The Lahore Journal of Economics
11 : 2 (Winter 2006) pp. 169-188

Note:

Understanding on Rules and Procedures Governing the Settlement of Disputes: A Developing Countries Perspective[1]

Somesh K. Mathur*

Abstract

This note discusses the workings of the Dispute Settlement Process (DSP) of the WTO, and the major problems concerning the implementation of decisions in the DSP. It provides some suggestions in order for the DSP to work for the benefit of all. It maintains that the ability to extend dispute settlement across agreements is one of the strengths of the World Trade Organization. The author concludes that substantial reform can be undertaken in the DSP if concerted efforts are made to quantify economic damages for working out the suspension of concessions.

Introduction

Dispute resolution in the World Trade Organization (WTO) is carried out under the WTO Dispute Settlement Understanding (DSU), the rules and procedures of which apply to virtually all WTO agreements. The DSU provides for consultations between disputing parties, panels and appeals, and possible compensation or retaliation if a defending party does not comply with an adverse WTO decision by a given date. Automatic establishment of panels, adoption of reports, and authorization of requests to retaliate, along with deadlines for various stages of the dispute process and improved multilateral surveillance and enforcement of WTO obligations, are supposed to produce a more expeditious and effective system than that which existed under the General Agreement on Tariffs and Trade (GATT). Though the DSU mechanism has gained credibility among the Member Countries, only a few developed countries continue to be major users of the

[1] This paper has been adapted from a chapter published in the World Trade and Development Report of the RIS-2006

* Fellow, Research and Information System for Developing Countries, India Habitat Centre, Lodhi Road, Delhi, India.

system due to some existing lacunae in the current dispute settlement procedure. The participation of developing countries, especially the least-developed countries (LDCs), in the DSU has still not improved. For example, the lack of effective sanctions in the DSU system results in a complaining party being largely left alone in their struggle against a violator. Consequently countries that are economically and politically weak stand at a relatively disadvantageous position in the WTO. This note discusses the workings of the dispute settlement process (DSP) and its flaws, and gives some suggestions for making it work for the benefit of all.

Workings of the DSP

The dispute settlement mechanism of the WTO works as follows. First, when one country believes that another is violating any aspect of the agreement (including the General Agreement on Trade Services (GATS) and the Trade Related Intellectual Property Issues (TRIPs), as well as the General Agreement on Tariffs and Trade (GATT)), the complaining country first requests consultation with the offending country, and the two then seek to resolve the dispute on their own. If consultation fails, then the complaining country requests the establishment of a panel, consisting of three persons with appropriate expertise from countries not party to the dispute. These panels assess the evidence in the context of its interpretation of the WTO rules and issue a report. The DSU emphasizes the importance of consultations in securing dispute resolution, requiring a Member to enter into consultations within 30 days of a request for consultations from another Member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Where consultations are denied, the complaining party may move directly to request a panel. The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration.

The panel report is automatically accepted unless all WTO members, acting through their Dispute Settlement Body (DSB), decide by consensus against its adoption, or if one of the parties to the dispute voices its intention to appeal. Therefore, the process requires unanimity among WTO members not to accept a panel report, in marked contrast to the procedures of the old GATT, where a panel report could be blocked by any one country, including the country that was the subject of the complaint. Panel procedures are set out in detail in the DSU. It is envisaged that a panel will normally complete its work within six months or, in cases of urgency, within three months. Panel reports may be considered by the DSB for adoption within 20 days after they are issued to Members. Within 60 days of

their issuance, they will be adopted, unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal.

To hear appeals, the WTO has established an Appellate Body, composed of seven members, of which three will serve on any given case. The permanent seven-member Appellate Body is set up by the Dispute Settlement Body and broadly represents the range of WTO membership. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government. The DSB established the Appellate Body in 1995, after which the seven first Appellate Body members were appointed. The DSB appoints the members by consensus (Article 2.4 of the DSU), for a four-year term and can reappoint a person once (Article 17.2 of the DSU). An Appellate Body member can, therefore, serve a maximum of eight years. On average, every two years a part of the Appellate Body membership changes. The purpose of this Appellate Body is to consider only issues of law and legal interpretations by the Panel, and it too issues a report which must be accepted by a unanimous decision of the DSB. An appeal will be limited to issues of law covered in the panel report and legal interpretations developed by the Panel. Appellate proceedings shall not exceed 60 days from the date a party formally notifies its decision to appeal. The resulting report shall be adopted by the DSB and unconditionally accepted by the parties within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.

