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THE PROPOSED HORIZONTAL MECHANISM – AN EVALUATION IN LIGHT OF EXISTING PROCEDURES UNDER THE DISPUTE SETTLEMENT UNDERSTANDING

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In 2006, the so-called NAMA 11 submitted a proposal for the "Resolution of Non-Tariff Barriers (NTBs) through a Facilitative Mechanism" [popularly known as Horizontal Mechanism] within the WTO, which shall be detached from the formal resolution mechanism under the Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU]. This Note provides a brief overview of the scope and procedures of the proposed Horizontal Mechanism. Then, it evaluates the merits of the proposed Horizontal Mechanism vis-à-vis the existing formal resolution mechanisms under the DSU. As the proposal emanated from a group of developing countries, special consideration has been given to their interests while evaluating the feasibility of the proposed new system.

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I. INTRODUCTION

In 2006, the so-called NAMA 11, a group of developing countries in the Negotiating Group on Market Access[1] submitted a proposal for the "Resolution of Non-Tariff Barriers through a Facilitative Mechanism"[2] within the WTO. Non-Tariff Barriers (NTBs) therefore, may be understood to be "any border measure other than a tariff, which acts as a barrier on trade".[3] The NAMA 11 put forward that "NTBs are evolving as an area of serious concern for the WTO Membership", especially for the developing country members,[4] as they may discriminate or unnecessarily restrict access to markets translating into additional costs for the exporters and the importers. Therefore, they called for a "new, standing, flexible and expedient mechanism that is *solution based* rather than *rights based*."[5] By 2010, a group of 88 Members presented a communication providing detailed "Procedures for the Facilitation of Solutions to Non-Tariff Barriers",[6] stressing again the desirability of "flexible and expeditious procedures of a conciliatory and non-adjudicatory nature".[7]

This Note assesses whether the proposed 'Horizontal Mechanism' would really constitute an improvement to the existing procedures under the DSU. Part II provides a brief outlay of the Horizontal Mechanism, followed by Part III which discusses the main reasons for the proposal provided by the co-sponsors. Part IV analyzes whether the arguments brought forward can be considered compelling. As the proposal was originally initiated and is strongly supported by developing country Members, special regard will be paid to whether the proposed Horizontal Mechanism would serve their interests in the WTO. Finally, Part V concludes.

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[1] This group consists of Argentina, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa, Tunisia, Venezuela.

[2] Negotiating Group on Market Access, *Resolution of NTBs through a Facilitative Mechanism*, TN/MA/W/68/Add. 1 (May 8, 2006) [hereinafter NAMA, *Resolution of NTBs through a Facilitative Mechanism*].

[3] *Id.* at 2.

[4] *Id.* at 2.

[5] *Id.* ¶ 6 (emphasis in the original).

[6] Negotiating Group on Market Access, *Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers*, TN/MA/W/106/Rev. 1 (Feb. 3, 2010) [hereinafter NAMA, *Solutions to Non-Tariff Barriers*].

[7] *Id.* at 1.

II. SCOPE AND PROCEDURES OF THE HORIZONTAL MECHANISM

The Horizontal Mechanism shall cover "all NTBs affecting trade in goods and falling under the remit of the Council for Trade in Goods", with the exception of measures regulated by the Agreement on Agriculture, countervailing, antidumping, and safeguard measures.[8]

The procedure shall be divided into two stages: Stage I ("Request and Response on a specific NTB") concerns the exchange of information on the NTB in question, upon submission by the requesting Member.[9] Following this, the Members involved may enter into Stage II ("Resolution Procedures") if they mutually agree. In this stage, a facilitator will be appointed by the parties who can either be the Chairperson or one of the Vice Chairpersons of the relevant WTO Committee (or the Chairperson of the Council for Trade in Goods in case it is not clear which agreement is most closely related) or someone else agreed upon by the parties.[10] The facilitator's role is to assist the parties "in an impartial and transparent manner in bringing clarity to the NTB concerned and its possible trade-related impacts".[11] The procedure following the appointment of the facilitator shall be fully confidential and only the final, factual outcome of Stage II shall be submitted to the relevant WTO Committee.[12]

There is great emphasis on the wish that the whole procedure should be conducted without consideration of the respective NTBs in legal terms.[13] Under the current proposal, the entire procedure shall not take longer than 85 days and any outcome shall not deprive the parties of their rights under the DSU.[14] Lastly, the implementation of any mutually agreed solution shall not run counter to the parties' obligations under the WTO Agreement.[15]

