

who would pay and to whom. For example, if the proceeds from a fine were funneled by national governments to industry, incentives to raise complaints would be significantly increased (and, in this connection, it was also suggested that, in the case of a developing country that is receiving World Bank/IMF support, payment of fines might simply represent flow-through of development assistance from the international financial institutions).

Mexico, meanwhile, has controversially proposed retroactive damages in order to promote early settlement.<sup>12</sup> However, it was argued that, as rules get more complex, there is the increasing likelihood that countries will be found offside on measures that they had reasonable grounds to believe were legitimate; in this context, retroactive damages could put a chill on entering into obligations.

That being said, support was voiced for placing greater emphasis on early settlement because empirically it appears to be more effective than litigation in eliciting commercial concessions. Analysis of the outcomes of WTO-era versus GATT-era disputes shows that the WTO has improved matters in terms of increasing the likelihood of getting commercial concessions to plaintiffs but the gains are largely in the early settlement phase. Developing countries do not do as well as developed at this phase and the initiatives designed to move cases more quickly to the litigation phase thus run counter to their interests, includ-

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<sup>12</sup> Editors' note: Mexico has argued that length of the WTO process (cases can take up to three years) gives domestic interests a *de facto* waiver during this time and has proposed four changes: (a) early determination by the panel of the level of nullification or impairment; (b) retroactive determination and application, (c) preventive measures to address cases where damages would be difficult to repair, and (d) "negotiable remedies", which amounts to the right to trade the right to retaliate to other WTO members who might be in a better position to implement them without damaging themselves. Mexico proposed three alternatives for starting the clock on damages: (a) date of imposition of the disputed measure; (b) date of request for consultations; and (c) date of the establishment of the Panel. See Mexico's submission to the Negotiating Group on Improvements and Clarifications of the Dispute Settlement Understanding (TN/DS/W/23).