Once this process is completed, countries are expected to implement the recommendations of the Panel/Appellate Body reports. If they do not, then complaining countries are entitled for compensation from them, or to use suspension of concessions (usually increased trade barriers) against them. If suspension of concession occurs, it is to be done preferably in the same sector as the dispute, or failing that under the terms of the same Agreement (GATT, GATS or TRIPs). But if this too is impractical, suspension can come under another agreement. Thus, in particular, violations of the TRIPs agreement can lead to increased barriers to trade in goods if the violations are not corrected in accordance with the recommendations of a panel report.

Dispute Settlement Process: A Critical Evaluation

This ability to extend dispute settlement across agreements is one of the strengths of the WTO, and no doubt is one of the things that motivated advocates of extended intellectual property protection to incorporate it into the Uruguay Round negotiations (Deardorff, 1996). However, there is a possibility that countries retaliate by withdrawing concessions or

commitments even before the panel gives its report. This issue needs to be addressed under the dispute settlement mechanism of the WTO. Also, there is a possibility that ultimate reliance on suspension of concession by trading nations either (1) would be defeating the purpose of the WTO in case the cases do not get settled either by implementing the panel recommendations or by compensation, or (2) expedite the rest of the process work and lead to cooperation if there is a threat of suspension. Deardorff (1996) notes that the threat of expulsion from WTO membership in case of violation of rules will not be effective because members will be reluctant to set a precedent by expelling another lest the same thing later happen to them.

It is to be noted that most developing countries, partly because they are small and partly due to lack of experience, are finding it difficult to cope with the WTO's new dispute settlement mechanisms. Blackhurst (1997) points out that two-thirds of the least developed countries in the WTO have no representation. For the other third, there is typically only one person covering all the international organizations. Given the active participation of members in the work of the WTO, this inevitably leads to under representation of their interests and their inability to participate and exercise any influence on WTO decisions. An enlargement of the WTO Secretariat to permit the establishment of a service which could provide legal advice on procedures and other aspects of dispute settlement would benefit not only the least developed countries but also some of the smaller developing countries[2].

[2]While some subsidized legal assistance can be accessed by developing countries through the independent, Geneva-based, Advisory Centre on WTO Law (ACWL) the assistance is limited. Because of the membership fee, a developing country (other than a least developed country) may wait to join the Centre until it believes that it can benefit meaningfully from WTO litigation. The United States is not a member of the Centre and provides no funding for this initiative. Canada is the only non-European developed country member of the Centre. The other nine are Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden, Switzerland and the United Kingdom. The term "least developed country" (LDC) is clearly defined according to United Nations criteria based on per capita income and related development indicators. The criteria used in the triennial review in 2003 were based on domestic gross domestic product (under $900 average over three years), a human resource weakness index and an economic vulnerability index. Under the annexes to the agreement establishing the Centre, developing countries are divided into three categories, A, B and C, with least developed countries (as defined by UN rules) constituting a fourth category. As of August 2002, hourly rates for the Centre's members for WTO litigation support were set at $200 for category A countries, $150 for category B countries and $100 for category C countries. Least developed countries hourly rates are set at $25. Non-member developing country rates are set at $350 for category A countries, $300 for category B countries, and $250 for category C countries (See The Agreement Establishing the Advisory Centre on WTO Law, Annex II, Nov. 13, 1999, available at http://www.acwl.ch/Docs/ACWLAgreementEnglish.htm.)

The DSU system has experienced growing pains due to major problems so far as the implementation of decisions is concerned (Mercurio, 2004). Mexico had raised concerns over non-compliance with panel rulings as one of the problems within the DSU (paper submitted to the WTO, TN/DS/W/23, November 4, 2002). It noted that losses caused by non-compliance with rulings and procedural delays amounted to hundreds of millions of dollars each year. According to this paper, non-compliance problems occurred both when members failed to ensure the conformity of their laws, regulations and administrative procedures with WTO obligations (compliance *a priori*), and when members failed to withdraw measures found to be inconsistent with WTO provisions (compliance *a posteriori*). On procedural time frames, the study noted that out of 77 cases where the WTO had found a Member to be in violation of WTO rules, immediate compliance had been secured only five times, with five cases being settled mutually. The average 'reasonable period of time' (RPT) to comply ran to 292 days. The study (Mexican paper) also pointed out that the average period of time between the establishment of a panel and the expiry of the reasonable period of time was 775 days, or over two years, which grew to 1507 days or over 4 years once the consultation period was included.

