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DEVELOPING COUNTRIES POSITION IN WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT WITH SPECIAL REFERENCE TO INDIA *

Introduction

The term developed country or advanced country is used to categorize countries with developed economics in which the tertiary and quaternary sectors of industry dominate. This level of economic development usually translates into a high income per capita and a high human development index. Country with high gross domestic product per capita often fit the above description of a developed economics. However anomalies exist when determining developed status by the factor GDP per capita alone.¹

Modern term synonymous with the term developed/advanced country includes industrialized centralized more developed countries and more economically developed countries. The term industrialized country may be ambiguous as industrialization is an ongoing process that is hard to define. The term MEDC is one used by modern geographers to specifically describe the status of the countries referred to more economically develop. The first industrialized country was England, Followed by Germany, France the remainder of the United Kingdom and other Western Europe countries. According to economists such as Jeffrey Sachs, however the current divided between the developed and developing world is largely a phenomenon of the 20th century noting that until the post world war II era most persons in all societies were improved.²

Meaning of World Trade Organization (WTO)

The world Trade Organization (WTO) is an international organization designated to supervise and liberalized international trade. The WTO come into being on January 1, 1995 and is the successor to the General Agreement on Tariffs and trade (GATT) which was created in 1947 and continued to operate for almost five decades as defector international organization. Ordinary the World

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¹ N.K Jain, *WTO, Concept, Challenge and Global Development*, Regal Publication, New Delhi, p206.

² *Id.*

Trade Organization is an organization for liberalizing trade. It is a place for them to settle trade dispute .It operates a system of trade rules. Its deals with the rules of trade between nation at a global or near global level.WTO is responsible for negotiating and implementing new trade agreements and is in charge of policing member countries adherence to all the WTO agreements signed by the bulk of the world trading national and ratified in their parliament. The WTO is a place where member governments go to try to sort out the trade problems they face with each other. The first step is to talk. The bulk of the WTO current work comes from the 1986-94 negotiation called the Uruguay Round and earlier negotiation under the GATT. The WTO is currently the host to new negotiations under the “Doha Development Agenda” launched in 2001.where countries have faced trade barriers and wanted them lowered the negotiation have helped to liberalized trade. But the WTO is not just about liberalizing trade and in some circumstances its rule support maintaining trade barriers for example to protect consumers or prevent the spread of disease.³

WTO as a Dispute Settlement Mechanisms

The dispute settlement mechanism of the WTO is a central element in providing securities and predictability to the multilateral trading system. WTO members have committed themselves not to take unilateral action against perceived violation of the trade rules. In fact they have pledged to see recourse to the WTO dispute settlement system and abide by its rule and procedures.⁴

Under the WTO there is a Dispute settlement Body (DSB) which is the custodian of the Dispute Settlement System. The DSB has been empowered to established panels (the panels are the bodies set up for specific investigation) constitute appellate body adopt panel and appellate body reports, exercise surveillance for compliance with rules and recommendations and authorize retaliatory measures in the case of non- implementation of recommendations.⁵

Dispute settlement is regarded by the World Trade Organization (WTO) as the central pillar of the multilateral trading system, and as the organization's "unique contribution to the stability of the global economy". A dispute arises when one member country adopts a trade policy measure or takes some action that one or more fellow members considers to a breach of WTO agreements or to be a failure to live up to obligations. By joining the WTO, member countries have agreed that if they believe fellow members are in violation of trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally this entails abiding by agreed procedures

³ N.K Jain, *WTO Challenges and Global Development*, Regal publication, New Delhi, 2008, p.1.

⁴ Kumar Ratnesh, *WTO Structure Function Tasks Challenges*, Deep and Deep Publications PVT. LTD, New Delhi, 2004, p 36.

⁵*Id.*

(Dispute Settlement Understanding) and respecting judgments, primarily of the Dispute Settlement Body (DSB), the WTO organ responsible for adjudication of disputes. A former WTO Director-General characterized the WTO dispute settlement system as "the most active international adjudicative mechanism in the world today."⁶

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.⁷

An effective dispute settlement system is critical to the operation of the World Trade Organization. It would make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO that function is performed by the Dispute Settlement Understanding (the "DSU"). As stated in Article 3.2 of the DSU, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". There are four phases to dispute settlement: consultations, the panel process, the appeal and the surveillance of implementation. Under the procedures of the WTO dispute settlement system, the first step in the process is consultations.⁸ 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 stage 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.

