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Dispute Settlement in the WTO, Developing Countries and India

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Abstract

A widely shared assessment of the WTO dispute settlement mechanism is that it has worked reasonably well. But has the mechanism served the interests of developing countries? There were worries during the Uruguay round that developing countries would not benefit from the strong and quasi-judicial dispute settlement procedures of the WTO as they lacked the economic muscle for effective retaliation on which the procedures relied in the end. There were fears also that developing countries would be vulnerable to cross-retaliation by developed countries across the agreements on goods, services and intellectual property agreements.

Actual experience during the 17 years of dispute settlement has shown that the anxieties of developing countries were overly exaggerated. Developing countries have not only raised a large number of disputes against developed countries but have also succeeded in obtaining rulings of legal violation in 88 per cent of the cases. They have also secured implementation in 94 per-cent of the cases in which they obtained rulings in their favour. Developed countries have been even more successful in cases against the developing. Their task has been made easier by the readiness of developing countries to live up to their WTO commitments. As a consequence, there has been no case of retaliation by the developed against developing countries. Cross-retaliation has proved to be an arrow in the quiver of developing countries rather than that of the developed, although they have been hesitant in using it. Overall, there has been sparing use of retaliation even among developed countries and WTO Members have relied more on moral pressure than coercive legal measures to enforce compliance.

Provisions in the Dispute Settlement Understanding (DSU) on special and differential treatment of developing countries have benefited them only marginally and their main handicap has been the dearth of human and financial resources to protect and defend their interest in disputes.

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Executive summary

Introduction

The WTO has been getting a bad name for over 10 years now over the lack of progress in the negotiations for further trade liberalisation. But during all these years, the WTO framework has been held aloft by the success in dispute settlement. If the WTO Agreement served as a bulwark against protectionism during the recession of 2008-09, it was due to a large extent to its dispute settlement system. But what has been the experience of developing countries with dispute settlement in the WTO? During the Uruguay Round, developing countries felt uncomfortable about the possible impact on them of the onward march of the dispute settlement mechanism towards a judicial approach as they felt that it was not an instrument that they could use. They did not have the economic muscle to be able to resort to retaliation, which was the ultimate weapon necessary to enforce the verdict in a dispute. Another source of concern was the possibility of cross-retaliation that the system provided across agreements on goods, services and intellectual property rights. The paper undertakes an examination of the experience of developing countries with dispute settlement vis-à-vis developed countries during the 17 years since the entry into force of the WTO Agreement.

Evolution of the dispute settlement mechanism

Article XXIII of GATT 1947, as originally drafted, laid down the barest outline of the procedures for dealing with disputes. As disputes arose in the initial years, flesh was added to the skeleton provided in Article XXIII and more elaborate procedures were evolved for dealing with disputes, and some cautious, tentative advances were made towards a judicial approach. A milestone in the evolution was the codification during the Tokyo Round negotiations of the customary practice on dispute settlement in the *Understanding on Notification, Consultation, Dispute Settlement and Surveillance*, which was adopted by the Contracting Parties on November 28, 1979, with an annex setting out an *Agreed Description of the Customary Practice of the GATT in the Field of Dispute* Settlement (GATT 1979).

Despite the gradual improvement in GATT's dispute settlement procedures over the years, it had egregious inadequacies, deriving mainly from the GATT practice of consensus in decision- making. Thus, all important decisions pertaining to complaints, whether for the establishment or composition of a panel, the adoption of a panel report, or the authorisation of retaliatory suspension of concessions were potentially liable to be blocked by individual contracting parties. Access to dispute settlement procedures was not guaranteed.

The Dispute Settlement Understanding (DSU), which was one of the important agreements in the WTO framework, envisaged bold steps to strengthen the judicial approach. The dynamics of the dispute settlement procedures was altered

fundamentally by introducing the concept of negative consensus in decision making by the Dispute Settlement Body (DSB). This novel procedure results in guaranteed access of WTO members to dispute settlement procedures and, what is more, rules out blockage in the adoption of panel and Appellate Body Reports.

Time limits are set for the dispute settlement procedures to be completed, right from the time a request has been made by the complaining member for consultations.

An Appellate Body has been established for appeal on issues of law covered in the panel reports and legal interpretations developed by the panel. Procedures have been established for ensuring compliance with rulings and recommendations, including the authorisation of retaliatory action by aggrieved Members.

In 1966 the Contracting Parties agreed to establish Special Procedures for developing countries, which gave them the right to a panel and improved the procedures generally by laying down time limits for various stages in cases in which in one of them had a complaint against a developed country. Although these improvements were effectively generalised in the DSU and all Members were given the benefits of guaranteed access to panel and strict time limits, the developing countries attached value to the Special Procedures and consequently, their right to invoke these procedures was retained as an alternative to the new procedures and time limits. In addition, the DSU provides for special treatment to developing countries, particularly in giving them additional time at various stages and according other privileges such as inclusion of a panelist from developing countries in cases involving them and explicit indication of the manner in which account was taken of the special and differential treatment envisaged in the covered agreements.

Experience of developing countries with dispute resolution (1995-2012)

Doubts about the ability of developing country Members to enforce their rights under the WTO Agreement against developed country Members have not proved to be well-founded and the DSU has worked well for them. They have been strong users of the dispute settlement mechanism and, in a large number of cases, the respondents have been large developed economies. Out of 60 complaints pursued by developing countries from 1995 to 2012 (February 29), they obtained mutual agreement in 12, and legal ruling in their favour in 42, losing only six. The success rate at 88 percent (42 out of 48) is considerably better than 65 percent (11 out of 17) during the history of GATT 1947. In all but three of these cases, there has been full implementation of the rulings and recommendations, giving a success rate of 94 percent, against 82 percent during GATT 1947. A caveat might be added here that in one or two cases, a somewhat unexpected interpretation by the AB of the provisions of the WTO provisions has diminished the level of satisfaction of developing countries with the DSU.

The DSU has worked even better for the developed countries in enforcing their rights against developing countries. Against 64 cases pursued by the developed against developing countries, there was mutual settlement in 23 and in the remaining 41, the verdict was in favour of the complainants in 39 cases, making the success rate 95 percent. Out of this, the implementation procedures have been completed in 35, and in all of them the rulings and recommendations have been implemented. As a matter of fact, in 29 cases, implementation was notified straightway, and only two involved compliance procedures.

Retaliation and cross- retaliation

Contrary to the fears of developing countries during the Uruguay Round, there has not been any occasion for retaliation or cross- retaliation by developed countries against the developing. One reason for this is that developing countries have shown a greater commitment towards the multilateral trading system and complied readily with rulings and recommendations, even if long-standing policies and practices have had to be changed, without seeking to drag the procedures. Cross-retaliation has proved to be an arrow in the quiver of developing country Members, although they have been reluctant to use it. Moral pressure on governments for being seen to be abiding with their international obligations has been a greater factor in obtaining implementation of rulings and recommendations than coercive legal action.

Special and differential treatment of developing countries

Special and differential treatment in DSU has proved to be of marginal utility to the developing countries. The most serious challenge confronting developing countries in protecting and defending their interest in the WTO disputes is the dearth of human and financial resources. The WTO secretariat's ability to provide such support has been constrained by the overriding requirement that they remain neutral among litigant Members. The role of assisting developing countries with appropriate legal advice has been fulfilled by the Advisory Centre of WTO Law (ACWL), which was established by a number of WTO Members at Geneva in 2000.

