The World Trade Organisation (WTO) Dispute Settlement Mechanism in Developing Countries

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ABSTRACT

This review on the World Trade Organisation (WTO) Dispute Settlement Mechanism in Developing Countries aims at discussing how WTO dispute settlement works, the prospective benefits and hurdles to effective use of the regime by developing countries, and some potential directions for technical assistance and capacity building, focusing on WTO dispute settlement in particular. The Dispute Settlement Understanding (DSU) in several provisions has made some ways to help the developing and less developed countries access the benefits provided by the DSU. Hence, the operation of the system could be improved from the perspective of developing countries, by reforms that provide more effective remedies for smaller countries and help to defray the cost of WTO litigations and save more time and resources for these countries.

Keywords: *World Trade Organisation, Dispute Settlement Mechanism, dispute settlement understanding, Developing Countries*

INTRODUCTION

An effective dispute settlement system is critical to the operation of the World Trade Organisation. It will make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. In the WTO, dispute settlement is governed by the Dispute Settlement understanding (DSU), which is effectively an interpretation and elaboration of GATT Article xxiii. Essentially the dispute settlement process of WTO is considered in four phases namely: consultations, the panel process, the appellate process, and surveillance of implementation. A WTO member may ask for consultations with another WTO member if the complaining member believes that the other member has violated a WTO agreement or otherwise nullified or impaired benefits accruing to it.

The goal of the consultation is to enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute and to resolve the matter without further proceedings. The manner in which the consultations are conducted is up to the parties as the DSU has no rules on consultations beyond that they are to be entered into in good faith and are to be held within 30 days of a request. Normally, they are held in Geneva and involved capital – based officials, as well as the local WTO delegates of the parties. If consultations fail to resolve the dispute within 60 days of the request for consultations, the complaining party may request the Dispute Settlement Body (DSB), the WTO body that oversees the operations of the dispute settlement system (DSS) to establish a panel to rule on the dispute. Thus, unless the member requesting the establishment of a

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panel consents to delay, a panel will be established within 90 days of the initial request for consultations. Parties are not required to request a panel at any particular point in time and in most cases, a panel is not requested until considerably more than 60 days after the start of consultations. This gives room to the parties to approach each other for possible settlement as to avoid waste of time and resources in taking on a panel. The panel's task is to examine, in light of the relevant WTO agreements, the matter referred to the DSB by the complainant and make such findings as will assist the DSB in making the recommendations or in giving the rulings as provided for in those agreements. DSU provides that a panel shall make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant WTO agreements[1].

Thereafter, the panel issues its "interim report", which contains the panel's findings and recommendations. Parties are allowed to comment on the interim report and a panel must respond to those comments when it issues it final report. To date, no final report has reached a definite overall result than an interim report, although some significant changes in wording have been made from time to time[2]. If a panel finds that a WTO rule has been violated, it typically recommends that the measure found to be in violation of WTO rules be brought into conformity with those rules. Panels are authorized to make suggestions on how that recommendation could be implemented, but most panels tend not to do so.

After its circulation to the WTO members, the final report is referred to the DSB for formal adoption which is to take place within 60 days unless there is a consensus not to adopt the report or an appeal of the report to the WTO Appellate Body. This "negative consensus' rule is a fundamental change from the GATT dispute settlement system where a positive consensus was needed to adopt a panel report thus permitting a dissatisfied losing party to block any action on the report. Now, as long as one member wants the report adopted, it will be adopted. However, while the losing party cannot block adoption of a report, a right of appeal is available if the party wishes to appeal. If a panel report is appealed, after the completion of the appeal, it is adopted as affirmed, modified or reversed by the Appellate Body. The above development is welcomed as in the previous cases where the losing party can frustrate or stop the report from being implemented as the requirement is that, there should be consensus of all parties involved in the particular case.

For panels, the DSU sets as a goal that the final report should be issued to the parties within six months of panel's composition and that the report should be circulated to all members of the WTO within nine months of the panel's composition or establishment. This has not been possible as the report has been circulated between twelve and fifteen months on the average (12 - 15 months). The possibility of an appeal is a new feature of the WTO dispute settlement system. The appellate Body consists of seven individuals, appointed by the DSB for four-year terms. The Appellate Body hears appeals of panel reports in divisions of three, although its rules provide for the division hearing a case to exchange views with the other four Appellate Body members before the division finalises

[1] Article 11 of Dispute Settlement understanding.
[2] The World Trade Review, July 2006.