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[8] *Id.* at Annex 1.
[9] *Cf.* Negotiating Group on Market Access, *Answers by the Co-Sponsors to Questions Raised during Chair's NTB Session in 2009 Regarding the Proposed,* "*Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers*", TN/MA/W/110/Rev. 1 (Oct. 29, 2009), part IV [hereinafter NAMA, *Answers by the Co-Sponsors*].
[10] NAMA, *Solutions to Non-Tariff Barriers*, *supra* note 6, ¶ 12.
[11] *Id.* ¶ 15, with further details of their assistance.
[12] *Id.* ¶ 17.
[13] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶ 8.
[14] *Id.* at 1.
[15] *Id.* ¶ 19.

III. MAIN ARGUMENTS BROUGHT FORWARD IN FAVOUR OF THE HORIZONTAL MECHANISM

The Horizontal Mechanism is intended to meet certain shortcomings with regard to NTBs – which frequently reflect sensitive issues of domestic policy objectives such as the protection of human health[16] or public morals[17] – which the co-sponsors find in the existing procedures under the DSU.[18] The resolution of NTBs is of particular interest to developing country Members as some of them state that they are "more exposed to the adverse effects of nontariff measures".[19] Such adverse effects include higher costs of implementation e.g., of technical or sanitary and phytosanitary standards.[20] An illustrative example of such an adverse impact particularly on developing countries is the arguments brought forward by the complainants India, Malaysia, Pakistan and Thailand in the panel report *US – Shrimp*. According to the United States' representation, the devices that it required shrimp fishing vessels to install in order to avoid accidental fishing of turtles cost around 75-100 USD.[21] Pakistan noted that this amount accounts for "10 to 70 per cent of a Pakistani shrimper's annual income"[22]. It is thus comprehensible that developing country Members in the WTO find themselves in a particularly disadvantageous position when it comes to NTBs.

The Horizontal Mechanism shall further introduce procedures that "promote mutually acceptable solutions to Members' concerns"[23] regarding NTBs in a more timely and cost-saving[24] manner than those provided under the DSU.

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[16] *Cf.* Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011) and Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R (Apr. 4, 2012) (*adopted* Apr. 24, 2012).

[17] *Cf.* Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013).

[18] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶ 8.

[19] Panel Report, *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) (*adopted* June 13, 2012), ¶ 7.31.

[20] *See* UNCTAD, Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries, UNCTAD/DITC/TAB/2012/1 (2013), http://unctad.org/en/PublicationsLibrary/ditctab20121_en.pdf (last visited Feb. 25, 2014).

[21] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 3.79, WT/DS58/R (*adopted* Nov. 6, 1998).

[22] *Id.* ¶ 3.85.

[23] NAMA, *Solutions to Non-Tariff Barriers*, *supra* note 6, at 1.

[24] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶¶ 4, 5.

The co-sponsors emphasise that the initiation of the formal procedures under the DSU as well as its following "adversarial direction" shall be avoided.[25] The reason for their reluctance to use the mechanism under the DSU is not unequivocally formulated. However, from the foregoing, it seems that costs and time play a crucial role.[26]

Also, it appears that the co-sponsors place much emphasis on *mutually agreed* solutions.[27] It can thus be concluded that they are dissatisfied with the risk of being bound by judicial decisions running counter to their trade policy interests. In addition, considering that the Horizontal Mechanism is strongly supported by developing country Members, the restraint to initiate an adversarial proceeding might result from their experience that the mere legal analysis of a measure does not take into account the special needs and interests they might have as developing economies.

A recent example of this "overly legalistic dispute settlement system"[28] that does not take into account "principles of equity"[29] is the Panel report in *US – COOL*.[30] In this case, the Panel, *inter alia*, examined the extent of developed countries' obligations under Art. 12.3 of the Agreement on Technical Barriers to Trade (TBT) when it comes to "tak[ing] account of the special … needs of developing country Members", thoroughly exploring the meaning of "taking account of". The Panel's analysis will be discussed in detail in Part IV.

In a nutshell, the reasons in favour of the Horizontal Mechanism are that it would avoid

a. adversarial procedures and by that promote mutually agreed solutions,
b. the lengthiness of procedures,
c. the associated high costs, and
d. overly legalistic rulings.

