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DISPUTE SETTLEMENT MECHANISM

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From the Director's Desk

K.T. Chacko

One of the major achievements of the Uruguay Round has been the establishment of Dispute Settlement Mechanism (DSM) which provided a comprehensive legal system with automatic and binding implementation of its decisions. Its mandate is to ensure that the trade policies and other measures of the member countries are consistent with the WTO rules, and do not impair or nullify the rights and obligations of any Member. Since its coming into existence in 1995, many experts believe that it has played an important role in solving complex trade issues, while others express that the experience has revealed both merits and demerits in the system.

There is enough evidence that the trust in the system has grown and the mechanism has been effectively utilized. By 2009, 260 cases have been registered in the WTO. Developed countries like the US and the EU have figured as the major complainants or respondents in a number of cases and LDCs have also figured as litigants. The disputes profile exhibits that there is no clear North-South division because many litigations are amongst the South. Various disputes have also brought to the fore the inconsistencies and ambiguities in the text of DSM, e.g. Articles 21.5 and 22 are causing serious concerns for a fair settlement of trade disputes.

While Member countries agree that compared to the GATT, the DSM puts emphasis on legal positivism and judicial restraint, it is expected that the need for greater legal competence and fair settlement of disputes can be arrived at with the effective participation of the developing countries in the DSM. This requires developing adequate legal capacities, providing financial support for litigation and building interlinkages between relevant domestic stakeholders. Developed countries, the WTO Secretariat and even more developed amongst the developing countries can play a key role in this regard.

Dispute Settlement Mechanism and Its Implication

Biswajit Nag*

Dispute settlement mechanism (DSM) in the WTO is argued to be a central element in providing security and predictability to the multilateral trading system. With such provision in place many developing and LDCs have breathed a sigh of relief as their disputes are taken up here to provide a non partial verdict on the issue. This article makes an attempt to analyze and familiarize reader with the provision of how a trade dispute is settled in WTO with the help of DSM. It mentions how the verdict is tilted in favour of developed countries as they wield more power in the system. It tries to indicate certain measures how developing countries can strengthen this process of dispute settlement.

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Introduction

THE WTO's legalized dispute settlement system has been hailed as a new development in international economic relations in which law, more than power, prevails. It outlines the procedure for resolving trade conflicts between nations under the Dispute Settlement Understanding (DSU). A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in the WTO. Ultimate responsibility for settling disputes lies with member governments, through the Dispute Settlement Body (DSB). This system is at the heart of multilateral trading system to provide security and predictability in international trade.

This DSU is based on the principle of reverse consensus at three crucial stages of the system: when a dispute panel is established, when its report is adopted, and when the complaining member is authorized to retaliate on account of non-compliance by the member concerned. The current system was created as part of the WTO Agreement during the Uruguay Round. It is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, generally called the DSU. Its origin lies in Articles XXII and XXIII of the GATT, and is the result of the evolution of rules, procedures and practices developed over five decades of the life of GATT.

The dispute settlement system is aimed neither to make rulings nor to develop jurisprudence rather is to settle dispute. Preference is given to mutually agreed solution between the Parties. Parties can defer Panel/Appellate Body work at any stage to settle bilaterally. In fact, WTO encourages member countries for bilateral discussion to find out an amicable solution for any dispute. By July 2005, only about 130 of the nearly 332 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.[1]

Panel/Appellate Body (AB) reports in themselves have no legal status; they have to be adopted by the DSB to acquire legal status. Prompt settlement of disputes is the main function of the DSU. Through DSU, the WTO

members have agreed to resort to multilateral settlement of disputes rather than unilateral determination of rights and obligations. As per the agreement, there is no need for separate declaration or agreement for the panel/Appellate Body to acquire jurisdiction as jurisdiction comes from the Members having signed the WTO.

