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Considering development in the implementation of panel and appellate body reports

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CONSIDERING DEVELOPMENT IN THE IMPLEMENTATION OF PANEL AND APPELLATE BODY REPORTS

SONIA E. ROLLAND*

Dispute settlement at the WTO does not end once the Panel and Appellate Body have issued their reports. Implementation proceedings, including arbitration on the reasonable time period for implementation, the level and manner of retaliation and further Panel proceedings on whether implementation has taken place, can be equally critical in order to secure compliance with the WTO agreements for developing members. Yet, either as complainants or as implementing parties, they may face specific challenges due to their socioeconomic vulnerabilities or costs associated with implementation. While the dispute settlement process includes a number of special and differential treatment (SDT) provisions for developing members, implementation proceedings offer much more limited safeguards and flexibilities, and their use by litigants and adjudicators has been very inconsistent. This article analyzes how members, parties, disputes, arbitrators, Panelists, the Appellate Body and the Dispute Settlement Body have addressed developmental claims and arguments in implementation proceedings. It finds that developing members have often argued that, based on SDT provisions, their development status should have a bearing on the time for implementation (by themselves or by an opposing party).

While arbitrators have been sensitive to such concerns, the time period granted has been rarely modified. By contrast, there are no specific SDT provisions relating to retaliation, yet arbitrators seem to have been more receptive to considering development-related arguments as part of their analysis. This may be a rare instance of development considerations being "mainstreamed" in the interpretation of WTO rules.

Beyond this doctrinal analysis, the article assesses the trajectory of attempts to reform implementation procedures from the Uruguay Round to the Doha Round. Drawing lessons from the practice of members and adjudicators, it offers a cautionary perspective on the likely effect of current proposals. The article concludes by offering avenues for

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improving the consideration of development and the consistency of arbitrators' responses to developmental claims in implementation proceedings despite the absence of formal amendments or a Doha package.

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I. INTRODUCTION

The debate on development and dispute settlement at the World Trade Organization [WTO] has thus far largely focused on compliance when the parties in dispute have unequal economic and political power. However, comparatively little attention has been paid to the process leading to decisions on implementation under the Dispute Settlement Understanding [DSU].[1] Developmental

[1] AMIN ALAVI, LEGALIZATION OF DEVELOPMENT IN THE WTO: BETWEEN LAW AND POLITICS 146-47, 160-62 (2009); Shin-yi Peng, *How Much Time is Reasonable? – The Arbitral Decisions Under Article 21.3(c) of the DSU*, 26 BERKELEY J. INT'L L. 323 (2008); Werner

considerations in WTO disputes do not end once the final Panel or Appellate Body [AB] report has been adopted. At that point, there are still a number of possible proceedings related to implementation: arbitration regarding the reasonable time period for implementation, a new Panel to determine whether implementation has taken place, and arbitration regarding the level and manner of retaliation if implementation is not forthcoming. Several clauses in Article 21 of the DSU on the determination of the implementation period requires to take into account the interests of developing countries. Article 22 on retaliatory rights is silent regarding the special position of developing countries, but the practice of states shows that developmental considerations are integral to their legal arguments.

This article examines whether and how the Special and Differential Treatment [SDT] mandate of Article 21 can be fulfilled to account for the circumstances of developing members in determining the period for implementation. The examination of proposals put forth in the Doha Round, the history of the current provisions in the Uruguay Round, as well as earlier practice under the GATT reveal that developing members have long identified the inadequacy of developmental considerations in implementation procedures. The twelve available Appellate and Panel Reports point to the lack of harmonization in the interpretation of development under Article 21, and raise the question of whether current trends will ever allow the substantiation of Article 21's SDT provisions. Article 22 on retaliation poses even greater challenges because it lacks an explicit development mandate. Despite these obstacles, a number of developing members have argued in disputes that their development circumstances support the application of particular countermeasures.

The issues discussed here are likely to grow in qualitative and quantitative importance as the number of disputes involving developing members multiplies,

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Zdouc, *The reasonable period of time for compliance with the rulings and recommendations adopted by the WTO Dispute Settlement Body, in* KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 88, 91-92 (Rufus Yerxa & Bruce Wilson eds., 2005). Most of the literature on this issue simply restates or quotes Article 21.3(c) or Article 22.6 arbitrations involving development arguments without further analysis. *See for example*, Amin Alavi, *On the (Non)-Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process*, 41 J. WORLD TRADE 319, 325-26 (2007) (describing the outcome in a number of cases); Marco Bronckers & Nabath van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101, 105 (2005); Mary E. Footer, *Developing Country Practice in the Matter of WTO Dispute Settlement*, 35 J. WORLD TRADE 55, 70 (2001) (describing the findings in the *EC–Bananas III* and *Indonesia–Autos* arbitrations); Pierre Monnier, *The Time to Comply with an Adverse WTO Ruling: Promptness within Reason*, 35 J. WORLD TRADE 825, 838 (2001) (describing the *Indonesia–Autos* arbitration).

leading to an increased probability of development arguments in future Article 21 and 22 proceedings. It will be particularly interesting to see to what extent China will be able to successfully use development arguments as it continues to increase its share of global trade. For small and medium sized developing economies with trade and bargaining power asymmetries, the ability to argue that their circumstances should play a role in determining the time period for implementation and possible retaliatory measures is even more critical.

The article begins with an analysis of the current legal framework for SDT in the DSU provisions dealing with the implementation of Panel and AB reports (Articles 21 and 22). This first part assesses developing members' practice with respect to the assertion of development-related arguments in the implementation phase, focusing on the determination of the time period for implementation (*infra* Part II.A), whether implementation has occurred (*infra* Part II.B), and the authorization of retaliation measures (*infra* Part II.C). It demonstrates that there is very little consistency in the manner that arbitrators, Panels and the AB have dealt with developmental considerations in deciding the modalities for implementation of reports.

The second part of the article compares the drafting history of the SDT provisions of Articles 21 and 22 to proposals submitted in the Doha Round to reform these clauses. It suggests that there are many parallels between past proposals and amendments on the one hand, and negotiations on the other hand. The comparison highlights the continuity of the concerns of developing nations regarding implementation and their long-standing recognition that the system is ill equipped to serve the interests of certain developing members. Trade asymmetries and the disproportional burden of longer or shorter implementation time periods for developing members, compared to their developed counterparts have been at the forefront of proposals for reform for decades. In recent years, the recognition that not all developing countries are similarly situated with respect to their ability to retaliate has brought further complexity to the debate.

The last part of this article proposes some avenues for considering how to account for development disparities in the implementation of Panel and AB reports, taking into account the current state of the practice, the history of the negotiations and dynamics in the Doha Round.

II. THE CURRENT LEGAL FRAMEWORK

Article 21 provides three sets of procedures: surveillance of implementation of reports by the DSB, recourse to arbitration to define the reasonable period of time for implementation when the parties disagree, and recourse to a Panel in the case of a dispute regarding the conformity of implementation measures with the WTO

agreements, panel Reports or AB Reports. The Article includes three clauses regarding developing members:

- Article 21.2 specifies that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement"
- Article 21.7 provides that "[i]f the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances" and
- Article 21.8 states that "[i]f the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."

Article 22, dealing with compensation and suspension of concessions, sets the framework in which the implementing member falling short of its obligations might compensate the affected member, and also allows for the latter to seek a suspension of concessions pending full implementation. When the parties cannot agree on the manner and level of the suspension of concessions, they may have recourse to a binding arbitration under Article 22.6. Unlike Article 21, Article 22 does not include any SDT provision for developing members. Arguably, the broad language of Article 21.2 may be construed to apply equally to the procedures of Article 21 and 22 since they all relate to measures which have been subject to dispute settlement.[2]

Additionally, Article 24 on special procedures for Least Developed Country (LDC) members may offer additional elements that affect the interpretation of Articles 21 and 22. Article 24.1 specifies that "if nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures". More generally, it states that "[a]t all stages … of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members".

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[2] *See Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, ¶ 45, WT/DS87/15, WT/DS110/14 (May 23, 2000); Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU*, ¶ 51, WT/DS155/10 (Aug. 31, 2001), DSR 2001:XII, 6013 [hereinafter *Argentina – Hides and Leather (Article 21.3(c))*].

In practice, how has this framework been applied in post-Panel and AB Report procedures? While many provisions of the DSU include allowances for developing countries, few are put to use in Panel, AB and Dispute Settlement Body (DSB) proceedings. The discrepancy may be largely ascribed to the wording of the provisions, often setting a "best efforts" objective rather than a positive obligation. This is a pervasive problem with SDT obligations throughout the WTO agreements.[3] For instance, Article 8.10 of the DSU, allowing developing parties to a dispute to request the inclusion of at least one Panelist from a developing member, does not raise particular problems. The right is clearly defined and implementation is easily ascertainable.[4] In contrast, Article 4.10 provides that "Members should give special attention to the particular problems and interests of developing country Members" during consultations. The mandate here is not couched in the language of legal obligation, nor is the required conduct defined specifically. Even the clear, mandatory obligation that Panel Reports "shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more favourable treatment for developing country Members"[5] has been largely ignored or given short shrift. The same trends can be observed with respect to developmental considerations under Articles 21 and 22 of the DSU on the implementation of Panel and AB Reports and suspension of concessions.[6] The remainder of this section examines DSB meeting minutes, Article 21.3 and 22.6 arbitrations as well as Article 21.5 Panel reports for evidence of both

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[3] *See for example*, General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, art. XXXVII:1 [hereinafter GATT]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, art. 10.2 – 10.4 [hereinafter SPS Agreement]; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, arts. 12.2, 12.3, 12.5, 12.6, 12.9 [hereinafter TBT Agreement]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201, art. 15 [hereinafter Anti-dumping Agreement]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, art. IV:2, IV:3 [hereinafter GATS].

[4] That is not to say that the provision is not controversial. Indeed, a number of developing members have argued that such an appointment should be done as a matter of course, rather than upon request of a member.

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes Art. 12.11, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[6] *See* SONIA E. ROLLAND, DEVELOPMENT AT THE WTO Ch. 6-7 (Oxford Univ Press 2012) [hereinafter ROLLAND]. *See also* Magda Shahin, *WTO dispute settlement for a middle-income developing country: the situation of Egypt, in* DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 275, 280 (Gregory C. Shaffer & Ricardo Melendez-Ortiz eds., 2010).

development arguments and to assess whether arbitrators or Panelists ultimately factored such arguments into their findings.

The three categories of proceedings, comprising the determination of the time period for implementation, disputes regarding substantive implementation, and authorisation of retaliation under Articles 21 and 22 will be examined in turn.

A. Developmental Considerations in Determining the Time Period for Implementation

The member whose measures are not in conformity with WTO obligations must implement the recommendations of the reports immediately if practicable, or within a reasonable period of time, as defined in DSU Article 21.3. If the reasonable period of time cannot be determined by mutual agreement amongst the parties or with the DSB, the matter may be submitted to arbitration.

1. Invoking Development at the DSB

Have the SDT provisions of Article 21.2, 21.7 and 21.8 been invoked at the DSB in relation to the reasonable time period for implementation? While Article 21.2 apparently covers all dispute-related proceedings, Articles 21.7 and 21.8 specifically refer to actions by the DSB, rather than by Panelists, arbitrators or the AB.

A perusal of the DSB's minutes of meetings reveals extremely few references to these provisions in relation to the determination of time period for the implementation of a Panel or AB Report. While there have been over eight hundred instances of developing country participation in disputes as complainants, respondents or third parties, a mere eleven references to these SDT provisions have been recorded in DSB minutes.

Article 21.2 was mostly raised in the course of surveillance of the implementation of a Panel or AB Report before any recourse to arbitration, and in cases where no arbitration took place, it was raised regarding the reasonable time for implementation. While Argentina was negotiating with the European Communities (EC) regarding the latter's timing and modalities for implementation of *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*,[7] it repeatedly invoked Article 21.2, noting that "in future more attention could be paid to Article 21.2 of the DSU concerning the particular attention to be given to developing countries"[8] and that "as provided for in Article 21.2 of the

[7] Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1 (*adopted* Feb. 16, 2001), DSR 2001:V, 1779.

[8] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/99 (Apr. 3, 2001), at 10-11.