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[25] NAMA, *Answers by the Co-Sponsors*, *supra* note 9, at part II, ¶ 2.
[26] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶ 1.
[27] NAMA, *Solutions to Non-Tariff Barriers*, *supra* note 6, ¶¶13-16.
[28] Hansel T. Pham, *Developing Countries and the WTO: The Need for more Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 358 (2004) [hereinafter Pham].
[29] *Id.* This quotes from an interview with Ramirez Boettner, Ambassador, Paraguay, in Geneva, Switzerland. (Oct. 30, 2002).
[30] Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R ,WT/DS386/R (Nov. 18, 2011) (*adopted* July 23, 2012) [hereinafter Panel Report, *US – COOL*].

IV. EVALUATION OF THE REASONS BROUGHT FORWARD

The above depicted deficiencies in the formal DSU proceedings which motivated the proposal for the Horizontal Mechanism shall now be examined to determine the improvements of the proposed procedure as compared to the existing framework. Special regard shall be had to the interests of developing country Members where it seems appropriate.

A. Adversarial character of procedures under the DSU and promotion of mutually agreed solutions

The co-sponsors of the Horizontal Mechanism place much emphasis on their desire to avoid adversarial procedures.[31] One reason for this certainly is the fact that once formal legal procedures have been launched, positions can easily stiffen, creating a hostile atmosphere. This may not facilitate the finding of "a positive solution" which is the aim of the dispute settlement mechanism as described in Art. 3.7 of the DSU. Trying to avoid inter-state frictions is inherent in a system that is based on inter-state relations and largely governed by diplomatic conduct.[32] It is thus comprehensible that adversarial procedures are not the first means of choice when disagreements arise. However, Art. 3.10 of the DSU should be borne in mind, which explicitly lays down "that requests for consultations and the use of the dispute settlement procedures should not be intended or considered as contentious acts". Obviously, this formal regulation might have little practical impact when diplomatic relations are actually tense; but it is not inconceivable that a request under Stage I of the Horizontal Mechanism could equally entail the danger of an adverse effect on bilateral relations.

Further, the co-sponsors make it clear that solutions shall be based on the consent of the parties involved. This, too, is the primary aim of the procedures under the DSU. According to Art. 3.7 of the DSU, "[a] solution mutually acceptable to the parties to the dispute … is clearly to be preferred". Art. 5.5 of the DSU further substantiates this objective, by allowing "procedures for good offices, conciliation or mediation [to] continue while the panel process proceeds". Art. 5 of the DSU itself provides for confidential mechanisms which are based on dialogue, diplomacy, and aimed at mutually acceptable solutions. The fact that the DSU does allow for considerable diplomatic latitude renders the respective arguments in favour of the

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[31] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶¶ 4, 7.

[32] *Cf.* Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40(3) AM. BUS. L. J. 511, 539 (2003) [hereinafter Roberts].

Horizontal Mechanism less persuasive. However, the mechanism provided by Art. 5 of the DSU "is virtually never used".[33] It is argued that this reluctance may partially be due to Art. 5.6 of the DSU.[34] According to this paragraph, the "Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute". The danger of impairing the Director-General's impartiality may explain the restraint to make use of that possibility.[35] However, the provision only lays down that the Director-General *may offer* conciliation or mediation. It is not apparent from the text of the whole provision that such conduct shall only be limited to the Director-General. The parties would thus be free to appoint a person of their choice, at least with regard to mediation and conciliation. Accordingly, the co-sponsors' proposals regarding the appointment of a facilitator, *i.e.* the Chairperson or one of the Vice Chairpersons of the relevant WTO Committee,[36] can well be part of the procedure provided under Art. 5 of the DSU.

It is true that the proposed Horizontal Mechanism holds more detailed procedures than Art. 5 of the DSU,[37] which merely lists certain keywords[38]. As a matter of fact, in 2001 the Director-General proposed more detailed procedures under Art. 5 of the DSU which could help specify the provided procedures under the DSU.[39] It might further be worth considering to complement Art. 5 of the DSU with the proposed facilitator's course of action under the Horizontal Mechanism rather than introducing a mechanism completely detached from the existing procedural framework.

Another mechanism of conciliation provided by the DSU is the consultation stage under Art. 4 of the DSU which, like the Horizontal Mechanism, is

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[33] William J. Davey, *Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultation and Implementation of Panel Reports?* 19 (Ill. Pub. L. & Legal Theory Research Papers Series, Research paper No. 05-19) (Nov. 30, 2005) [hereinafter Davey].

