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The WTO *US – Steel* Case and a Principal Deficit of International Dispute Resolution

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I. Introduction

Given its political profile and economic significance, the *US – Steel* case marks one of the most important decisions rendered by the WTO dispute resolution system ever.[1] Both a panel and the Appellate Body were called upon to comprehensively interpret and apply the principal safeguard provisions in WTO law, namely Article XIX of the GATT 1994 and the supplementing Agreement on Safeguards. From a purely legal perspective, the final ruling is rather unspectacular; still, it allows drawing some noteworthy conclusions for future safeguard cases. In particular, the Appellate Body confirms the stringent requirements to impose safeguard measures and emphasizes the need for sound economic explanation. From an economic perspective, the case perfectly illustrates the basic dilemma of safeguard measures in international trade law. They inherently accompany the process of liberalisation and of structural adjustment that goes along with enhancing market access for imported products. The instrument is politically necessary in order to undertake liberalisation in the first place and to find the necessary majorities to do so at home. WTO members are entitled to unilaterally take restrictive measures should trade liberalisation cause difficulties to domestic producers. At the same time, safeguard measures constantly run the risk of being abused, as producers seek excessive relief by recourse to such measures. Economists have ever since argued controversially whether safeguards are a sensible instrument for economic adjustment and for compensating ‘losers’ from trade liberalisation or whether they amount to inefficient protectionism, generally discouraging the redeployment of resources from declining industries to competitive ones.[2]

International trade law hence seeks to strike a careful balance and to define conditions for taking recourse to safeguard measures in sufficiently precise terms.[3] However, the *US – Steel* case highlights a

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[1] *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-49/251-54/258-59/AB/R, panel report of 11 July 2003, Appellate Body report of 10 November 2003; all relevant documents are available at www.wto.org and the link to dispute settlement.

[2] See Alan O. Sykes, “The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute”, (2004) 7 JIEL 523, at 524-25.

[3] See for an overview on safeguards in the WTO system Thomas Cottier/Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the EU and Switzerland* (Cases, Materials and Comments) (2005), at 486-99; Mitsuo Matsushita/Thomas J. Schoenbaum/Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and*

fundamental deficit of current WTO dispute resolution under the Dispute Settlement Understanding (DSU). The period of time, during which a WTO-inconsistent measure can be in place without any consequences, remains a prime, yet unresolved shortcoming. Steel producers all over the world which were targeted by the U.S. measures were unduly harmed and lost billions of dollars. Though, there is currently no mechanism available for WTO members challenging a WTO-inconsistent measure to recover such losses. This paper concludes with some proposals to establish a mechanism, which potentially remedies such unfair outcomes and creates stronger incentives for WTO members to comply with their obligations in the first place.

II. The Facts

In March 2002, President Bush imposed definitive safeguard measures on ten different steel products. The final determination was based on an investigation and remedy recommendations set forth by the U.S. International Trade Commission (ITC Report). This report determined in the affirmative that various steel products were being imported into the United States in such increased quantities so as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing like or directly competitive products. The measures consisted of additional tariffs ranging from 8% to 30% and were intended "to facilitate positive adjustment to competition from imports of certain steel products".[4] Certain exemptions were granted to imports from preferential trading partners (Canada, Mexico, Israel and Jordan) and from certain developing countries as well as to imports from specific firms if the U.S. steel industry depended on such primary products and the domestic market did not produce them itself.

In essence, the safeguard measures resulted in a temporary relief and breathing space for the ailing U.S. steel industry in order to allow it to adjust to import competition. The products of many foreign steel producers, having become more competitive than their U.S. counterparts, were kept out of the U.S. market; the price of others was artificially increased by the amount of the additional tariffs. In fact, the partly prohibitive effect of the safeguard measures resulted in the lowest level of steel imports in years. As a consequence of the U.S. measures, the world supply exceeded demand which inevitably led to increased price competition.[5] The European Communities remained virtually the only sizeable steel market in the world and faced the risk of being seriously flooded by steel shut out of the U.S. and diverted into the European market. Therefore, the European Communities itself adopted safeguard measures on steel products in March 2002 as a direct response to the U.S. measures. A tariff quota system on the basis of the highest recent level of imports (2001) was imposed in order to limit trade diversion resulting from U.S. protectionism.[6] In addition, various other WTO members such as Cana-

Policy (2003), at 181-202; for an economic analysis Chad P. Bown, "Trade Remedies and WTO Dispute Settlement: Why are so few challenged?", The Brookings Institution Working Paper Series (2004).