The majority of proposals made by developing countries for improving the S&D provisions in the DSU are not going to be of much help. The only useful suggestion is for establishing the Dispute Settlement Fund 'to facilitate effective utilisation of the dispute settlement procedures by developing country Members'.

India's experience with dispute settlement in the WTO

India has pursued 11 cases against developed countries, out of which in three the matter was settled through mutual agreement. In the eight contested cases, India won seven, and the rulings and recommendations have been fully or substantially implemented in all. In two (*US- Shrimps Turtle* and *EC- Tariff Preferences)* of the seven cases,

satisfaction with the results has been somewhat diminished by the fact that the pronouncements made by the APB in the cases made India's success more of form than substance.

Out of the 11 cases pursued by developed countries against India, five cases were settled or terminated with mutually agreed solution. India defended successfully in one case but faced adverse rulings in the remaining five. None of the five cases in which India faced adverse rulings was easy and each of them resulted in major policy changes by the government. And yet, in all these cases India notified implementation without further complications. The complainants did not need to take recourse to compliance proceedings or to seek authorisation for retaliation. Clearly India showed a greater commitment towards supporting the multilateral trading system than its developed country partners.

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Anwarul Hoda*

1. Introduction

The WTO has been getting a bad name for over 10 years now over the lack of progress in the negotiations for further trade liberalisation. But during all these years the WTO framework has been held aloft by the success in dispute settlement. A widely shared assessment of the WTO dispute settlement mechanism is that it has worked reasonably well. Its efficient functioning has lent strength to the multilateral trading system through effective enforcement of the rights and obligations. At the same time it has reflected the consensus support that the WTO agreement continues to enjoy among its membership. If the WTO agreement has served as a bulwark against protectionism during the recession of 2008-09, it is due to a large extent to its dispute settlement system.

What has been the experience of developing countries with dispute settlement in the WTO? The Dispute Settlement Understanding (DSU), which was one of the agreements included in the WTO agreement, was a key element in resolving the most contentious issue that had divided participating countries during the Uruguay Round. Would the outcome in the new areas of negotiations, services and intellectual property rights, be dealt with by amending GATT 1947 or be covered by separate agreements? During the run up to the Punta del Este Ministerial meeting that launched the Uruguay Round, developing countries were particularly insistent that the services negotiations should be held separately from the main negotiations on GATT issues. Later, during the mid term review, when agreement was reached that the negotiations on Trade Related Aspects of Intellectual Property Rights (TRIPS) would be expanded to cover substantive norms and standards of intellectual property rights, one explicit condition put down by the developing countries was that the TRIPS negotiations too would be held on a separate track. The principal motivation of developing countries in securing the separation of tracks was the fear that market access in the area of goods would be used by developed countries as a bargaining lever for obtaining market access in the sensitive area of services and further for securing improvement in the standards of protection of intellectual property rights in individual developing countries. The negotiators found a way out by having three separate multilateral agreements, embodying the results in the areas of goods, services and intellectual property rights. In the case of goods it was not one agreement but a set of agreements. These three separate agreements were to be bound together by an overarching dispute settlement machinery. The fear of cross-retaliation that troubled developing countries was allayed

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by imposing constraints on parties seeking authorisation of retaliation under a different agreement than the one to which the complaint related, as described in detail in Section 2 below. Despite this, worries remained among developing countries about the dangers of cross-retaliation to which they had been exposed in the WTO Agreement. In fact, in many developing countries, there were deeper worries that the more effective DSU being put in place might generally go against the interest of developing countries. It was argued in some quarters that the DSU was not an instrument that the developing countries could use, as they did not have the economic muscle to be able to resort to retaliation, which was the ultimate weapon necessary to enforce the verdict in a dispute. With this mind set, they tried to improve the framework by extending the notion of special and differential treatment to the dispute settlement machinery and succeeded in wresting some minor procedural concessions for themselves.

It is more than 17 years since the WTO Agreement entered into force and as many as 427 disputes have been raised since then up to December 31, 2011. These years have yielded rich experience on the functioning of the dispute settlement system in the WTO. Developing countries have been involved in a large number of disputes with developed countries but equally, they have also been embroiled in disputes with other developing countries. Having regard to the two-fold worries of developing countries at the outset about the inherent limitations placed on them by the lack of retaliatory strength in taking recourse to these procedures against developed countries on the one hand, and the threat that they felt from disputes as defendants on the other, the focus of the study is the disputes between developing and developed countries. We leave aside the cases in which developing countries only are involved. Has the initial assessment by some people that the DSU is not amenable to being used by developing countries against developed countries proved justified? How have developing countries fared with regard to the use of cross-retaliation? In this paper, we take up these and related questions. Section 2 examines the main improvements in the dispute settlement mechanism embodied in the DSU, as compared to the pre-existing GATT paradigm. The section considers the special rules adopted in the GATT 1947 days for the developing countries and the elements of special and differential treatment provided in the DSU. Section 3 appraises the overall experience of developing countries with dispute resolution in the WTO, as complainants and defendants, vis-à-vis developed countries. Section 4 analyses how India has coped with disputes, both as a complainant and defendant. Finally Section 5 draws conclusions from the aforesaid analyses.

2. From GATT to WTO: evolution of the dispute settlement mechanism

Dispute Settlement in GATT 1947 (1947-1984)

Article XXIII of GATT 1947, as originally drafted, laid down the barest outline of the procedures for dealing with disputes. These procedures could be invoked if a contracting party (the term used for signatories to GATT 1947) considered that any benefit under the Agreement was being nullified or impaired or the attainment of any objective of the agreement was being impeded as a result of

(a) another contracting party acting inconsistently with its obligations under GATT, or
(b) another contracting party applying any measure, whether or not it conflicts with the provisions of GATT, or
(c) the existence of any other situation.

In practice Article XXIII was invoked only when there was a case of nullification and impairment of a benefit accruing to a contracting party under GATT. A unique feature of Article XXIII is that nullification and impairment can occur even in the absence of a breach of GATT obligations. There can thus be what is known as non-violation nullification or impairment.

Under Article XXIII the aggrieved contracting party was expected to make written representations or proposals to the concerned contracting party or parties and the latter was required to give sympathetic consideration to such proposals and representations. If the matter was not resolved bilaterally, the contracting party concerned could approach the Contracting Parties (the contracting parties acting jointly), which was required to 'promptly investigate the matter and make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate'. Article XXIII further provided that if circumstances were serious enough to justify such action, the Contracting Parties 'may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.'

As disputes arose in the initial years, flesh was added to the skeleton provided in Article XXIII and more elaborate procedures were evolved for dealing with disputes. Early in the history of GATT 1947, in one case, the Chairman of the Contracting Parties was requested to give a ruling, which was duly adopted. After this, the practice developed of referring the matter for detailed examination to a working party, following a preliminary debate before the full membership. The working parties consisted of five to 20 delegations, including the disputants, who were given full rights of participation in the deliberations. The approach of working parties was conciliation and compromise, not adjudication. The findings and recommendations of the working

parties were the outcome of a negotiating process and did not always meet the tests of objectivity and impartiality. The desire to have a procedure, which was quasi-judicial in nature led to the adoption of the panel system. In 1952, a Panel of Complaints was established to consider all complaints referred to it by the Contracting Parties. The practice of appointing standing panels for each Session was discontinued in 1955 and the Contracting Parties began appointing ad hoc panels to consider individual disputes. The panels were composed of three to five persons drawn from countries having no direct interest in the dispute. The panellists were expected to act in their individual capacity without receiving instructions from their governments.