Under the old GATT system, a procedure existed for settling disputes, but it had no fixed timetables, rulings were easier to block. Many cases were dragged on for a long time without any conclusion. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year and 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent it is accelerated as much as possible. Under GATT system, rulings were adopted by consensus and a single party could block. However, WTO DSU provides automatic adoption of any ruling. Only rejection of any verdict is done through consensus. There was no effective monitoring and enforcement of rulings under GATT system but DSB of the WTO monitors how rulings are adopted.

GATT-WTO DIFFERENCES

GATT	WTO
• No time frames.	• Clear Time Tables
• Rulings adopted by consensus. Single party could block.	• Automatic adoption. Rejection only by consensus.
• No effective monitoring and enforcement of rulings.	• DSB monitors how rulings are adopted.

The Procedure

The Dispute Settlement Body (DSB) is authorized to monitor and supervise the entire procedure. DSB has authority to set up panels, adopt Panel and AB reports, maintain surveillance and implementation of rulings. It also has responsibility to authorize Members to suspend concessions and other obligations. The agreed Procedure for settling any dispute has four stages as given below.

A dispute starts with notification of a request for consultation by the complainant. This event is mostly preceded by intense informal bilateral efforts at resolution. Through a request for consultations the member government brings the case to the WTO (*the complainant*) and sets out its objections to the trade measure(s) of another member government (*the defendant*). The two sides are then required to consult for 60 days with the goal of negotiating a mutually satisfactory solution to the dispute. Interestingly, a large proportion of cases are successfully resolved during consultations; 46 per cent of all disputes brought to the WTO end at this stage, and three-quarters of those yield at least partial concessions from the defendant.[2]

Consultations should begin within 30 days of the request being made by a party.

- 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 through mutual discussions.
- Parties have flexibilities on adopting the manner and form to resolve dispute:

Stage	*Related DSU Articles*
Consultations	Articles 4 and 5 of DSU
Panel process	Request for panel as per Article 6 and panel work as per Article 7-15 of DSU
Adoption decision or appellate process	Articles 16-20 of DSU
Surveillance of implementation	Articles 21 & 22 of DSU

- Can be bilateral between complaining and defending party; or
- If complaining party agrees, other Members having *substantial trade interest*, can join [multilateral].

Consultations are Confidential, and without prejudice to rights of Members in further proceedings.

If no agreement within 60 days, complainants allowed to seek establishment of a panel to DSB. It actually takes 150 days on an average from request for consultations to panel establishment. Establishment of panel at the 2nd request is automatic. Any WTO Member can become a third party in a dispute panel due to its systematic interest in the subject matter. The request for panel actually brings the issue at the formal litigation stage. Panels are comprised of three to five persons with a background in trade law, agreed to by the parties on a case-by-case basis. The WTO Secretariat suggests the names of possible panelists to the disputing parties. 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, which he is required to do within ten days of the request. The vast majority of panelists are current or former government officials.

There are typically two rounds of testimony, including from other countries (*third parties*) that notify the WTO of a "substantial" interest in the case. The panel then circulates an "interim report," offering both sides an opportunity to comment and seek clarification. The complainant and defendant can still negotiate a settlement at this point. Panel also asks oral and written questions from parties and third parties. Panel is expected to issue report within 6 months; maximum 9 months. Deadline often breached. Average time taken is 372 days. Around 13 per cent of all cases end *before* a ruling is rendered. If not, the panel issues its final report, which is then adopted by the WTO, unless one of two things happens. *First*, the two sides can agree *not* to adopt the panel report for whatever reason, although to date this has not happened. *Second*, one or both sides (but not third parties) can appeal the panel's report, which happens frequently (i.e., in 73% of panel rulings).

The Appellate Body (AB) handles these appeals. Unlike panels, the AB is a standing body of jurists which is designed to ensure greater consistency across its rulings. AB consists of seven individuals, appointed by the DSB for four-year terms. It hears appeals of panel reports in divisions of three. AB is required to issue its report within 60 (at most 90) days from the date of the appeal. Report is to be adopted automatically by the DSB within 30 days, unless there is consensus among the DSU members to the contrary. Appellate Review is limited to Legal Interpretation on Questions of Law covered in the Panel Report. AB cannot engage in fact-finding or evaluation of evidence. The AB is tasked with hearing testimony from the parties, and any third parties, on how the panel may have erred in its legal reasoning. The AB can uphold or overturn the panel in whole or in part, and its decision is final. If this verdict favours the defendant, the case typically ends. If this verdict, instead, favours the complainant, the dispute may proceed to the implementation stage.