Part of the above problem lies in procedural flaws in the dispute settlement process. Those are reflected in the members' proposals to the WTO (see section below). We give an account of two such inherent problems with the articles of the DSP.

In many municipal legal systems, an appellate court that reverses a finding of a court of first instance may remand the case back to the lower court for further proceedings consistent with the appellate court's decision. This is an efficient and expeditious way of handling cases at that stage. But the WTO Appellate Body lacks this authority, and this lack can result in a complaining Member going through the entire dispute settlement process without receiving a decision on its claim.

The problem, that has become known as "sequencing", results from a conflict in the provisions of the DSU dealing with the time available to a Member, whose measure has been found to be inconsistent, to bring that measure into conformity – and with the time within which the successful complaining Member must act to secure its remedy if the measure is not brought into conformity.

Developing countries face at least three major problems as far as the implementation of decisions in the DSP is concerned (RIS, World Trade and Development Report 2003):

(i) It may take up to three years from the start of the dispute settlement process until the withdrawal of the offending measure. Meanwhile, the export opportunities for the complaining developing country in the developed country concerned may suffer irreparably during this time. Indeed, there is no retrospective relief from the time the incorrect measure was applied by the respondent Member country. In the case of a developing country as a complainant, this gap of time-period in relief may be very costly.

(ii) There is substantial export loss to the developing country during the dispute settlement period, but there is hardly any provision for compensation for this loss even when the measure in question is found to be in contravention of the WTO rules or frivolous. This can be particularly damaging for smaller developing countries which are highly dependent on a limited number of export products/markets.

(iii) Retaliation is the final remedy to allow the complaining country to take action against the defending country. As for developing countries, it is difficult to take any retaliatory action against a developed country. This is owing not only to political considerations but also to the unequal economic relationship with developing countries being more dependant on continuing the relationship with developed countries for their economic growth and development.

In November 2001, at the Doha Ministerial Conference, member governments agreed to negotiate to improve and clarify the DSU. These negotiations take place in special sessions of the Dispute Settlement Body (DSB). The Doha Declaration mandates negotiations and states (in para 47) that these will not be part of the single undertaking — i.e. that they will not be tied to the overall success or failure of the other negotiations mandated by the declaration. Originally set to conclude by May 2003, the negotiations are still continuing without a deadline.

The Chair's text of May 28, 2003, otherwise known as the Balas text after the then-Chair Ambassador Peter Balas of Hungary, contained a large number of issues, including, inter *alia* sequencing of retaliation and

compliance procedures, remand authority for the Appellate Body, compensation for litigation costs, third party rights, consultation proceedings, as well as various elements of special and differential treatment for developing countries. Since the Balas text, members have submitted approximately 50 proposals. In light of the broad scope of the review in terms of the proposals to be considered, the sense among some WTO members is that ample opportunities exist for reforms in the dispute settlement process of the WTO, both procedurally and justice specific. The challenge, however, lies in finding common ground on existing proposals contained in the Balas text. It becomes altogether important because at the recently concluded Hong Kong Ministerial Conference, Ministers agreed to conclude DSU negotiations rapidly.

Number and Nature of Disputes

The latest available data show that 376 cases were brought to the WTO dispute settlement procedure till August 30, 2006. Table-I, by breaking down these figures by category of country (developed/developing), shows that out of 376 cases for resolution, 228 were presented by developed countries (145 against other developed WTO Members and 83 against developing Members). The developing countries filed 148 claims, with 90 against developed country members and 58 against developing countries. An agreement-wise break-up reveals another interesting dimension of the dispute settlement process: The largest share of maximum cases that have been registered, measured by the obligation enforceable by the DSU, pertain to industrial products. This is followed by anti-dumping cases and subsequently followed by cases in agriculture.

In addition, there has been an increase in the number of disputes involving developing country Members (complainant/respondent or third party) during the last five years. The question arises that despite the increase in the number of cases involving developing countries, they are still skeptical about the use of DSU. The observed asymmetries are also indicative of gaps in legal power and economic capacities of developed and developing countries.

By July 2005, only about 130 of the nearly 332 cases then had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995 (WTO website, www.wto.org).