The move from working parties to panels was the first decisive step taken in GATT 1947 to make the dispute settlement procedures more judicial in nature. Thereafter, until 1979, the customary practice on dispute settlement evolved gradually without any decision being taken formally by the Contracting Parties, except for the adoption in April 1966 of the special procedures for cases in which a dispute was raised by a developing against a developed country (GATT 1966).

The 1966 procedures provided for the possibility of using the good offices of the Director General to resolve such disputes and more importantly laid down time limits for various stages of the procedures. The complaining party could make a reference of the matter to the Director General, who was required to hold consultations with the contracting parties concerned, with a view to promoting a mutually acceptable solution. In the event of failure of the good offices effort within two months of the commencement of consultations, at the request of one of the Parties, the Director General was required to report the matter to the Contracting Parties or the Council. On receipt of such a report, the Contracting Parties or the Council was mandated to appoint a panel of experts to examine the matter with a view to recommending solutions. The panel on its part was required to submit its findings and recommendations within a period of sixty days for the consideration and decision of the Contracting Parties or Council. Within ninety days of the decision, the contracting party concerned was required to make a report on the action taken pursuant to the recommendation.

Some of the innovations made in these procedures anticipated the improvements that were to be embodied almost three decades later in the DSU of the WTO. In the event of failure of the good offices effort of the Director General to resolve the dispute, the procedures envisaged the establishment of a panel on a virtually automatic basis. Strict time limits were placed for the panel to submit the report (sixty days) and for the defendant contracting party to report compliance (ninety days). Indeed, what was offered to developing countries was a judicialised procedure, far ahead of the times. The adoption of the special procedure was the result of the groundswell of support in the mid-sixties for international action for according trade and development benefits to developing countries. It was the same wave that led to the establishment in 1964 of the United Nations Conference on Trade and Development (UNCTAD) and to the addition of Part IV to GATT 1947.

The next milestone was the initiative during the Tokyo Round negotiations to codify the customary practice on dispute settlement. One of the outcomes of the negotiations in the Framework Group in the Tokyo Round was the *Understanding on Notification, Consultation, Dispute Settlement and Surveillance*, which was adopted by the Contracting Parties on November 28, 1979, with an annex setting out an *Agreed Description of the Customary Practice of the GATT in the Field of Dispute* Settlement (GATT 1979). Subsequently, mini-steps were taken to improve these procedures in the 1982 Ministerial Declaration (GATT 1982) and a Decision on Dispute Settlement Procedures adopted on November 30, 1984 (GATT 1984).

The *Agreed Description* describes the practice in respect of both working parties and panels, the normal terms of reference, the procedure of nomination of individuals to the panel by the secretariat for acceptance by the parties, the working procedures set up by panels, the practice of review of the reports by the parties and the practice of submitting only the findings in the report, and the recommendations only on the specific request of the Contracting Parties. An important point in the customary practice recognised in the *Agreed Description* is that in cases where there is an infringement of GATT obligations, the measure is considered, prima facie, to constitute a case of nullification or impairment. In such cases, there is normally a presumption that a breach of rules by one contracting party has an adverse impact on other contracting parties and it is for the contracting party against which a complaint is made to rebut the charge. The *Understanding* made only some subtle changes to the *Agreed Description*.

Mention must also be made here of the establishment of independent procedures for dispute resolution in five agreements on non-tariff measures, viz., technical barriers to trade, government procurement, subsidies, customs valuation and anti-dumping. The dispute settlement mechanism in these non-tariff measure agreements made good progress towards establishing quasi-judicial procedures by granting the right to a panel and in some cases, even stipulating strict time limits for the submission of report by the panel and for the committees to present recommendations to the parties. A noticeable difference between some of the non-tariff codes and the *Understanding* referred to above was that whereas in these codes, the dispute settlement machinery moves inexorably to the consideration of retaliatory measures, the *Understanding* only envisaged vaguely that such measures might be considered.

Despite the gradual improvement in GATT's dispute settlement procedures over the years and the codification of customary practice in 1979, it had egregious inadequacies, deriving mainly from the GATT practice of consensus in decision- making. Thus, all important decisions pertaining to complaints, whether for the establishment or composition of a panel, the adoption of a panel report, or the authorisation of retaliatory suspension of concessions, were potentially liable to be blocked by individual contracting parties. And in fact, they did raise hurdles particularly in the adoption of panel reports, which touched on politically or economically sensitive areas. The general procedures also did not envisage the right to a panel and access to dispute settlement

procedures was not guaranteed to a contracting party. There were no time limits laid down for various stages and cases could drag on for years. We have seen that these features contrasted with the improvements made in the special procedures for developing countries and in some of the non-tariff measure agreements.

All these deficiencies were addressed in the DSU. The mid- term Review of the Uruguay Round held at Montreal, in December 1988, began the process of reform by agreeing to lay down time limits for the consultation stage and providing for the automatic establishment of panels if the dispute remained unsettled during these time limits. These improvements were applied provisionally through a Decision of the Contracting Parties (GATT 1989) and later made permanent by their assimilation in the DSU.

Dispute Settlement Understanding of the WTO

A report made by the Executive Secretary in the early days of the GATT (GATT 1955) on the use of Working Parties and Panels in complaints under Article XXIII shows that the principal objective of the changeover to the panel system was to enable the preparation of 'an objective analysis for the consideration by the contracting parties, in which the special interests of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the contracting parties'. The beginning thus made for the infusion of a quasi-judicial approach was to be carried forward in the GATT/WTO dispute settlement system in subsequent decades and culminate in the DSU. The evolution has been succinctly described by Zimmerman (2005):

'Summarising the evolution of multilateral dispute settlement between the earliest days of the GATT and ITO drafts on the one hand and the new DSU procedures under the WTO on the other, one finds a gradual and very cautious evolution of the dispute settlement system from a rather diplomacy-oriented towards a more adjudication-oriented mechanism'

While the progression towards a judicial approach in the days of GATT 1947 was tentative and cautious, the Uruguay Round negotiators took bold steps to strengthen this approach by introducing the following main elements:

- The dynamics of the dispute settlement procedures was altered fundamentally by introducing the concept of negative consensus in decision making by the Dispute Settlement Body (DSB). At key stages such as the establishment of a panel, the adoption of a panel report or of a report of the Appellate Body, positive decisions have to be taken unless there is consensus for not doing so. This makes decision making on these matters effectively automatic because the complaining party or the party that has obtained a favourable verdict cannot be expected to join the consensus not to establish the panel or not to

adopt the panel or Appellate Body report. This novel procedure results in guaranteed access of WTO members to dispute settlement procedures and, what is more, rules out blockage in the adoption of panel and Appellate Body Reports.

- Time limits are established for the dispute settlement procedures to be completed right from the time a request has been made by the complaining member for consultations. If an agreement is not reached in the consultations within 60 days the complaining party may proceed to request for the establishment of a panel. If no agreement is reached on panelists within 20 days after the date of establishment of a panel, the Director General may determine the composition in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee. Panels are mandated to complete the process in no more than nine months and the Appellate Body within ninety days. In practice, during the first 10 years of the WTO, the panels took an average of 12 months and the Appellate Body kept to the time limit (den Bossche 2005). In recent years, however, the AB has breached the time limit frequently, particularly in complex cases.

- An Appellate Body was established for appeal on issues of law covered in the panel reports and legal interpretations developed by the panel. The Body has been empowered to uphold, modify or reverse the legal findings and conclusions of the panel.