When a defendant is ruled against, the panel and (or) AB calls for it to bring its measures into accordance with its WTO obligations. However, this is often contested. If the complainant feels that the defendant has not taken appropriate steps, it can subsequently request a

MUTUALLY AGREED SOLUTION AFTER CONSULTATIONS: AN EXAMPLE

- *July 2004:* India requested consultations with the European Communities concerning the imposition of definitive anti-dumping measures on imports of certain flat rolled products of iron or non-alloy steel, of a width of 600 mm or more, not clad, plated or coated, in coils, not further worked than hot-rolled ("HR Coils") from India.
- *22 October 2004*: India and the European Communities notified the DSB that they had reached an agreement with respect to the matter raised by India in its request for consultations. According to the notification, the European Communities agreed to terminate the measure at issue.

How Dispute Settlement Works: An Example
United States — Continued Dumping and Subsidy Offset Act of 2000

Short title:	US — Offset Act (Byrd Amendment)
Dispute Number	DS-217
Complainant:	Australia; Brazil; Chile; European Communities; India; Indonesia; Japan; Korea; Thailand
Respondent:	United States
Third Parties:	Argentina; Canada; Costa Rica; Hong Kong, China; Israel; Mexico; Norway
Request for Consultations received:	21 December 2000
Request for Panels	Request came in August 2001, but panel was established on 10 September 2001. On 25 October 2001, the Panel was composed
Panel Work	On 17 April 2002, the Chairman of the Panel informed the DSB that the Panel would not be able to complete its work in six months since the parties were given the maximum amount of time for preparing submissions and oral statements. The Panel expected to complete its work by July 2002.
Panel Report circulated:	16 September 2002
Request for Appellate Body	On 18 October 2002, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel On 13 December 2002, the Appellate Body informed the DSB that it was not able to circulate the Report within 60 days from the appeal and that the Report was to be circulated no later than 16 January 2003. On 16 January 2003, the Appellate Body circulated its Report
Appellate Body Report circulated:	On 16 January 2003. It upheld the finding of the Panel and mentioned that the CDSOA is inconsistent with certain provisions of the *Anti-Dumping Agreement* and the *SCM Agreement* and that, therefore, the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement* The Appellate Body recommended that the DSB request the United States bring the CDSOA into conformity with its obligations under the *Anti-Dumping Agreement*, the *SCM Agreement*, and the GATT 1994. Further to Canada's request, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, at its meeting on 27 January 2003.
Article 21.3(c) Arbitration Report circulated:	13 June 2003. On 14 March 2003, the complainants requested arbitration under Article 21.3(c) of the DSU to determine the reasonable period of time for implementation by the US of the DSB recommendations. On 24 March 2003, the complainants requested the Director-General to appoint the arbitrator in consultation with the parties pursuant to footnote 12 of the DSU. On 4 April 2003, the Director-General appointed an Arbitrator. On 13 June 2003, the Arbitrator issued its award to the parties. The Arbitrator concluded that the "reasonable period of time" for the United States to implement the DSB's recommendations and rulings should be 11 months from the date of the DSB's adoption of the Panel and Appellate Body Reports in this dispute. The reasonable period of time will therefore expire on 27 December 2003.
Recourse to Article 22.6 Arbitration Report circulated:	31 August 2004. On 15 January 2004, on the grounds that the US had failed to implement the DSB recommendations and rulings within the reasonable period of time, Brazil, Chile, the EC, India, Japan, Korea, Canada and Mexico requested the DSB authorization to suspend concessions pursuant to Article 22.2 of the DSU. On 23 January 2004, the US requested, in accordance with Article 22.6 of the DSU, that the matter be referred to arbitration, since the US objected to the level of suspension of concessions proposed by the foregoing parties. At its meeting on 26 January 2004, the DSB decided to refer the matter to arbitration. On 31st August 2004, the arbitrator circulated its decisions. It rejects the position of Brazil, Canada, Chile, the European Communities, India, Japan, Korea and Mexico that the level of suspension of concessions or other obligations should be equivalent to the disbursements made by the United States under the measure at issue, *i.e.*, CDSOA. It recommended an economic model.
Follow Up	On 10 November 2004, Brazil, the European Communities, India, Japan, Korea, Canada and Mexico requested authorization to suspend concessions or other obligations under Article 22.7 of the DSU. At is meeting of 17 December 2004, the DSB authorized the suspension of concessions. On