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its reports. The members of the division that hears a particular appeal are selected by a secret procedure that is based on randomness, unpredictability and the opportunity for all members to serve without regard to national origin. The Appellate Body is required to issue its report within 60 or at most 90 days from the date of the appeal, and its report is to be adopted automatically by the DSB within 30 days, absent consensus to the contrary. The Appellate Body's review is limited to issues of law and legal interpretation developed by the panel. However, the Appellate Body has taken a broad view of its power to review panel decisions as it has the express power to reverse, modify, or affirm panel decisions, though the DSU does not discuss the possibility of a remand to a panel. Partly as a consequence, the Appellate Body has adopted the practice, where possible, of completing the analysis of particular issues in order to resolve cases where it has significantly modified a panel's reasoning. This avoids requiring a party to start the whole proceeding all over as a result of those modifications.

The final phase of the WTO dispute settlement process is the surveillance stage. This is designed to ensure that DSB recommendations, based on adopted panel/Appellate Body reports, are implemented. In the surveillance function, the offending member is required to state its intentions with respect to implementation within 30 days of the adoption of the applicable report(s) by the DSB. If immediate implementation is impracticable, a member is to be afforded a reasonable period of time for implementation.

If a party fails to implement the report within a reasonable period of time, the prevailing party may request compensation. If that is not forthcoming, it may request the DSB to authorize it to suspend concessions that is, to take retaliatory action, owed to the non-implementing party. DSB authorization is automatic, absent consensus to the contrary, subject to arbitration of the level of suspension if requested by the non-implementing member, suspension of concessions is viewed as a last resort and the preference is for the non-implementing member to bring its measures into conformity with its obligations.

WTO member states can use this mechanism to shine the spot light of international legal scrutiny on the protectionist practices of their trading partners. This rule-of-law system is especially important for developing countries, which typically lack the market size to exert much influence through more power oriented trade diplomacy. Indeed, some poorer countries have used the WTO dispute settlement system to great effect, proving the system's worth from a development perspective. Of course some developing countries also have access to dispute settlement procedures in preferential trade agreements. Such bilateral or regional mechanisms, however, have yielded fewer benefits in practice. This is because they cover fewer partners, and often do not have the same in-depth coverage of areas that are especially salient for developing countries, like agriculture. Nevertheless, the technical and legal complexity of this regime makes it difficult for other developing countries, to effectively use the system, many of which have never filed a WTO dispute, despite having repeated ground to do so.

How WTO Dispute Settlement Works

A WTO dispute proceeds through three main stages: consultation, formal litigation (panel procedures and appellate body); and, if necessary, implementation (compliance and

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arbitration panels). All disputes start with a request for consultations, in which the member government, bringing the case to the WTO (the complainant) sets out its objections to the trade measure(s) of another member government (the defendant). The two sides are then required to consult for 60 days with the goal of negotiating a mutually satisfactory solution to the dispute. Interestingly, a large proportion of cases are successfully resolved during consultations; 46% of all disputes brought to the WTO end at this stage, and three quarters of those yield at least partial concessions from the defendant[3]. If consultations do not result in a mutually satisfactory solution, the complainant can request a panel proceeding, marking the start of the formal litigation stage. Panels are comprised of three to five persons with a background in trade law, agreed to by the parties on a case by case basis.

There are typically two rounds of testimony, including from other countries (third parties) that notify the WTO of a "substantial" interest in the case. The panel then circulates an "interim report", offering both sides an opportunity to comment and seek clarification. The complainant and defendant can still negotiate a settlement at this point. In fact, another thirteen per cent[4] of all cases end at this stage before a ruling is rendered. If not, the panel issues its final report, which is then adopted by the WTO, unless one of two things happens. First, the two sides can agree not to adopt the panel report for whatever reason, although to date this has not happened. Secondly, one or both sides (but not third parties) can appeal the panel's report, which happens frequently. We submitted that since third parties with substantial interest are allowed to send in testimonies, they too should be allowed to appeal the panel report if it is not favourable to them to justify their input.