Table I: Comparison of Participation by Developed and Developing Countries in the WTO Dispute Settlement Process up to August 30, 2006

Cases Filed by Developed Countries		Cases Filed by Developing Countries	
Total	Against Developing Countries	Total	Against Developed Countries
228	83	148	90

Source: Based on information posted on the WTO website (www.wto.org)

Concerns and Proposals Put Forward by Developing Countries to Improve Dispute Settlement Process in the World Trade Organization: Making Them Work

Formal submissions at the ongoing post-Doha DSU review negotiations could be put under the broad categories given below. These revolve around the following themes: transparency, security and predictability, special and differential treatment, and implementation issues. Although all proposals are still on the table, during the last year or so, active negotiations have centered on the following issues:

Access to Legal Assistance: The membership- based Advisory Centre on WTO Law which has been set up recently in Geneva (by virtue of the Agreement establishing the Advisory Centre on WTO Law which came into force on June 15, 2001) provides legal assistance to developing country Members and LDCs in dispute settlement, on a sliding-scale fee basis. It is an independent inter-governmental organization and provides legal services and training to all developing countries. Although it is a step in the right direction, it alone cannot meet the needs of all the developing country Members and LDCs for legal support.

Several proposals have also been tabled for the payment of litigation costs to developing country Members or LDCs where in any action involving such a Member and a developed country Member, if the dispute does not end with a Panel or the Appellate Body finding against the former, then it should be awarded litigation costs to the tune of US$500,000 or actual expenses, whichever is higher. The litigation costs should include lawyers' fees, charges and all other expenses for the preparation of necessary documentation and participation in the consultations, Panel and Appellate Body proceedings, including travel and other logistics for a reasonable

number of capital-based officials. There is also a proposal which is being considered sympathetically for holding consultations in the capitals of LDCs where possible for a developing country and because an enormous amount of ground work is required to be done when bringing a dispute to the DSB. There is a need to have ongoing research into trade matters, involving collection and analysis of trade data across the board, and using the research to identify and establish a violation which may be litigated. There is the cost of maintaining the presence in Geneva of the officials concerned of disputant LDCs as may be required during the course of the dispute. Developing country members and LDCs have taken the position that they will need supplementary resources and means to be provided to develop both the institutional and human capacity for using the Dispute Settlement.

Currently, Article 27 mandates the WTO Secretariat to make a qualified legal expert available from the WTO technical services to any developing country member which so requests. This expert shall assist the developing country member in a manner ensuring the continued impartiality of the Secretariat. The restriction in the last sentence often restricts the legal expert in fully discharging the functions of counsel to the developing or least-developed country Member. The extent of the assistance is also restricted by the lack of manpower. Another issue with the Secretariat is that the inputs it provides to the Panels or the Appellate Body in the course of adjudication of a dispute are not available to the parties, whereas these inputs may crucially influence the decisions made. It has been proposed that the Secretariat should provide all relevant legal, historical and procedural material relating to a dispute to the developing and least-developed country Members that are parties or third parties in the dispute. Additionally, any document, notes, information, etc. submitted by the Secretariat to a Panel should be given promptly to the parties to the dispute, whose views on these shall be taken into consideration by the Panel.

Amicus Curiae Briefs: *Amicus curiae* means "friend of the court" or "disinterested adviser". This issue has been discussed in detail in the Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe (TN/DS/W/19 dated October 9, 2002), in which they come to the conclusion that the dispute settlement system of the WTO being of an intergovernmental character, allowing non-members to participate and submit *amicus curiae* briefs would undermine this character, and these non-member entities would seek to represent and advance their own sectoral interests, rather than the overall interests of the territories concerned.

Non-State Access: Access to the DS is restricted to WTO Members, who are largely states, but entities such as the European Community and certain Customs Unions are also Members. In one sense, the door has been opened to certain forms of access by non-state entities. However, the emerging issue is that of corporate entities having access to the DS to litigate cross-border disputes, particularly if and when agreement is reached within the WTO framework, on trade and investment, for example. The DSU would have to be radically restructured to enable such litigation to take place within its compasses. This would once again place developing countries at a huge disadvantage as large and well-organized commercial enterprises would be much more able to commit the resources required to litigate issues in Geneva over a length of time.

Special and Differential (S&D) Treatment: Developing countries have sought to make mandatory for the developed country member to explain in the panel request or in its submission to the panel as to how it has taken or paid special attention to the particular problems and interests of developing countries.

Developing countries and LDCs have submitted that they attach great importance to the provisions of Article 24 of the DSU which requires Members to exercise "due restraint" in matters involving an LDC. There is a need for clarification in terms of how to determine whether such restraint was exercised and what the consequence would be if it is established that such restraint was not exercised. It is proposed that Article 24.2 should also be amended by removing "upon request by a least-developed country Member" to make it incumbent upon the complaining party to seek the good offices of the Director General before a request for the establishment of a Panel is made.