If consultations fail to resolve the dispute within 60 days of the request for consultations, the complaining WTO member may request the WTO Dispute Settlement Body⁹, which is composed of all WTO members, to establish a panel to rule on the dispute.⁴ Pursuant to the DSU, if requested, the DSB is required to establish a panel no later than the second meeting at which the request for a panel appears on the agenda, unless there is a consensus in the DSB to the

⁶ Available at http://en.wikipedia.org/wiki/Dispute_settlement_in_the_World_Trade_Organization source.

⁷ Understanding the WTO: Settling Disputes, Available at <http://.wto.org/english/thewtoe/whatis/tife/dsp1e.htm>,

⁸ Dispute Resolution Understanding Article-4

⁹ Dispute Resolution Understanding Article-2

contrary.¹⁰ Thus, unless the member requesting the establishment of a panel consents to delay, a panel will be established within approximately 90 days of the initial request for consultations. In fact, most complainants do not push their cases forward that quickly. After the panel is established by the DSB, it is necessary to select the three individuals who will serve as panelists.¹¹ If the parties cannot agree on the identity of the panelists within 20 days of the panel's establishment, any party to the dispute may request the WTO Director-General to appoint the panel.¹² In fact, this has become the norm over time. Typically, panelists are current or former government trade officials, although academics and practitioners sometimes are selected to serve as panelists. Although an insistent complainant can ensure the composition of a panel within 30 days of its establishment, panel composition takes more time in almost all cases.

Panels normally meet twice with the parties to discuss the substantive issues in the case.¹³ Each meeting is preceded by the filing of written submissions. After completing the fact-gathering and argument phase, the panel issues its "interim report", which contains its findings and recommendations. Parties are allowed to, and almost always do, comment on some aspects of the interim report. In light of the comments received, the panel then issues its final report. The DSU provides that a panel's final report is to be circulated to WTO members within nine months of the panel's establishment,¹⁴ although on average panels take 12-13 months, which means that some cases take much longer. 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 Body¹⁵. This so-called 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.

The majority of panel reports are in fact appealed. The appeal is to the WTO Appellate Body¹⁶, which consists of seven individuals, appointed by the DSB for four-year terms. The Appellate Body hears appeals¹⁷ 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 finalizes its report. The Appellate Body is required to issue its report within 60 (at most

¹⁰ Dispute Resolution Understanding Article-4.7

¹¹ Dispute Resolution Understanding Article-6.1

¹² Dispute Resolution Understanding Article-8

¹³ Dispute Resolution Understanding Article-8.7

¹⁴ Dispute Settlement Understanding Article-11-12

¹⁵ Dispute Settlement Understanding Article-12.9

¹⁶ Dispute Settlement Understanding Article- 16-16.4

¹⁷ Dispute Settlement Understanding Article-11-17

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. Appellate Body reports have almost always met the 90- day deadline.

The final phase of the WTO dispute settlement process is the surveillance of implementation stage.¹⁸ This is designed to ensure that DSB recommendations (based on adopted panel/Appellate Body reports) are implemented. If a panel finds that an agreement has been violated, it typically recommends that the defaulting WTO member concerned bring the offending measure into conforming with its WTO obligations.¹⁹ While panels may suggest ways of implementation, they seldom do. In any event, it is ultimately left to the WTO member to determine how to implement. The DSU expressly provides that “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all [WTO] Members”.²⁰ Under the DSB’s surveillance function, the defaulting 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.²¹ While members virtually always express their intention to implement, they typically indicate that immediate implementation is impractical, which means under the DSU that they are to be afforded a reasonable period of time for implementation.²² Absent agreement, that period of time may be set by arbitration, and the DSU provides that, as a guideline for the arbitrator, the period should not exceed 15 months.²³ Overall, in non-export subsidy cases, the median reasonable period of time has been around 8 to 9 months.

If a party fails to implement the report within the reasonable period of time, the prevailing party may request compensation. If that is not forthcoming within 20 days of the expiration of the reasonable period of time,²⁴ it may request the DSB, within 30 days of said expiration, to authorize it to suspend concessions owed to the non-implementing party (i.e. take retaliatory action).²⁵ DSB authorization is automatic, absent consensus to the contrary, subject to arbitration of the level of suspension if requested by the non-implementing member.²⁶ Suspension of concession is said to be only temporary and is to be applied only until the inconsistency of the measure is removed²⁷.