The Appellate Body (AB) handles these appeals. Unlike panels, the AB is a standing body of jurists, which is designed to ensure greater consistency across its rulings. The AB is tasked with hearing testimony from the parties, and any third parties, on how the panel may have erred in its legal reasoning. The AB can uphold or overturn the panel in whole or in part, and its decision is final. If this verdict favours the defendant, the case ends. If this verdict, instead favours the complainant, the dispute may proceed to the implementation stage. The Appellate Body consisting of jurist who are learned in trade law is a good thing but it will be better if the panels (made of government official and non-legal personnel) are jurist as to avoid some fundamental errors or flaws at the early stage.

When a defendant is ruled against, the panel and/or AB calls for it to bring its measures into compliance with its WTO obligations. What this means in practice is, itself, often contested. If the complainant feels that the defendant have not taken appropriate steps, it can subsequently request a "compliance" panel. This panel, which is often comprised of the original panel members, must determine whether the defendant's efforts have, infact, brought its measure (s) into compliance. If not a judgment that the defendant can appeal to the AB – the complainant can request a second panel to set the level at which it can "retaliate" against the defendant. This involves imposing tariffs on the defendant's exports.

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[3] Busch, M.L and Reinhardt E. (2003). Developing countries and GATT/WTO Dispute Settlement. Journal of World Trade 37(4), 719-735.

[4] Ibid

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It is essential to note two things about retaliation. Firstly, requests for authorization to retaliate are rare[5]. Secondly, it is up to the complainant and not the WTO, to follow through on this authorization to retaliate, and this is rare still[6]. What makes this rare is the fact that to implement the retaliation always prove difficult as one needs the cooperation of some other parties who may serve as alternatives for the defendant market. What is remarkable is that despite its blend of law and politics, the system works, and works quite well. It is worthy of note that two thirds of the disputes brought for adjudication in Geneva are resolved to the full satisfaction of the complainant. Developing countries are not left out, even in their disputes against the developed countries, they get satisfaction and acknowledge that the system is useful to them-developing countries[7]. This has helped the Global trade dispute to resolve issues and parties have respect for the discipline that is exhibited in finding lasting solutions to trade dispute.

WTO Dispute Settlement from a Development Perspective

Trade liberalization promises considerable returns, but it comes with some risks such as the possibility that a foreign government will succumb to lobbying by its own domestic producers and grant them protection. This could undermine a developing country's interest in re-allocating resources to the affected export sector, since poor countries tend to have fewer alternative export markets, and fewer export goods. As a result, the mere anticipation of such protectionism can deter or dilute much needed trade reform in developing countries. The WTO dispute settlement system can help insure against this risk by maintaining market access once it is won, thereby encouraging developing countries to embark on an open trade growth strategy.

The conventional wisdom of course, is that developing countries face substantial hurdles in using WTO dispute settlement.[8] Foremost among these, is their lack of market size with which to credibly threaten retaliation for non compliance. In other words, the concern is that even with a legal victory in hand, a developing country may not be able to compel the defendant to liberalize, since its threat to retaliate, lacks credibility. This may deter developing countries from filing complaints in the first place. A developing country may also be reluctant to initiate a dispute because of fears of reprisals, such as suspension of foreign aid or unilateral trade preferences.

In addition to these difficulties, which are true for small developed countries as well, developing countries face a unique problem; the lack of legal capacity. To take full advantage of WTO law, developing countries need the facility to aggressively pursue their rights in the increasingly complex legal trade regime. For such capacity, a country must have several things. It needs experienced trade lawyers to litigate a case, but also seasoned

[5] In fact complainants have asked for authorization to retaliate in just seven out of the hundreds of cases handled by the WTO

[6] Complainants have retaliated in only three cases as at the time of this writing

[7] Busch, M.L. and Reinhardt E., op cit.@pp.725-732

[8] Hoekman, B.M., and Mavroidis, P.C "WTO Dispute Settlement, Transparency, and surveillance", World Economy 23(4), (2000) pp. 527-542.