Further proposals have been tabled, to make it mandatory to give special attention to developing country Members' particular problems and interests during consultations (Article 4.10), and also to amend Article 12.10 to provide developing country Members sufficient time to prepare and present their arguments before Panels.

China has proposed that explicit provisions applicable to all developing country Members (and by extensions all LDCs) be established in the DSU in order to strengthen the S&D provisions. Such provisions may include that in the exercise of due restraint, developed country Members shall not bring more than two cases to the DSB against a particular developing country Member within a calendar year. Further, if a developed country Member brings a case against a developing country

member, if the Panel or Appellate Body finds in favour of the latter, the former should bear the legal costs of the latter incurred in defending the proceedings. The LDC Group may consider adopting these or placing similar proposals before the DSB.

Third-party Rights: Under the current DSU rules, it is possible for members, under certain conditions, to join in consultations in a dispute in which they are not the complaining or responding party, to become third-parties at the panel stage, and to become third-participants in the appellate stage. Members are generally supportive of enhanced third-party rights, provided that an adequate balance between the rights of main parties and third-parties is maintained.

On a number of occasions a Member' s request to be joined in the consultations has been refused on the ground that the Member concerned does not have substantial trade interests in the consultations being held. Thus one problem area is the use of two different phrases, namely "substantial trade interest" and "substantial interest" in the same article namely, Article 4.11 of the DSU. It should be recognized that the interests of LDCs and developing country members in a case may include gaining legal experience in procedural, substantive, systemic or other issues, gaining insight into the workings of the WTO, and protecting long-term development interests and prospects that any findings and recommendations could adversely affect. Accordingly, provision should be made for third party developing country members and LDCs to have the right to all the documents and information, and to fully participate in all the proceedings. Developing countries have often been a third party. Experience calls for making third party rights in the appellate proceedings analogous to the panel proceedings.

Remand authority: Given the number of disputes being raised before the DSB in contrast to other international tribunals, the Appellate Body may soon become the foremost interpreter of a number of principles of international law. At present, the Appellate Body's function is limited to the examination of issues of law and legal interpretation developed by panels, and it is not empowered to make factual findings. This can lead to difficulties if a factual issue arises at the appellate stage which had not been examined by the Panel. The issue therefore arises as to whether the Appellate Body should have the possibility to remand the case back to the panel or should put its final judgment based on facts and figures. The latter development would require enhancing the resources and strength of the Appellate Bodies to deal with the factual cases and its judgment should be considered final, subject to contradictions if any with the constitution and

in accordance with the customary rule of interpretation of public international law. This also calls for strengthening the quality of Panel rulings based on facts and figures. Ideally, an appellate court that reverses a finding of a court of first instance may remand the case back to the lower court for further proceedings consistent with the appellate court's decision. This is an efficient and expeditious way of handling cases.

Several questions are raised by the concerned member countries. First, how far is the Appellate Body (and consequently, WTO) aware of and concerned about the systematic consequences of its decisions in relation to international mandates on the environment, health, human rights, labor standards and other like issues? What happens if there are contradictory findings in similar matters under dispute settlement provisions in different multilateral or regional agreements? This will become increasingly important in relation to investment disputes as and when these are covered by the DSU.

Sequencing, Retaliation and Development Concerns: The word "sequencing" is shorthand for the procedural steps and time periods needed to deal with a situation where the complaining country claims that the defending country has not implemented the rulings.

- Article 21.5 states that where the two parties disagree whether the rulings have been implemented or not, a Panel examines the dispute and reports within 90 days.

- Article 22.2 states that if the defending country fails to implement the ruling, the complaining country can ask the Dispute Settlement Body to authorize it to retaliate. Article 22.6 states that, within 30 days from the end of the reasonable period of time for implementation, the Dispute Settlement Body authorizes the complaining country to retaliate. So, there are two key steps with their own time-periods: 90 days for a Panel to examine whether a ruling has been implemented; and 30 days for the Dispute Settlement Body to authorize retaliation. The wording of the Dispute Settlement Understanding does not specify whether these steps have to come one after the other. Hence, according to the current wording of the agreement, it seems that the 30-day period for the Dispute Settlement Body to authorize retaliation runs out before the Panel has examined whether the defending country has implemented or not.