¹⁸ Dispute Settlement Understanding Article-12-17.5

¹⁹ Dispute Settlement Understanding Article-13-17.14

²⁰ Dispute Settlement Understanding Article-14-21

²¹ Dispute Settlement Understanding Article-15-19.1

²² Dispute Settlement Understanding Article-16-21.1

²³ Dispute Settlement Understanding Article-17-21.3

²⁴ Dispute Settlement Understanding Article-18-21.3

²⁵ Dispute Settlement Understanding Article-19-21.3(c)

²⁶ Dispute Settlement Understanding Article-20-22.2

²⁷ Dispute Settlement Understanding Article-21-22.6

Under the timeframes described above, one would anticipate that a diligent complainant could obtain the removal of an inconsistent measure within about 26 months of its request for consultations. In fact, as noted above, the minimum specified timeframes are typically exceeded, particularly in the consultation, panel establishment and panel report stages. As a consequence, in those cases where the initial reasonable period of time for implementation had expired as of December 2004, the median time from the request for consultations to implementation was 34 months, or eight months (30%) longer than the period foreseen in the DSU. Of course, the figure of 34 months is only a median time. By definition, half the cases have taken longer, some much longer, to resolve. Given the goal of dispute settlement as set out at the beginning of this part – security and predictability in trading relations – it is obvious that the DSU is failing to ensure that goal is met in too many cases. It is true that some of the delay can be attributed to complainants' failure to prosecute their cases vigorously to the extent allowed by the DSU. Nonetheless, the data in the tables suggests that a significant part of the problem is the failure to ensure prompt implementation. I now turn to the WTO's record in that regard.²⁸

Developing countries share in the World Trade

Developing country as a group has increased their share of world trade. They now account for an estimated 25 percent of world trade compared with 19 percent two decades ago and 21 percent one decade ago. A key feature has been the increasing share of developing countries in the world trade in manufacturing products it was 20 percent in 1993, double the level of the decade ago and four times the level of 1963. Among developing region, Asia and Latin America are already major exporters of manufactures. These exports account for almost 80 percent of the exports of developing Asia and almost 50 percent of the exports of the Latin America. This reflects a significant re-orientation away from primary products over the past decades particularly in Latin America. Africa and the Middle East continued to exports mainly primary products with the share of the manufactures in each case at roughly 20 percent.²⁹

Share of developing countries in the world merchandise exports, 1973-1995³⁰

	1973	1980	1985	1990	1995 ^p
Agricultural products	27	28	29	25	26½

²⁸ William J. Davey, "Implementation in Wto Dispute Settlement: An introduction to the Problems and possible solutions", University of Illinois College of Law, 2005, Available at <http://papers.ssrn.com/sol/papers.cfmabstractid=862786&http.rs.cfmabstractid=862786>.

²⁹ Kumar Ratnesh, *WTO Structure functions tasks challenges*, Deep and Deep publication Pvt. Ltd. New Delhi, p105.

³⁰ Participation of developing countries in World Trade: Overview of major trends and underlying factors, Available at http://www.wto.org/english/tratop_e/devel_e/w15.htm.

Mining products	55	64	49½	50	47½
<i>Fuels</i>	68½	72	54½	60	57
Manufactures	7	10	13	15½	20
Total merchandise	19	28	23	21½	22½

The Participation of Developing Countries in WTO Dispute Settlement

Ambassador Bhatia of India recently stated that the 'WTO dispute settlement system is certainly one of the most valuable achievements of the Uruguay Round.'³¹ He observed that the 'experience of the last thirteen years has been generally positive.'³² The number of disputes brought to, and jurisprudence generated from, the WTO dispute settlement system since its inception is unprecedented for an inter-governmental dispute settlement system. Since its establishment, almost 400 disputes have been initiated resulting in just under 250 panel and Appellate Body reports. This caseload rivals over 80 years of litigation in the International Court of Justice (and its predecessor the Permanent Court of International Justice) and is greater than that of 50 years of dispute resolution in the GATT.³³ Nonetheless, Ambassador Bhatia cautioned that the picture from a developing-country perspective is not all positive and that much can be done to make the WTO dispute settlement system 'more responsive and relevant' for those countries.³⁴