- To strengthen procedures for surveillance and implementation, Article 21 of the DSU provides for the defendant member to notify its intention on implementation, for arbitration (Article 21.3) of the 'reasonable period of time' if such period cannot be mutually agreed, and for recourse to dispute settlement procedures (under Article 21.5) in cases in which there is disagreement on compliance with the recommendations of the panel or APB.

- In principle, the matter stays on the agenda at the subsequent meetings of the DSB until the recommendations or rulings have been fully implemented. Even in cases in which agreement has been reached between the parties on compensation or action has been taken by the aggrieved member pursuant to authorisation of suspension of concessions and obligations, surveillance is continued until the measure has been brought into conformity with the relevant provisions of the WTO Agreement.

- If the recommendations of the DSB are not implemented and no agreement reached on mutually acceptable compensation, the complainant is entitled under Article 22.2 to request authorisation from the DSB to 'suspend the application to the Member concerned of concessions or other obligations under the covered agreements', or, in other words, to retaliate. If the Member

concerned objects to the level of suspension proposed, Article 22.6 provides for the matter to be referred to the original panel for arbitration.

- As for cross-retaliation, the general principle adopted in Article 22 of the DSU was that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or APB had found a violation or other nullification or impairment. All goods were deemed to belong to the same sector, but the sectors identified in the sectoral classification of services and various categories of IPRs were treated as different sectors. If it was not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), action could be taken in other sectors under the same agreement. Cross retaliation under another covered agreement was possible only if retaliation in other sectors of the same agreement was not practicable or effective and additionally if 'the circumstances are serious enough'.

Special and Differential Treatment (S&DT) of Developing Countries in the DSU

The DSU generalised for all members the privileges of the right to a panel and observance of time limits that were reserved only for developing countries in the 1966 Special Procedures for Developing Countries. Although the Special Procedures thus lost much of their relevance, in Article 3.12 of the DSU, developing countries retained the right to invoke those procedures as an alternative to the provisions of the DSU. The additional benefits that this provided were shorter time frames and mediation by the Director General to settle the dispute before the panel stage. A qualification was added that where the panel considers that the time frame provided for submission of its report in the 1966 Decision is insufficient, the time frame might be extended with the agreement of the complaining party.

In addition, certain other provisions of the DSU accord special and differential treatment (S&DT) to the developing countries. The full list of such provisions is Articles 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, and 27.2. Two provisions, Articles 24.1 and 24.2 give certain privileges to the Least Developed Countries (LLDCs).

Article 4.10 is a very broadly phrased provision requiring all Members to give special attention to developing country Members' particular problems and interests. Article 8.10 mandates that when a dispute is between a developing country Member and a developed country Member, the panel must include a panelist from a developing country if so requested by the developing country concerned. Article 12.10 allows time extensions to them in the pre-panel consultations involving a measure taken by a developing country. If there is disagreement on whether the consultation period has concluded, the Chairman of the DSB has been empowered to extend the period of consultation. In such cases, the panel is also mandated to give to developing countries sufficient time to prepare and present its arguments. Article 12.11 is an important

provision, which calls for an explicit indication of the form in which account was taken of the S&DT of developing countries envisaged in the covered agreement in question. Article 21.2 is another broadly phrased provision that stipulates that particular attention should be paid to matters affecting the interests of developing country Members. Article 21.7 requires that during surveillance of implementation, if the matter is one that has been raised by a developing country Member, the DSB may consider what further appropriate action could be taken. Article 21.8 adds that in considering such appropriate action the DSB must take into account not only the trade coverage of the measures complained against but also their impact on the economy of the developing country Member concerned. Article 27.2 requires the WTO Secretariat to make available a qualified legal expert from the WTO technical co-operation services to any developing country Member which so requests. The qualification is added that the expert must assist the developing country Members 'in a manner ensuring the continued impartiality of the Secretariat'. Lastly, Article 24.1 requires that particular consideration be given to the special situation of least developed countries (LLDCs) in all stages of dispute settlement procedures. Further, all Members have been mandated to exercise due restraint in raising disputes against the LDCs and in asking for compensation or seeking authorisation of retaliatory measures in cases in which nullification or impairment has been found to result from a measure taken by them. Article 24.2 provides that in a dispute involving a least- developed country Member and where consultations have not led to a solution, the least- developed country Member concerned may request the Director General or the Chairman of the DSB for their good offices, conciliation and mediation, before making a request for the establishment of a panel.

In Section 3, we evaluate, inter alia, the experience of developing countries with the S&DT provisions in the DSU.

3. Developing country experience with DSU

How have developing countries fared so far in dispute settlement cases involving them?

Unlike in the pre-WTO days, developing countries have been big users of the dispute settlement system. Of the 429 complaints up to February 29, 2012,, 180 were initiated by developing countries, multiple complaints by them being counted as one. Of these, 106 were against developed countries and 74 against the developing. Thirty-six developing countries have brought one or more complaints so far, 12 of them once, 18 more than twice and 7, 10 times or more. The top three users have been Brazil (25), Mexico (21) and India (20). Their share of disputes has been far in excess of their share in world trade. Out of 172 disputes in which developing countries were defendants, in as many as 104, developed countries were complainants. As the anxieties of developing countries (about the lack of retaliatory strength) and their fears (about the use of cross-retaliation) were vis-à-vis the developed countries, we take up for separate assessment

the disputes raised by them against developed countries and those in which they were defendants and developed countries complainants.

Developing countries as complainants

Rulings of legal violation obtained

The strike rate in obtaining rulings of legal violation is one obvious measure of success. Even in the days of GATT 1947, when blockages were experienced at various stages and there was no guarantee of implementation of adverse rulings, analysts took into account the extent to which the complainant benefited from a satisfactory outcome. Thus Hudec observes as follows:

'Over the GATT's entire history, 28 complaints were brought by developing countries. Of these, 17 ended in legal rulings, 11 of which were rulings of legal violation, and 10 of the 11 (91 percent) had a successful outcome. Of the 22 complaints known to be based on valid legal claim, satisfaction was achieved in 18 of the cases (82 percent) (Hudec, 2005, 82)

In the WTO, up to February 29, 2012, 104 cases have been raised by developing country members against developed country members since January 1, 1995. Leaving out cases in which consultations have dragged on, or the establishment of panels has not been pursued, or the cases in which the panel reports are in circulation or in appeal, the net number of cases for evaluating the success rate of developing countries in raising disputes against the developed during the period 1995- 2011 works out to 60.

What happened in these 60 cases? In 12 of these cases mutual settlement was reached, in most cases by the withdrawal of the measure at issue, without a ruling. Out of the remaining 48 cases, in 42 (about 88 percent) developing country members obtained rulings of legal violation in their favour and the reports were adopted with recommendations to the defendant developed country members to bring the measures into conformity with the WTO obligations. This percentage is better than what was obtained during GATT history, for which the count given by Hudec (11 out of 17) works out to about 63 per cent.

Implementation of rulings and recommendations

Out of 42 complaints in which developing countries have had favourable rulings, in four[1] the reasonable period of time agreed between the parties, pursuant to Article 21.3 of the DSU, had not expired up to the time of writing; in one,[2] the DSB had agreed to give time for appeal up to February 22, 2012, and in another,[3] compliance proceedings

[1] *US- Anti-Dumping and Countervailing Duties(China)*(DS 379), *US- Orange Juice (Brazil) (*DS382), *EC-Fasteners (China)* (DS 397)and *US- Shrimps(Viet Nam)* (DS 404)
[2] *EC- Footwear* (DS405)
[3] *US- Stainless Steel(Mexico)* (DS 344)

under Article 21.5 was in process. In the remaining 36, implementation was notified in 19 without further ado and in four mutually agreed solution on implementation was notified. In three,[4] the parties reported agreement under Articles 21 and 22, and four[5] were subject to compliance proceedings under Article 21.5. In two,[6] retaliation was requested but no step was taken subsequently to seek authorisation and in five,[7] retaliation was actually authorised under Article 22. One[8] of these cases involved both compliance proceedings under Article 21.5 as well as retaliation.