[34] *Id.* at 19.

[35] *Id.* at 19.

[36] NAMA, *Solutions to Non-Tariff Barriers*, *supra* note 6, ¶ 12.

[37] *Cf.* Veronique Fraser, *Horizontal Mechanism Proposal for the Resolution of Non-Tariff Barrier Disputes at the WTO: An Analysis*, 15(4) J. INT'L ECON. L. 1033, 1041 (2012).

[38] See for explanations of the different procedures, World Trade Organization, *Article 5 of the Dispute Settlement Understanding (Communication from the Director-General)*, WT/DSB/25 (July 17, 2001), at note 9 [hereinafter *Article 5 of the DSU*]; *see also* ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM – INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 68 f (1997).

[39] *Article 5 of the DSU*, *supra* note 38.

confidential. It lays down that "before resorting to further action under [the DSU], Members should attempt to obtain satisfactory adjustment of the matter". This approach very much resembles the diplomatic character of the Horizontal Mechanism, but it seems to be rather neglected in WTO dispute settlement practice.[40] The crucial difference from the Horizontal Mechanism certainly is the requirement to give a legal basis for the complaint[41] whereas the Horizontal Mechanism shall be free of legal considerations. Presumably, Members expect consultations to be more fruitful and less adversarial when they leave legal arguments out of consideration.[42] This first identification of a legal basis, however, does not preclude the parties from finding a mutually acceptable solution that is not based on legal, but practical and diplomatic considerations. Naturally, such an outcome has to be consistent with the WTO Agreements, but the same applies to solutions found under the Horizontal Mechanism.[43]

Apart from the above considerations, one could ask whether it is desirable "to turn the wheel of history back, reintroducing elements of the original 'diplomatic' model of dispute settlement",[44] especially with regard to the interests of developing country Members. It is generally acknowledged that "[t]he 'rule-based' organization of the WTO seems to have decreased the risk that the system will be hampered by economic and political pressures."[45] The rule-oriented system of the WTO is thus of particular importance to developing country Members with mostly little economic and equally little political power.[46] Moreover, it shall be reiterated that the WTO is based on diplomatic interaction to a significant extent.[47] Especially in the WTO Committees there seems to be an active exchange of information with regard

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[40] Kim Van der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the current Debate*, 14 AM. U. INT'L L. REV. 1223, 1234 (1998-1999).
[41] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 4.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
[42] *Cf.* NAMA, *Answers by the Co-Sponsors*, *supra* note 9, at Part II, 2.
[43] NAMA, *Solutions to Non-Tariff Barriers*, *supra* note 6, ¶ 19.
[44] Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the World Trade Organization (WTO)*, 97 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y INT'L L.) 77, 85 (Apr. 2-5, 2003) [hereinafter Ehlermann].
[45] Beatrice Chaytor, *Dispute Settlement under the GATT/WTO: The Experience of Developing Nations*, *in* DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION 250, 251 (J. Cameron & K. Campbell eds., 1998) [hereinafter Chaytor].
[46] Bernard Hoekman et al., *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún*, 27(4) THE WORLD ECON. 481, 482 (2004) [hereinafter Hoekman et al.].
[47] *Cf.* Roberts, *supra* note 32.

to the trade measures between Members' delegates, which can serve conciliation outside the formal framework of dispute resolution.[48] Additionally, from an outside perspective these procedures can increase the legitimacy of the WTO as their outcomes are, to a large extent, available to the public. This can hence lower the risk of a "perception that agreement was reached as a result of an application of power".[49]

The DSU's primary aim is to facilitate mutually agreed solutions and it holds various mechanisms providing for considerable diplomatic leeway. In fact, the main difference to the proposed Horizontal Mechanism appears to be the avoidance of launching formal procedures under the DSU.[50] Instead, a mechanism free of legal considerations shall be introduced which might undermine one of the great achievements of the WTO, namely a rule-based system that increases the organization's legitimacy.

B. The lengthiness of procedures under the DSU

WTO Members have repeatedly complained about the protracted procedures.[51] One of the main criticisms by NAMA 11 of the procedures under the DSU is their failure to provide timely solutions to the exporters. It takes a time period of up to 2 years for an enforceable decision to be rendered under the present procedures of the DSU.[52] However, for all its shortcomings, a strong legal regime like the WTO dealing with such complex issues will inevitably have to accept a degree of procedural formalism[53] which will in turn require a certain amount of time. It is nonetheless undeniable that in the often long process of dispute settlement affected industries are damaged.[54] It is questionable, though, whether these problems can be solved

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[48] *See* Andrew Lang/Joanne Scott, *The Hidden Hand of WTO Governance*, 20(3) EUR. J. INT'L L. 575 ff (2009).