Measuring the extent of developing-country participation in WTO dispute settlement activity depends on how one interprets the available data and statistics. A cursory analysis of the WTO Secretariat data for the first ten years of dispute settlement activity provides a relatively positive picture. 127 of the 335 consultations requests made during that period were from developing countries, 40 of the 96 panel proceedings completed involved developing-country complainants,³⁵ and 33 of the 56 appearances before the Appellate Body in 2007 were from developing countries.³⁶ A further positive development is the increasing utilisation of the system over time. Davey notes

³¹ H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO, "Settling Disputes Among Members", Presentation at the WTO Public Forum 2008, Session 6, 24 September 2008. Available at: http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm.

³² *Id.*

³³ Donald McRae, 'What is the Future of WTO Dispute Settlement?' 2004 *JIEL* 7(1) 3, at 9.

³⁴ Presentation by Ambassador Bhatia of India, above footnote 5. WTO Secretariat Document, 'Update of WTO Dispute Settlement Cases, New Developments since last Update Until 1 December 2005', WT/DS/OV/25, 12 December 2005, at iii-iv. A similar trend can be observed through to May 2008. See WTO Secretariat Document, 'Update of WTO Dispute Settlement Cases, New Developments since'.

³⁵ W. Davey, 'The WTO Dispute Settlement System: The First Ten Years' 2005 *JIEL* 8(1) 17, at 24.

³⁶ WTO Secretariat Document, 'Appellate Body - Annual Report for 2007', 30 January 2008, WT/AB/9, at 17. Developing country Members made 1 appearance as appellant, 3 as other appellants, 5 as appellees, and 24 as third participants.

that, by increasing their share of initiated consultations requests from 25 per cent in the first five years of the system's existence to over 60 per cent in the following five years, 'developing countries have become more frequent users of WTO dispute settlement, both in absolute and relative terms.'³⁷ The Consultative Board Report is equally positive commenting on the 'much greater participation of developing countries than was the case in the GATT dispute settlement system' and that 'developing countries – even some of the poorest... – are increasingly taking on the most powerful.'³⁸ These figures and statements do not portray, however, the full picture. Statistical analysis illustrates that the dispute settlement activity of developing countries is highly concentrated with a few main users. Only five developing countries account for 60 per cent of activity. Together with another eight developing countries, 90 per cent of activity is covered. While this practice demonstrates that some developing countries, notably Brazil and India, are utilizing the system effectively; the strong concentration of activity in a few developing countries highlights that the vast majority of developing countries are largely absent from the process. This is particularly the case for LDCs, with Bangladesh the only LDC to have initiated consultations in a dispute to date.

When the data is examined from this perspective, a more critical assessment of developing country participation in WTO dispute settlement activity seems warranted. It has been commented that the poorest countries in the WTO system are almost completely disengaged from the enforcement of market access rights through formal dispute settlement litigation. Elsewhere, concerns regarding 'the absence from the game' of a large number of developing countries, and the 'miniscule' participation of countries from Africa,³⁹ have been raised. Ambassador Bhatia concluded his comments on developing-country experience in WTO dispute settlement with the question "Why is it that, except for a few larger developing countries, dispute settlement as an option has not been exercised?"⁴⁰

Duration of a Dispute Settlement procedure

These approximate periods for each stage of a dispute settlement procedure are target figures. The agreement is flexible. In addition, the countries can settle their dispute themselves at any stage.⁴¹

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointed

³⁷ W. Davey, 'The WTO Dispute Settlement System: The First Ten Years' 2005 *JIEL* 8(1) 17, at 24.

³⁸ Report of the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing institutional challenges in the next millennium*, 2004, at 50.

³⁹ V. Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' 2006 *JIEL* 9(2) 427, at 435.

⁴⁰ Hunter Nottage, *Developing Countries in the WTO Dispute Settlement*, Global economic Governance Program, 2009, Available at www.globaleconomicgovernance.org/.../nottage-working-paper-final..

⁴¹ Understanding the Wto: settling disputes A unique contribution, Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1 year (without appeal)	Total = 1 year 3 months (with appeal)

Conclusion

This paper has overviewed the operation of the WTO's dispute settlement system in its first decade of operation and focused on the experience of developing countries. It found that in the last four or five 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 provided more effective remedies for smaller countries and helped to defray the cost of WTO litigation.