Unless the respondent notifies compliance in a particular dispute, there is no sure way of knowing that implementation has taken place. Article 21.6 gives the right to Members to raise the issue of implementation of the recommendations and rulings at any time after their adoption. In the light of this provision it is possible to make a presumption of compliance where the complainant has not raised for a long time an issue of implementation at a meeting of the DSB after adoption of the panel or AB report. On this basis it is possible to conclude that compliance has taken place in all cases in which developing countries obtained a legal ruling in their favour, except three, in which lack of compliance persisted despite proceedings under Articles 22.2 and 22.6 for authorisation of retaliation (*US-Gambling, Canada-Aircraft Credits and Guarantees* and *US-Upland Cotton).* Thus in 33 out of 36 cases in which the implementation process had been completed, developing countries have been successful in securing compliance. If we add to this the 12 cases in which mutual settlement was reached, we have 45 cases out of 48, or 94 per cent, in which full satisfaction was received by developing countries in disputes raised against developed countries. This is better than the 82 per cent figure worked out by Hudec of cases during the GATT 1947 era in which full satisfaction was received by them. However, as we shall in the Section 4, Dispute Settlement in the WTO and India, developing countries complainants have reasons to be dissatisfied with the rulings and recommendation in at least two cases because of the far- reaching implications of the interpretation given by the AB.

[4] *EC-Export Subsidies on Sugar* (DS 283, complainant Thailand), *EC-Export Subsidies on Sugar (*DS 266, complainant Brazil), and *EC- Poultry* (DS 69)
[5] *US- Shrimp* (DS58), *EC- Bananas III* (DS 27), *Canada Aircraft* (DS 70) and *EC-Bed Linen* (DS 141)
[6] *US- Gambling (*DS 285) and *US-Oil Country Tubular Goods Sunset Reviews (*DS 268)
[7] *EC- Bananas III* (DS 27), , *US-Offset Act (Byrd Amendment)*(DS 217), *US- Offset Act (Byrd Amendment)* (DS234) , *Canada- Aircraft Credits and Guarantees* (DS 222) and *US- Upland Cotton* (DS 267)
[8] *EC- Bananas III* (DS 27)

Developing countries as defendants

Rulings of legal violation against developing countries

Out of the total 103 cases in which complaints had been made by developed countries against developing countries, 31 were still under consultations at the time of writing; in 4 cases, the panel was established but not composed and in one case, the authority for establishment of the panel had lapsed. We would also not consider the 3 cases in which the panels have been composed recently, leaving us to find out the status of implementation only in 64 cases. What happened in these 64 cases? In 23 of these, mutual settlement was notified, and there was no need for a ruling. Out of the remaining 41, the verdict went against developing country defendants in 39, making the success rate for developed countries 95 per cent.

Implementation

Four of the 39 cases were under appeal at the time of writing and in the remaining 35, implementation procedures had been completed. Only two cases had involved compliance procedures under Article 21.5 and in none Article 22 had been invoked seeking retaliation. In 29 cases, the developing country respondents notified implementation straightaway and the minutes of the DSB show that in four,[9] there has been full or substantial compliance. In one[10] of the cases, which underwent procedures under Article 21.5, non-compliance was not found and in another,[11] no issue of compliance has been raised after the adoption of the AB report in the compliance proceedings. Thus, in disputes in which developed countries secured rulings of legal violation against developing countries, there has been 100 percent compliance.

Recourse to retaliation or cross-retaliation

Use of retaliation

Automatic recourse to retaliation was considered to be a major plus factor in the DSU to enable complainants to secure implementation of DSB rulings and recommendations in disputes. As things turned out, developing countries have achieved an impressive success rate in the implementation of DSB rulings and recommendation secured by them without recourse to retaliation. This is not to say that they have not had to work hard to secure such implementation. They were authorised to retaliate in five cases, Ecuador in *EC-Bananas III*, Mexico in *US-Offset Act (DS 234)*, Brazil, Chile, India, Indonesia, Korea and Thailand in *US- Offset Act (DS 217)*,Brazil in *Canada-Aircraft Credits and Guarantees (*DS 222) and Brazil again in *US- Upland Cotton* (DS 267). In

[9] *China-Publications and Audiovisual Entertainment Products* (DS 363); *Brazil-Retreaded Tyres* (DS 332); *Mexico- Anti-Dumping Measures on Rice* (DS295); and *Argentina- Hides and Leather* (DS155).
[10] *Brazil-Aircraft* (DS 46)
[11] *Mexico-Corn Syrup* (DS132)

US-Offset Act (DS 234) Mexico actually went ahead with the authorised measure along with Canada, which was a co-complainant. However, Brazil, Chile, India, Indonesia and Korea did not avail of the authorisation in *US Offset Act (DS217)*, while three developed countries that were co-complainants viz., the EC, Japan and Australia did. Similarly in *Bananas III,* while Ecuador did not go ahead with retaliation, the US did so. In two important cases, *US- Upland Cotton* and *Canada- Aircraft Credits and Guarantees,* Brazil has been reluctant to act on the authorisation. In two other cases, developing countries took the initial steps necessary for being authorised to retaliate but did not actually proceed to follow up. In *US-Oil Country Tubular Goods Sunset Reviews* (DS268), Argentina requested for authorisation but did not need to proceed further because the US announced withdrawal of the WTO inconsistent measure, bringing itself into full compliance with the recommendations of the DSB. In *US-Gambling,* Antigua and Barbuda obtained the recommendation of the arbitrator for retaliation, but did not move to the next step of requesting the DSB to authorise such retaliation.

The moral pressure on governments for being seen to be abiding with their international obligations has been a greater factor in obtaining implementation of rulings and recommendations than coercive legal action. However, in politically difficult cases, such as the *EC-Bananas* and *US-Offset Act* the pain caused by the retaliation by the developed country co-complainants could have been a contributory factor in clinching enforcement. Can retaliation by developing countries help to secure compliance from developing countries? What can be said about this on the basis of the experience so far? Retaliatory action by small countries such as Ecuador and Antigua cannot really help much in securing compliance because it is unlikely to cause any economic or political pain, particularly in behemoths such as the US and the EC. Moral pressure arising from the deliberations of the DSB, whenever the matter is taken up, to consider implementation of rulings and recommendations, is likely to be more effective in such cases. The position could be different when larger developing countries are concerned. Brazil is a large developing economy and it might be expected that it is in a position to cause pain to the US and Canada, should it choose to go ahead with the retaliatory steps in the two cases in which it has obtained authorisation. However, even Brazil has baulked and has not proceeded against Canada at all and has signed an interim 'Framework Agreement' with the US in which the latter has promised to provide annual payments of US $ 147.3 million for the establishment of a technical fund for Brazilian farmers. These payments are to continue until the US reforms its subsidy programme under the 2012 farm bill.