[4] U.S. Presidential Proclamation No. 7529 of 5 March 2002.

[5] See Michael J. Hahn, "Balancing or Bending? Unilateral Retaliation to Safeguard Measures", (2005) 39 JWT 301, at 303.

[6] See WTO Doc. G/SG/N/8/EEC/1, G/SG/N/10/EEC/1; Commission Regulation (EC) No. 560/2002 and Commission Regulation (EC) No. 1694/2002. Some WTO members initiated formal WTO dispute settlement proceedings against the EC safeguard measures. However, after a set of consultations, no member ever requested that a panel be established.

da, China, Mexico and Hungary followed suit and adopted or announced their intention to adopt safeguard measures.[7]

Eight WTO members – the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil (the co-complainants) – challenged the U.S. safeguard measures before the WTO dispute resolution process arguing that the measures were inconsistent with Article XIX GATT 1994 and the related Agreement on Safeguards. Various members participated as third parties.[8] After unfruitful consultations, a single panel was established in order to examine the matter. The panel report was subsequently appealed, and the Appellate Body was called upon to issue a final ruling.

III. The Decision

According to established case law, Article XIX of the GATT 1994 and the Agreement on Safeguards, read together, confirm the right of WTO members to apply safeguard measures when, as a result of unforeseen developments, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products. However, the right to impose safeguard measures arises only if the national authority delivers "a reasoned and adequate explanation as to how the facts supported the overall determination."[9] In the *US – Steel* case, the panel determined, and the Appellate Body subsequently confirmed, that these conditions were not met by the United States for any steel product at issue:[10]

- The panel recalled at the outset that an unforeseen development is an unexpected circumstance leading to increased imports; it is measured by what negotiators could reasonably have expected when they incurred (on behalf of their country) obligations under the GATT. The panel agreed with the U.S. argumentation according to which "the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round." However, the panel concluded that the ITC report failed "to demonstrate, through a reasoned and adequate explanation, that unforeseen developments had resulted in increased imports of *each of the products* on which the United States imposed safeguard measures."[11] The Appellate Body approved the panel's finding.[12]

- The panel recalled the case law according to which "the increase in imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury." Moreover, it stressed that a determination of increased imports cannot be made merely by examining the end points of the period of investigation; rather, the competent authority is required to examine trends. The panel determined, and the Appellate Body subsequently confirmed, that these requirements were ful-

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[7] See WTO Docs. G/SG/N/6/CAN/1, G/SG/N/8/CAN/1, G/SG/N/7/CHN, G/SG/N/7/HUN.

[8] Canada, Chinese Taipei, Cuba, Mexico, Thailand, Turkey, Venezuela.

[9] Panel report, para. 10.23.

[10] See for an overview on this case Brendan McGivern, "Summary" (on file with author); Gary Clyde Hufbauer/Ben Goodrich, "Next Move in Steel: Revocation or Retaliation?", International Economics Policy Briefs, No. PB03-10 (2003); Sykes (supra n 2), at 543-64; worldtradelaw.net, "Dispute Settlement Commentary on *US – Steel*".

[11] Panel report, paras. 10.31-150.

[12] Appellate Body report, paras. 269-330.

filled for five steel products at issue, but that the ITC report failed to provide an adequate and reasoned explanation of increased imports for three products.[13] With regard to two products, namely tin mill and stainless steel wire, the panel ruled that the requirements were not fulfilled since the six commissioners comprising the U.S. International Trade Commission did not base their (partly) affirmative determinations on the same product categories (not identically-defined like product grouping); the President eventually combined the results and thus came to an overall affirmative conclusion. In the panel's view, the determination hence was based on alternative explanations that could not be reconciled. However, the Appellate Body reversed this finding on the grounds that the Agreement on Safeguards "did not interfere with the discretion of a WTO member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations." Nonetheless, the Appellate Body did not complete the analysis itself.[14]

– The panel assumed *arguendo* the existence of serious injury and increased imports in order to examine the requirement of a causal link between them. It recalled the case law according to which causation implies "the existence of a genuine and substantial relationship of cause and effect" and requires that a "non-attribution" exercise must be undertaken where factors other than increased imports have caused injury. The panel established for all but one product (stainless steel rod) at issue that the relevant ITC report "failed to provide a reasoned and adequate explanation demonstrating a causal link between increased imports and serious injury."[15] The Appellate Body subsequently declined to rule on the issue of causation with regard to eight products. For tin mill and stainless steel wire, it reversed the findings on the same grounds as set out supra under increased imports, but it again declined to complete the analysis itself.[16]