23 December 2004, 7 and 11 January 2005, Australia, Thailand and Indonesia, respectively, reached Understanding with the United States with respect to this dispute. At its meeting of 25 January 2005, the DSB agreed to take note of these Understandings.

On 29 April 2005, the European Communities and Canada notified the DSB that they were suspending, as of 1 May 2005, the application of concessions and related obligations under GATT 1994 on imports of certain products originating in the United States of America. As a result, an ad valorem additional duty of 15 per cent will be imposed on certain products originating in the United States of America On 18 August 2005, Japan notified the DSB that they were also suspending.

At the DSB meeting on 17 February 2006, the United States stated that the US Congress had approved the Deficit Reduction Act on 1 February 2006 and the President had signed the Act into law on 8 February 2006 bringing the US into conformity with its WTO obligations.

Prepared by author from Dispute Settlement Section of WTO website www.wto.org

"compliance" panel. This panel, which is often comprised of the original panel members, must determine whether the defendant's efforts have, in fact, brought its measure(s) into compliance. If not – a judgment the defendant can appeal to the AB – the complainant can request a second panel to set the level at which it can "retaliate" against the defendant. This typically involves imposing tariffs on the defendant's exports. It is essential to note two things about retaliation. *First*, requests for authorization to retaliate are rare.[3] *Second*, it is up to the complainant, and not the WTO, to follow authorization process to retaliate. This is still a rare occurrence. It is important to note that despite its blend of law and politics, the dispute settlement system works well. In fact, two-thirds of the disputes brought for adjudication in Geneva are resolved to the full satisfaction of the complainant.

DISPUTE SETTLEMENT TIME LINE

The approximate periods for each stage of a dispute settlement procedure are target figures and can be extended somewhat. In addition, the countries can settle their dispute themselves at any stage. Totals for each stage are approximate.

60 days	Consultations, mediation, etc.
45 days	Panel established by DSU and appointment of panelists
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)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1 year 3 months	(with appeal)

Source: WTO dispute settlement available in http://www.commercial diplomacy.org/manuals/wto_dispute.htm

Disputes in Numbers[4]

During 1995-2004,

- The US and EC (G2) have highest complaints – 242 times, that is, 28.3 per cent of all bilateral disputes. Other industrialized nations (IND) had 334 bilateral complaints, that is, 39 per cent of all disputes, followed by developing countries (DEV) with 272 bilateral disputes, or 31.8 per cent. LDCs have complained only 8 times, that is, in 0.9 per cent of all bilateral disputes.
- US and EC are the most active respondents. Their practices (together) have been challenged 481 times, which accounts for 56.2 per cent of all bilateral disputes. Developing countries follow with 226, that is, 26.4 per cent. Other industrialized countries finally have acted as respondent on 149 occasions, that is 17.4 per cent of all bilateral disputes. LDCs have never acted as respondent.
- G2 complaints against G2 constitute 32.6 per cent of its total complaints (79/242), against IND, 29 per cent (70/242), and against DEV 38.4 per cent of its total complaints (93/242). 59.2 per cent of all IND complaints are directed against G2 (198/334); 72.4 per cent of all DEV complaints concern G2 practices (197/272), and finally,

90 per cent of all LDC complaints (few as they are) aim at the G2 countries (7/8).