In relation to strengthening the provisions of Article 21 (***Surveillance of Implementation of Recommendations and Rulings***) members have proposed the following:

(a) A footnote should be appended to Article 21.2 to the effect that Article 21.1 is qualified by Article 21.2, in order to clarify that matters affecting the interests of developing country members and LDCs must be borne in mind in ensuring prompt compliance with recommendations or rulings of the DSB.

(b) Article 21.7 should be amended to read as below:

"If a matter is one that has been raised by a developing country member or a least developed country member, the DSB ***shall take any further [appropriate] action in the circumstances.***"

(c) Article 21.8 should be amended to read as below:

"If the case is one brought by a developing-country Member or a least-developed country Member, in considering what appropriate action ***to take***, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy and the ***development prospects*** of the developing-country Members ***or least developed country Members*** concerned."

It has been generally proposed that the terms of reference of the Panels should include the requirement to evaluate the development implications of any findings and recommendations.

It may be stated that prompt compliance with recommendations and rulings of the DSB is essential to ensure the effective resolution of disputes to the benefit of all Members. Enhanced market access to the complaining party may in fact be of limited use, especially if it is an LDC or even a developing country Member. Retaliation is the least preferred solution for an LDC or most of the developing country members because (i) to undertake retaliation in view of the negative effect it may have on the retaliating country's economy (ii) or the possibly much less significant impact it will have on the economy of the offending state and (iii) primarily because retaliation as a preferred option simply brings back the specter of trade wars. Because of the significant potential for disputes that go to the Panel and Appellate Body stage to result in a modification of WTO Members' rights and obligations, greater attention ought to be paid to procedures for

consultations between WTO Members, as well as good offices, conciliation and mediation.

However, if at all retaliation becomes a necessity, a developing country should have the ability to suspend concessions in the 'other' sector or agreement (Mathur, 2001) and the same Member should be exempted from proving the DSU requirements that it was not practicable or effective to suspend concessions in the same sector or agreement where the violation was found. A significant proposal made by the developing country Members relates to the concept of collective retaliation. The members consider that one solution to the well documented lack of an effective enforcement mechanism and the potential negative impact of retaliatory measures for poor economies is to adopt a "principle of collective responsibility" similar to that in the United Nations Charter. Under this principle, all WTO members collectively would have the right and responsibility to enforce the recommendations of the DSB. In a case where a developing or least developed country Member is a successful complainant, collective retaliation should be available automatically, as a matter of special and differential treatment.

Mutually Agreed Solution and Post-retaliation: Many of the member countries have raised the pertinent question as to what would happen if parties choose not to notify a mutually agreed solution. According to Article 3.5 of the DSU it is specifically provided that all solutions "... shall not nullify or impair benefits accruing to any member under those agreements, nor impede the attainment of any objective of those agreements." There is nothing in the DSU to suggest that the expression 'all solutions' necessarily excludes mutually agreed upon solutions. There is a need to clarify the extent to which a prior notified mutually agreed upon solution would bar a subsequent panel request by the parties.

The post retaliation issue arises from the fact that the DSU does not provide any specific procedure for the removal of an authorization to retaliate, once the Member concerned has complied, or claims to have complied, with the rulings.

Composition of Panels: The DSU currently provides for disputes to be examined by panelists selected on an *ad hoc* basis for each case, in consultation with the parties. This process can often cause delay. Negotiators are discussing the possibility of geographical balance in selecting panelists, as also whether enough panelists would be available in a permanent roster with experience in all the issues which arise to speed up the process and to reinforce the independence of panels and quality of their reports.

Panel members should be chosen through a rigorous procedure (taking into account the interest of all developing countries) and then from this permanent panel a Panel can be chosen randomly. The only concern is to keep the influence of the Secretariat away from the whole process. Also, in order to facilitate negotiations and speed up the entire implementation process, the task of determining the level of nullification and impairment should be made part of the Article 21 compliance review. Such a change would not overly burden the compliance panel and would further clarify the amount of nullification or impairment at a much earlier stage in the process, allowing both the complaining members and Member concerned to better address the situation and provide more time to negotiate a settlement between the parties.

Time Savings: At present, the period between the start of a dispute and its final determination may be up to three years. This period is too long for complainant developing countries, as their capacity to absorb the adverse effects of measures taken against them is considerably low. This can be improved by making suitable amendments in the time-frame of the relevant provisions of Articles 4, 5, 6 and 12 of the DSU, especially in all the complaints brought by a developing country against a developed country.

