitled to call upon its member states to implement measures taken in its resolutions.128 This can be seen in the enforcement measures to restore peace placed on Iraq in 1990.129 The United Nations placed an embargo on the country to prevent armed conflicts. More recently, there is currently an enforcement measure on Iran, aimed at restricting missile and weaponry materials that could be used for the creation of destructive weapons.130 Other instances include the economic enforcement measures placed on Rhodesia131 in 1965 and South Africa132 in 1977.

Collective retaliation is an attractive proposal for developing countries. As previously discussed, retaliation is the ultimate threat that can be made against a member that does not comply with the DSB. According to Hudec, developing countries never use retaliation remedy prescribed under the DSU since they know that retaliation will have no positive effects because they depend on developed countries in so many ways that they fear angering them.133 Likewise, Hoekman adds that, if developing countries raise import barriers, this will have little impact on the target market while being costly to their own economy.134 This is the reality today in the WTO as it was under the GATT system.

Hudec goes further in stating that developed countries view things from the perspective of their role as potential defendants and they are quite comfortable with their membership in a legal system where they can hurt others but cannot be hurt by most.135 He concludes that the disproportionate impact of this remedy can be viewed as a serious flaw in the basic structure of WTO legal remedies.136 Thus, collective retaliation could work towards empowering coalitions of developing countries.137 With regards to the issue of making collective retaliation available only to developing countries, it could be argued that it is not a preferential treatment for developing countries, but a remedial treatment to make retaliation substantively equal to developed countries. Nevertheless, the introduction of the substantive equality theory to the DSU could also touch upon the fundamentals of the Dispute Settlement System and could be considered, as discussed previously under the cross-retaliation proposal, to be one-sided and going beyond the already provided Special and Differential Treatment, and Part IV of the GATT. Thus, collective retaliation could be available to all members, including developing and developed countries, since it is not critical to make it exclusive for developing countries. As argued earlier, making any of the proposals in this article available to developed countries will not provide them with something that they do not already have. They do not experience the retaliation problems of developing countries because they possess large and diversified markets which allow them to effectively retaliate. The

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133 Hudec, supranote 116, p.572.
134 Hoekman, supranote 92, p.353.
135 Hudec, supranote 116.
136 Ibid.
137 Krishnamurthy, supranote 53, p.222.
The proposal of collective retaliation is intended to benefit the weaker members, aimed at placing them at the same standing with the strongest members for whom collectiveness is not required when retaliating. This proposal seeks the amendment of the existing unilateral retaliation system, which might seem to generate some conflict to a certain extent with the bilateral elements of the WTO agreements. Thus, one must examine the collective retaliation proposal in light of the Dispute Settlement System's fundamentals, taking into particular account the nature of WTO obligations, in order to identify its compatibility with the current system.

First, let us examine the nature of WTO obligations. There is still some uncertainty regarding this matter. One view is that obligations under the WTO Agreements are bilateral, involving legal obligations between two countries. This concept is based on the idea that the object of WTO obligations is trade. The identification of WTO obligations as bilateral leads to restrictions on which countries have the possibility to challenge a breach and places limits on the right of countries to retaliate. Under this view, trade is effectively between pairs of countries and therefore identifiable, divisible and determinable. The view is supported by the bilateral way in which trade concessions were negotiated, the bilateral form of the WTO dispute settlement, and the consistency of some WTO rules with the Vienna Convention on the Law of Treaties and the International Law Commission’s Articles on State Responsibility concerning bilateral obligations.

A different position, and the one that this article takes, is that WTO obligations are collective. It is based on the idea that the principal objective of the WTO is the protection of collective expectations regarding the trade-related behavior of governments. Thus, obligations form a common interest over and above the interests of WTO members individually. Under this view, obligations are unquantifiable and indivisible and therefore fundamentally unitary in nature. This is supported by the following reasons.

The core reason is the Most Favored Nation (MFN) obligation of the GATT. It is the key feature of the WTO agreements which is referred to as “central”, “essential” and as “a cornerstone of the world trading system” by the WTO Appellate Body. This obligation requires WTO members to extend their most favorable trade-related “advantage, favor, privilege or immunity” to all other members “immediately and unconditionally”. Thus, WTO obligations are undertaken by one WTO member toward all other members.

Moreover, the shape of WTO Dispute Settlement System under the DSU allows member countries to take other members before panels when there is reason to believe that a national measure violates the WTO agreements.