- 93.6 per cent of requests for consultations were on GATT and Annexes, 2.3 per cent on GATS and Annexes and 4 per cent on TRIPS.
- More precisely, GATT agreements were invoked in requests for consultations by 35.6 per cent among all requests, SCM by 8.9 per cent, Anti-Dumping by 8.3 per cent, Agriculture by 8 per cent, TBT by 5.1 per cent, SPS by 4.6 per cent, etc.
- Out of all GATT agreements (581 times) invoked for consultation, Article III was invoked by 94 times, Article I by 82 times, Article XI by 72 times, Article XXIII by 68 times, etc.
- For Anti-Dumping (316 times), Article III was invoked by 38 times each, Article II and VII by 37 times each. Other articles were invoked relatively smaller number of times. For SCM out of 212 times, Article III was raised by 31 times followed by Article I 21 times, Article 10 by 20 times.

TABLE OF DISPUTES (SELECTED COUNTRIES) AS ON FEB 2009

Country	*As complainant*	*As Respondent*
EC	79	64
US	92	105
India	18	20
China	3	14
Brazil	24	14
Canada	31	15
Japan	13	15

- 13.7 per cent panelists came from G2, 54.4 per cent from IND and 31.9 per cent from DEV.

Trade Disputes and LDCs

The WTO Dispute Settlement Understanding includes a number of provisions that grant differential treatment to "developing country" members. For example, Article 8 of the DSU provides that a WTO panel shall "include at least one panelist from a developing country Member" when a dispute is between developing and developed country members and the developing country member so requests. However, these provisions are of rather limited scope and many of them are merely declarative and not obligatory. Since special and differential provisions in favour of developing countries are of limited scope, they have been rarely invoked in WTO cases, and where they have been invoked, they have been of little relevance. The Doha Declaration instructs the WTO members to review all "S&D" provisions with a view to strengthening them, although whether or not they will be strengthened significantly remains a contentious and open question. India raised the issue of special and differential treatment of WTO remedies in the WTO Committee on Trade and Development, but the Committee directed the matter to the DSU review process.

WTO highlights the special procedures when LDCs are involved in litigation. Members are to exercise due restraint in raising issues under these procedures when LDCs are involved. If nullification or impairment is found to result from a measure taken by an LDC, complaining parties are expected to go slow and show restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures. If satisfactory solution has not been found in the course of consultations, DSB may be approached by LDCs to assist them to settle the dispute, before a request for panel is made.

Till now, very few LDCs have taken up steps to move DSBs. Between 1995 and 2004, only 0.9 per cent of total complaints were by LDCs.[5] Bangladesh, Congo, Madagascar, Malawi are among the LDCs who made bilateral complaints. Only one request was to participate in consultation as original complainant and 7 others were about joining the consultation at later stage.

The most important pre-requisites for seeking legal redress from any unfair trade practice or measure are a decision to seek redress and a capacity (both intellectual and material) to seek redress. While the former might seem trivial, it could prove to be the most critical factor in many circumstances. Most of the trade (particularly exports) of the LDCs are done with the developed countries, particularly US and EU. The domestic economies of the LDCs are also

greatly influenced by the internal policies of the developed countries such as agricultural subsidies. Many of the trade related complaints that LDCs have been involved are due to discriminatory policies of the developed countries. On some occasions, large developing countries could also be involved. When this is the case, a decision to confront the adversary in the WTO is no longer a simple decision based on the merit of the case. The political, economic and financial leverage that these countries possess are usually sufficient to browbeat the aggrieved LDCs into inaction. For example, the cotton-growing African LDCs might quite correctly assess that their economies are being badly injured by the subsidies provided by the US to its cotton farmers; but they might not proceed further for fear of the US retaliation in other important areas. Even when there are no explicit threats, these countries might worry about hardening of the attitude of the developed nations in various negotiations, or withdrawal of support of the government.