In summary, substantial reform can be undertaken in the DSB if concerted efforts are made to quantify the impairments for working out suspension of concessions so that proposed countermeasures are appropriate and also not in contradiction with other provisions of the WTO.

Quantification of the Impairment or Nullification that has arisen from the breach of WTO obligations

There is a need to quantify the above to estimate the retaliation measures required by the defendant under Article 22. In other words, in arbitration cases under Article 22.6 of the Dispute Settlement Understanding (DSU), a quantification of counterfactual trade effects has been a key device for some arbitrators to fulfill their mandate – namely, to determine the level of nullification or impairment of benefits suffered by a complaining Member, which the requested suspension of concessions or other obligations must not exceed. The key challenge for arbitrators usually lies in determining what trade flows would have been in the absence of the unlawful measure. So far, this so-called "trade effects approach" that equates nullification or impairment with the value of trade foregone has been the principal tool used to determine the final arbitration award. Closest to describing this type of analysis are probably

Sumner *et al.* (2003), Malashevich (2004), Keck (2004) and aspects of Horn and Mavroidis (2003).

Conclusions and Some Suggestions

It is a recognized fact that the current system of DSU is a rule-based multilateral trading procedure and is a principal tool which can help developing countries protect and promote their interests. However, doubts have emerged regarding the possibility of the developing countries to use the system effectively. The issue is the effective participation of all the developing countries in the DSU. This seems to be the fundamental problem with the dispute settlement process of the WTO. Also, the delay in the whole process of the DSU lies inherently with some articles of the DSP. This note has reviewed the articles of the DSU in order to make them work in the better interest of all.

Most of the developing member countries objectively fail to engage as either complainants or interested third parties in formal dispute settlement activity related to their market access interests. It has been proposed in addition to the provisions for technical assistance in the DSU, a new Article should be introduced for the creation of a fund for dispute settlement to facilitate the effective utilization by developing and least-developed country Members of the DSU. The fund is proposed to be financed from the regular WTO budget or a small cess on Membership contributions or otherwise within the framework of the Doha Development Round. We see a role of research organizations, legal service centres, development organizations, international trade litigators, economists, consumer organizations, and law schools to provide poor countries with the services needed at critical stages of the WTO's extended litigation process.

The WTO cannot force the country losing an arbitration case to change the domestic laws and regulations that do not comply with WTO obligations; neither can the WTO impose "stiff financial penalties" for noncompliance. Disputes arise when countries differ on the application of the WTO legal framework. In such cases, members should agree that the WTO dispute settlement mechanism will resolve disagreements. As with other international arbitration systems, the WTO mechanism is placed outside the domestic institutions of any of the parties to the dispute—no country wants to have its differences with another nation decided by domestic institutions of the other party. Once the Dispute Settlement Body, which is made up of all WTO Members, has adopted a decision that finds a member country not in compliance with some aspect of the WTO

agreement, there are three alternatives. First, the Member country can change its offending practice, but the WTO cannot force it to do so. Second, the country at fault could offer the complaining country market access in a different product that would be equivalent to the value of trade lost because of the offending practice. These compensations are defined and accepted by the countries in dispute. If they still cannot reach an agreement, the alternative left is for the complaining country to withdraw equivalent trade concessions from the country found at fault. These trade sanctions should be defined and administered by the complaining country. Moreover, the sanctions are not "stiff financial penalties," but are simply the withdrawal of trade concessions previously agreed upon.

In response to criticism being leveled against the dispute settlement understandings (DSUs) own rules and procedures from NGOs, former President Clinton[3] has proposed that "hearings by the WTO be open to the public, and all briefs by the parties be made publicly available and that the WTO provides the opportunity for stakeholders to convey their views... to help inform the panels in their deliberations." Most WTO members, are expected to resist such a proposal of transparency in the dispute settlement process on the grounds that NGOs should not interfere in the policy decisions of the member states. However, now South Asia's position has moved from the prohibition of consideration to the prohibition of acceptance of unsolicited information, notwithstanding the concern of the lack of equality of parties at all stages of the DSU. This latter step by the developing nations may prompt developed nations to offer some leverage in S & D treatment in the DSU.

Open proceedings and public access to submissions would help private parties with an interest in a dispute to play a more active role in support of the government officials engaged in the litigation. It is important to note here that many trade disputes are at their heart not disputes between governments, but rather disputes between private parties with competing economic interests. The greater the role that the real parties in interest can play, especially in fact-intensive cases like trade remedy disputes, the easier it will be for governments to focus on the larger policy questions at issue.