DSU, particular attention should be paid to matters affecting the interests of developing-country Members due to a possible impact of the implementation of the DSB's recommendation on their fiscal situation".[9] The representative also pointed out the lack of a framework in the DSU for addressing Article 21.2 fully.[10] In relation to the EC's implementation of the AB report in *European Communities—Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*,[11] India's representative stated that "India called upon the EC to respect its obligations under Article 21.2 of the DSU and to act without further hesitation or delay".[12] Similarly, Peru called for the EC to comply with Article 21.2 in relation to the implementation of the AB report in *European Communities—Trade Description of Sardines*.[13] In rare instances, developed countries have also invoked Article 21.2, as did Canada in several DSB meetings to monitor implementation in *United States—Section 211 Omnibus Appropriations Act of 1998*.[14]

Beyond surveillance by the DSB, members have called for the application of the SDT provisions of Article 21 when dealing with the timing for arbitration regarding the reasonable period of time for implementation (Article 21.3(c) arbitrations). After negotiations between the EC and Argentina resulted in a dead end in the case of *Argentina—Hides and Leather*, Argentina stated that it "recognized the right of the EC to request arbitration and … it would invoke the provisions of Article 21.2 of the DSU – developing country status – in relation both to the appointment of one or more arbitrators, if necessary, and to the substantive aspects of the dispute".[15] This is one of the most specific recourses to Article 21.2 that has been made at the DSB, suggesting that the provision could have both procedural and substantive implications. In response to the EC's recourse to an

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[9] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/101 (May 8, 2001), at 9.

[10] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/99 (Apr. 3, 2001), at 10-11.

[11] Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (*adopted* Mar. 12, 2001), as modified by Appellate Body Report, *Canada—Certain Measures affecting the Automotive Industry*, WT/DS141/AB/R (Oct. 4, 2000) DSR 2001:VI, 2077.

[12] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/101 (May 8, 2001), at 13.

[13] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/134 (Jan. 29, 2003), at 11, discussing the implementation of the Appellate Body report in *European Communities—Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002).

[14] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/207 (Apr. 26, 2006), at 4; DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/210 (May 30, 2006), at 4-5, discussing the implementation of the Appellate Body report in *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002).

[15] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/105 (June 19, 2001), at 13.

Article 21.3(c) arbitration in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Ecuador stated that "[t]his dispute could be further prolonged as a result of the initiation of procedures to challenge, once again, the EC import banana regime. The time involved in any such procedures favoured the EC's trade interests and harmed Ecuador. The EC had also disregarded the letter and spirit of the DSU, and in particular Article 21.8 thereof. In this dispute, no account had been taken of the trade impact on Ecuador's economy pursuant to Article 21.8 of the DSU".[16]

Overall, WTO members acting as the DSB have made little effort to translate the broad mandates of Articles 21.2, 21.7 and 21.8 into actual measures, rights or obligations. Even where a member to the dispute has raised one of the clauses, the minutes of DSB meetings do not reflect any discussion or response by other members regarding their implementation.

2. Invoking Development in Article 21.3(c) Arbitrations

With its broad wording, Article 21.2 can be read to apply to arbitrations regarding the reasonable time period for implementation (Article 21.3(c) arbitrations). By contrast, Articles 21.7 and 21.8 specifically refer to actions by the DSB and hence may reasonably be construed as not binding upon arbitrators. Indeed, WTO members (generally, but not exclusively developing members) have raised Article 21.2 in twelve arbitrations.[17] While arbitrators did comment on the legal effect of Article 21.2, it is quite unclear from this small sample whether those references had any impact on the length of time granted for implementation.[18]

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[16] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/49 (Nov. 19, 1998), at 5.

[17] *See* Table 1 summarizing how much time each party requested and how much time the arbitrator granted.

[18] *See* Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221, 254 (2006) (commenting that arbitrators have been "bewildered" when the "interests of developing country Members" have been raised and often bypassed the issue altogether.). *But see,* MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE & POLICY 159 (2d ed. 2006) (relying on the Award of the Arbitrator in *Chile–Alcoholic Beverages* to argue that arbitrators will "usually define a longer [reasonable period of time]" when the member concerned is a developing country, but not necessarily when both countries involved in the dispute are developing).

Table 1 - Time requested and awarded in Article 21.3(c) arbitrations.
(Implementing member noted in italics)

CASE NAME AND REFERENCE	MEMBER RAISING 21.2	RESISTING MEMBER	ARBITRATOR
Indonesia—Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU, WT/DS54/15,WT/DS55/14,WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029	*Indonesia*: 15 months	EC: 6 months; US: immediately	12 months
Chile—Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583	*Chile*: 18 months	EC: 8 months, 9 days	14 months, 9 days
Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU, WT/DS155/10, 31 August 2001, DSR 2001:XII, 6013	*Argentina*: 46 months, 15 days	EC: 8 months	12 months, 12 days
Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237	*Chile*: 18 months	Argentina: 9 months, 6 days NOTE: Argentina also raised 21.2	14 months
United States—Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU, WT/DS217/14, WT/DS234/22, 13 June 2003, DSR 2003:III, 1163	Complaining parties: 6 months	*US*: 15 months	11 months
European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU, WT/DS246/14, 20 September 2004,	*EC*: 20 months, 10 days	India: 6 months, 2 weeks. NOTE: India also raised	14 months, 11 days

DSR 2004:IX, 4313		21.2.	
United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU, WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619	Argentina: 7 months	*US*: 15 months	12 months
United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU, WT/DS285/13, 19 August 2005, DSR 2005:XXIII, 11639	Antigua: 1 month/ 6 months	*US*: 15 months	11 months, 2 weeks
European Communities — Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, 11581	Brazil & Thailand: 6 months, 6 days/ 7 months, 8 days	*EC*: 19 months, 12 days. NOTE: EC also raised 21.2	12 months, 3 days
European Communities—Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU, WT/DS269/13, WT/DS286/15, 20 February 2006	Brazil: 5 months, 10 days	EC: 26 months	9 months
Colombia—Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU, WT/DS366/13, 2 October 2009	Colombia: 15 months	Panama: 4 months, 19 days. NOTE: Panama also raised 21.2	8 months, 15 days

As a matter of litigation strategy, two sets of issues emerge:

First, who can rely on Article 21.2? Can both the implementing party (the party found to be non-compliant, typically the respondent in the original dispute) and the complaining party (which typically brought the claim in the original dispute) equally invoke the provision? Can the interests of non-parties be raised in relation to an Article 21.2 argument? How have arbitrators ruled when both sides of the dispute invoked Article 21.2?

Second, how have Article 21.2 arguments been framed? What particular aspects of being a developing country have the litigants put forth as warranting special treatment under Article 21.2? How have arbitrators responded to the various types of arguments, if at all?

(i) Who can rely on Article 21.2?

Case law suggests that Article 21.2[19] is least controversial when it is invoked by a developing country which is supposed to be implementing its obligations, in a case brought by a developed country.[20] In contrast, whether Article 21.2 applies to complaining or non-party developing countries fighting to obtain implementation was unsettled until relatively recently.[21] In *US—Gambling*, the arbitrator engaged in a contextual analysis to determine whether a complaining member (Antigua, in this case) could ever invoke Article 21.2, but failed to answer the question on merits. Instead, the arbitrator left open the possibility that a complaining member could invoke Article 21.2 by ruling that he was not persuaded that the criteria for Article 21.2 were satisfied by Antigua "in the absence of more specific evidence or elaboration" of Antigua's affected interests and "their relationship with the measures at issue".[22] A few months later, the arbitration in *EC—Export Subsidies on Sugar (Article 21.3(c))* answered the question in the affirmative: Complainants can raise Article 21.2.[23] Indeed, nothing in the wording of Article 21.2 suggests that it serves only as a defence.

No arbitrator has ever allowed an implementing developed country to invoke Article 21.2 to protect the interests of third party developing countries benefiting from the challenged trade measure.[24] It may still be possible to make such

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[19] DSU Article 21.2 states "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

[20] Award of the Arbitrator, *Indonesia—Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU*, ¶ 24, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (Dec. 7, 1998) [hereinafter *Indonesia—Autos (Article 21.3(c))*].

[21] *See for example*, Award of the Arbitrator, *European Communities—Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, ¶ 99, WT/DS265/33, WT/DS266/33, WT/DS283/14 (Oct. 28, 2005) [hereinafter *EC—Export Subsidies (Article 21.3(c))*]; Award of the Arbitrator, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU*, ¶ 52, WT/DS268/12 (June 7, 2005) [hereinafter *US—Oil Country (Article 21.3(c))*].

[22] Award of the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU*, ¶ 62, WT/DS285/13 (Aug. 19, 2005) [hereinafter *US —Gambling (Article 21.3(c))*].

[23] *EC—Export Subsidies (Article 21.3(c))*, *supra* note 21, ¶ 99.

[24] *Id.* ¶ 102; *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU*, ¶ 59, WT/DS246/14 (Sept.

arguments in the future, provided the developed country can present specific evidence as to how the interests of developing country beneficiaries bear on the reasonable period for implementation.[25]

For instance, in *EC—Tariff Preferences (Article 21.3(c)),* the EC argued that under Article 21.2, it should receive more time to implement the AB decision because the beneficiaries of its Drug Arrangements (tariffs) were developing countries. India countered that the EC should have less time because Article 21.2 only applies to developing countries that are parties to the dispute. The arbitrator avoided deciding whether Article 21.2 could extend to non-party developing countries, finding instead that Article 21.2 was inapplicable to his determination of a reasonable period of time for implementation. This was because neither side had "provided a satisfactory explanation or evidence of the precise manner in which these countries are particularly affected, as developing country Members, by the European Communities' implementation of the recommendations and rulings in this dispute, nor how this should affect the reasonable period of time for implementation".

Similarly, both the implementing party (the EC) and complaining developing parties invoked Article 21.2 in *EC—Export Subsidies on Sugar (Article 21.3(c)).* Once again, the EC argued that Article 21.2 also applied to protect the interests of developing countries that are not parties to the dispute. The arbitrator concluded that Article 21.2 required that attention be paid to "particular interests to matters affecting . . . *complaining* parties to the dispute" (emphasis added) and that Brazil and Thailand had sufficiently demonstrated that their interests as developing countries were relevant for a determination of the reasonable period of time for implementation. Regarding the non-party African, Caribbean, and Pacific (ACP) countries whose interests were cited by the EC, and non-party non-ACP developing countries in general, the arbitrator concluded that the EC had not submitted sufficient evidence to satisfy the Article 21.2 criteria.[26] The arbitrator also declined to answer the question of whether Article 21.2 could ever be applicable to non-party developing country members, stating simply "it is not necessary for me, in the specific circumstances of this arbitration, to decide whether Article 21.2 is also applicable to developing country Members that are not parties to the arbitration proceedings under Article 21.3(c)".[27]

An equally contentious issue is the applicability of Article 21.2 when both complaining and implementing parties are developing countries, and both invoke

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20, 2004).

[25] *EC—Export Subsidies (Article 21.3(c))*, *supra* note 21, ¶ 102.

[26] *Id.* ¶ 103.

[27] *Id.* ¶ 104.

the provision.[28] In every instance where that scenario occurred, the arbitrator decided that the interests of both parties as developing countries offset each other and therefore Article 21.2 had no bearing on what constituted a reasonable period of time for implementation.[29]

Apparently, the only possibility for Article 21.2 to commend a particular result when both sides (developing countries) invoke it is when one party can show that it is more severely affected by its developing status than the other party. In *Colombia—Ports of Entry (Article 21.3(c)),* both the implementing party, Colombia and the complaining party, Panama invoked Article 21.2. Colombia gave specific evidence as to how its interests as a developing country would be affected by delayed implementation, and argued that unlike the complaining party in *Chile—Price Band System (Article 21.3(c))*, Panama was not experiencing "daunting financial woes" that would justify an offset.[30] In contrast, Panama argued that implementing party Colombia had failed to demonstrate that it was in a "dire economic or financial" situation sufficient to satisfy Article 21.2 criteria.[31] The arbitrator held that the interests of the two parties as developing countries essentially offset each other because Article 21.2 "[was] of little relevance," unless "one party succeeds in demonstrating that it is more severely affected by problems related to its developing country status than the other party".[32]

Future arbitrations under Article 21.3(c) will undoubtedly reveal more regarding when, how, and for whom Article 21.2 should bear on an arbitrator's determination of what constitutes a reasonable period of time for implementation of DSB decisions. Two significant questions remain: Whether a developing country can ever successfully invoke Article 21.2 against another developing country, and whether an arbitrator will ever consider the interests of non-party developing countries when determining what constitutes a reasonable period of time for DSB implementation.

(ii) <u>How are Development Arguments framed under Article 21.2?</u>

Leaving aside the question of who can have recourse to Article 21.2, the next

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[28] *See for example,* Award of the Arbitrator, *Colombia—Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU*, ¶ 104, WT/DS366/13 (Oct. 2, 2009) [hereinafter *Colombia—Ports of Entry (Article 21.3(c))*].

[29] *Id.* ¶ 106; Award of the Arbitrator, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, ¶ 56, WT/DS207/13 (Mar. 17, 2003) DSR 2003:III, 1237 [hereinafter *Chile—Price Band System (Article 21.3(c)*].

[30] *Colombia—Ports of Entry (Article 21.3(c)), supra* note 28, ¶ 32.

[31] *Id.* ¶ 54.