– With regard to the requirement of parallelism, the panel recalled established jurisprudence: "where a member has conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade areas), that member may not, subsequently, without further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure." However, the United States had included all imports from any sources for the purpose of determining injury, but it had subsequently exempted its free trade partners from the safeguard measures. This "gap" between imports covered by the investigation and imports subject to the safeguard measure led the panel to conclude that this requirement was not fulfilled.[17] The Appellate Body confirmed this finding.[18]

– Relying on the principle of judicial economy, the panel declined to rule on various additional claims and arguments set forth by the co-complainants, concerning among others the issue of like products and product grouping, the definition of domestic industry, serious injury and China's claim that it qualifies as developing country and hence should have been accorded special and differential treatment specifically set forth in the Agreement on Safeguards.[19]

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[13] Panel report, paras. 10.152-277.

[14] Appellate Body report, paras. 401-31.

[15] Panel report, paras. 10.278-586.

[16] Appellate Body report, paras. 475-93.

[17] Panel report, paras. 10.587-699.

[18] Appellate Body report, paras. 433-74.

[19] Panel report, paras. 10.700-715.

Thus, the panel could avoid ruling on the controversial definition of what constitutes a developing country in the WTO framework; this definition still awaits authoritative guidance either through the membership by amending the legal texts or through case law.

– Lastly, the Appellate Body was called upon to rule on various procedural claims set forth by the United States. It confirmed the panel's standard of review for the examination of unforeseen developments; here, as in general, the appropriate standard is "neither *de novo* nor 'total deference' but an objective assessment of the matter". The Appellate Body emphasized, throughout its report, the central principle that "a panel must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination." Therefore, the Appellate Body advocated a certain degree of deference to be granted to the defendant which the panel has, in the view of the Appellate Body, adequately applied in the present case.[20] Moreover, the Appellate Body dismissed the argument that the panel did not sufficiently set out in its report the "basic rationale" for its findings as required by Article 11 of the DSU.[21]

Overall, the findings of both the panel and the Appellate Body are unspectacular. From a legal perspective, the reports are closely based on the legal texts and in full line with the established body of jurisprudence developed over the last years. There are no legal findings potentially breaking new grounds.[22] Not surprisingly, most commentators accordingly expected the outcome.[23]

Nonetheless, at least two observations are noteworthy: Firstly, the Appellate Body has confirmed the panel's constant reliance on the requirement to present a "reasoned and adequate explanation" as to how the facts supported the determination made. This formula of how to assess the soundness and acceptability of a national authority's determination suggests a rather deferential standard of review. Accordingly, neither a panel nor the Appellate Body is to substitute its own findings for those of a competent national authority but is simply to examine whether the facts reasonably and adequately support the factual conclusions. As long as a member's conclusion is reasoned and adequate, a panel must not reverse it even though it would also be perfectly possible to arrive at another conclusion. However, the jurisprudence so far does not indicate where on the spectrum between *de novo* review and 'total deference' the benchmark is exactly to be set.[24] The same holds true for the present case. Both the panel and the Appellate Body determined that the ITC Report fell short of a reasoned and adequate explanation as to how the facts supported the imposition of definitive safeguard measures, but they did not indicate what alternative reasoning would have sufficed.[25] Although no *de novo* review has ever been advocated by the Appellate Body, nor in fact applied by a panel, the standard of review seems obviously to require a meticulous and intrusive examination of national decision-making, hence tending on the spectrum between *de novo* review and 'total deference' rather towards the former than towards the latter. Accordingly, Alan O. Sykes concludes that it will be difficult "for

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[20] Appellate Body report, paras. 273-81, 494-99.

[21] Appellate Body report, paras. 500-7.

[22] Similar McGivern (supra n 10), at 1; Sykes (supra n 2), at 562.

[23] According to Hufbauer/Goodrich (supra n 10), at 3, "even casual knowledge of WTO agreements and prior WTO cases would suffice to expose flaws in the USITC's original reasoning."

[24] See Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (2003), at 132-42.

[25] Sykes (supra n 2), at 563.