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139 Ibid.
141 Ibid.
142 General Agreement on Tariffs and Trade of 1994, Art.1.
144 Canada Autos, DS139 (1998), para.69.
145 General Agreement on Tariffs and Trade of 1994, Art.XXXIII, Pum.1(a)-(c).
146 General Agreement on Tariffs and Trade of 1994, Art.XXXIII, Pum.1(a)-(c).
It also extends to “non-violation” claims, cases in which the measure at issue does not directly conflict with the WTO agreements but may have some indirect effect on negotiated concessions, and to “any other situation”, meaning any circumstances that may be nullifying or impairing a benefit or impeding the attainment of any objective under the WTO agreements.147

WTO obligations can be more appropriately understood as obligations *erga omnes partes* obligations undertaken in the collective interest and owed to all members of the treaty system.148 At the WTO, concessions are bilaterally negotiated and collectively applied. This was identified in the *EC-Poultry* dispute where the Appellate body agreed with the panel that countries usually negotiate trade concessions bilaterally, but subsequently the application is multilaterally because “the results of the negotiations are extended on a multilateral basis”.149

An additional argument is the *Theory of WTO Law* proposed by Carmody. His theory recognizes WTO agreements as *law of expectations*, *law of realities* and *law of interdependence*. The WTO agreements as *law of expectations* have the principal aim to protect expectations. The GATT panels were the first to recognize such focus: they were able to see beyond the fact that international trade usually evokes images of trade and came to acknowledge that the treaty’s true purpose was something much more profound: the protection of expectations.150 One might assert that *expectations* could be bilateral, such as in the case of the 1961 Vienna Convention on Diplomatic Relations, where there is a general expectation that the multilateral treaty be complied with, though not making the system integrally multilateral. The 1961 Vienna Convention on Diplomatic Relations was designed to promote the protection of diplomats to perform their functions without fear of coercion or harassment by the receiving country, making the obligations relationship strictly bilateral between the sending and receiving states while providing limited involvement of third states.

However, under the WTO regime, some means of arranging expectation was necessary and it was provided by the *general/MFN obligation*, the “cornerstone of the world trading system” as described by DSB which reveals the degree to which the drafters sought to create something uniform for all its members.151 Additionally, bilaterally negotiated trade concessions, as previously discussed, are extended on a multilateral basis and collectively applied, resulting in an integrally multilateral system. Also, if taken into consideration the definition by the International Law Commission of integral obligation,152 a WTO law breach could be considered integral, because an unlawful measure by a state can theoretically affect all WTO members. For instance, if a state does not provide MFN treatment to a certain product which all members are importing into that state, this could be considered a breach of an integral obligation because it will affect all the parties to the treaty. The operation of the WTO regime was designed to go beyond the boundaries of any single country or pair of countries in promoting the protection of collective expectations.

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148 Carmody, *supra* note 140, p.422.
149 *EC-Poultry*, DS69 (1997), Para.94.
151 *Canada/Autos*, *supra* note 130.
152 International Law Commission, *supra* note 97, p.95.
The WTO agreements as law of realities provide some merits to the view of obligations as bilateral.\(^{153}\) The treaty gives some flexibility to members to respond to specific situations encountered in trade: the realities. These situations often resolve themselves bilaterally despite their role in reinforcing the greater collective whole. For instance, rules on safeguard, subsidies and anti-dumping often present the vision of a single injury and bipolar dispute settlement.\(^{154}\) These realities are negotiated in advance and are agreed upon in order to constitute permissible derogations from the treaty. In other words, realities are akin to reservations as prescribed under the Vienna Convention of the Law of Treaties, which are negotiated and binding upon all members when accepted.\(^{155}\) Carmody asserts that the negotiation in advance of authorization to derogate from the treaty confirms that the core structure of WTO obligations is collective. He adds that the bilateralism is a by-product of the need to make adjustments and it is superficial because all dispute settlements must be consistent with the covered agreements. Therefore, this article supports Carmody’s conclusion that the WTO agreements as a law of realities are supplementary and assistive to the dominant task of protecting expectations.\(^{156}\)

The combination of the WTO agreements as law of expectations and as law of realities results in the law of interdependence.\(^{157}\) Carmody explains that the WTO agreements have the tendency to protect and promote interaction among producers and consumers in different countries, and thereby to create a web of economic relations that goes beyond the interest of WTO members individually, resulting on the focus of the common interest of all members. The obligations are predominately collective, but they must also accommodate certain realities and therefore occasionally assume a bilateral appearance.\(^{158}\) Thus, Carmody identifies WTO obligations to be most appropriately thought of as collective.

The WTO obligations as collective make the proposal for collective retaliation consistent with the complementary bilateral nature of the WTO agreements, on the account that the bilateralism is a by-product. The International Law Commission recognizes occasions of countermeasures taken by states other than the injured state.\(^{159}\) Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts nothing prejudices the right of any state to take lawful measures against a state to ensure cessation of the breach in the interest of the beneficiaries of the obligation breached.\(^{160}\) The International Law Commission recognizes that, provisions on countermeasures may be excluded or modified under the lex specialis principles and welcomes this kind of further development of international law,\(^{161}\) which could be the case under the WTO regime.

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153 Carmody, supra note 140, p.431-432.
154 Ibid.
156 Carmody, supra note 140, p.431-432.
157 Carmody, supra note 140, p.433.
158 Ibid.
159 International Law Commission, supra note 98, p.129.
160 Ibid.
161 International Law Commission, supra note 98, p.139.
Improving Remedies at the WTO Dispute Settlement for Developing Countries

Based on the arguments presented, it could be concluded that the proposal for collective retaliation seems to be compatible with the *fundamentals* the Dispute Settlement System’s objective and the nature of its current remedies. Collective retaliation possesses the strongest compliance-inducing effect since it will permit the formation of coalitions of members, which will constitute a valid threat to the non-complying members to end their unlawful behavior. This credible threat to induce compliance aimed at restoring the *status quo ante* has no punitive element because it does no more than to provide a collective character to the existing retaliation remedy.