[32] *Id.* ¶ 106.

issue is determining the content and legal effect of the provision. Over time, the reasonable period of time for implementation has come to mean the shortest possible period of time in which implementation can be achieved within the legal and administrative system of the implementing country.[33] With such an objective standard, the fact that the opposing party is a developing nation will be of no import. In *US—Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, Argentina argued that the arbitrator should take "cognizance" of the fact that it was a developing country member which was being hurt by the US tariff regime, and that the arbitrator should use Article 21.2 as "context" for determining the reasonable period of time granted to the US. The arbitrator ruled that the reasonable period of time would be the "shortest period possible" within the US legal system, and that this fact was not affected by Argentina's status as a developing country. Similarly, in *EC—Chicken Cuts (Article 21.3(c))*, Brazil persuaded the arbitrator that its interests as a developing country were affected by the EC's measures at the core of the dispute, but failed to persuade the arbitrator that those interests had any additional bearing on the reasonable period of time necessary for the EC's implementation, because the arbitrator had already concluded that the reasonable period of time was the shortest period of time possible in which the EC could implement its obligations.[34] In the *US—Gambling (Article 21.3(c))* arbitration, Antigua invoked Article 21.2 and gave the most specific explanation yet as to how its interests as a developing country would be affected by the timing for implementation. The US countered that the task of the arbitrator was to "determine the shortest possible period for implementation within the legal system of the implementing member", and thus the status of a complaining party as a developing member had no impact on the determination.[35] The prevailing interpretation of the "reasonable period of time" therefore largely eviscerates Article 21.2, particularly when the request of the developing country is for the implementation period to be shorter than what the implementing country's legal system would normally require.

Nonetheless, some arbitrators have found that Article 21.2 *can* be taken into account, typically to extend the period of time that would be reasonable beyond the strict requirements of the legal process for bringing the measure into conformity with the covered agreements. This has been true for some cases involving developing implementing parties. The question then is to determine what "matters" are relevant, and what "interests of developing Members" warrant special consideration under Article 21.2. For instance, citing Indonesia's status as a

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[33] *See for example,, US—Oil Country (Article 21.3(c))*, *supra* note 21, ¶ 52.

[34] Award of the Arbitrator, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, ¶ 82, WT/DS269/13, WT/DS286/15 (Feb. 20, 2006).

[35] *US—Gambling (Article 21.3(c))*, *supra* note 22, ¶ 57.

developing country, and particularly one facing harsh economic conditions, the arbitrator in *Indonesia—Autos (Article 21.3(c))* found that the "reasonable period of time" for Indonesia to implement the recommendations and rulings of the DSB was six months longer than the six months required for the completion of Indonesia's domestic rule making process. This was the first arbitration where the decision deviated from the "shortest period possible" standard to take into account the interests of a developing member.[36] The arbitrator accepted Indonesia's assertion that its economy was "near collapse" and that its economic conditions constituted "very particular circumstances".[37]

When the implementing country is the developing country claiming Article 21.2 benefits, arbitrators appear most persuaded that special consideration is warranted when the developing country asserts with specificity as to how its interests as a developing country affect the reasonable period of time required for implementation. Claims that the implementing country is in the midst of a financial or economic crisis can also be persuasive, as was seen in *Indonesia—Autos (Article 21.3(c))* and *Argentina—Hides and Leather (Article 21.3(c)).*

In *Chile—Alcoholic Beverages (Article 21.3(c)),* the arbitrator agreed that Chile's status as a developing country should factor into its "reasonable time" determination despite the fact that Chile had "not been very specific or concrete about its particular interests as a developing country Member nor about how those interests would actually bear upon the length of 'the reasonable period of time' ".[38] The arbitrator observed that Article 21.2 "enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB".[39]

The arbitrator also followed this reasoning in the *Argentina—Hides and Leather (Article 21.3(c))* case: Argentina's interest as a developing country was a general factor to be considered in the determination of what would be a "reasonable period of time" for Argentina to implement the DSB ruling, despite the fact that Argentina had not identified how its interests would be specifically served by a longer time frame, and despite the arbitrator doubting that Argentina's economy was "near collapse." Indeed, the *Argentina—Hides and Leather (Article 21.3(c))* arbitrator observed that Argentina was arguably "assimilating its 'interests' as a

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[36] Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 716-17 (2000).

[37] *Indonesia – Autos (Article 21.3(c)), supra* note 20, ¶ 24.

[38] Award of the Arbitrator, *Chile—Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, ¶ 44, WT/DS87/15, WT/DS110/14 (May 23, 2000).

[39] *Id.* ¶ 45.

developing country Member with the severe economic and financial difficulties" that it was then facing.[40] Noting the general language of Article 21.2, the arbitrator accorded Argentina special treatment, thereby implicitly accepting that an assertion of a general economic or financial crisis by a developing country is acceptable in lieu of "specific interests" to invoke Article 21.2 successfully.

The *Chile—Price Band System (Article 21.3(c))* arbitration offers an interesting contrast. In the first Article 21.3(c) arbitration between two developing countries, both sides invoked Article 21.2 to support their positions. The arbitrator refused to accord Chile any special treatment for two reasons: first, Chile had not identified additional "*specific* obstacles that it faces *as a developing country*", and second, Argentina was also a developing country facing "daunting financial woes".[41] Whereas the failure to raise specific developing country circumstances had not been an obstacle in *Argentina—Hides and Leather (Article 21.3(c))*, it apparently justified rejecting Chile's argument in *Chile—Price Band System (Article 21.3(c))*.

A wide disparity in the reasoning and outcomes characterizes the treatment of Article 21.2 in arbitration awards rendered under Article 21.3(c). Table 2 summarizes whether development arguments have been accepted by arbitrators in such proceedings. While the older cases seem more flexible in their consideration of the circumstances of developing country litigants, recent cases have been more restrictive, requiring a narrow tailoring between developmental circumstances and the particular request for a longer or shorter time period for implementation.

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[40] *See Argentina—Hides and Leather (Article 21.3(c))*, *supra* note 2, ¶ 51.
[41] *Chile—Price Band System (Article 21.3(c))*, *supra* note 29, ¶ 56.

Table 2 - Arbitrators' treatment of development arguments in determining the reasonable time period for implementation under Article 21.3(c)

Versus	COMPLAINANT Developing member	COMPLAINANT Developed member
IMPLEMENTING Developing member	Development has a bearing but interests generally found to offset each other	Development arguments accepted
IMPLEMENTING Developed member	Development arguments Accepted but objective standard for time period for implementation limited the effect in practice	Not applicable
IMPLEMENTING Developed member on behalf of developing Third Party	Development may have a bearing but unsuccessful on facts so far	Undecided

B. *Development in Disputes Regarding Implementation (Article 21.5 panels)*

A Panel can be convened when the parties in dispute disagree on whether the implementing party has complied with a panel or AB Report, or on whether the compliance measures run afoul of some other provision of the covered agreements. The ensuing panel Report (preferably produced by the same Panel convened for the original dispute) can in turn be appealed to the AB. Few disputes ever reached this stage of the dispute settlement procedure. The *EC—Regime for the Importation, Sale and Distribution of Bananas* cases stands out, with a total of two recourses to Article 21.5 Panels, one of which was also appealed to the AB. Spanning over a decade, the *Bananas* dispute emerged in the early years of the WTO and tested the full range of procedures under the DSU, particularly with respect to implementation procedures under Articles 21 and 22. The 1996 Panel report was appealed and followed by an arbitration under Article 21.3(c) on the time period for implementation. The parties then came back to the panel for Article 21.5 proceedings regarding whether the EC had properly implemented the appropriate measures. The parties also underwent an Article 22.6 arbitration for the purposes of retaliation. Despite a mutually agreed solution that was notified in 2001, a second recourse to Article 21.5 was initiated and that second report was eventually appealed to the AB in 2008.

While Article 21.5 itself does not mention development or SDT for developing members, it may be argued that other SDT provisions of Article 21 could, or possibly must, infuse Article 21.5 proceedings. In particular, Article 21.2 specifies that "[p]articular attention should be paid to matters affecting the interests of developing country Members *with respect to measures which have been subject to dispute settlement*" (emphasis added). This suggests that the article could apply to Article 21.5 proceedings. Indeed, in *United States—Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, Thailand, as a third party, pointed out that repeated litigation cycles were detrimental to developing countries with limited resources and contradictory to the spirit of Article 21.2. The argument was made to support Japan and the EC's interpretation of the measures covered by the underlying substantive AB Report.[42] After the first recourse to Article 21.5 in the *Bananas* dispute, Ecuador asked whether "the EC's non-compliance would be reviewed in the context of the new round of negotiations and what would be reported in connection with the implementation of Article 21.2 of the DSU on special and differential treatment in the context of an evaluation of the implementation of the Uruguay Round Agreements at the Third Ministerial Conference in Seattle".[43]

The *EC—Bed Linen* Article 21.5 Panel and AB Reports, along with the parties' submissions in these proceedings provide the most extensive discussion of Article 21.2 in all of WTO case law. India argued that Article 21.2 was mandatory rather than merely giving members discretion whether and how to pay attention to the interests of developing countries.[44] It also argued that Article 21.2 pointed to a particular substantive interpretation of the Antidumping Agreement and the EC's obligations therein.[45] According to India, the violation of Article 15 (SDT) of the

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[42] Third Party Oral Statement of Thailand, *United States—Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, ¶ 5, WT/DS322/RW Annex E-11 (Nov. 5, 2008) ("Thailand fully supports the views of Japan and the European Communities that if the subsequent reviews were excluded, concerned Members would be forced into a "Groundhog Day" scenario of never-ending litigation. As a developing country with a limited amount of resources, Thailand cannot afford to participate in never-ending litigation cycles. In this instance, we recall that Article 21.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement"./").

[43] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/70 (Dec. 15, 1999), at 3.

[44] First Written Submission of India, *EC—Bed Linen (Article 21.5–India)*, ¶¶ 266-271, WT/DS141/RW Annex A-1 (July 15, 2002) [hereinafter *EC—Bed Linen (Article 21.5–India)*].

[45] Second Written Submission of India, *EC—Bed Linen (Article 21.5–India)*, ¶ 122, WT/DS141/RW Annex C-2 (Aug. 12, 2002).

Antidumping Agreement also triggered a breach of Article 21.2.[46] The EC responded that the use of the word "should" rather than "shall" in Article 21.2 indicated the non-mandatory nature of the provision and equated its broad wording to vagueness.[47] It conceded, however, that the AB had interpreted "should" to mean "shall" in some instances and that a non-mandatory provision was not necessarily meaningless altogether.[48] In the alternative, the EC argued that Article 21.2 did not restrict the discretion of the implementing member with respect to the substance of the measure to be adopted, but rather imposed, at most, a procedural obligation. It specifically rejected an interpretation of Article 21.2 that could require the implementing member to select the measure that had the least adverse impact on the interests of the developed member.[49] Last, the EC argued that it had, in fact, taken India's interests into account by agreeing to implement in only five months, rather than 15 months, and by not delaying the establishment of the Article 21.5 Panel.[50] The US, as a third party, supported the EC's reading of Article 21.2 as non-mandatory.[51]

The Panel further probed India's argument, asking both the EC and India "[a]gainst what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members?"[52] The parties' answers provided no further clarification, and the US stated that it would not take a position on the matter. The Panel ultimately found that Article 21.2 did not impose any obligation upon a member, neither requiring that member to act nor to refrain from acting. The Panel agreed with the EC and US that Article 21.2 was not mandatory, and rejected India's argument that "should" was the equivalent of "shall" but rather found that it established "an important general policy" that can be effectuated in various ways. With respect to India's substantive arguments, the Panel held that "we fail to see how the legitimate initiation of a proceeding specifically provided for in the AD Agreement could be considered to violate Article 21.2 of the DSU".[53] The AB restated the Panel's findings with respect to

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[46] *Id.* ¶¶ 241-243.

[47] First Submission of the European Communities, *EC—Bed Linen (Article 21.5–India)*, ¶¶ 279-285, WT/DS141/RW Annex A-2 (July 29, 2002).

[48] Oral Statement of the European Communities, *EC—Bed Linen (Article 21.5–India)*, ¶¶ 122-124, WT/DS141/RW Annex D-3 (Sep. 10, 2002).

[49] *Id.* ¶¶ 286-87.

[50] *Id.* ¶¶ 290-293.

[51] Third Party Submission of the United States, *EC—Bed Linen (Article 21.5–India)*, ¶ 12, WT/DS141/RW Annex B-2 (Aug. 5, 2002).

[52] India's Answers to the Panel's Questions, *EC—Bed Linen (Article 21.5–India)*, ¶ 31, WT/DS141/RW Annex E-1 (Sep. 23, 2002).

[53] Panel Report, *EC—Bed Linen (Article 21.5–India)*, ¶¶ 6.262–6.271, WT/DS141/RW (Nov. 29, 2002).