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politicians and bureaucrats to decide whether it is worth litigating a case, which is arguably the most critical stage of the process. It needs a staff to monitor trade practices abroad, but also the domestic institutions necessary to participate in international negotiations on complex issues, like health and safety standards, which figure so prominently on the WTO's agenda. The fact is that, many developing countries lack even a single full-time WTO representative, let alone the necessary dedicated trade negotiation bureaucracy at home.

It might seem that developing countries stand to benefit little from WTO dispute settlement with the mentioned obstacles in mind. But this is far from the truth, poorer complainant have filed and won concessions from large industrialized states in a wide variety of disputes, with millions of dollars at stake. These cases involved exports of underwear (COSTA RICA V. US), SHRIMP (THAILAND and PAKISTAN V. US), wool shirts (INDIA V. US) gasoline (VENEZUELA AND BRAZIL V. US), SARDINES (PERU V. EUROPEAN COMMUNITIES) and poultry (BRAZIL V. EUROPEAN COMMUNITIES)[9] among other products. These developing countries have succeeded in making effective use of the WTO dispute settlement despite their lack of a credible threat to retaliate because their wealthier counterparts have benefitted from the fact that defendants worry about the normative condemnation that goes along with a legal defeat, rather than threats of direct retaliation as it were. In other words, defendants prefer to avoid being found "non-compliant" because such a label may damage their prospects of gaining compliance when they, in turn, file as complainants. This way, defendant governments may value the integrity of the multilateral trade regime over the outcome of a single case. This shows that poor complainants can use legal victories at the WTO to weigh in on the domestic political debates over free trade within defendant countries, as they look to gain market access. The effectiveness of WTO dispute settlement derives more from these intangibles than from trade sanctions, which are rare, and which could never have been a credible factor in the dozens of cases which wealthy defendants have conceded to poor complainants.

Viewed from this perspective, the emphasis on retaliation at the WTO is misplaced. While it is true that larger countries can more credibly threaten to retaliate, threats of retaliation are not the key to the system. As Robert Hudec[10] explained, other provisions of the WTO "make legal complainants without retaliation quite a bit more effective than they were" under the GATT. He further observed that the inability of poor countries to retaliate "is a problem, but it is a separate problem that has nothing to do with the utility of the dispute settlement procedure for a developing country complainant".[11] A few developing countries, such as Brazil and India, have launched a relatively large number of disputes, while others, like China are increasingly, active in dispute settlement as third parties, seeking to gain experience with the system. Nevertheless, the record of dispute outcomes testifies

[9] Hudec, R. "A statistical profile of GATT Dispute Settlement cases: 1945-1989", Minnesota Journal of Global Trade (1993).

[10] Hudec, R.E (2002) "The Adequacy of WTO Dispute Settlement Remedies", in Hoekman, B., Aaditya, M. and English, P., (eds.), Development, Trade and the WTO, World Bank, Washington DC.

[11] Ibid

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to the acuteness of the legal capacity problem for smaller and poorer countries in developing world. To be sure, despite their weak market power, the poorest complainants have nonetheless managed to get larger defendants to concede fully in over 40% of their cases[12]. Yet their developed counterparts gain full concessions in nearly three-quarters of their complaints[13]. This is not just an artifact of difference in economic size. While the system is clearly working for all complainants, it is working better for those with the know-how and practical knowledge and ability to take maximum advantage of the legal opportunities the system affords. There is no proof to show that the legal decisions handed down by the WTO are politically biased against developing countries. Developing countries, as it turns out, are no less likely to win a ruling than wealthier complainants.[14]

Moreover, defendants are just as likely to comply with a ruling won by a developing country as they are with a ruling won by a wealthier complainant. The problem is that developing countries are far less likely than richer ones to induce a settlement before a ruling is issued. That is, wealthier countries tend to resolve their disputes through negotiation, either in consultations or at the panel stage before a verdict, whereas poorer complainants are unable to get defendants to offer substantial concessions at these points in the process. For example in trade disputes between the United States and the European Union, all cases yielding concessions have ended before the panel rules. It is essential that developing countries emulate the developed countries by closing the gap in "Early Settlement". This will enhance a harmonious and cordial relationship, thereby reducing the time and energy expended on litigation. This time could be channeled to better use in other transaction between the parties.