In this context, the following comments made by Hudec on the experience of developing countries with dispute settlement in the GATT 1947 era, are very appropriate:

'Other things being equal, one would expect a better chance of compliance with a retaliation tool than without it. The key point, however, is that a legal ruling without

retaliation can still be an effective policy tool for a developing country seeking to reverse a legal violation by a larger country. Although not invariably effective, in many cases it may well be more effective than the other practical alternatives' (Hudec 2005, 82).

Use of Cross- Retaliation

In actual experience, the fears of developing countries on cross-retaliation during the Uruguay Round have proved to be overly exaggerated. The question of retaliation or cross-retaliation across agreements in disputes raised by developed countries against developing countries has not risen at all, in view of the readiness shown by the latter to implement the rulings and recommendations of the DSB in these cases . In fact, in three cases, the possibility of cross retaliation against developed countries in the areas of TRIPS and GATS agreements to obtain compliance with the recommendations of the DSB in the areas of goods and services has been shown to have some real potential for developing countries, although the potential remains unutilised so far.

In the *EC-Bananas III*, the arbitrators had found that to the extent the suspension of concessions under GATT 1994 and GATS was insufficient to reach the level of nullification and impairment determined by the arbitrators, Ecuador could request such authorisation under TRIPS in Section 1 (copyright and related rights); Article 14 on protection of performers, producers of phonograms and broadcasting organisations), Section 3 (geographical indications) and Section 4 (industrial designs). Similarly, in the *US-Gambling*, the arbitrator determined that Antigua could request authorisation from the DSB to suspend obligations under the TRIPS agreement at a level not exceeding US$21 million annually. In *US-Upland Cotton*, while approving the formula for Brazil to determine the annual amount of sanctions on imports from the US (based on the current US spending on cotton subsidies), the arbitrators have ruled that Brazil could impose sanctions not only by way of increased tariffs on imports of goods from the USA but also in the form of restrictions on US service providers and by way of lifting of intellectual property rights for US right holders in copyright, trademarks, industrial designs, patents and protection of undisclosed information. They, however, have put the condition that Brazil may begin exercising the right relating to services by US service suppliers and US IPRs only if the sanctions exceed a certain threshold (estimated at US$409.7 million based on 2008 figures).

As things turned out, in *EC-Bananas III* , Ecuador did not go beyond the goods and services areas in seeking authorisation for suspension of concessions and other obligations and did not proceed with retaliation at all even in the areas in which it had been authorised to do so by the DSB. In the *US-Gambling* case, Antigua did not proceed to seek an authorisation from the DSB for retaliation/cross-retaliation under the TRIPS agreement. We have also seen that Brazil has not proceeded with cross-retaliation, and has reached what looks like an interim agreement with the US for

compensatory payments until the latter carries out the reforms through legislation in the next farm bill

It must be acknowledged here that the use of retaliatory measure in the area of TRIPs would not be as straightforward as raising tariffs on goods or imposing a restriction on service providers. There is no precedent as yet of suspension of obligations in the TRIPS Agreement and it would be a challenge to design the precise modality for taking such measures, including on account of the difficulty in estimating their trade value.

Experience with S&D Treatment

It is not within the scope of this paper to provide a comprehensive list of all the instances in which the S&D provisions have been invoked by developing countries. What we propose to do is to illustrate through some cases the extent to which these provisions have helped developing countries in pursuing their interest in WTO disputes.

Of the S&D provisions in the DSU, several Articles (3.12, 4.10, 24.1 and 24.2) are addressed to individual Members. In a few cases some of these provisions were cited, but the relevant provisions were not actually used. In *EC-Regime for the Importation of Bananas* (DS 361), Colombia mentioned in its consultation request (WT/DS361/1) that should the consultation not lead to satisfactory conclusion, it would consider referring the matter to the Director General pursuant to Article 3.12 of the DSU in the hope that his good offices would facilitate a rapid solution to the dispute. Similarly, in its consultation request in *EC-Regime for the importation of Bananas (*WT/DS 364/1*)*, Panama requested the EC to work on achieving a prompt and full resolution of this disagreement, taking properly into account Panama's developing-country interests as required by Articles 4.10and 3.12. These cases had not progressed beyond the consultations stage in December 2009, when the EC notified the changes in the tariff regime for bananas that settled the dispute.

There has been only one case, *India- Anti-Dumping Measures on Batteries* (DS 306) in which an LLDC (Bangladesh) was the complainant and the case was terminated on the basis of a mutually agreed solution. There has been no dispute in which a least developed country has been a defendant and there is no way of knowing whether this was due to Members showing restraint in raising matters against the LLDCs, or because no significant trade problem arose as a result of a measure taken by any one of them. Since there has not been any case in which an LLDC was a respondent, the occasion has not arisen for any other Member to show restraint in asking for compensation or seeking authorisation to suspend the application of concessions or other obligations as provided in Article 24.1. The occasion has not arisen also for the Director General or the Chairman of the DSB to offer their good offices, conciliation or mediation upon request by a least developed country, as envisaged in Article 24.2.

The remaining seven of the S&D provisions in the DSU are addressed to specific organs in the dispute settlement process. As required by Article 8.10, in cases between developed and developing countries, the practice has developed to include invariably one panelist from a developing country Member. In order to provide additional legal advice and assistance to developing country Members in respect of dispute settlement pursuant to Article 27.2, the Secretariat has made available two consultants. However, the qualification in the Article that the legal assistance must be given 'in a manner ensuring the continued impartiality of the Secretariat' imposes a serious handicap on the ability of the Secretariat to provide legal assistance. It is for this reason that a number of governments considered it necessary to establish in 2001 the Advisory Centre on WTO Law at Geneva to render independent legal advice to the WTO Members.

There is no record of developing countries requesting the Chairman of the DSB under Article 12.10 for extension of the consultation period envisaged in Article 4.7 and 4.8 before proceeding to next stage of establishment of the panel. However, there have been instances in which the panel has allowed additional time to developing countries for making its first written submission, such as in *India-Quantitative Restrictions (DS90).* Article 21.2 which requires particular attention to be paid to matters affecting the interests of developing country Members, has been referred to in arbitration awards under Article 21.3 (c) for determining 'the reasonable period of time' for implementing the DSB rulings and recommendations. It has been applied in cases in which developing country Members were defendants against complaints made by the developed country Members, as in *Indonesia-Auto* and in *Chile-Alcoholic Beverages.* In the former case the Arbitrator granted an additional period of time of six months (WT/DS54/15, WT/DS55/11, WT/DS59/10, WT/DS/64/9) for implementation and in the latter (WTDS87/15, WT/DS110/4), only recognised the requirement that he had to be generally mindful of the difficulties of developing countries in implementation, but gave no extra time explicitly on this account.

Reference has been made by panels in three important cases to the requirement of Article 12.11 for giving an explicit indication of the form in which account has been taken of the relevant S&D provisions in the covered agreements. In *India- Quantitative Restrictions,* the panel noted that by analysing Article XVIII:B of GATT 1994, which embodies the principle of S&D in relation to measures taken for balance-of-payment purposes, it had effectively discharged the mandate of Article 12.11 of the DSU. In *US-Offset Act,* the panel referred to Article 15 of the Anti-Dumping Agreement, which requires developed countries to explore constructive remedies provided for in the Agreement before applying anti-dumping duties, and mentioned that certain developing country Members attached importance to price undertakings as a constructive remedy. Similarly, in *Mexico- Telecoms,* the Panel emphasised that its findings would not prevent Mexico in pursuing development objectives by extending telecommunications services at affordable prices. These cases underscore the point that Article 12.11 only

emphasises the need for taking the S&D provisions in the substantive WTO rules into account rather than giving them any additional privileged treatment.