[49] Roberts, *supra* note 32, at 528.

[50] *Cf.* NAMA, *Answers by the Co-Sponsors*, *supra* note 9, at part II, 2.

[51] *See, e.g.*, World Trade Organization, Dispute Settlement Special Session, *Improvements and Clarifications of the Dispute Settlement Understanding (Proposal by Mexico)*, TN/DS/W/91 (July 16, 2007).

[52] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶ 4.

[53] Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4(1) TRADE L. & DEV. 45, 103 (2012) [hereinafter Bohanes & Garza].

[54] Another problem is the recurrent negligence of Members to ensure compliance with DSB rulings. *See, e.g.*, World Trade Organization, Dispute Settlement Body Special Session, *Diagnosis of the Problems affecting the Dispute Settlement System (Some Ideas by Mexico)*, TN/DS/W/90 (July 16, 2007), listing "16 cases pursuant to Article 21.5 (of

more efficiently outside the existing framework under the DSU. According to Art. 4.5 of the DSU, consultations are to be held in which, "before resorting to further action under [the DSU], Members should attempt to obtain satisfactory adjustment of the matter". This procedure is therefore not much unlike the proposed Horizontal Mechanism but it differs with respect to the time frame: while the Horizontal Mechanism shall be carried out within a maximum of 85 days, Art. 4.7 of the DSU provides for a maximum time frame of 60 days. Although the expeditiousness of the procedure is one of the express reasons brought forward in favour of the Horizontal Mechanism,[55] it does not have an edge over the consultations procedure under Art. 4 of the DSU in that regard. Apart from that, developing country Members often enjoy extended time limits that more appropriately reflect their capabilities to prepare and provide information. Thus, shorter periods might not necessarily serve their best interest.[56] Resorting to Art. 5 of the DSU could very well serve developing countries' interests with respect to more appropriate time frames, as paragraph 5 expressly allows for the continuation of good offices as well as conciliation or mediation in the panel process. The existing procedure is hence not less flexible than that under the Horizontal Mechanism with respect to developing country and least developed country Members.

Furthermore, it should be borne in mind that the overall procedure – in case the parties fail to come to a mutually acceptable solution and one of them initiates the formal DSU proceedings – will be even more prolonged if the Horizontal Mechanism is implemented. Above all, unless WTO Members agree otherwise and adapt the DSU, consultations would still have to be held, rendering them truly redundant.

With respect to time frames, the Horizontal Mechanism is not more expeditious when compared to the consultation stage under the DSU. Apart from that, it might not even be desirable to curtail time frames when it comes to developing and least developed country Members. The co-sponsors' emphasis on that point is thus little convincing.

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which 13 were referred to a panel)" and "12 cases [which] remain in limbo or ongoing non-compliance", at 10 and Annex 10; Davey, *supra* note 33, at 20 ff.

[55] NAMA*, Solutions to Non-Tariff Barriers*, *supra* note 6, at 1.

[56] *Cf.* NAMA, *Answers by the Co-Sponsors*, *supra* note 9, at Part IV, 6.

C. High costs of the procedures under the DSU

There is no doubt that "[f]or developing countries, in particular, the dispute settlement is very costly".[57] These costs primarily result from keeping legal staff in Geneva as "not having [a resident mission] impedes the process"[58], or from the charges for external counsel for a dispute.[59] The Horizontal Mechanism, however, shall strengthen the procedures that are less expensive and especially developing country Members seem to favour such an approach.[60] While the proposed Horizontal Mechanism will still require official staff presence in Geneva, the costs for external counsel would not arise since legal considerations shall be excluded.

However, in order to overcome these legal[61] and financial deficiencies that developing country Members may face, the Advisory Centre on WTO Law (ACWL) was established in 2001. The ACWL assists developing and least developed country Members with legal expertise and representation. It has achieved considerable success, like assisting Bangladesh in *India — Anti-Dumping Measure on Batteries from Bangladesh*,[62] which is the first least developed country to use the WTO system.[63] Such assistance covers all phases of dispute settlement proceedings: right from consultations to implementation and retaliation proceedings.[64]

The legalization of the WTO is generally acknowledged as a great achievement, especially with regard to developing country Member

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[57] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, ¶ 5.