Priorities for Capacity Building and Technical Assistance

There are several priorities for capacity building and technical assistance. First, developing countries need more access to information on the WTO legality of the measures employed by their major trade partners. This information is vital not just in thinking about "How" to prosecute a case, but "Whether" to prosecute a case. Institutions like the Agency for International Trade Information and Cooperation (AITIC) offer assistance to developing countries in interpreting trends in the global economy, and the Advisory centre on WTO law provides subsidized legal assistance. To close the early settlement gap, developing countries need to bridge the important contributions of these and other institutions, particularly with respect to evaluating the merits of a case "before" it is filed in Geneva, and articulating a negotiating strategy to win concessions before a legal verdict is issued. The long term goal, is to build-up this expertise in the capitals of developing countries, but in the short-term, the focus might be on funding institutions like the Advisory centre to increase staff and tackle this broaden mandate, or develop others to fill this role.

Secondly, developing countries also require assistance in monitoring compliance

[12] World Bank (2003)

[13] Busch and Reinhardt 2003

[14] Both groups win about 60% of the time, with only a little variation from that figure depending on how you define the "develop" categories.

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with the WTO verdicts that they win. The domestic and foreign trade associations and consumer groups can play a key role in this respect. Indeed, those organizations have strong incentive to keep track of protectionist practices on behalf of their constituents, and often have information that government need to monitor compliance. The challenge for developing countries is not only to sponsor domestic trade associations and consumer groups but to forge contacts with foreign ones. A British consumer group for example assisted Peru in challenging Europe's trade restrictions on sardines,[15] an ally that will prove crucial in monitoring future compliance. This forging alliance with foreign trade associations and consumer groups is also highly cost effective for making better use of WTO dispute settlement, since resources are shared across a wide variety of organizations with local expertise. Wealthy countries should be advised to invest in capacity building and technical assistance to developing countries as a way of making the countries more successful in WTO dispute settlement and reduce cheating in the system generally, which in turn may hurt wealthier countries, not just the poor ones. Lesser success in dispute settlement would also have a chilling effect on the willingness of developing countries to negotiate future trade rounds. Investing in capacity building and technical assistance should thus be a priority for the WTO membership as a whole, especially as a means of closing the early settlement gap.

Recognition of the Interests and Needs of Developing Countries

In the preamble of the WTO agreement, WTO members explicitly recognize the need for positive efforts designed to ensure that developing countries, especially the least developed countries, are integrated into the multilateral trading system and secure a share in the growth in international trade commensurate with the needs of their economic development.[16] A large majority of WTO members are developing countries and some are regarded as least developed countries. In the Doha Ministerial Declaration adopted at the close of the fourth session of the ministerial conference in Doha in November 2001, the WTO members noted:

> *International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries; we seek to place their needs and interests at the heart of the work programme adopted... we shall continue to make positive efforts designed to ensure that developing countries and especially the least developed among them secure a share in the growth of world trade commensurate with the needs of their economic development. We recognize the particular vulnerability of the least developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the*

[15] Shaffer, G. and Mosoti V. (2002) "EC Sardines: A new model for collaboration in Dispute Settlement" Bridges 6(7) October, pp: 15-22

[16] WTO Agreement, Preamble, Second paragraph

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marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system… We are determined that the WTO will play its parts in building effectively on these commitments under the work programme we are establishing.[17]

The interest and needs of developing countries and in particular, least-developed countries are, since the 2001 Doha session of the ministerial conference, more than ever before are at the heart of the WTO's activities and concerns.

Special and Differential Treatment for Developing Country Members

WTO law provides for many special provisions in favour of developing and least-developed countries, taking into account their particular needs and interests to ensure those developing countries and especially the least developed countries are integrated into the multilateral trading system and increase their share in international trade. These provisions provide in many areas for fewer or less demanding obligations, longer periods for implementation and technical assistance. In the Doha Decision on Implementation Issues of 14th November, 2001, members agreed that the Committee on Trade and Development should be instructed as follows:

i. To identify those special and differential treatment provision that are already mandatory in nature and those that are non-binding in character to consider the legal and practical implications for developed and developing members of converting special and differential treatment measures into mandatory provisions, to identify those that members consider should be made mandatory and to report to the General Council with clear Recommendations for a decision by July 2002;

ii. To examine additional ways in which special and differential treatment provision can be made effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

iii. To consider in the context of the work programme adopted at the fourth session of the ministerial conference, how special and differential treatment may be incorporated into the architecture of WTO rules[18]