Article 21.2 without further discussion.[54]

Leaving aside the issue of whether Article 21.2 imposes a legal obligation or is merely discretionary, there has been no consideration of the nature of the SDT clause in the context of Article 21.5. Should it be read as a procedural or substantive obligation? If it is understood as a procedural obligation, the party bearing the obligation need only pay attention to "matters affecting the interests of developing country Members", but the end result might be the same. Presumably, the "interests" of developing members are somehow balanced against some other as yet undefined interests (perhaps of other members). The clause provides no indication as to how such a procedural obligation might be implemented. What are legitimate competing interests? Under what standard are they balanced against the interests of developing members? Are the interests of developing members those of the members in the dispute, of third parties, of any and all potentially affected developing members? If Article 21.2 is read as a substantive obligation, it remains to be determined what results it requires. Moreover, none of the Article 21.5 reports address who would have obligations under Article 21.2 (the parties in dispute, the panel, etc.).

The SDT provisions of Articles 21.7[55] and 21.8[56] have also been raised in connection with Article 21.5 proceedings, though these provisions are clearly directed at the DSB rather than at the Panels or AB. In the aftermath of its first recourse to Article 21.5 in the *EC—Regime for the Importation, Sale and Distribution of Bananas*, Jamaica suggested at the DSB that Article 21.7 and 21.8 could come into play.[57] In *US—Tubular Goods*, Argentina argued that Article 21.7 was a ground for the Panel to recommend that the US terminate an anti-dumping duty order "so as to prevent the 'never-ending cycle' of US violation and subsequent Section 129 proceedings", because "such an endless loop" would permit the US to continue to avoid actual implementation of the DSB rulings and recommendations.[58] However,

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[54] Appellate Body Report, *EC—Bed Linen (Article 21.5–India)*, WT/DS141/AB/RW (Apr. 8, 2003).

[55] DSU Art. 21.7: "If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances".

[56] DSU Art. 21.8: "If the case is one brought y a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned".

[57] DISPUTE SETTLEMENT BODY, Minutes of Meeting, WT/DSB/M/51/Add.2 (Mar. 8, 1999), at 9.

[58] First Written Submission of Argentina, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, ¶ 244, WT/DS268/RW Annex A-1 (Apr. 5, 2006) [hereinafter *US—Oil Country*

neither the Panel nor the AB addressed the issue, and hence the relevance of Articles 21.8 and 21.8 remains to be seen.

C. Taking Development into account in Retaliation

In the event that an implementing member fails to fulfil its obligations, complaining members are entitled to negotiate for compensation and, failing that, request the suspension of concessions against the non-complying member after the expiration of the reasonable implementation period.[59] Although Article 22 of the DSU does not provide any specific safeguard for developing countries, a number of noteworthy disputes have taken place regarding the level of suspension of concessions involving the interests of developing members.

Article 22 of the DSU controls the availability of "compensation and the suspension of concessions or other obligations" for a complaining party when an implementing party fails to comply within a reasonable period of time. If the complaining and implementing parties fail to negotiate a mutually acceptable compensation agreement, the complaining party may appeal to the DSB for authorization to retaliate by suspending concessions or other obligations. [60] However, the implementing party may request arbitration under Article 22.6 when it objects to the level of suspension envisioned, or claims that the modalities of the suspension are not in accordance with Article 22.3.

Unlike Article 21, Article 22 does not include any SDT clause. Nonetheless, developing parties have made arguments based on their developing country status regarding both the levels of retaliation and the type of retaliation to be authorized. The latter is governed by Article 22.3 under which a complaining party would normally retaliate in the same sector in which the implementing party's measures were previously found to be in violation of WTO rules (Article 22.3(a)). However, if the complaining party can show that it is not "practical or effective" to retaliate in the same sector, then it may retaliate in a different sector covered by the "same agreement" (Article 22.3(b)). Finally, if the complaining party can show that the "circumstances are serious enough" and that it is not "practical or effective" to retaliate under the same agreement, that party may retaliate under a different "covered agreement" (Article 22.3(c)). Development arguments have been raised in relation to the interpretation of Article 22.3.

(Article 21.5–Argentina)]. On appeal, Argentina also asserted that the AB should be guided by Article 21.7. Appellate Body Report, *US—Oil Country Tubular Goods Reviews (Article 21.5–Argentina)*, ¶ 58, WT/DS268/AB/RW (Apr. 12, 2007).

[59] DSU, *supra* note 5, art. 22.

[60] "Retaliation" will hereinafter be used as a short form for "suspension of concessions or other obligations".

The number of instances where such disputes have involved developing countries is still small and there is no consistency in how parties make developing arguments, or in how those arguments influence arbitrators. Many questions remain regarding the standard of proof, the level and type of evidence that is required to make the case and the factors that can be considered in weighing the type of retaliation. Unfortunately, arbitrators have shown little inclination to develop tests and standards to address these questions.

1. Guiding Principles for the Interpretation of Article 22.3: What is the Role for Developmental Considerations?

Article 22.3(d) lists certain qualitative and quantitative economic factors that must be weighed when determining what type of retaliation can be authorized under Article 22.3(c). None of these factors specify the role or place of developmental considerations. However, nothing in Article 22.3(d) suggests that the listed factors are exclusive; rather they represent the minimum that arbitrators must take into account. Some developing country litigants have taken this openness as an opportunity to introduce broader socio-economic elements in their pleadings, but most tend to relate their arguments to listed factors under Article 22.3(d).

Article 22.3(d)(i) mandates the consideration of the level and importance of trade in the sector or agreement where the violation was found to the complaining party. In *EC—Bananas III (Ecuador) (Article 22.6–EC)*, Ecuador submitted trade statistics displaying the widespread inequality between itself and the EC and the role of the banana trade as the "lifeblood" of its economy to demonstrate the importance of the specific trade affected.[61] The arbitrators, relying on the difference in economic wealth between the two parties, and the fact that Ecuador's economy was "highly dependent" on bananas, concluded that Ecuador had demonstrated that the banana trade was sufficiently important to it.[62] The award interpreted Article 22.3(d)(i) to primarily relate to the actual trade affected by the WTO-inconsistent measure at issue, particularly when the complaining party is a developing country and the measure affects a trade sector that is "much more important" for that country than the developed implementing party.[63] The arbitrators then found that Ecuador had met the requirements of Article 22.3 by requesting authorization to suspend certain obligations under the TRIPS

[61] *European Communities—Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 129, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter *EC—Bananas III (Ecuador) (Article 22.6–EC)*].

[62] *Id.* ¶ 130.

[63] *Id.* ¶ 84.

Agreement. In contrast, the *US—Gambling (Article 22.6–US)* arbitrator posited that the provision was meant to apply to all trade within the sector affected by the measure.[64] The *US—Upland Cotton (Article 22.6–US I)* and *US—Upland Cotton (Article 22.6–US II)* arbitrations followed the *US—Gambling (Article 22.6–US)* approach.[65]

With respect to Article 22.3(d)(ii), which instructs arbitrators to take into account the "broader economic elements related to the nullification or impairment and the broader economic consequences of the [retaliation]", the main ambiguity is whether the impact to be considered is required to be on the complaining or the implementing country. In *EC—Bananas III (Ecuador) (Article 22.6–EC)*, Ecuador argued that it was facing the worst economic crisis in its history.[66] The EC replied that Ecuador had failed to establish a causal connection between the trade measures at issue and the economic crisis.[67] Over the EC's objection, the arbitrator adopted Ecuador's position almost verbatim.[68] In support of this decision, the arbitrator cited Article 21.8[69] mandating the DSB to consider a party's developing country status, but did not explain why or how that SDT clause applied to an Article 22.6 arbitration. The arbitrator found that the "broader economic elements *related to the nullification or impairment*" primarily concerned the effect of the existing impairment on Ecuador as the complaining party rather than the effect of retaliation on the EC as the implementing party (emphasis added).[70] The arbitrator also concluded that the "broader economic consequences" of *retaliation* applied in part to the complaining party as well, particularly when the differences in the "level of socio-economic development are substantial".[71] The arbitrators in three subsequent cases involving developing countries followed this approach, citing *EC—Bananas III (Ecuador) (Article 22.6–EC)*.[72]

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[64] *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, ¶ 4.34, WT/DS285/ARB (Dec. 21, 2007) [hereinafter *US—Gambling (Article 22.6–US)*].

[65] *See United States—Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, ¶ 5.86, WT/DS267/ARB/1 (Aug. 31, 2009) [hereinafter *US—Upland Cotton (Article 22.6–US I)*]; Decision by the Arbitrator, *United States—Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, ¶ 5.86, WT/DS267/ARB/2 and Corr.1 (Aug. 31, 2009) [hereinafter *US—Upland Cotton (Article 22.6–US II)*].

[66] *EC—Bananas III (Ecuador) (Article 22.6–EC)*, *supra* note 61, ¶ 132.

[67] *Id.*

[68] *Id.* ¶ 135.

[69] *Id.* ¶ 136.

[70] *Id.* ¶ 85 (emphasis added).

[71] *Id.*

[72] *See US—Gambling (Article 22.6–US)*, *supra* note 64, ¶¶ 4.45-4.37; *US—Upland Cotton*

It therefore seems that in the very few instances where developing countries have been involved in Article 22.6 arbitrations, arbitrators have been relatively open to developmental considerations in their interpretation of the terms of Article 22.3(d), despite the lack of an express SDT mandate. Rather, these developmental considerations have emanated from the interpretation of the broad references to "circumstances" or economic conditions generally mentioned in Article 22.3. This suggests that development is considered here not as an anomaly that needs to be addressed by special treatment, but is instead recognized as part of the fundamental make-up of some members. Put even more starkly, one could say that while development is treated as a marginal issue or a deviation when viewed in the context of SDT, it is mainstreamed under Article 22.3 because it is an organic component of the analysis of the facts. This interpretation is somewhat provocative and the practice so far is still limited, but it hints that development need not be addressed solely through SDT provisions and that there are already opportunities in the WTO agreements for the mainstreaming of development considerations.

2. Developmental Considerations in Determining the Sector and Agreement for Retaliation

Many developing countries lack the leverage to compel compliance with members that are economically more powerful because of trade asymmetries and massive differences in economic output. For example, a large country with a diversified, export-oriented industrial economy would hardly notice if a small country, mostly reliant on imports from that large country, raised its agricultural tariffs against products from it. The volume of trade affected would be a small fraction of the large economy's agricultural exports, and an even smaller share of its GDP. However, consumers in the small country might be greatly affected by the rise in prices of agricultural commodities. The small country would injure its domestic market much more than its measure would affect the large country's trade policy.

The sector in which retaliation is authorized is therefore critical to the effectiveness of retaliation by developing members, because it provides them with the flexibility to target retaliation in areas that would maximize the impact on non-compliant members while minimizing self-inflicted economic harm for the retaliating member. However, no specific SDT provision explicitly protects the interests of developing members by giving them greater leeway for cross-sector retaliation. At most, the blanket clause of Article 21.2 could be interpreted to cover the interpretation of Article 22.3. Article 24.1 would certainly apply if an LDC was

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(Article 22.6–US I), *supra* note 65, ¶ 5.88; *US—Upland Cotton (Article 22.6–US II)*, *supra* note 65, ¶ 5.88.

involved, but no LDC member has been a primary party to an Article 22.6 arbitration, and the interests of LDCs as third parties or non-parties have not been considered in the few available cases to date (assuming that they should be taken into consideration at all). Despite the lack of an express SDT clause, developmental considerations have been raised and appear to have had a bearing on the determination of the sector in which the developing member would be allowed to retaliate.

(i) Development Arguments that Retaliation in the Same Sector is "Not Practicable or Effective"

In *EC—Bananas III (Ecuador) (Article 22.6–EC)*, Ecuador's status as a developing country was a factor that the arbitrator used in determining that retaliation under the GATT with respect to primary goods and investment goods would not be practicable or effective.[73] The arbitrator noted that Ecuador accounted for a "negligible portion" of the EC's trade in those areas, hence retaliation in those areas would not have a significant impact on the EC's exports.