[58] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM – THE WTO AND BEYOND 91 (2nd ed. 2001); WTO DISPUTE SETTLEMENT TRAINING MODULE – CHAPTER 11, *Developing Countries in WTO dispute settlement*, *available at* http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm (last visited Feb. 25, 2014); *see also* Constantine Michalopoulos, *The Developing Countries in the WTO*, 22(1) THE WORLD ECON. 117, 125 ff (1999).

[59] Bohanes & Garza, *supra* note 53, at 71.

[60] NAMA, *Resolution of NTBs through a Facilitative Mechanism*, *supra* note 2, at 5.

[61] On the influence of developing countries' legal capacity on WTO litigation performance, see Ka Zeng, *Legal Capacity and Developing Country Performance in the Panel Stage of the WTO Dispute Settlement System*, 47(1) J. WORLD TRADE 187-214 (2013).

[62] Panel Report, *India – Anti-dumping Measure on Batteries from Bangladesh,* WT/DS306/R (Jan. 28, 2004).

[63] Gregory Shaffer, *Assessing the Advisory Centre on WTO Law from a Broader Governance Perspective (for the ACWL at Ten symposium 2011)* 2 (Univ. Minn. L. Sch., Research Paper No. 11-46, 2011).

[64] Bohanes & Garza, *supra* note 53, at 72.

participation in the dispute settlement system.[65] There is extensive literature showing that their involvement has increased since the establishment of the WTO as compared to the GATT.[66] Most notably, arguing against the reinforcement of an institutionalized informal and diplomatic procedure for the settlement of disagreements is a study showing that "a poor complainant's disadvantage in terms of legal capacity manifests itself entirely in pre-litigation negotiations".[67] This implies that the Horizontal Mechanism would actually work to the detriment of developing country Members, unless they receive aid and support with regard to such consultations. In fact, the proposal by the co-sponsors does not provide for a solution to these shortcomings. Malaysia, for example, anticipated such impediments, pointing at the potential problem of effective implementation "due to [developing and least developed countries'] limited resources".[68]

So, while it is true that high litigation costs can be avoided through informal negotiations, their outcome might adversely affect those who lack legal expertise and financial resources. Accordingly, in order to respond to the financial challenges arising from high litigation costs, it seems more desirable to strengthen mechanisms that aim to balance disadvantages that developing and least developed country Members face with respect to legal capacity and financial resources.

D. Overly legalistic interpretation of the WTO Agreements

Another concern that developing country Members bring forward, and which could add to their support of the Horizontal Mechanism, is that they feel that the "overly legalistic" interpretation of the WTO Agreements does not sufficiently take into consideration their special needs.[69] The recent Panel report in *US – COOL*[70] posed this kind of problem.[71] By referring to prior

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[65] Julio Lacarte-Muró/Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3 (3) J. INT'L ECON. L. 395, 400 f. (2000).

[66] Bohanes & Garza, *supra* note 53, at 55 ff with further references; *see also* WORLD TRADE ORGANIZATION, *WTO Dispute Settlement Body developments in 2011 – Analysis by Elin Østebø Johansen*, *available at* http://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm (last visited Feb. 25, 2014).

[67] Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37(4) J. WORLD TRADE 719, 732 (2003).

[68] NAMA, *Answers by the Co-Sponsors*, *supra* note 9, at part I, ¶ 2.

[69] Pham, *supra* note 28, at 358.

[70] Panel Report, *US – COOL*, *supra* note 30.

jurisprudence under Art. 5.2 and Art. 10.1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures [SPS Agreement][72] as well the ordinary meaning of the term, the Panel concluded "that Article 12.3 of the Agreement on Technical Barriers to Trade [TBT Agreement] does not amount to a requirement for WTO Members to conform their actions to the special [development, financial and trade] needs of developing countries".[73]

The Panel analyzed the scope of the term "take account of" in Art. 12.3 of the TBT Agreement with regard to the special needs of developing countries. The Panel did not find an obligation to act upon those special needs of developing countries "but merely to give consideration to such needs along with other factors before reaching a decision".[74]

It cannot be said, though, this was necessarily due to an overly legalistic interpretation or rather that a legalistic interpretation could not have led to another result.