WTO Members to use safeguards going forward without a prospect of near-certain defeat when a complaint is brought against them."[26]

Secondly, the overall findings of inconsistency rest on fairly narrow procedural grounds.[27] Neither the panel nor the Appellate Body unequivocally determined that the requirements for adopting safeguard measures were not fulfilled *in substance*. Rather they held that the United States did not provide an acceptable explanation for the imposition of the measures. An illustrative example is provided by the panel's assessment of unforeseen developments. It stated that "the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments", but it painstakingly avoided to rule on the question of whether these occurrences, in addition to others which were cited by the United States such as the strength of the U.S. economy and the appreciation of the U.S. dollar, were in fact unforeseen developments pursuant to Article XIX GATT 1994 or not. Such line of reasoning was consistently applied throughout the panel report and confirmed by the Appellate Body. In concluding their reports, panels and the Appellate Body usually recommend, as they did in this case, that the Dispute Settlement Body (DSB) requests the losing party to bring its measure found to be inconsistent with WTO law into conformity with its obligations, short of specifying ways or steps as to how to bring about conformity. It might have come as a consequence of the deferential approach followed by the panel and the Appellate Body in this case that the United States could have decided not to terminate the safeguard measures but simply to present a revised ITC Report claiming that it would remedy the deficiencies identified in the reports. In doing so, the United States could have argued that it had duly implemented the reports. In fact, one of the major steel manufacturers in the United States called upon the U.S. Government to implement the Appellate Body decision accordingly although such a proceeding would, of course, have been met with strong resistance from the co-complainants.[28]

IV. The Termination of the Measures

After the Appellate Body report had been issued, the United States informed the DSB that it decided to comply with the ruling in the advent of the adoption of the panel and Appellate Body reports by the DSB. On 4 December 2003, the United States withdrew the safeguard measures accordingly.[29]

There might have been various reasons why the United States eventually repealed the illegal measures. One of the following four – or a mixture between them – might have been the most decisive: Firstly, the Appellate Body determined unequivocally that the measures were not consistent with Article XIX GATT 1994 and the Agreement on Safeguards. The DSU makes it clear that decisions adopted by the DSB are legally binding between the parties and shall be implemented accordingly without an option for losing parties to "buy out".[30] From a legal perspective, the United States was hence obliged to

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[26] Sykes (supra n 2), at 562.

[27] See McGivern (supra n 10), at 1.

[28] The company being Nucor Corp., see Inside U.S. Trade, "Steel Company Requests Report on Compliance With Steel Ruling", 14 November 2003.

[29] Immediately after the U.S. removal of the safeguard measures, the EC repealed its safeguard measures likewise, see Commission Regulation (EC) No. 2142/2003.

[30] See John H. Jackson, "Editorial Comment – International Law Status of WTO Dispute Settlement Reports: Obligations to Comply or Option to Buy Out?", (2004) 98 AJIL 109-25.

bring the measures into conformity with its obligations under international law, and the rule of law prevailed. Secondly, the United States accomplished from a political perspective what it intended to achieve with the imposition of the measures. They were considered to facilitate the adjustment of domestic steel industries that experienced serious economic difficulties and overproduction. In particular, President Bush was anxious to please constituencies in States in which many jobs are traditionally found in the steel industry such as Pennsylvania, Ohio and West Virginia. According to the U.S. statement in the DSB meeting leading to the adoption of the reports, the domestic steel producers in fact used the breathing space provided by the measures to restructure, consolidate and negotiate new labour contracts in order to adjust to import competition.[31] Thirdly, the measures were arguably beginning to have a negative effect on the U.S. industry. In December 2003, steel users probably had already lost more business and jobs as a direct consequence of the safeguard measures than steel producers had gained. The United States itself acknowledged in the relevant DSB meeting that it based the decision to terminate the measures on the fact that "the effectiveness of the safeguard measures had been impaired by changed economic circumstances."[32] According to a survey by Gary C. Hufbauer and Ben Goodrich, the steel safeguards did in fact more harm to the steel-using industries than good for steel producers.[33] Interestingly, the American Institute for International Steel (AIIS) sought to represent the views of steel users before the Appellate Body. It submitted an *amicus curiae* brief arguing that the ITC Report should have explained why the safeguard measures would or would not be in the "public interest" as provided for in Article 3:1 of the Agreement on Safeguards. However, the Appellate Body did not find the *amicus curiae* brief to be of assistance in deciding the case, and it declined to take it into consideration.[34] Fourthly, Article 8 of the Agreement on Safeguards stipulates, specifically for that agreement, that members affected by safeguard measures are entitled to apply re-balancing measures in accordance with the procedures laid down in that provision. It is commonly held that, if the safeguard measure in question violates WTO rules, affected members can re-balance immediately after a panel or the Appellate Body has confirmed such a violation.[35] In fact, various co-complainants signalled their intent to impose re-balancing measures against the United States within five days of an Appellate Body decision condemning the U.S. measures. The European Communities, the complainant by far the most affected by the safeguard measures, notified to the WTO the proposed suspension of substantially equivalent concessions against U.S. products worth $2.2 billions, which would have resulted in $580 millions of duty collected annually.[36] The European Communities had already adopted a regulation stipulating potentially targeted products such as various fruits and vegetables, textile products and Harley Davidson motorcycles; these re-balancing measures would have come automatically in force five days after the adoption of the Appellate Body report.[37] Gary C. Hufbauer and Ben Goodrich succinctly characterised the list as follows: „In short, the list is designed