5. Conclusion

Current remedies available under the DSU do not provide security, predictability and most importantly compliance inducement for most developing countries. As a consequence, they have no incentive to resolve their trade disputes at the WTO. Thus, this article set out to identify which of the three proposals presented at the ongoing New Negotiations on the DSU integrate the needs of developing countries into the system while not altering with its *fundamentals*. Findings built on the remedy proposals by WTO members aimed at improving and clarifying the dispute settlement rules and procedures and on existing academic writings on the matter.

It should be acknowledged that compliance inducement is identified as the objective of remedies under the DSU. Thus, the remedies effectiveness is intertwined to the idea that members will only be persuaded to abandon their WTO-inconsistent practices if countermeasures or the threat thereof is indeed a credible threat.\(^2\) Hence, from the three proposals, only cross-retaliation and collective retaliation can be identified as to have a valid compliance inducement effect while being compatible with the *fundamentals* of the current system.

The idea of monetary compensation is not new to general international public law and it is recognized by the International Law Commission as non-punitive, as previously discussed. Its main function is to offset the damage suffered, which possess a *punitive* nature when introduced into the current Dispute Settlement System. This runs counter to the WTO dispute settlement *fundamentals*, since the main function of compensation under the DSU is to induce compliance and not to offset the damage suffered, which is acceptable under *lex specialis* regime established by the DSU. For these main reasons and the earlier argued ones, monetary compensation is identified as incompatible with the current system.

The proposal for automatic cross-retaliation provides for a more flexible right for developing countries to retaliate across sectors and agreements which could provide the compliance inducement effect sought by developing countries. It is in line with the *fundamentals*, since it already exists via a non-automatic process which does not possess any punitive element. However, it should be recognized that even when developing countries have the authorization for cross-retaliation, this does not guarantee compliance inducement as it was seen in the *EC-Bananas III, US-Upland*

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Collective retaliation provides the strongest compliance inducement effect since it offers a valid threat to the non-complying members to end their unlawful behavior considering that it permits the formation of coalitions. The WTO obligations as collective, as argued earlier, make the proposal for collective retaliation not counter to the complementary bilateral nature of the WTO agreements. The International Law Commission recognizes that nothing prejudices the right of any state to take lawful measures against a state to ensure cessation of the breach in the interest of the beneficiaries of the obligation breached. Furthermore, it is recognized that the provisions on countermeasures may be excluded or modified under the *lex specialis* principle, which welcomes the further development of international law which takes place under WTO regime. Thus, the proposal for collective retaliation seems to be compatible with the *fundamentals* as a credible threat to induce compliance aimed at restoring the *status quo ante* having no punitive element as it does no more than to provide a collective character to the existing retaliation remedy. Out of the three proposals, collective retaliation is the best option to meet the needs of developing countries while not altering the *fundamentals*.

To conclude, to keep the *fundamentals* of the Dispute Settlement System, both of the proposals pushed forward in this article should be implemented as general remedies available to all WTO members, so not to go beyond the Special and Differential Treatment, and Part IV of the GATT. Many questions remain concerning the implementation, procedures and requirements of these two proposals. It is up to the WTO members to negotiate the appropriate and precise method of implementing these remedy proposals in the system. Thus, this article intends to serve as a catalyst for further research and discussion on the approval and effective implementation of the two proposals identified as compatible with the current WTO Dispute Settlement System.

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Improving Remedies at the WTO Dispute Settlement for Developing Countries

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Abstract

The central pillar of the World Trade Organization’s (WTO) multilateral trading system is the Dispute Settlement Understanding (DSU), its most important contribution for the stability of global trade. It establishes the rules and procedures governing the settlement of disputes at the WTO.

There is a general perception in most developed countries that the Dispute Settlement System works well, and the assessment of the system by their scholars has been positive. However, it is also undisputable that there are many aspects where the system is lacking. This article proposes an academic, yet pragmatic perspective, which takes the position of developing countries at the WTO Dispute Settlement System. It examines three remedy proposals (monetary compensation, cross-retaliation and collective retaliation) in the light of the ongoing New Negotiations on the DSU and existing academic literature.

The New Negotiations on the DSU aim to improve the rules and procedures governing the settlement of disputes under the WTO regime. The negotiations are not intended to generate revolutionary changes in the system, but to improve it by permitting minor changes. Thus, the fundamentals of the current system must be kept intact to not alter with its effectiveness and reputation. The new negotiations are to give a voice to the concerns of those members who have yet to participate in the system, the majority of developing countries, so as to provide them with an incentive to settle disputes at the WTO.

This article provides a compatibility study of the three proposals with the current system, so as to identify which proposals positively incorporate the needs of developing countries, while not altering with the fundamentals of the current system. This article concludes that two of the three proposals, cross-retaliation and collective retaliation, do not alter the fundamentals of the current system and incorporate the needs of developing countries.