Article 21.7 requires the DSB rather generally to consider what further action it might take, which might be appropriate in the circumstances, if the matter is one which has been raised by a developing country. There is no record of any action under this Article ever being considered. Article 21.8 requires that in cases brought up by a developing country Member, the DSB must take into account not only the trade coverage of the measures but also their impact on the economy of developing country Members concerned. The Article could be relevant in determining the level of suspension to be authorised under Article 22.2 to a developing country Member. Although the Article was invoked before the Arbitrator by Ecuador in *EC-Bananas III*, it was not considered on the ground that the point had not been made in the original request.

The above review of developing country experience with the S&DT provisions in the DSU reveals that they have benefited from them to a very limited extent, only by way of being given additional time for consultation or preparation in the initial stages of the dispute settlement process and in the implementation by them of DSB rulings and recommendations. In the ongoing negotiations on the DSU some proposals have been made to elaborate on the S&D provisions of the DSU. In the Consolidated Draft Legal Text attached to the report by the Chairman of the Special Session of the Dispute Settlement Body on April 21, 2011 (TN/DS/25), there are proposals for elaborating such provisions as Article 4.10, which calls upon Members to give special attention to the problems and interests of developing country Members. There are others that are more far- reaching such as the one for authorising other developing country Members to take retaliatory action, where it is demonstrated that such action by the affected developing country Member would have negative consequences for it. The procedural proposals are for the most part of little consequence and the proposal for other developing countries to retaliate on behalf of the affected Member is of little practical value, in the light of the experience that developing countries have been reluctant to take such action even on their own behalf. The only useful suggestion made for giving benefits to developing countries is the proposal to establish a fund on dispute settlement to 'facilitate the effective utilisation of the dispute settlement procedures by developing country Members'.

Rather than special treatment in the rules and procedures of dispute settlement what developing countries need is technical support in dispute settlement cases. Given the complexities in the framework of the rights and obligations embodied in the WTO Agreement, and the evolving practice within the framework, the most serious challenge confronting developing countries in protecting and defending their interest in the WTO disputes is the dearth of human and financial resources. Their predicament has been well summarised in the following observation:

'By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews and compensation arbitration; by judicialising proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential of two years to the defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation' (Busch and Reinhardt, 2000).

In the light of the above, developing countries have been well served by the establishment of the ACWL and they would be further benefited by the creation of the dispute settlement fund, which is under negotiation. Reliance on the provisions in the DSU granting them S&D treatment can help only to a very limited extent.

4. Dispute Settlement in the WTO and India

What has been India's experience with dispute settlement in the WTO vis-à-vis developed country Members, both as respondent and complainant? We address this question below.

Disputes raised by India

India has lodged a total of 20 Dispute Settlement complaints since 1995 and 15 of them are against developed country Members. Four of these have been under consultation for more than a year, viz., *EU- Seizure of Generic Drugs (*DS 408), *EC-Anti-Dumping PET* (DS385), *EC-Anti-Dumping Unbleached Cotton Fabric* (DS140) and *EC-Restrictions on Imports of Rice* (DS 134). Out of the remaining 11, 3 cases were settled or terminated with a mutually agreed solution: *EC-Anti-Dumping Steel Products* (DS 313), *US-Wool Coats (DS 32) and Poland-Automobiles (*DS 19). India lost one case, *US-Rules of Origin* (DS243) but obtained a favourable ruling in seven out of the remaining eight. Thus India's success rate in obtaining rulings of legal violations by developed countries was 88 per cent.

How successful was India in getting these rulings and recommendations in these seven cases implemented? In one case, *US-Restrictions on Textiles* (DS33), there was a mutually acceptable solution on implementation and in three, *US-Steel Plates* (DS 206), *EC-Tariff Preferences (DS246)* and US-*Customs Bond Directive* (DS345), implementation was notified by the respondent. India had to work harder to secure compliance in the remaining three cases. In *US-Shrimp Turtle (*DS 58) and *EC-Bed-Linen* (DS 141), India had to resort to compliance proceedings under Article 21.5. In one case, *US-Offset Act* (DS 217), India obtained authorisation for retaliation under Article 22.2 of the DSU.

In all cases in which India obtained rulings of legal violation in its favour it can be claimed that the rulings and recommendations were fully implemented. But statistics do not reveal the quality of satisfaction flowing from the substantive aspects of some of these cases. Was India's success in the important cases a matter of only form or substance as well? To find an answer we look at the details in three celebrated cases, viz. US- *Shrimp Turtle (*DS 58), *EC-Tariff Preferences (DS246)* and *US-Offset Act* (DS 217). In two of these cases, *EC-Shrimp Turtle* and *EC-Tariff Preferences*, the verdicts went in favour of India but for reasons other than the ones cited in the complaints. As a result the offending measures were not withdrawn, as the Members concerned made good merely the procedural deficiencies due to which the measures had been held to be WTO inconsistent.

In *US-Shrimp Turtle*, in which India, Malaysia, Pakistan and Thailand were joint complainants, the measure at issue was the US import prohibition of shrimp and shrimp products from countries that did not use nets equipped with a turtle excluder device. In a far-reaching pronouncement, the Appellate Body held that the US measure qualified for being treated as an exception under Article XX (g) of GATT 1994, as animal species under threat of extinction could be regarded as exhaustible natural resources. However, the measure did not meet the requirements of the chapeau of that Article that such measures should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, as no effort had been made to persuade the complainant countries to agree to appropriate environmental practices as had been done with some countries in the American region. Once the US had made serious good faith efforts to reach a multilateral agreement on the environmental measure at issue, the Appellate Body held that the requirement of the chapeau had been fulfilled.

In *EC- Tariff Preferences*, the issue was the WTO consistency of the special arrangement under the EC GSP scheme to combat drug production which discriminated in favour of 12 Andean, Central American countries and Pakistan, seemingly at variance with the requirement in the Enabling Clause that the preferences be non-discriminatory among developing countries. In this case, the Appellate Body held that, notwithstanding the provision in the Enabling Clause that tariff preferences be non-discriminatory, granting different tariff preferences to products originating in different GSP beneficiaries was allowed, provided that the relevant tariff preferences responded positively to the particular development, financial and trade needs and were made available on the basis of an objective standard to all beneficiaries that shared the need. The special treatment of 12 beneficiary countries in the EC GSP scheme was found to be inconsistent with the Enabling Clause not because it was discriminatory but because the scheme did not set out objective criteria that, if met, would make it possible for other developing countries that are similarly affected to be included as beneficiaries under the measure. The EC was able to retain the discriminatory treatment for the 12 countries after it made good this shortcoming. As observed in another ICRIER paper, from India's point of view, 'the development of a hierarchy of preferential treatment

among GSP beneficiaries is an adverse development and it hurts the country's interest to be in the least preferred category' (Hoda and Prakash, 2011, 10). Tomazos (2007, 322) criticises the ruling on legal and economic grounds:

'The Appellate Body's Ruling in *EC-Tariff Preferences* is difficult to justify on legal grounds as tariff preferences that discriminate among "similarly situated" developing countries are not supported either by a reasonable interpretation of the Enabling Clause nor are they tenable in light of its negotiating history. The decision is also difficult to defend on economic grounds as it disregards the potential harm that is caused by trade diversion and the negative externalities that are produced for those developing countries excluded from the special arrangement.'