Quantification of dispute cases will be an aid to the legal proceedings of the Dispute Settlement process. Multilateral trade rules reflect key economic principles such as comparative advantage, and that

[3] Speech by President Clinton at WTO Ministerial Conference 18 May, 1998. Detailed proposals were tabled by the US and the EU in the General Council on 22 July, 1998.

many of the terms in WTO Agreements, which are important in the resolution of disputes, have an economic basis. It may also have to do with the fact that increasing numbers of disputes are reaching the implementation phase, in which arbitrators need to quantify the allowable level of retaliation.

More importantly, developing and least developed nations instead of necessarily insisting on the S & D treatment for costs of litigation, and non compliance, must seize the opportunity to strengthen their cases by garnering support from every member state of the WTO.

The panel should be mandated to determine the amount of compensation in all cases where measures by developed countries against developing countries are found to violate the WTO rules. This will help prevent the initiation of trade-related measures on frivolous grounds by developed countries, and hence will serve an important objective of the dispute settlement process, that is, the prevention of trade disputes. Owing to the asymmetric legal powers and economic capacities of developed and developing countries, the former may bring a large number of disputes, some even on frivolous grounds, against the latter. There have also been instances where developed countries brought repeated cases, on the same grounds, against developing countries.

The proposals to address these issues should include:

(i) The complainant developed country may be asked to pay the cost of the dispute incurred by the defendant developing country, if the case brought by the former is not maintained by the Panel/Appellate Body.

(ii) WTO members may be prohibited from bringing cases against a developing country member once a case on similar grounds involving the same developing country has been decided by a Panel/Appellate Body.

(iii) The panels and the Appellate Body should be directed to give, to the extent possible, transparent and clear rulings that are less prone to conflicting legalistic interpretations so that once the case is decided it should not be appealed against on similar grounds again.

The United States, the European Union, and other larger trading entities, to be sure, have some flexibility in ignoring some aspects of WTO law in a particular case. They can delay compliance; they can compensate

indefinitely; they can shrug off or suspend concessions. They can get away with quite a bit. But the extent to which they can do so is not unlimited. Every step they take in the direction of non-compliance does some damage, however minor, to the dispute settlement system and to the WTO. Since developed country members have an interest in preserving that system, they have a strong incentive to limit the use of the extra-legal flexibility they may enjoy by virtue of their size and wealth. As long as this is the case, the comparative inability of developing country members to impose sanctions will not be a major impediment to their ability to benefit from the dispute settlement system.

It seems that the Balas text on reforming the dispute settlement process needs further strengthening to make it work for the interest of all; not least of all, the developing countries.

References

Blackhurst, Richard, 1997, The WTO and the Global Economy, *World Economy*, Volume 20, No.5, August, pp 527-544.

Deardorff, Alan V., 1996, An Economist's Overview of the World Trade Organization, paper presented for the seventh US-Korea Academic Symposium, "The Emerging WTO System and Perspectives from East Asia", Ann Arbor, Micigan,28-30 August.

Horn, H. and Mavroidis, P.C. (eds.), 2003, The WTO Case Law of 2001, The American Law Institute Reporters' Studies, Cambridge: Cambridge University Press.

Keck, A., 2004, 'WTO Dispute Settlement: What Role for Economic Analysis?, *Journal of Industry*, Competition and Trade 4, 4: 365-371.

Malashevich, B., 2004, 'The Metrics of Economics As Applied to WTO Dispute Settlement', presentation made at the Seventh Annual Conference on Dispute Resolution in the WTO, organized by Cameron May, 18 June 2004, Geneva.

Mathur, Somesh K., 2001, "Domestic Challenges and the TRIPs Agreement: The Way forward for India", *Journal of World Intellectual Property Right*, Geneva, Vol.4, No 3, May.

Mercurio, Bryan, 2004, Improving Dispute Settlement in the World Trade Organization: The Dispute Settlement Understanding Review-Making it Work?, *Journal of World Trade*, October, Volume 38, No 5.

RIS, 2003, World Trade and Development Report: Cancun and Beyond, New Delhi.

Sumner, D.A., Barichello, R. C. and Paggi, M. S., 2003, 'Economic Analysis in Disputes of Trade Remedy and Related Measures in Agriculture, with Examples from Recent Cases', Paper presented at the International Conference "Agricultural policy reform and the WTO: where are we heading?", 23-26 June 2003.

WTO Website for Articles and Legal Texts on Dispute Settlement Undertaking.