Increasing Trade Opportunities

Pursuant to Article XXXVII: I of part IV of the GATT 1994, entitled Trade and Development,[19] WTO members must "to the fullest extent possible" give high priority to the reduction and elimination of barriers to trade in products currently or potentially of particular export interest to developing country members and refrain from imposing higher

[17] Doha Ministerial Declaration, 14 November, 2001, WT/MIN (01)/DEC/1 Paris, 2&3

[18] Para. 121. Of the Decision, WT/MIN(01)/EC/17

[19] Part IV was not part of the original GATT 1947 but was added in 1965

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tariff or non-tariff barriers to trade with developing country members. Also, Article XXXVI:8 of part IV of the GATT 1994 incorporates into WTO law the principle of non-reciprocity in trade negotiations between developed and developing country members whose provisions states:

> *The developed country members do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing country members.*

The 1979 Decision on Differential and More Favourable Treatment commonly referred to as the "Enabling clause" further elaborates the provisions of part IV of the GATT 1994.[20] The Enabling Clause allows developed country members to depart from the MFN treatment obligation in their trade relations with developing countries and to grant these countries "differential and more favourable treatment". The Enabling Clause states in relevant parts:

> *Notwithstanding the provisions of Article 1 of the General Agreement, members may accord differential and more favourable treatment to developing countries, without according such treatment to other members.*

Developed country members are thus allowed to grant preferential tariff treatment to developing country members. Most developed country members have done so under the Generalized System of Preference (the "GSP"), first adopted as a policy by UNCTAD in 1968. A high percentage of the exports of developing countries is covered by GSP schemes and thus benefits from preferential tariff treatment. The Enabling Clause also provides for differential and more favourable treatment with respect to non-tariff measures and allows developing country members to enter into regional or global arrangements amongst themselves for mutual reduction or elimination of tariff and under certain conditions, non-tariff barriers to trade.

Measures in Support of Economic Development

Article XVIII of the GATT 1994, entitled "Government Assistance to Economic Development", recognizes that it may be necessary for developing country members "to take protective or other measures affecting imports" in order to implement their programmes and policies of economic development. Specifically, sections A, C and D of Article XVIII, the "infant industry" sections, allows, under certain conditions, developing country members to modify or withdraw tariff concessions or to take other GATT inconsistent measures in order to promote the establishment of a particular industry. Also section B of Article XVIII, (the "balance of payments" section) allows under certain conditions, developing country members to impose quantitative restrictions on imports in order to safe-guard their external financial position and to ensure a level of reserves adequate for the implementation of their programmes and policies of economic development.[21]

The SCM Agreement recognizes that subsidies may play an important role in economic development programmes of developing country members. This agreement thus

[20] BISD 265/203

[21] See also the Uruguay Round Understanding on the Balance of payments provisions of GATT 1994

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provides that the general prohibition on export subsidies does not apply to developing country members that have a per capita income below $1000 per annum[22]. The safeguards agreement allows developing country members to extend the period of application of a safeguard measure for a period of up to two years beyond the normal maximum period of eight years. Developing country members may also apply a safeguard measure again to the import of a product that has been subject to such a measure, earlier than developed country members are allowed.[23]

The Agreement on Agriculture imposes on developing country members less demanding requirements regarding the reduction of, for example, agricultural export subsidies and tariffs on agricultural imports. Developing country members are required to reduce the budgetary outlays for export subsidies and the quantities benefiting from such subsides by 24 and 14 per cent respectively. Developed countries must reduce by 36 and 21 percent respectively. The required average reduction of tariffs of developing country members was 24 percent, while developed country members had to reduce their tariff by 36 percent[24]. Article XII:I of the GATS recognizes that particular pressures on the balance of payments of a member in the process of economic development "may necessitate the use of restrictions to ensure inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development". As under Article XVIII of the GATT 1994, the use of restrictions for balance of payments purposes is, therefore, allowed subject to specific conditions.