Antigua raised its developing status in *US—Gambling (Article 22.6–US)* as a reason why retaliation in the same sector was not practicable or effective. Antigua noted that it was the smallest WTO member "by far" to have made a request for the suspension of concessions. Additionally, 48.9 percent of Antigua's imports came from the US and Antigua's economy was infinitely smaller than America's. Therefore, Antigua argued that if it were forced to retaliate in the goods or service sectors it would essentially be subjecting its own citizens to economic hardship, while the impact on the US economy would be negligible.[74] The United States responded that Antigua's assertion that it was a developing country was "conclusory", and that Antigua had not provided an adequate explanation of why it could not retaliate on specific services under the GATS.[75] The arbitrator ultimately sided with Antigua, but apparently relied more on statistical data than on Antigua's developing country status.[76]

In both, *US—Upland Cotton (Article 22.6–US I)* and *US—Upland Cotton (Article 22.6–US II)*, Brazil argued that it was neither practical nor effective to suspend trade in the goods sector with the United States because such retaliation would be contrary to its objectives as a developing country and thus "costly and impracticable by definition". Trade between the two countries was very imbalanced, and the economic differences between the two countries were

[73] *EC—Bananas III (Ecuador) (Article 22.6–EC)*, *supra* note 61, ¶ 95.
[74] *US—Gambling (Article 22.6–US)*, *supra* note 64, ¶ 4.2.
[75] *Id.* ¶ 4.50.
[76] *Id.* ¶ 4.60.

considerable.[77] The United States stressed that regardless of whether a country is developing or not, if it has sufficient bilateral trade in the disputed sector to retaliate in that sector, then it must do so under the DSU.[78] The arbitrator rejected Brazil's imbalance argument, partially on the grounds that Brazil did not sufficiently explain why it would not be practical or effective to target specific subsets of the goods sector, where total goods imports from the US greatly exceeded the level of permissible countermeasures.[79] Similarly, the arbitrator concluded that Brazil had not demonstrated that it would not be "practical or effective" to retaliate solely in the goods sector. Nonetheless, the arbitrator examined "whether the circumstances were serious enough" if the level of countermeasures to which Brazil was entitled were to increase in the future to a level beyond Brazil's import level of US consumer goods. In that case, Brazil would be entitled to seek retaliation under the GATS and TRIPS. Neither party made any developing country arguments at that stage of the analysis.[80]

In sum, the standard of proof remains uncertain for a development-based argument that retaliation in the same sector is not practical. No specific test regarding the type of evidence to be adduced has been developed by the arbitrators in the few available cases.

(ii) Development Arguments that Retaliation in a Different Sector under the Same Agreement is "Not Practicable or Effective"

If retaliation in the same sector under the same trade agreement is not practicable or effective, then a retaliating party can apply for retaliation under a different sector covered by the same trade agreement. With only one case to consider, there are no trends to speak of, but as in the case of retaliation in the same sector, the arbitrator engaged in some measure of evaluation of the actual economic situation of the country making the development argument.

Addressing Ecuador's arguments that it would not be practicable or effective to suspend under a different sector covered by the same agreement, the arbitrator in *EC—Bananas III (Ecuador) (Article 22.6–EC)* accepted that the only service sector

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[77] *US—Upland Cotton (Article 22.6–US I)*, *supra* note 65, sought to determine the appropriate retaliation for export subsidies and guarantees (¶¶ 5.124, 5.196), whereas *US—Upland Cotton (Article 22.6–US II)*, *supra* note 65, concerned itself with marketing loan and counter-cyclical payments (¶¶ 5.124, 5.196).

[78] *US—Upland Cotton (Article 22.6–US I)*, *supra* note 65, ¶ 5.115; *US—Upland Cotton (Article 22.6–US II)*, *supra* note 65, ¶ 5.115. The US cited *EC—Bananas III (Ecuador) (Article 22.6–EC)*, *supra* note 61, in support of this assertion.

[79] *US—Upland Cotton (Article 22.6–US I)*, *supra* note 65, ¶ 5.139; *US—Upland Cotton (Article 22.6–US II)*, *supra* note 65, ¶ 5.139.

[80] *US—Upland Cotton (Article 22.6–US II)*, *supra* note 65, ¶¶ 5.201-5.202.

in which Ecuador could retaliate was the "commercial service" sector, which includes foreign direct investment (FDI).[81] The arbitrator then concluded that the commercial service sector was not an appropriate one for retaliation given Ecuador's status as a developing country "highly dependent" on FDI, particularly in light of the inequality between the population and GDP per capita figures for both parties. Accordingly, he determined that it was not practicable or effective for Ecuador to retaliate under a different sector covered by the same agreement.[82]

(iii) Development Arguments regarding whether "Circumstances are Serious Enough" to Retaliate under Another Agreement

If neither retaliation in the same sector, nor under the same agreement is found to be practicable or effective, then the arbitrator may consider retaliation under another agreement. In practice, while most disputes involving developing country complainants focus on trade in goods and sometimes services, the most effective means for retaliation appears to be under TRIPS.[83] Here again, no clear standard has emerged to date regarding the relationship between development concerns and the "serious" circumstances required under Article 22.6(c). It is also unclear which party's circumstances are to be considered, and which types of circumstances are legitimate factors. The open-ended drafting of the provision suggests that any development concern having a bearing on the proposed cross-sectoral retaliation would be admissible, even beyond the principles set forth in Article 22.3(d).

In *EC—Bananas III (Ecuador) (Article 22.6–EC)*, the arbitrator subsumed the Article 22.3(d) factors into his Article 22.3(c) analysis, and relied almost entirely on an analysis of the Article 22.3(d) factors. He concluded that Ecuador had demonstrated that circumstances *were* serious enough to justify retaliation under another agreement, in that instance the TRIPS.[84]

In *US—Gambling (Article 22.6–US)*, Antigua forcefully invoked its status as a developing country to justify that the circumstances were serious enough to retaliate under TRIPS.[85] It noted that its economy was completely dependent on the service sector in the form of tourism and financial services.[86] Antigua also explained that the provision of remote gambling services was meant to help

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[81] *EC—Bananas III (Ecuador) (Article 22.6–EC)*, *supra* note 61, ¶ 110.

[82] *Id.* ¶¶ 120, 125.

[83] CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 135 (Brookings Institution Press 2009).

[84] *EC—Bananas III (Ecuador) (Article 22.6–EC)*, *supra* note 61, ¶ 137.

[85] *US—Gambling (Article 22.6–US)*, *supra* note 64, ¶ 4.3.

[86] *Id.*

diversify its economy and accelerate its development, and alleged that the United States had initially cooperated with that endeavour. Antigua further highlighted the disparity in size between the two economies and its limited natural resources.[87] The United States did not dispute any of Antigua's assertions in this regard. The arbitrator agreed with Antigua that the circumstances were in fact serious enough, citing the unbalanced nature of trade between the parties and Antigua's heavy reliance on the US in the sectors that would be immediate candidates for retaliation. Thus, the arbitrator agreed that retaliation under the GATS would have an adverse impact for Antigua, "including for low wage workers".[88] The factors that were considered in this case seem broader and beyond the principles listed in Article 22.3(d).

Somewhat surprisingly therefore, parties have relied on development arguments in Article 22.6 proceedings, and arbitrators have factored a party's developing status into their analyses, despite the lack of any SDT language in Article 22. This willingness to take into account developmental considerations is all the more unexpected given the timidity that parties and adjudicators have shown thus far in invoking SDT provisions.

What is less clear is how a developing country party to a future Article 22.6 arbitration can successfully raise the developmental arguments, or indeed how an arbitrator is likely to factor the issue into his analysis. Two trends emerge based on *EC—Bananas III (Ecuador) (Article 22.6–EC)* and *US—Gambling (Article 22.6–US)*. First, arbitrators seem likely to be receptive to development arguments when the size of the complaining developing country's economy is dwarfed by the size of the developed implementing party, and thus retaliation in the goods or services sectors will impose more harm on the developing country that should be benefitting from the retaliation. Second, arbitrators may be receptive for similar reasons when exports in the sector or industry in question are particularly important to the developing country's economy.

In conclusion, the state of the law regarding development in implementation proceedings remains largely in flux. Panel and AB Reports as well as arbitrators' awards demonstrate very little consistency in the treatment of developmental issues at the implementation stage. No clear boundary exists between the role of adjudicators (arbitrators, panelists and the AB) and that of the DSB when it comes to discharging duties under the SDT clauses of Article 21. The fundamental questions of who bears obligations and what the nature of these obligations also remain uncertain in reports and awards, and to a large extent, in the DSU provisions themselves.

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[87] *Id.* ¶ 4.110.
[88] *Id.* ¶ 4.114.

With regard to the time period for implementation, it is statistically impossible to discern whether arbitrators have significantly modified the time for implementation in light of the circumstances of parties that are developing nations. At most, development has been one factor amongst others in the determination of the reasonable time period on a case-by-case basis. No clear factors or weighing methods transpire which would give guidance on when and how development arguments can be made, and whether they have been successful in an implementation dispute. This lack of clarity permeates decisions on the time period for implementation. In part, this is due to the drafting of SDT provisions under Article 21, which is arguably more hortatory than a clear legal obligation would be, and which is often vague as to what it seeks to achieve.

Decisions on the conformity of implementation measures with adopted reports and the covered agreements (Article 21.5 proceedings) similarly suffer from uncertainty regarding the availability of SDT. From the few available cases, it can be seen that Panels and the AB have generally been disinclined to consider developmental issues in relation to the determination of compliance efforts, regardless of whether the implementing party is a developed or developing member.

With respect to the modalities for suspension of concessions in retaliation under Article 22, development arguments seem to have been given greater qualitative importance in Article 22 arbitrations. This is an unexpected result since no SDT provision speaks directly to the duty of arbitrators in that respect. The paradox may be explained by the more pragmatic interpretation of Article 22.3 factors. The increased political visibility of issues posed by trade asymmetries in retaliation may also account for arbitrators' openness to development arguments in these proceedings. At any rate, this trend suggests that development can be a factor in interpreting "mainstream" WTO rights and obligations and not just SDT clauses. This is a fairly unusual position, but it is noteworthy in light of the current demands from a segment of the WTO membership that development be taken into account as a matter of principle, rather than as a matter of exceptions and derogations via SDT. As many SDT provisions have shown their limited usefulness over the past decade of practice, this embryonic practice under Article 22 may provide an alternative, and perhaps a more effective avenue for addressing development issues.

III. LOOKING BACK, LOOKING FORWARD

This section traces the drafting history of Article 21 and 22 and compares it to proposals made in the Doha Round. It highlights some parallels between past amendment initiatives and current negotiation positions that may be valuable to negotiators when considering future demands.

While developing countries have continuously pointed to the inadequacies of what are now Articles 21 and 22 of the DSU, they have been mostly unsuccessful at reforming the law and practice over the past six decades. Moreover, many of the proposals tabled in the Doha Round reflect positions similar to earlier attempts at reform, leaving some doubts as to whether recent proposals are likely to fare any better than they have in the past.

This longitudinal overview of development concerns at the GATT and WTO in relation to implementation proceedings is organized around three themes that are relevant today and could guide practice in the future. First, who has the right or duty to account for development in implementation? Second, what could be the standards for development considerations in the time period for implementation? Third, how are development constraints managed in the case of retaliation?

A. Allocating the Duty or Right to Factor Development Status into Implementation

Article XXIII of the GATT 1947 originally placed an obligation upon Contracting Parties acting jointly (reflected by the typeface "CONTRACTING PARTIES" in the original text) to "promptly investigate any matter so referred to them" and also to "make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate" if measures are not brought in compliance with the agreement within a "reasonable time." If the "circumstances are serious enough to justify such action", they may also authorize one or more party to suspend concessions vis-à-vis others "as they determine to be appropriate in the circumstances".[89] There is no mention of developmental considerations in this regard.

Over the following decades, in step with the rise of developing countries, several additional procedures emerged. In the aftermath of developing countries' organization in UNCTAD, a 1966 Decision allowed additional measures to be taken by the Contracting Parties acting jointly if a "recommendation to a developed country" is not applied within the prescribed time period.[90] Adopted on the same day as the Enabling Clause, an Understanding Regarding the Notification on Consultation, Dispute Settlement and Surveillance provides that "[i]f the case is one brought by a less-developed contracting party, [action on reports of Panels] should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but

[89] General Agreement on Tariffs and Trade, art. XXIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[90] Procedures under Article XXIII, Decision of 5 Apr. 1966, ¶¶ 9-10, GATT B.I.S.D. (14th Supp.) at 18-20 (1966).

also their impact on the economy of less-developed contracting parties concerned."[91] Such language foreshadows the aforementioned debates on the interpretation of Article 22 of the DSU. With respect to the surveillance of implementation, the Decision provides that "[p]articular attention would be paid to developments which affect rights and obligations under the GATT, to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding".[92] This provision was further reiterated in a 1982 Ministerial Declaration decision.[93]

In practice, far from examining what additional measures might be appropriate, the GATT Council typically refrained from defining the reasonable period of time or from reconvening a Panel to examine the issue. Even suspension of concessions was only authorized once in GATT history.[94]

During the Uruguay Round negotiations, a number of proposals were made to reinforce the monitoring role of the Contracting Parties acting jointly (eventually becoming the DSB) in the case of matters raised by a less-developed member.[95] A number of these proposals aimed at giving express authority to the Contracting Parties to automatically take measures regarding time period of implementation and retaliation as part of the Panel Report adoption in disputes brought by developing countries.[96]

Some proposals also suggested that this power should be given to the Panels. A Panel Report on a substantive dispute would thus also include more robust

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[91] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, ¶ 21, GATT B.I.S.D. (26th Supp.) at 210-218 (1980).