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[31] DSB Meeting, 10 December 2003, WTO Doc. WT/DSB/M/160, para. 33. According to Hufbauer/Goodrich (supra n 10), at 12, the main explanation as to why the consolidation occurred in 2002/2003 was the new labour agreement with the United Steelworkers of America (USWA), the industry's largest union, and not the safeguard measures *per se*.

[32] DSB Meeting, 10 December 2003, WTO Doc. WT/DSB/M/160, para. 33.

[33] Hufbauer/Goodrich (supra n 10), at 9-14.

[34] Appellate Body report, para. 268. This cautious approach towards the handling of *amicus curiae* briefs by panels and the Appellate Body is in line with established practice, see Cottier/Oesch (supra n 3), at 169-76.

[35] However, this procedure is controversial, see Hahn (supra n 5), at 308-25; Hufbauer/Goodrich (supra n 10), at 5-6; McGivern (supra n 10), at 2.

[36] See WTO Docs. G/C/10, G/SG/43.

[37] Regulation (EC) No. 1031/2002.

to maximize the political pain for Republicans in 2004."[38] Japan, China, Norway and Switzerland followed suit and threatened to adopt similar re-balancing measures.

V. A Principal Deficit of International Dispute Resolution

When President Bush proclaimed the termination of the safeguard measures, the steel saga eventually came to a conciliatory end. Moreover, the pending adoption of re-balancing measures by various co-complainants, and thus a new and potentially most unpicturesque chapter in the strained transatlantic relationship between the United States and the European Communities, could be avoided. Nonetheless, several delegations might have detected a sad smile on their faces at the end of the whole proceedings. Although the U.S. measures were unequivocally held to be inconsistent with the relevant WTO law, the price on the part of the co-complainants to pay for the eventual removal of the measures and hence classical *restitution in kind* was high. From a *legal* viewpoint, the final WTO ruling of inconsistency contributed decisively to the withdrawal of the U.S. measures. Nonetheless, the discussion supra on the reasons for their termination revealed that other factors might have played an equal, or even greater, role. In the absence of any WTO dispute resolution proceedings and a final ruling of inconsistency against the United States, the measures would most likely have remained in force just a couple of months longer and then have been terminated. From an *economic* viewpoint – which matters in the end –, the United States achieved what they intended to accomplish, namely to protect its steel industry from global competition and to facilitate positive adjustment and consolidation. Overall, the safeguard measures were put in place over a period of one year and nine months. Irrespective of whether the protectionist measures were best suited to achieve the goals, the United States raised its tariffs in some cases to prohibitively high levels which inherently created an uneven playing field for foreign competitors both within the U.S. market and globally. In addition, the United States supplemented its tariff revenues considerably by collecting additional duties. Conversely, foreign steel industries not only suffered damages due to the higher tariffs, but they have also, in the longer term, lost market shares that they now need to regain tediously. From a viewpoint of *financial and personal resources*, the delegations of the co-complainants were burdened to a considerable extent during the proceedings. They either handled the case internally or sought advice from external law firms. In both instances, the expenses were enormous. The resources of a middle-sized trading nation, such as Switzerland, in personal terms were strained to the maximum after it had decided to manage the case internally by building an in-house team of specialists without seeking external support.[39] Obviously, proceedings with dimensions, in terms of economic significance and legal complexity, similar to the present case easily overburden the governments and trade departments of most WTO members. Other co-complainants sought advice from external law firms, which has amounted, as unofficially reported, to fees of approximately $400.000.

Against this background, it becomes obvious that the frown on the faces of the co-complainants at the end of the successful proceedings was built on the impression that the economic price which was paid by the domestic industry during the imposition of the safeguard measures and the expenses incurred

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[38] Hufbauer/Goodrich (supra n 10), at 8.