Article XIX:2 of the GATT provides that the process of liberalization of trade in service must take place with due respect for national policy objectives and the level of development of individual members. For developing country members there must be "appropriate flexibility" for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and attaching to such market access conditions aimed at achieving the objectives of increasing their participation in world trade in services.

Longer Periods of Implementation (Additional Time)

Many WTO agreements provide that developing country members have longer periods to implement the obligations under those agreements. The TRIPS Agreement for example granted developing country members a delay of application of the TRIPS provisions until 1st January 2000.Developed country members had to apply the TRIPS provisions as of 1st January 1996. Under the Agreement on Agriculture, developing country members have ten years, instead of the "normal" six years, to implement their reduction commitments[25]. The Decision of 14th November 2001 of the Ministerial Conference at the Doha session on implementation issues includes a number of provisions to make "additional time"

[22] Article 27.2 and Annex VII of the SCM Agreement.

[23] Article 9.3 of the safeguards agreement

[24] United Nations Conference on Trade and Development: Dispute Settlement – WTO overview, New York and Geneva 2003 UNCTAD/EDM(Misc.232/Add.//

[25] Article 15.2 of the Agreement on Agriculture

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provision in the WTO agreements more specific. We submit that this latitude no doubt has enabled the developing countries to make necessary adjustment while learning from the developed countries some technicalities of how to maximize their gain from the WTO and its Dispute mechanism. The recognition of the fact that developing countries need more time to put their house in order as compared to developed countries is a welcome development. Such should encourage the developing countries to see that they will not be cheated in their transactions as disadvantaged group.

Limitations on Action against Products Originating in Developing Country Members (Anti-Dumping Measures)

Several WTO agreements that allow actions against fair and unfair trade of members, such as the Anti-Dumping Agreement (Article VI, GATT 1994) the SCM Agreement (Article XVI & Annex IA (Article 2)) and the safeguards Agreement (1995 WTO Agreement), limit the possibility to take action against developing country members. The Anti-Dumping Agreement requires developed country members considering the application of anti-dumping measures to give "special regard" to "the special situation of developing countries"[26] before applying anti-dumping duties affecting the essential interests of developing country members, developed country member must first explore the possibilities of constructive remedies provided for by the Anti-Dumping Agreement.[27] Under the safeguards Agreement, safeguard measures shall normally not be applied against a product originating in a developing country member as long as that member's share of imports of the product concerned in the importing member does not exceed three percent.[28] The SCM Agreement requires developed country members to terminate any countervailing duty investigation of a product originating in a developing country as soon as it has been determined that the overall level of subsides granted upon the product concerned does not exceed two percent of its value, or the volume of the subsidized imports represents less than four percent of the total imports of the like product in the importing member[29].

Technical Assistance and Increased Trade Opportunities

Many WTO agreements like the SPS Agreement, the TBT Agreement, the TRIPS Agreement, the Customs Valuation Agreement and the DSU specifically provide for technical assistance to the developing country members. This assistance may be given on a bilateral basis by the developed country members, or may be given by the WTO

[26] Article 15, first sentence, of the Anti-Dumping Agreements, see also paras. 7.1 to 7.4 of the Doha Decision on Implementation Issues, WT/MIN(01)/DEC/17.

[27] Article 15, second sentenced, of the Anti-Dumping Agreement.

[28] Article 9.1 of the safeguards Agreement. (However, if the import of all developing country members with less than three percent import share collectively account for more than nine percent of the total imports of the product concerned, safeguard measures may be applied).

[29] Articles 27.10 of the SCM Agreement. However, if imports from developing country members whose individual share of total imports represents less than four percent collectively account for more than nine percent of the total imports of the like product in the importing member than the countervailing duty investigation must not be terminated.