[92] *Id.* ¶ 24.

[93] Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, ¶ I:4, GATT B.I.S.D. (36th Supp.) at 61-67 (1990).

[94] Ernst-Ulrich Petersmann, *The GATT Dispute Settlement System and the Uruguay Negotiations on its Reform*, *in* LEGAL ISSUES IN INTERNATIONAL TRADE 91 (Petar Sarcevic & Hans van Houtte eds., 1990).

[95] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Summary and Comparative Analysis of Proposals for Negotiations*, ¶ 6, MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988). On Uruguay Round negotiations on compliance proceedings, see also Terence P. Stewart & Christopher J. Gallaghan, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)–DISPUTE SETTLEMENT MECHANISMS 101-102 (1993).

[96] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Differential and More Favorable Treatment of Developing Countries in the GATT Dispute Settlement System*, ¶ 15, MTN.GNG/NG13/W/27/Rev.1 (Aug. 22, 1988) (summarizing a communication from Nicaragua).

modalities for implementation and retaliation in the case of a continued breach,[97] and perhaps even an estimation of the "retroactive prejudice" to the developing member's economy.[98] Proposals that the Panel include an amount for compensation or retaliation, should implementation not be forthcoming within the reasonable time period, were clearly aimed at streamlining the process for developing countries and adding credibility to the threat of retaliation.[99] With respect to LDCs, no specific proposal was recorded, and the draft text of 1990 presents language virtually identical to parts of the eventual Article 24.[100]

The Doha Round negotiations echo some of these concerns. For instance, Nicaragua proposed that an arbitration on the level of nullification could be requested before the expiry of the reasonable period for implementation, and in that case, it could be set as part of, and within the same time frame as, the Article 21.3(c) arbitration.[101] A more radical proposal by the African Group was aimed at bypassing the normal implementation procedures of Articles 21 and 22 in cases where a developing member's measure is found to be inconsistent with the covered agreements:

> [T]he DSB, if requested by the developing-country Member and fully taking into account the findings of the panel or Appellate Body, as well as the reports of relevant development institutions where appropriate, on the development implications of the issues raised in the dispute, may recommend arbitration in accordance with Article 25 for purposes of drawing up an adjustment programme under which the developing-country Member will gradually implement the recommendations and rulings.[102]

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[97] Negotiating Group on Dispute Settlement, *Note by the Secretariat: Meeting of 20 November 1987*, ¶ 11, MTM.GNG/NG13/5 (Dec. 7, 1987) (summarizing a communication from Korea).

[98] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Summary and Comparative Analysis of Proposals for Negotiations*, ¶ 70, MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988).

[99] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Summary and Comparative Analysis of Proposals for Negotiations*, ¶ 70, MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988)

[100] Negotiating Group on Dispute Settlement, *Draft Text on Dispute Settlement*, MTN.GNG/NG/W/45, at 7 (Sep. 21, 1990).

[101] Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Ecuador*, TN/DS/W/33, at 2 (Jan. 23, 2003).

[102] Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya*, TN/DS/W/42, at 3-4 (Jan. 24, 2003). *See also* an earlier version at Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group*,

The issue of who should take into account developmental considerations and at what stage of the dispute settlement process remains in flux in the present negotiations. In the Uruguay Round as in the Doha Round, developing members have consistently expressed concerns over the time lag between the time when the main report on the dispute is issued and the earliest opportunity for taking or requesting implementation measures.

B. Factoring Developing Status into a Determination of the Reasonable Time Period for Implementation

A recurring issue in negotiations past and present is whether the "reasonable" time period for implementation should be replaced by a set time period in the case of a dispute between a developing member and an implementing developed member. An automatic implementation period of 90 days was proposed in several instances during the Uruguay Round negotiations.[103] However, the draft text of 1990 had already settled on the "reasonable period of time",[104] with no particular derogation as to when the dispute was initiated by a developing member.

Early in the Doha Round, India put forth a comprehensive proposal on behalf of a group of developing countries, to give more robust substance to Article 21.2. It proposed a specific framework for implementation procedures when developing countries are involved in a dispute. If a developing member is the implementing member, the proposal set the reasonable time period for implementation at no less than 15 months, and no less than two years if a statutory change is required or if the implementation would require a "change of long held practice/policy". By

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TN/DS/W/15, at 4 (Sep. 25, 2002). This proposal is noteworthy because it explicitly seeks to involve development agencies in the process. Indeed, issues of consistency between IMF or World Bank conditionalities, and WTO obligations, have at times surfaced with respect to developing members, particularly when structural adjustment programs put pressure on the reforming country's balance of payments. When the measures to be brought into conformity by a developing member would involve a significant reshaping of its trade policies, the implementation of such measures may need to be considered alongside other economic reforms that are ongoing under the auspices of other international organisations such as the Bretton Woods institutions or regional development banks.

[103] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Summary and Comparative Analysis of Proposals for Negotiations*, ¶ 6, ¶ 78, MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988); Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System*, ¶ 15, MTN.GNG/NG13/W/27/Rev.1 (Aug. 22, 1988) (citing a Communication from Nicaragua).

[104] Negotiating Group on Dispute Settlement, *Draft Text on Dispute Settlement,* ¶ 3, MTN.GNG/NG/W/45 (Sep. 21, 1990) (describing drafting options 1 and 4).

contrast, if the complaint is by a developing country against a developed member, then the reasonable time period should not exceed 15 months.[105] India's proposal sets some boundaries on the arbitrator's latitude, but does not fundamentally address the emerging standard of minimum time necessary for domestic implementation discussed in Part I above. The rationale for the 15 month benchmark is not related to any development analysis but merely reflects an existing advisory benchmark. A similar proposal from another group of developing members suggests 15 months as a normal time period when the defending party is a developing member, and two to three years when a significant statutory change would be required. The same maximum of 15 months is suggested when the complaining party is a developing member and the implementing party is a developed member.[106]

The more fundamental issue is to define the legal elements that an arbitrator may or must take into account to deviate on either side of that benchmark. For example, on what basis and to what extent could an arbitrator grant a developing member more than 15 months or two years to implement the Panel or AB Report? Conversely, could factors such as injury to the complaining member's economy be a reason to shorten the implementation period awarded to a developed member to less than 15 months, especially if the time required to pass the necessary legislation would be about 15 months? No proposal has tackled this question in the Doha Round. Should the proposal be adopted, it is likely that it would at best lead to a mechanical application of the 15 month time period, without any reasoned and predictable consideration of the impact on development constraints in implementation or vice-versa.

Other proposals relating to the time period for implementation aim mostly at accelerating the calendar for Article 21.3(c) arbitrations.[107] Similarly, several proposals would accelerate the calendar across the board for disputes involving antidumping or safeguard measures, except that the shortened time-table would

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[105] Special Session of the Dispute Settlement Body, *Dispute Settlement Understanding Proposals: Legal Text: Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia*, TN/DS/W/47, at 3-4 (Feb. 11, 2003).

[106] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding (Special and Differential Treatment for Developing Countries): Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, TN/DS/W/19, at 5-6 (Oct. 9, 2002).

[107] *See for example*, Special Session of the Dispute Settlement Body, *Jordan's Contributions Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding: Communication from Jordan*, TN/DS/W/43, at 5-6 (Jan. 28, 2003) (proposing a strict calendar for Article 21.3(c) arbitrations).

not apply if the defending party is a developing member.[108] Interestingly, most of these proposals fail to envision the increasingly frequent scenario of disputes between developing members. The case law already suggests reluctance by arbitrators to deal with SDT provisions when parties on both sides of the dispute are developing members. Instead, arbitrators have concluded that development considerations on both sides cancel each other out. Unfortunately, the Doha proposals provide no guidance on this point.

More generally, the debate has been largely displaced from deciding what constitutes a "reasonable time period" under Article 21, to making it more costly for a member not to implement through enhanced compensation mechanisms under Article 22 as discussed in the following section. As a theoretical matter, this shift in focus suggests that the "efficient breach" theory has gained traction at the WTO, such that members are more interested in determining the price of a continued breach than in actually securing compliance.[109]

C. Managing Development Constraints in Retaliation

Securing an effective retaliatory mechanism was clearly important to GATT parties during the Uruguay Round negotiations, and continues to be important to parties in the Doha Round, largely on the same terms. There are three relevant areas of concern: collective retaliatory mechanisms or in the alternative, individual retaliation by the party in dispute; introducing retroactive compensation for the injury suffered in addition to suspension of concessions when implementation is not forthcoming; and revisiting the modalities for retaliation (particularly with reference to the sector for retaliation).

An ongoing debate carried over from the Uruguay Round concerns whether the existing framework of individual retaliation should be maintained by a party

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[108] Special Session of the Dispute Settlement Body, *Amendments to the Dispute Settlement Understanding – Drafting Inputs from China: Communication from China (Revision)*, TN/DS/W/51R1, at 2-3 (Mar. 13, 2003); Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Communication from Australia*, TN/DS/W/49, at 3 (Feb. 17, 2003).

[109] Literature discussing efficient breach of WTO commitments in the context of the DSU includes John Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98(1) AM. J. INT'L L. 109-125 (2004); Bryan Mercurio, *Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding*, 8(2) WORLD TRADE REV. 315–338 (2009); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31(1) J. LEGAL STUD. 179-204 (2002); Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99(3) AM. POL. SCI. REV. 389-400 (2005).

trying to obtain implementation from another party, or whether a collective or third party retaliation system should be created.[110] Although the concern during the Uruguay Round was primarily the protection of developing members, some GATT Parties pointed out that small developed members would be facing the same issue of trade asymmetries in disputes with more economically powerful partners. The question then became whether it was really appropriate to differentiate dispute settlement procedures based on development (then equated to economic development).[111]

More specifically, some Uruguay Round submissions proposed to combine individual and collective retaliation in a tiered system whereby individual retaliatory rights would be available as soon as a Panel report is adopted. However, in the event that implementation of the substantive Panel recommendations did not occur within 90 days, then "the CONTRACTING PARTIES may take measures of a collective nature further to suspension of concessions by the party affected".[112]

Mutatis mutandis, the same issues have been raised again in the Doha Round by a variety of developing members. Mexico put forward a number of comprehensive proposals to improve implementation procedures under Articles 21 and 22, in particular envisioning transfer of a member's right to suspend concessions or other obligations to a third party.[113] The member holding the suspension right and the member wishing to acquire the right would present a joint request for the transfer to the DSB, which would adopt it by reverse consensus. Collective retaliation was suggested by the African Group in cases brought by developing or least-developed members. The DSB would then allow, upon request, either the members involved in the dispute or any other member to suspend concessions.[114] The LDC Group also supported collective retaliation, with a number of procedural safeguards.[115]

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[110] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Differential and More Favourable Treatment of Developing Countries in the GATT Dispute Settlement System*, ¶ 15, MTN.GNG/NG13/W/27/Rev.1 (Aug. 22, 1988) (referring to a Communication from Nicaragua).

[111] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Summary and Comparative Analysis of Proposals for Negotiations*, ¶ 6, MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988) [hereinafter Note by Secretariat].

[112] *Id.* ¶ 6.

[113] Special Session of the Dispute Settlement Body, *Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes Proposed Text by Mexico: Communication from Mexico*, TN/DS/W/40, at 4-5 (Jan. 27, 2003) (proposed Article 22.7*bis*).

[114] Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya*, TN/DS/W/42 (Jan. 24, 2003), at 4; see also Special Session of the Dispute Settlement Body, *Negotiations on the*

Another significant debate is whether some form of reparation should be granted to injured developing parties. Some Uruguay Round proposals argued that compensation should be calculated from the time the measure was put into place, rather than from the time, it was found to be in breach of the covered agreements.[116] Others suggested that "[t]he 'retroactive compensation' could cover also the prejudice originating from a threat of retaliation, especially against a less-developed contracting party . . . the compensation for a less-developed contracting party might be even greater than the injury suffered".[117] Traditionally, the GATT did not contemplate retrospective remedies. Some proposals appeared to prefer compensation for past injury to retaliation, as a less trade-restrictive measure.[118] In the Doha Round, Mexico put forth a broad redesign of Article 22 which would allow compensation to be calculated to offset the trade lost since the imposition of the measure, the request for consultations or the establishment of the Panel, and to be kept in place until the full offset has occurred.[119] While such suspension of concessions would take place *ex post facto*, much in the manner of current retaliation

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Dispute Settlement Understanding: Proposal by the African Group, TN/DS/W/15, at 3 (Sep. 25, 2002).

[115] Special Session of the Dispute Settlement Body, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication from Haiti*, TN/DS/W/37, at 3 (Jan. 22, 2003); Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group*, TN/DS/W/17, at 4 (Oct. 9, 2002) (collective retaliation to be available automatically in the case of a successful LDC complainant).