First of all, the Panel based its finding on the ordinary (dictionary) meaning of the term "take account of". However, the interpretation of an international treaty provision does not end with its letters. According to Art. 31(1) of the Vienna Convention on the Law of Treaties[75], the terms in their context and the treaty's object and purpose are to be considered in addition to the ordinary meaning. The preamble to the TBT Agreement recognizes the special difficulties of developing country Members in implementing their obligations under the TBT. Art. 12.3 of the TBT Agreement sets out that "technical regulations and standards do not create unnecessary obstacles to international trade", specifically to exports from developing countries. The Panel itself acknowledges that the term "with a view to" formulates an objective[76] which can also be found in the Preamble[77] to and other provisions[78] of the TBT Agreement, but merely in the – ultimately negative – assessment of whether it might constitute an additional obligation set out in

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[71] See for another example, Panel Report, *European Communities – Anti-Dumping Duties on Imports for cotton-type bed linen from India*, ¶ 6.231, WT/DS141/R (Mar. 1, 2001) (*adopted* Mar. 12, 2001), where the Panel denied that the obligation of developed country Members to explore possibilities of constructive remedies when a developing country is involved in art. 15 AD Agreement extends to provisional measures.
[72] Panel Report, *US – COOL*, *supra* note 30, ¶ 7.777 ff.
[73] *Id.* ¶ 7.781.
[74] *Id.* ¶ 7.781.
[75] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.
[76] Panel Report, *US – COOL*, *supra* note 30, ¶ 7.755.
[77] *Id.* ¶ 7.760.
[78] *Id.* ¶ 7.761.

the provision as asserted by Mexico.[79] However, the Panel hardly bears in mind this objective while analyzing the part of the provision that it deems as the operative one. If the Panel had done this by attaching greater weight to that objective, it might well have come to another conclusion in order to give full effect to the provision's terms in light of their context and the treaty's objective.

Furthermore, the reasoning is based on references to panel reports which dealt with provisions of the SPS Agreement that also demand Members to "take account of" certain facts. The first reference is made to the Panel in *US – Continued Suspensions* that examines the term under Art. 5.2 of the SPS Agreement.[80] Of course, this reference is coherent when the interpretation is solely based on the wording. Nevertheless it is noteworthy that this provision does not refer to developing countries, thus rendering the argumentation less compelling.

Additionally, and this is the general point of criticism with respect to the Panel's reference to the SPS Agreement,[81] the interpretation of terms in the SPS Agreement might not be suitable for those of the TBT Agreement since both agreements deal with different subject matters. The SPS Agreement is concerned with measures that serve the protection of goods of paramount importance, *i.e.* human, animal, and plant life.[82] Measures under the TBT Agreement, on the other hand, are not necessarily introduced for those reasons but may as well serve the mere information of consumers as the *US – COOL* measure did. It can well be argued that the interpretation of terms may be more restrictive when goods of utmost importance are at stake – again, provided that no other means of interpretation but the mere wording are included in the legal assessment.

Not only Panels but also "the Appellate Body has clearly attached the greatest weight to … the ordinary meaning of the terms of the treaty"[83] thereby expressing its restraint to determine objects and purposes that tend to be diverse when a large number of parties are involved.[84] This is not to say, however, that Panels and Appellate Body do not occasionally have recourse to

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[79] *Id.* ¶¶ 7.754-7.762.
[80] *Id.* ¶ 7.777, quoting the panel in Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 7.480, WT/DS320/R (Mar. 31, 2008) (*adopted* Nov. 14, 2008).
[81] Later, the Panel draws the parallel to art. 10.1 SPS Agreement which does refer to developing countries, Panel Report *US – COOL*, *supra* note 30, ¶¶ 7.778-7.781.
[82] *Cf.* ¶ 1 of Annex A of the SPS Agreement.
[83] Ehlermann, *supra* note 44, at 80.
[84] *Id.*

other means of interpretation than the ordinary meaning. The most prominent example in this regard certainly is the Appellate Body Report in the case *US – Shrimp.*[85] In the course of its evolutionary interpretation of the term "exhaustible natural resources" in Art. XX(g) of the GATT, the Appellate Body especially based its reasoning on the preamble of the WTO Agreement in order to explore the provision's objective and consequently its understanding.[86]

Clearly, Art. 3.2 of the DSU has to be borne in mind which lays down that "rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements". A consistent and convincing legal interpretation, though, which strives to find the object and purpose of a treaty and its provisions, will not run the risk to disregard Art. 3.2 of the DSU as it will clarify what is inherent in the law itself.

