INTRODUCTION

In keeping with the focus of this Conference on International Arbitration and Mediation, this paper will address the future of World Trade Organization (WTO) dispute settlement from the standpoint of its use to meet the needs of private parties. In particular, I want to analyze the strengths and weaknesses of the WTO system’s remedies for companies and industries aggrieved by the WTO-inconsistent actions and policies of foreign governments. I will also briefly address another important concern about dispute settlement—namely, the difficulties of least-developed countries in making effective use of the system.¹

In this analysis, it is my thesis that the WTO Dispute Settlement Mechanism (DSM) has the potential to become—but in most cases is not yet—an effective process, in appropriate circumstances, for achieving the objectives of private sector litigants. Whether the DSM will become effective in this way depends on three factors:

- First, whether complaining companies and industries learn how to use the system properly, and
- Second, whether the WTO case law on implementation of dispute settlement rulings continues to evolve in a manner that encompasses


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remedying the continuing effects of past WTO-impermissible practices, in addition to forbidding the future use of such practices.

- Third, the strength of the WTO dispute settlement system will ultimately depend on whether it is viewed as not just a tool of rich countries to use against poor countries, but one that provides fair solutions to all participants. Before this can happen, however, enough developing countries have to first participate and then obtain favorable results where WTO law lies in their favor.

There are WTO experts who will regard this entire discussion as heresy. Their view might be that the WTO is an organization of governments, and its dispute settlement system addresses government-to-government problems rather than those of private sector complaining entities. From this starting point, these commentators would advance such propositions as the following:

- Governments, not private parties, control the nature of the concerns raised and the arguments presented,
- The Dispute Settlement Mechanism addresses the changing of governments’ practices, not the remedying of damage or loss incurred by industries, companies or farmers, and
- Rulings and recommendations by the dispute settlement body operate prospectively, rather than rectifying or rescinding past governmental actions.

While there is much truth in these characterizations of the formalities of the system, they ignore some important realities:

In the major developed countries, and especially in the United States, WTO dispute settlement cases are rarely originated on the government’s own motion. Rather, governments act in response to petitions submitted by private parties that are aggrieved in one way or another by the acts or policies of a foreign government. It is these private parties that are called upon by their governments to supply the large amounts of data necessary for the case’s prosecution. And, in the last analysis, it is the needs of these private parties that should—and normally do—shape the goals of the effort.

The reliance on private-sector petitioning also has a political consequence. Having taken up the case at the urging of a private company or industry, the complaining government is inevitably under political pressure to achieve the goals of that company or industry. Needless to say, the domestic petitioner can take steps to enhance that pressure.

Finally, the government agencies that handle these WTO cases are small and invariably understaffed for a major advocacy effort. This is true even in the United States and the European Union. Therefore, given the right relationship between the domestic company’s or industry’s counsel and the