[116] Negotiating Group on Dispute Settlement, *Revision: Note by the Secretariat: Summary and Comparative Analysis of Proposals for Negotiations*, ¶¶ 68, 70 MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988).

[117] Negotiating Group on Dispute Settlement, *Note by the Secretariat: Meeting of 2 and 3 March 1988*, ¶ 10, MTN.GNG/NG13/6 (Mar. 31, 1988) (statements in support of the Peruvian proposal).

[118] *Id.* ¶ 70; *See also*, Negotiating Group on Dispute Settlement, *Communication from Mexico*, MTN.GNG/NG13/W/26 (June 23, 1988).

[119] Special Session of the Dispute Settlement Body, *Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes Proposed Text by Mexico: Communication from Mexico*, TN/DS/W/40 (Jan. 27, 2003) (proposed Article 22.4: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment from the date of [imposition of the measure] OR [request for consultations] OR [establishment of the panel]." Proposed Article 22.7: "shall determine whether the level of such suspension is equivalent to the level of nullification or impairment, measuring such nullification or impairment from the date of [imposition of the measure] OR [request for consultations] OR [establishment of the panel]" and proposed Article 22.8: "However, the suspension of concessions or other obligations may remain in force thereafter until such time as which such suspension becomes equivalent to the level of nullification or impairment from the date of [imposition of the measure] OR [request for consultations] OR [establishment of the panel] to the date on which the authorization by the DSB to suspend was granted." (brackets in the original)).

(except that Mexico also favours immediate implementation of Panel and AB Reports rather than the allowance for a "reasonable period of time"), it would be calculated based on the past and ongoing injury (since implementation would still not have taken place at that point), rather than on the present and future injury, as the current system provides. The African Group favoured monetary compensation for an injury from the date of adoption of the WTO-incompatible measure, in cases brought by a developing member against a developed member. The proposal was introduced as a possible amendment to Article 21.8.[120] LDCs also insisted on retroactive compensation that would take into account the impact of the non-compliant measure on the member's economy since the date of the measure's inception.[121] More modestly, China proposed that if a developed country brought a case against a developing country and did not prevail, the legal costs of the developing member shall be borne by the complainant.[122]

The modalities for retaliation have also been a longstanding area of concern for developing countries. In its Uruguay Round incarnation, the debate focused on what measure to take into account in determining the injury or the level of retaliation. Mexico called for the Contracting Parties to "take into account not only the trade coverage of measures complained of but also their impact on the matter raised by a developing contracting party".[123] The debate was still ongoing in draft texts in 1990, as demonstrated by the bracketed text: "suspension of measures or other obligations [commensurate to the damage suffered] [appropriate in the circumstances]." [124] This draft already reflects the possibility of recourse to arbitration if "the party required to implement the recommendations and rulings … considers the proposed retaliatory measures to be excessive in their trade effects".

After the adoption of DSU Article 22, the question remained open, as evidenced in the arbitration proceedings discussed in Part I. A proposal by Ecuador also mirrors the earlier movements to take into account the impact of a non-compliant measure on a developing members' economy:

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[120] Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya*, TN/DS/W/42 (Jan. 24, 2003).

[121] Special Session of the Dispute Settlement Body, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication from Haiti*, TN/DS/W/37, at 2-3 (Jan. 22, 2003), at 2-3.

[122] Special Session of the Dispute Settlement Body, *Amendments to the Dispute Settlement Understanding – Drafting Inputs from China: Communication from China (Revision)*, TN/DS/W/51R1, at 2-3 (Mar. 13, 2003).

[123] Communication from Mexico, MTN.GNG/NG13/W/26, p.8, ¶4.

[124] Negotiating Group on Dispute Settlement, Draft Text on Dispute Settlement, ¶ 3, MTN.GNG/NG/W/45 (Sept. 21, 1990).

> If the complaining party is a developing country and the Member concerned is a developed country, the complaining party may request that the arbitrator, in addition to determining the level of nullification or impairment on the basis of the trade affected by the challenged measures, make an estimate of the impact of those measures on its economy. That estimate shall include the determination of the level of injury and the recommendation that the Member concerned take account thereof in its prompt compliance with the recommendations and rulings adopted by the DSB – and in case of non-compliance, that the said estimate be taken into account in proceeding with the compensation or suspension of concessions or other obligations under Article 22.[125]

The LDC Group also called for the DSB to take into account "the development prospects" of developing country and least-developed members under Article 21.8.[126]

The debate in the Doha Round largely focused on the issue of determining the sector for retaliation under Article 22.3. India proposed that "in a dispute involving a developing country Member as complaining party and a developed country Member as a party complained against, the complaining party shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements, if the party complained against fails to bring its measures into compliance with the rulings and recommendations of the DSB or a covered agreement".[127] The proposal would, in effect, bypass the order of preferences set in Article 22.3(a)-(c), leaving it instead at the discretion of the complaining developing member to decide in which sector it can most effectively retaliate. Another group of developing members submitted similar language.[128] Much of the Article 22.6 arbitrations would then be moot, as

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[125] Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Ecuador*, TN/DS/W/33, at 2 (Jan. 23, 2003).

[126] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group*, TN/DS/W/17 (Oct. 9, 2002).

[127] Special Session of the Dispute Settlement Body, *Dispute Settlement Understanding Proposals: Legal Text: Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia*, TN/DS/W/47, at 2 (Feb. 11, 2003).

[128] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding (Special and Differential Treatment for Developing Countries): Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, TN/DS/W/19, at 1-2 (Oct. 9, 2002) ("in a dispute in which the complaining party is a developing-country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed-country Member, the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements.").

only the level of suspension of concessions could remain a contentious point. Other possible issues of interpretation would be whether the dispute qualifies as existing between a "developing" and a "developed" member, since the terms are not defined in the covered agreements. China and Russia's controversial status come to mind.

A more radical framework proposed by the African Group seeks to set the level of suspension "such as to secure, full compensation for the injury to the developing or least-developed country Member, the protection of its development interests, and the timely and effective implementation of the recommendations and rulings".[129] Here, the analysis would not focus on any particular sector, but rather on the compensatory and the deterring capacity of the suspension of concessions.

Finally, a number of members favour monetary compensation, rather than suspension of concessions or increased market access, particularly for LDCs.[130] This would also bypass the sectoral analysis and focus strictly on the level of nullification due to the WTO-incompatible measures or the injury to the member state, depending on the proposals.

A few observations may be derived from this longitudinal examination of members' submissions regarding implementation mechanisms. First, there is a remarkable symmetry in the concerns and interests of developing members at the time of the Uruguay Round and twenty years later during the Doha Round. Second, the members involved in tabling proposals are also similar in the Uruguay Round and the Doha Round. Both aspects are particularly striking since the dispute settlement system radically changed with the DSU: The much heralded shift from what many considered a power-based system in the GATT years to a law or rule-based system under the WTO[131] seems to have had a much more

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[129] Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya*, TN/DS/W/42 (Jan. 24, 2003).

[130] *See for example*, Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group*, TN/DS/W/15, at 2 (Sep. 25, 2002); Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group*, TN/DS/W/17, at 3-4 (Oct. 9, 2002); Special Session of the Dispute Settlement Body, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication from Kenya*, TN/DS/W/42, at 3-4 (Jan. 24, 2003); Special Session of the Dispute Settlement Body, *Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico*, TN/DS/W/91, at 2 (July 16, 2007).

[131] An extensive literature discusses the shift from the power-based system under the GATT to a rule-based system with the DSU. *See for example*, JOHN H. JACKSON, THE WORLD TRADING SYSTEM 107-112 (2d ed. 1997). In the former, the losing party could easily block the adoption of panel reports, or even, in the earlier days of the GATT,

limited impact on the implementation stage of the dispute process. The effect of the shift to a rule-based system is generally thought to have leveled the playing field for weaker members in terms of the accessibility of adjudication and their ability to win disputes. While it has been assumed that the reinforced procedures of the DSU would benefit developing country litigants, both the qualitative and quantitative data regarding developing country participation (and even more so the virtual absence of LDC participation as a main party in disputes)[132] suggest a more complex story. With respect to implementation, the rule-based framework's impact on developing members' ability to gain compliance from more powerful members is equivocal. While some large developing members have been successful at obtaining compliance from powerful members (see Brazil's success against the US in the *Upland Cotton* dispute), smaller developing members remain at a serious disadvantage. With some exceptions, such as Antigua in the *Gambling* dispute, weaker members have not often taken on more powerful members (developed or developing) in part because they realize that the retaliatory system of Article 22 may not be of much use to them.

Perhaps equally noteworthy is the virtual absence of developed country submissions on compliance procedures, both during the Uruguay Round and the Doha Round. Yet the reality of WTO disputes is that they have involved mostly developed countries–though the trend is rapidly shifting in favour of developed/developing country disputes and disputes between developing countries. In fact, trade asymmetries and the limitations they pose to effective retaliation affects small developed countries as well as developing countries. Submissions, however, generally propose to differentiate implementation recourses along the lines of the developed and developing members, rather than on macroeconomic criteria such as a ratio of the size of the economies of the country in disputes. Another approach would be to give all members access to the full range of implementation mechanisms (individual, third party and collective retaliation, for example) and to let the economic conditions of the disputants in specific cases determine which mechanism would be the most effective.

At present, it is questionable whether any of the Doha proposals will materialize, in light of the stalled Doha Round and the focus on other matters such as agricultural subsidies, non-agricultural market access and services negotiations. The question then becomes whether anything can be done to clarify the legal framework of Articles 21 and 22 of the DSU and to make the process more effective for developing country litigants.

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prevent a dispute from being adjudicated altogether. The DSU has a much more sophisticated procedural framework to overcome such tactics. *See also* Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VIRGINIA L. REV. 251, 251-260 (2006).

[132] ROLLAND, *supra* note 6, at Ch. 7.

IV. STAYING TRUE TO THE LETTER AND SPIRIT OF THE LAW: WHAT CAN BE DONE?

Before considering the specifics of what implementation measures could provide, a threshold question is how any sort of reform of the DSU might be undertaken at this time. With little expectation that the Doha Round will be concluded in the near future, one might regret that members did not avail themselves of the express allowance to address the DSU reform separately from the single undertaking.[133] There is no substantive reason why negotiations on the DSU should be tied to negotiations on agricultural subsidies or services (though there is clearly a strategic reason for doing so). Members' rather rigid adherence to the single undertaking is a major political obstacle to this strategy.[134]

In any event, this provision of the Doha Work Programme could also be interpreted as a license for members to proceed with the DSU reform through the normal amendment procedure, with an interim agreement that remains in place until the requisite number of ratifications has been collected. This procedure, though cumbersome and slow, as demonstrated by the experience of the amendment of TRIPS Article 31, would likely still be more functional than the fledgling round of negotiations, where attention is focused elsewhere. Unfortunately, the glacial pace of the ratification of the TRIPS amendment now casts the procedure in a very unfavourable political light.

Last, the extension of the consensus decision-making process to matters that would normally have been considered to require an amendment gives an avenue for reforming the DSU outside of a formal round of negotiations and without recourse to formal amendment procedures.[135] In this instance, WTO members essentially amended the Marrakesh Agreement Establishing the WTO through a

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[133] World Trade Organization, Ministerial Declaration of 14 November 2001, ¶47, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) ("With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking.").

[134] Director General Pascal Lamy recently urged to members to "move in small steps" in an attempt to revive the Doha Round. General Council, Report by the Chairman of the Trade Negotiations Committee, 14 and 15 February 2012, *available at*: http://www.wto.org/english/news_e/news12_e/gc_rpt_14feb12_e.htm. Members could see it as a veiled hint to depart from the single undertaking, but no such suggestion may be made explicitly as many developing members in particular, view the single undertaking as a critical tool to ensure that they will not be coerced into an unfavourable set of agreements.

[135] *See* World Trade Organization, Decision-Making Procedures under Articles IX and XII of the WTO Agreement, WT/L/93 (Nov. 15, 1995) (itself adopted by consensus, rather than using amendment procedures).

decision of the General Council taken by consensus, rather than through a formal amendment. The legality of this quasi-amendment is highly debatable and denotes the culture of pragmatism that can prevail at the WTO, when the requisite political will is present. It may be of use to reform the DSU.

Shifting the practice of dispute settlement without formal amendments that are politically unlikely at present may offer more immediate and less controversial options. Indeed, the very vagueness of SDT provisions under Articles 21 and 24, and the non-exhaustive criteria of Article 22.3 give considerable leeway for arbitrators and the DSB to strengthen the process for developing members to shift their implementation of the DSU simply through practice and treaty interpretation.