The above considerations demonstrate that the system, which some developing country Members have perceived as being too legalistic to respond to their special situation, is not inherent in the legalistic character of the procedure. Rather, other legal understandings of provisions that give special regard to the problems that developing country Members encounter in the WTO system are possible. It might just be *political* rather than *legal* considerations that account for certain results. Pursuing a more "balancing approach" could strengthen the "legitimacy of [the WTO] that would enable it to carry out its broader objectives relating to trade liberalization".[87]

There is another issue that is touched by the assertion of the interpretation being too legalistic to account for the special needs of developing country Members. It is that of whether the legal framework of the WTO itself manifests inequalities between developed and developing country Members as numerous "WTO rules reflect the 'interests' of rich countries"[88]. Especially the rules on textile products, agricultural products, and intellectual property rights are among those frequently criticized in this regard.[89] The latter two, however, are not covered by the proposed Horizontal Mechanism[90] and will thus not contribute to the solution of disagreements in those areas. Additionally, many of the developing country Members are often not able to

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[85] Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R (May 15, 1998) (*adopted* Nov. 6, 1998).
[86] *Id.* ¶¶ 129-31.
[87] JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW, 190 (2006).
[88] Hoekman et al., *supra* note 46, at 482.
[89] *Id.* at 486, 495 ff.
[90] NAMA, *Solutions to Non-Tariff Barriers*, *supra* note 6, at Annex 1.

comply with the obligations under the WTO agreements for reasons of lacking capacity and expertise,[91] thus running the risk of facing challenges under the DSU. There are various mechanisms to assist less and least developed country Members to comply with their obligations as well as the special and differential treatment provided in many of the legal provisions. These include technical assistance through training sessions, seminars and workshops on trade policy.[92] Particularly, the usefulness of the special and differential treatment provisions in the WTO agreements, though, it is very contested.[93] However, if the overall purpose of those provisions were to be included in an interpretation of the specific norms, imbalances could possibly be mitigated until certain aspects can be renegotiated.

It is hence not due to the law as it stands that Panels and Appellate Body are rather reluctant to attach greater weight to the special situations of developing and least developed country Members. It seems more likely that this restraint stems from political considerations. Tools of legal interpretation can plausibly lead to other results when a treaty's preamble and numerous provisions explicitly call for due regard to be given to the level of economic development.

V. CONCLUSION

The above analysis has shown that the Horizontal Mechanism in large parts does not fulfill its purposes. In particular, it would not bring considerable improvements to the existing framework under the DSU since "[t]he DSB [already] has a complete set of *formal* and *informal* enforcement tools including mediation [and] consultation procedures"[94]. Instead of extracting negotiation-based procedures, the Members could further elaborate mechanisms that are already provided for in the DSU and expand resources for legal assistance to developing country Members in order to work towards their full participation.

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[91] J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 23(4) THE WORLD ECON. 511, 511-25 (2000).

[92] *Cf.* Susan Prowse, *The Role of International and National Agencies in Trade-related Capacity Building*, 25(9) THE WORLD ECON. 1235, 1239 (2002).

[93] *See only* Constantine Michalopoulos, *Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries* (Pol'y Research Working Paper, Feb. 28, 2000), *available at* http://siteresources.worldbank.org/INTARD/825826-1111405593654/20432097/TradeanddevelopmentintheGATTandWTO.pdf (last visited Feb. 25, 2014) and Mari Pangestu, *Special and Differential Treatment in the Millenium: Special for Whom and How Different?*, 23 (9) THE WORLD ECON. 1285, 1292 ff (2000).

[94] Chaytor, *supra* note 45, at 251 (emphasis added).

Furthermore, the co-sponsors repeatedly bring forward that they wish to implement a system that is less rights based and more solution based. Introducing a system that works completely outside the institutional framework might endanger those achievements towards a rule of law that potentially levels the prevalence of economic and political power.[95] Especially developing country Members will probably not benefit from a return to a framework that relies on diplomacy and hence political power. It is now for the Members to decide whether they wish to strengthen the WTO as a legal system or as a political forum.

[95] On the rule of law with special regard to the WTO: James Bacchus, *Groping Towards Grotius: The WTO and the International Rule of Law*, 44(2) HARV. INT'L L. J. 533 (2003).