In *US-Offsets Act*, India was one of the complainants along with eight others (Australia, Brazil, Chile, European Communities, Indonesia, Japan, Korea and Thailand). Canada and Mexico were active Third Parties. The measure at issue was the provision in the Act for the anti-dumping and countervailing duties assessed after October 1, 2000, to be distributed among the affected domestic producers. The case went in favour of the complainants and the Byrd Amendment was found to be WTO inconsistent. Since the US did not withdraw the measure within the time allowed, in August 2004, eight Members including India obtained authorisation to suspend concessions or other obligations and four Members, Canada, the EC, Japan and Mexico went ahead with suspension of concessions.

In February 2006, the US repealed the legislation, but the WTO inconsistency has not been fully eliminated as the US has continued to distribute the duties already collected before the repeal of the legislation.

India lost in only one case, which was about the rules of origin applied by the USA and used in the administration of the quota regime maintained by it under the WTO Agreement on Textiles and Clothing. In this complaint, India had argued that the complex rules of origin introduced by the US for textile and apparel products(whereby the criteria that confer origin vary between similar products and processing operations) served trade policy purposes, contrary to the requirements of Articles 2 (b) and (c) of the WTO Agreement on Rules of Origin. The panel held that India had not been able to establish that the relevant provisions of the US law were inconsistent with the requirements of the abovementioned Article of the WTO Agreement. India did not file any appeal against the panel report.

While in terms of numbers, India has had an 88 per cent success in obtaining a legal ruling in its favour in disputes and 100 per cent record in securing compliance with these rulings, the substantive results in some of these cases were less than satisfactory.

Disputes raised against India

In 18 cases, India has been a respondent in disputes raised by developed countries. Six of these have remained under consultation and in one, the authority for the establishment of a panel has lapsed.Out of the remaining11 cases, five cases were settled or terminated with mutually agreed solution. India defended successfully in one case but faced adverse rulings in the remaining five.

The five cases in which the verdict went against India were high profile ones, *India-Patents (US)*(DS 50), *India-Patents (EC)* (DS79), *India-Quantitative Restriction (DS 90)* and *India-Autos (*DS 146) with the EC as complainant and *India-Autos* (DS 175) with the US as complainant. These related to important policy areas of patents, balance-of-payment restrictions and trade related investment measures, on which so much blood had been spilled during the Uruguay Round. A brief description of each of these cases is given below to enable an assessment of the impact that implementation of the rulings had on Indian economic policy:

Under the TRIPS Agreement India had to make fundamental changes in the Indian Patents Act, 1970, under which its pharmaceutical industry had flourished over the past 25 years. It was one of the countries availing of the transition period of 10 years given to developing countries to make patents available for pharmaceutical and agricultural chemical products. But under Article 70.8 (a) of the TRIPS Agreement, there is a requirement that notwithstanding the transitional period availed of by Members, they should provide a means (mail box) by which applications for patent protection of inventions in respect of pharmaceutical and agricultural products may be filed, for being taken up for consideration at the end of the transitional period. Indian laws did not originally have the provision for mail box and it was only after the US and the EC obtained the ruling from the APB that the shortcoming was rectified.

Complaints were filed against India in 1997 by the USA, Australia, Canada, New Zealand, Switzerland and the EC on the quantitative restrictions maintained for balance-of-payments reasons on the ground that the level of monetary reserves did not justify these restrictions as required under Article XVIII B of GATT 1994. This was another difficult issue as India had maintained these quantitative import restrictions for four decades and these restrictions were needed to be continued in order to allow its industry to adjust to the new conditions of competition resulting from the steep reduction of tariffs. India reached agreement with five of the complainants to phase out the restrictions by March 2003, but the USA pursued the complaint and finally obtained a ruling in its favour. India had to phase out the quantitative restrictions maintained for balance-of-payments reasons by April 1, 2001.

The third group of complaints filed again by the USA and the EC related to India's policy for indigenisation of automobile manufacturing through local content and export balancing requirements. This was another important ingredient of India's policy to support the development of domestic industry. Here too, following the AB finding India had to withdraw all measures on indigenisation and trade balancing requirements.

None of the five cases in which India faced adverse rulings was easy and each of them resulted in major policy corrections by the government. And yet in all these cases India notified implementation without further complications. The complainants did not need to take recourse to compliance proceedings or to seek authorisation for retaliation. Clearly India showed a greater commitment towards supporting the multilateral trading system than its developed country partners.

5. Conclusions

1. Doubts about the ability of developing country Members to enforce their rights under the WTO Agreement against developed country Members have not proved to be well-founded and the DSU has worked well for them. In fact, the share of disputes raised by them is far in excess of their share in world trade, and they have been quite successful in obtaining results in their favour. Out of 60 complaints pursued by developing countries from 1995 to 2012 (February 29), they obtained mutual agreement in 12, and legal ruling in their favour in 42, losing only six. The success rate at 88 per cent (42 out of 48) is considerably better than 65 per cent (11 out of 17) during the history of GATT 1947. In all but three of these cases, there has been full implementation of the rulings and recommendations, giving a success rate of 94 per cent, against 82 per cent during GATT 1947.

2. The DSU has worked even better for the developed countries in enforcing their rights against developing countries. Against 64 cases pursued by the developed against developing countries, there was mutual settlement in 23 and in the remaining 41, the verdict was in favour of the complainants in 39, making the success rate 95 percent. Out of this, the implementation procedures have been completed in 35, and in all of them, the rulings and recommendations have been implemented. As a matter of fact, in 29 cases, implementation was notified straightway, and only two involved compliance procedures.

3. Out of eight contested cases, in which India was the complainant against developed countries, India won seven, and the rulings and recommendations have been fully or substantially implemented in all. In two (*US-Shrimps Turtle* and *EC-Tariff Preferences)* of the seven cases, satisfaction with the results has been somewhat diminished by the fact that the pronouncements made by the AB in the cases made India's success more of form than substance. Out of the six contested complaints lodged by developed countries, India lost five. None of

these cases was easy and each of them resulted in major policy changes by the government. And yet in all these cases India notified implementation without further complications. Clearly, India showed a greater commitment towards supporting the multilateral trading system than its developed country partners.

4. Contrary to the fears of developing countries during the Uruguay Round, there has not been any occasion for retaliation or cross- retaliation by developed countries against the developing. One reason for this is that developing countries have shown a greater commitment towards the multilateral trading system and complied readily with rulings and recommendations, without seeking to drag the procedures. Cross-retaliation has proved to be an arrow in the quiver of developing country Members, although they have been reluctant to use it. Moral pressure on governments for being seen to be abiding with their international obligations has been a greater factor in obtaining implementation of rulings and recommendations than coercive legal action.

5. Special and differential treatment in DSU has proved to be of marginal utility to the developing countries. The most serious challenge confronting developing countries in protecting and defending their interest in the WTO disputes is the dearth of human and financial resources. The WTO secretariat's ability to provide such support has been constrained by the overriding requirement that they remain neutral among litigant Members. The role of assisting developing countries with appropriate legal advice has been fulfilled by the Advisory Centre of WTO Law (ACWL), which was established by a number of WTO Members at Geneva in 2000.

6. In the negotiations for improvements and clarification in the DSU in the Doha Round, the majority of proposals made by developing countries are of little consequence. A legitimate question arises whether it is appropriate for developing countries to seek anything substantive by way of S&D treatment in the dispute settlement procedures, beyond the flexibility already envisaged on the time frame. The only useful suggestion is for establishing the Dispute Settlement Fund 'to facilitate the effective utilisation of the dispute settlement procedures by developing country Members (TN/DS/25).'

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