[39] At least, the co-complainants cooperated closely throughout the proceedings, exchanged draft submissions and coordinated the oral statements and possible answers before the panel and the Appellate Body.

during the legal proceedings were enormous.[40] The WTO dispute settlement system might need instruments and tools in order to remedy such an outcome. Three come spontaneously to mind: Firstly, the system might need a mechanism for provisional measures to the effect that challenged domestic measures being *prima vista* illegal must be removed immediately. Interim measures are concerned with the preservation of the parties' rights while litigation is in process. They prevent damage to the complainant which would be difficult to repair, thus ensuring the effectiveness of the proceedings. Arrangements to protect the rights of litigants are a common feature of international dispute resolution; Article 41 of the Statute of the ICJ, for instance, provides explicitly for provisional measures.[41] In WTO dispute resolution, no such claim is available. The issue is discussed in the course of the current review of the DSU, but it is unlikely that provisional measures are agreed upon in the near future.[42] Secondly, the WTO dispute settlement mechanism does not provide for the compensation of damages suffered on the grounds of illegal actions taken by other members. The final rulings of panels and the Appellate Body are legally binding between the parties and must be complied with. The DSU provides, in its Articles 21 and 22, for an elaborate set of actions if a member fails to adequately implement an adopted report. However, compensation and suspension of concessions are potential default remedies only if an adopted report's recommendations are not properly implemented. Once an inconsistent measure has been brought in conformity with the law, there is no room for compensatory actions on the part of other members. This is, as the *US – Steel* case has demonstrated, a shortcoming. Whereas customary international law provides for both prospective and retrospective remedies in international dispute settlement, WTO law does arguably not provide for retrospective remedies *de lege lata*. At the time of writing, no specific proposals have been put forward to properly address this deficit in the current review of the DSU.[43] At least, Mexico presented the idea to include into the DSU a provision for the retroactive determination and application of nullification and impairment. It suggested that nullification and impairment should be calculated from the date of the imposition of an illegal trade measure or from the date of the formal request for consultations.[44] Thirdly, it is a traditional principle in international dispute settlement that parties bear their own litigation costs. Nonetheless, it might well be worth considering a mechanism by which litigation costs be awarded according to the outcome of a case. The cost of legal advice provided by law firms easily amounts to $500.000 per case. The experience over the past ten years of WTO dispute resolution indicates that the monetary costs of an active participation before WTO panels and the Appellate Body are, in particular for developing and least-developed countries, prohibitively high. The legal complexity of WTO law has increased the demand for external legal advice; in many areas of WTO law, it might be impossible to handle a case properly without the support of legal specialists in the field. Various proposals with re-

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[40] See for a general analysis of the incentives generated by the WTO legal system to engage in formal dispute settlement Chad P. Bown, „Participiation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders", The Brookings Institution Working Paper Series (2005).

[41] See J.G. Merrills, *International Dispute Settlement* (3rd ed., 1998), at 129-31; Jerzy Sztucki, *Interim Measures in the Hague Court* (1983).

[42] See Proposal by Mexico of 4 November 2002, WTO Doc. TN/DS/S/23; Thomas A. Zimmermann, *What Directions Should the DSU Take? Negotiations and Proposals to Review and Reform the WTO Dispute Settlement Understanding* (2004), at 153-54; see for a general overview on the current review of the DSU Federico Ortino/Ernst-Ulrich Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* (2004).

[43] See for customary international law on remedies and the DSU Gavin Goh/Andreas R. Ziegler, „Retrospective Remedies in the WTO After *Automobile Leather*", (2003) 6 JIEL 545, at 553-54; they argue that retrospective remedies have no legal basis in WTO law (contrary to the panel report in *Australia – Automotive Leather*, WT/DS126/RW, adopted 11 February 2000).

[44] Proposal by Mexico of 4 November 2002, WTO Doc. TN/DS/S/23.

gard to litigation costs have been submitted in the course of the DSU review.[45] However, it is unlikely that any of these proposals gains widespread support and is potentially ripe for consensus in the near future.

[45] See Proposal by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe of 9 October 2002, WTO Doc. TN/DS/W/19; Proposal by India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia of 11 February 2003, WTO Doc. TN/DS/W/47; Proposal by Jamaica of 10 October 2002, WTO Doc. TN/DS/W/21; Proposal by China of 13 March 2003, WTO Doc. TN/DS/W/51/Rev.1; Zimmermann (supra n 42), at 182-83.