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secretariat. At the Doha session of the ministerial conference in November 2001, developing country members made their participation in a new round of trade liberalization negotiations "conditional" upon a significant increase in technical assistance and capacity building efforts in order to enable them to participate effectively in the new round and to allow them to benefit fully from the results. The WTO has therefore embarked on a programme of greatly enhanced support for developing countries. This has resulted in a notable increase in the WTO's budget and generous donations from developed country members to the Doha Development Agenda Global Trust Fund. From 1998, available funds for technical assistance has risen by 340 percent in 2002[30]. The WTO has also significantly improved coordination with other international organizations like World Bank, IMF, UNCTAD etc in the so called integrated frame work, with regional banks and regional organizations and with bilateral government donors. The WTO consider that "[a]ssising officials from developing countries in their efforts to better understand WTO rules and procedures and how these rules and procedures can benefit developing countries is among the most important aspects of the organization's work"[31].

The WTO secretariat and in particular the technical cooperation Division, organizes, mostly in response to a specific request from one or more developing country members, general seminars on the multilateral trading system and the work of the WTO; technical seminars and workshops focusing on a particular area of trade law or policy, and technical missions to assist developing country members on specific tasks related to the implementation of obligations under the WTO agreements such as the adoption of trade legislation or notifications. In 2002, the WTO secretariat organized 514 technical cooperation activities as compared with 349 in 2001[32].

The WTO secretariat and in particular the WTO training institute, which was established in 2001, also organizes training courses, which held at WTO headquarters in Geneva and run for as long as 12 weeks and cover the full range of WTO issues. In 2002, 300 government officials of developing country members received an intensive training in WTO law and policy[33]. The WTO organizes a programme known as Geneva week, which is a special week-long event bringing together representatives of WTO member countries who do not have permanent missions in Geneva. This week covers all WTO activities and includes presentations by other international organizations based in Geneva. This was organized twice in 2002. Since 1997, the WTO secretariat has also been installing Reference centres in developing countries[34]. These reference centres allow government officials to access essential documents instantly via the WTO website. As of March 2002, 109 reference centres had been established in 88 countries including 54 in Africa, 16 in the

[30] Figure projected WTO secretariat fact sheet on technical cooperation, 28, March 2002 (www.wto.org)
[31] Ibid
[32] Ibid
[33] Ibid: In 2001 the number of government officials participating in these training seminars was only 116.
[34] The WTO secretariat provides governments with computer and other hardware, software and the training required for the operation of these Reference centres.

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Caribbean, 17 in Asia, 10 in the Middle East, 10 in the Pacific, 3 in Latin America and 2 in Eastern Europe[35]. In respect to trade in goods, the enabling clause provides that developed country members must exercise the utmost restraint in seeking any concessions or contributions in trade negotiations from the least-developed country members. At the first session of the ministerial conference in 1996 in Singapore, developed country members agreed to examine how they could improve access to their markets for products originating, in least-developed country members, including the possibility of removing tariffs completely. With regard to trade in services, the GATS provide that developed country members must take account of the serious difficulty of the least-developed countries in accepting specific commitments. The prohibition on export subsidies under the SCM Agreement does not apply to least-developed country members[36]. Moreover, the Agreement on Agriculture exempts the least-developed country members from the obligation to reduce tariffs on agricultural imports and agricultural domestic and export subsidies[37].

CONCLUSION

Considering the special needs and requirement of the less developed country members, their economic, financial and administrative constraints, and their needs for flexibility to create a viable technological base, less developed country members delayed the application of most obligations under the TRIPS Agreement for a period of 11 years, that is, until 1st January 2006[38]. Pursuant to the SCM Agreement, the prohibition on subsidies contingent on the use of domestic over imported goods did not apply to less developed countries for a period of eight years, that is, until 1st January, 2003[39]. This paper has viewed the operation of the WTO's dispute settlement system with a focus on developing countries. It found that in the last few years, developing countries have made increasing use of the system and have had considerable success in resolving disputes amongst themselves, as well as against developed countries. The operation of the system could be improved, however, from the perspective of developing countries, by reforms that provide more effective remedies for smaller countries and help to defray the cost of WTO litigations and save more time and resources for these countries.

[35] See WTO secretariat fact sheet on technical cooperation, 28th March 2002 (@www.wto.org.)
[36] Article 27.2 of the SCM Agreement
[37] Article 15.2 of the Agreement on Agriculture
[38] Article 66.1 of the TRISPS Agreement. However the MFN treatment obligation and the National treatment obligation do apply.
[39] Article 27.3 of the SCM Agreement.

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