The debate regarding the calendar for Article 21.3(c) arbitrations and perhaps even Article 22 suspension of concessions offers an illustration. While it may give members some reassurance to have a binding calendar, the reality is that the official time-line for dispute settlement is currently largely academic. Panels, the AB and arbitrators alike will take more time to issue decisions if they lack the resources and support to meet the deadlines and no amendment of the DSU will change that in practice. The same holds true for litigants with scarce resources. Conversely, a policy of the DSB or the General Council encouraging a shorter timeline and giving the relevant bodies (and litigants) the means to do so would likely achieve that objective even in the absence of a binding textual basis. Capacity building, technical assistance, and legal aid such as that provided by the Advisory Centre for WTO Law could all contribute to improving the calendar of disputes and implementation proceedings.

Turning to the substance of implementation issues and the DSU reform, a few observations may be drawn from past and present practice, and from the proposals made by developing members over the years.

First, as is the case with many other SDT provisions, open-ended language calling for members of WTO bodies to "take into account" the interests of developing members is of very little practical effect at present. Even the use of language of legal obligation (such as "shall") rather than hortatory language (such as "should"), a component of many proposals, may be a first step, but is likely insufficient. Instead, recasting such provisions as "best efforts" obligations could help (and would not require a formal amendment). Rather than requiring a particular result, a "best efforts" provision mandates a party to tend towards that result to the best of their ability, through procedural devices, substantive actions or a combination of both.[136] International environmental law provides illustrations of

[136] Unlike "command and control" rules, "best efforts" clauses are inherently flexible and mean different things for different members, depending on their situation. For

the growing acceptance of "best efforts" clauses as a progressive obligation, rather than merely hortatory language with no legal effect.[137] Mandates to take into account circumstances or to refrain from engaging in a particular course of conduct are increasingly given legal substance as "best efforts" obligations, or a procedural obligation, even if no specific result is required (understood as an "*obligation de moyen*" in French civil law, to distinguish between an obligation to use certain means, and an obligation to achieve particular ends).[138] One way to substantiate "best efforts" provisions is to read them as due diligence obligations. Nothing in the text or context of the DSU would prevent such a reading of Article 21.2 and 21.8. A future textual reform could then include language that would clarify the nature of the obligation as procedural or substantive or a combination of the two. While, WTO members and adjudicators have generally not been inclined to follow contemporary evolutions of public international law, such an approach may well offer valuable opportunities for developing members. Few proposals have considered that angle so far.

Second, most proposals focus on disputes between developed and developing countries. While arbitral awards have been fairly inconsistent regarding the effect of SDT provisions in those cases, they provide even less guidance in the case of disputes between developing countries. Yet this is a quickly growing body of disputes, and very little attention has been given to that scenario in members' proposals. The first 50 disputes filed after the inception of the WTO comprised of 31 disputes between developed countries, 26 disputes between developed and developing countries and only 6 disputes between developing countries.[139] By contrast, the most recent 50 disputes include only 9 disputes between developed countries, 29 disputes between developed and developing members (over half of which are disputes between China and the US or EU) and 13 disputes between developed and developing countries.[140] The recent wave of disputes involving

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instance, the technical assistance provisions of the SPS Agreement (Article 9) may be construed as a best efforts provision where Members must strive to provide technical assistance, individually or collectively through international organizations, to developing members. A member with more resources would be able to implement such a mandate more fully than a member with very little manpower and financial means.

[137] *See for example*, Convention for the Protection of the World Cultural and Natural Heritage (Paris, 23 November 1972; 1037 UNTS 151), Arts. 4, 5; Commonwealth of Australia v. State of Tasmania (1983) 158 CLR 1 (High Court of Australia); Queensland v. Australia (1989) 167 CLR 232; Richardson v. Forestry Commission (1988) 77 ALR 237.

[138] For more discussion and case law analysis, *see* ROLLAND, *supra* note 6, at Ch. 6.

[139] Several disputes are counted multiple times to account for each complainant in the dispute. Turkey has been counted as a developing country, as it raised development arguments in a number of disputes it was involved in. The first 50 disputes span early 1995 to mid 1996.

[140] Considering DS/386 to DS/436. The last 50 disputes span December 2008 to May

China (with developed and developing members alike) and the diversification of disputes between developing members are trends that should lead many members to reorient their negotiation strategy with respect to compliance and implementation procedures of the DSU. The crux of the matter may well be that the developed/developing country categories are increasingly inept at capturing the implementation and compliance difficulties faced by weaker economies, such that a different standard or benchmark for SDT may be necessary in this area. In stark terms, would Ecuador find itself in a substantially different position with respect to its ability to coerce China into compliance, than it does when it tries to obtain compliance from the EU? For that matter, will Articles 21 and 22 be useful to Norway (a non-EU country) when trying to gain compliance from China? This is a highly controversial issue with a number of developing countries and the comments presented here are only made with implementation and compliance issues in mind, and do not imply that the categorization should necessarily be abandoned across the board without due consideration to the context of each SDT provision. The changing patterns of world trade, along with the evolving geopolitics of WTO disputes, are neither fully reflected in the current implementation provisions of the DSU, nor are they in the Doha Round proposals.

Third, with respect to the interpretation of the "reasonable period of time" for implementation, some current proposals could be addressed outside of formal amendments. This is the case for the fixed time benchmarks proposed by India and others (15 months, or 2 years or more, depending on who is involved in the dispute and what type of implementation measures are required)[141], which only require a shift in the interpretation of reasonable time period away from the minimum time period necessary. The current interpretation is not textual, and since there is no *stare decisis* value of earlier arbitrations over later cases, nothing prevents arbitrators from moving towards the more mechanical approach advocated by India and others. Whether this approach would actually serve developing members and whether it would be an adequate substitute for looking into the substantive requirements for implementation is another question. In fact, delayed implementation (whether because a fixed timeline is applied, or under the current interpretation of the minimum time required for the necessary domestic procedures) might have disproportionately adverse effects on developing country complainants.

Alternatively, along with some other proposals, an interpretative standard could be developed to balance the hardship faced by the developed implementing party in the form of further compression of the time period for implementation

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[141] Note by Secretariat, *supra* note 110 & 111.

beyond the normal time required for domestic procedures (current standard), with the hardship faced by the developing country complainant in the form of a longer implementation period. It could be argued that such an interpretation, in deviation of the current standard, is justified under Article 21.2. The DSB could even take a decision on that matter under Article 21.7 (as a "further action [the DSB] might take as would be appropriate to the circumstances.").

Fourth, during both the Doha and the Uruguay Rounds, many developing countries wished to include a stronger compensatory mechanism, and in many cases, to make it retroactive to the time when the WTO-incompatible measure was put into place, particularly when a developing member was complaining of the measure (and when the measure was put in place by a developed member). While developing members did not have the bargaining and institutional power to prevail on this issue, it may be that the dynamics have shifted enough in their favour such that it would now be possible to amend the DSU to include retroactive compensation, perhaps in combination with stricter monetary compensation requirements. Some countries have argued that such mechanisms would have less trade-distortive effects than the current framework. In a number of cases, such altered mechanisms may be sufficient to obtain compliance from the breaching member. In other cases where there is a vast disparity in the economic make-up and the trade pattern between the countries in disputes, it will still not have the requisite effect. For instance, proponents of the efficient breach of contracts theory may well argue that even strengthened, retroactive, monetary compensation would not have brought the United States into compliance in the *Gambling* dispute with Antigua.

It follows from the compensation debate that retaliation remains a useful tool, despite the many objections levelled at it by developing members. That is not to say that the current framework of Article 22.3 serves these members as well as it purports to do. A threshold issue would be to clarify whether the SDT provision of Article 21.2 would apply to Article 22 proceedings. With respect to LDCs, Article 24 clearly applies; therefore, there is no need to add broad SDT mandates for LDCs in Articles 21 and 22. The effectiveness of Article 24, however, remains to be tested.

More substantively, several proposals suggested that developing members should be free to retaliate in any sector or under any agreement, unconditionally. Leaving aside the issue of who should benefit from SDT under Article 22, it is worth considering whether such a proposal would be effective and would comport with the objective and safeguards of Article 22. Considering the scarce evidence so far (from the *Bananas* dispute, the *Gambling* dispute and the *Upland Cotton* dispute), it seems that the mere threat and authorization of retaliation under a different agreement has been the most effective avenue in disputes involving high stakes

and trade asymmetries. The objective of Article 22 is to bring the non-compliant member back into compliance, and retaliation under a different, more sensitive, agreement or sector, seems to be more effective. Another implied objective is that the retaliation mechanism does not do additional harm to the retaliating member. This is clear from the language of Article 22.3 (b) and (c), which states that "if [the retaliating] party considers that it is not practicable or effective to suspend obligations" under the same sector or agreement, then it may retaliate in other sectors or agreements, respectively. The clauses may also be considered as safeguards for the retaliating member. Here again, nothing in the proposals runs afoul of this objective or safeguard. On the contrary, the reformed framework seems to carry out such an objective more effectively. Another safeguard is that retaliation may not exceed the level of nullification or impairment. There has been no suggestion in the proposals that this broad discretion for retaliation under any sector or agreement would exceed the level of nullification or impairment (though there was some suggestion that such a level should be computed retroactively to cover the whole period of the breach). This safeguard is therefore unimpeded by the proposals for a more liberal approach to retaliation.

In sum, even without formal amendments or a Doha package, a number of features of the DSU regarding implementation could be reformed through an increase in resources, shifts in the arbitrators and Panels' interpretation, and members' practice. Beyond that, the proposals in the Doha Round appear to have important blind spots, particularly with respect to the treatment of development in disputes between developing members.

V. CONCLUSION

The SDT mandate of Article 21 of the Dispute Settlement Understanding provides a number of procedural avenues through which developing countries can invoke their special status for consideration when determining the reasonable time period for implementation. At the Article 21.3(c) arbitration stage, implementing developing countries have most successfully invoked development in cases brought by developed countries. In contrast, developed countries have never been able to use Article 21.2 in favour of third party developing countries, and no developing country has successfully invoked Article 21.2 against another developing country. Development arguments appear to have had some influence in determining the reasonable period of time for implementation in some cases, but in others, they have been largely ignored. Instead, arbitrators have adhered to the view that the reasonable period of time is the shortest possible period of time in which implementation can be achieved within the legal and administrative system of the implementing country. With such a standard, there is little room for development considerations despite the mandate of Article 21.2.

By contrast, Article 22 on the level and manner of retaliation in case of non-compliance does not include an SDT clause. Nevertheless, arbitrators have factored development arguments into their analyses. Developing countries have not been involved in many Article 22.6 arbitrations, but arbitrators have clearly taken development into account in some instances, when determining the appropriate sector and the agreement under which authorized developing countries may retaliate. Without overstating the case, this approach by arbitrators suggests that it is possible to "mainstream" the consideration of development when interpreting WTO obligations outside of the SDT context. There maybe a valuable lesson here for a development-oriented reading of WTO disciplines that does not require any formal amendment or renegotiation and that might in fact be more powerful than marginal SDT exceptions and derogations.

Overall, the standard of proof and weight to be accorded to development arguments by developing countries remains generally unclear at the various procedural stages for implementation of adopted Panel and AB Reports. In the Doha Round, a number of developing countries have tabled proposals to reinforce compliance and implementation remedies under the DSU, but these negotiations along with the rest of the Round, show no sign of conclusion in the near future. Moreover, the proposals might not always achieve their stated objectives because of their drafting style.

Nonetheless, a number of alternative avenues exist to reinforce the DSU's effectiveness for developing countries with respect to compliance and retaliation, even in the absence of any textual reform. First, a more coherent and concerted practice by arbitrators, Panelists and the AB could lead to the emergence of new standards of interpretation. For instance, provisions urging members to "take into account" the developmental conditions of some members may be read as due diligence or best efforts obligations rather than be ignored altogether or treated as merely hortatory language. Second, decisions by the DSB, or WTO members acting as the General Council, could also be used to implement an interpretative framework that could be more cognizant of the needs of developing members. Third, increased resources and technical assistance could support both a shorter litigation calendar and faster compliance by developing country members. While trade asymmetries are certainly an economic problem hindering small developing countries from obtaining compliance from more powerful members, it is one that can be mitigated in part by legal and institutional intervention.

Given the current deadlocks in the Doha Round and the unwillingness of members to consider revising the DSU outside of the single undertaking, such avenues for reform would seem more manageable from a legal standpoint. The main hurdles would be the relative lack of political momentum and institutional inertia. Another difficulty is the lack of *stare decisis* in dispute settlement. On the

one hand, it is more cumbersome to achieve consistency across Panel and AB Reports and arbitration awards, should members wish to account for development considerations under Articles 21 and 22 more meaningfully, but on the other hand, it also grants flexibility for the more progressive adjudicators to address development issues on a case-by-case basis. It may be that such progressive interpretations will eventually become more entrenched in the practice under the DSU.