Another factor that contributes to the unwillingness of the LDCs to seek a legal recourse is the sheer lack of capacity to take such a measure. WTO laws, regulations, etc. have quickly multiplied into tens of thousands of pages. It requires enormous amount of effort to prepare a case for presenting at the panel of the dispute settlement body of the WTO. No LDC is in a position to develop the capacity for such a task.

Furthermore, it might not be economically feasible for any LDC to do so unless the country foresees a steady stream of disputes that it would have to settle at the WTO. For most LDCs this is unlikely to happen and hence they would not have an incentive to build up a legal capacity in this area. For most LDCs this is unlikely to happen and hence they would not have an incentive to build up a legal capacity in this area.

One of the most important cases in which LDCs were involved was Lead Acid Battery Export Case between India and Bangladesh (DS306). Bangladesh had to overcome lot of hurdles to prepare a case against a controversial anti-dumping measure taken by India against its lead acid battery exports, and formally lodging a request for consultation in the WTO (as a prelude to a legal challenge). The case indicates that LDCs lack capacity in preparing the case due to absence/shortage of legal experts, knowledge on how to develop a case, ability to bear the cost for case, etc. The legal experts of the Advisory Centre provide legal support to LDCs on any disputes in the dispute settlement body of the WTO at only 10 per cent of the full costs. The concessionary service provided by the Advisory Centre eased the burden on Bangladesh to prepare the legal case against India. Although Bangladesh Tariff Commission did not have in-house legal expertise it could manage to prepare the case identifying several inconsistencies and legal breaches in India's conduct of the dumping investigation and the imposition of the anti-dumping duties. The Advisory Centre helped with the preparation of Bangladesh's 'request for consultations' served on India at the WTO. It also provided two lawyers to assist the Bangladeshi team during the Consultation with India under the provisions of WTO dispute settlement. Case ended in February 2006 through mutual consultation between India and Bangladesh and India finally withdrew the anti-dumping duty.

Initiative for Strengthening Development Perspective in Dispute Settlement

It has been argued earlier that developing countries face considerable hurdles in using the WTO dispute settlement. Some of the hurdles come from lack of supply side capacity in handling a case. But there are quite a few structural issues which indirectly inhibit a developing country to go forward even in a credible case. Prominent among them is their lack of market size which credibly threatens retaliation for non-compliance. In other words, the concern is that even with a legal victory in hand, a developing country may not be able to compel the defendant to liberalize, since its threat to retaliate lacks acceptance or credibility. This may deter developing countries

from filing complaints in the first place. A developing country is also not in a position to initiate a dispute because of fears of reprisals, such as the suspension of foreign aid or unilateral trade preferences. Developed countries enjoy the kind of advantage over LDCs.

This is true that a country needs experienced trade lawyers to litigate a case, but also seasoned politicians and bureaucrats to decide whether it is worth litigating a case, which is arguably the most critical stage of the process. It needs a staff to constantly monitor trade practices abroad, but also the domestic institutions necessary to participate in international negotiations on complex issues, like health and safety standards, which figure so prominently on the WTO's agenda.

There is an argument that many developing countries after winning a case could convince developed countries to implement the verdict easily as defendants most often prefer to avoid being found non-compliant. This is because such a label may damage their prospects of gaining compliance when they, in turn, file as complainants.[6] There are plethora of cases where developing countries have filed and won concessions from large industrialized states in a wide variety of disputes, with millions of dollars at stake. These cases have involved exports of underwear (Costa Rica v. US), shrimp (Thailand and Pakistan v. US), wool shirts (India v. US), gasoline (Venezuela and Brazil v. US), sardines (Peru v. European Communities) and poultry (Brazil v. European Communities), among other products.

There is a tendency that wealthier countries would like to resolve their disputes through negotiation, either in consultations or at the panel stage before a verdict, whereas developing countries are unable to offer substantial concessions at these points in the process. In trade disputes between the US and the EU, for example, in most cases yielding concessions have ended before the panel rules. In short, the benefits of adjudication disproportionately happen before formal litigation is complete, and often before it even commences. This is why it is especially important for developing countries to close the gap in "early settlement."[7]

With regard to supply side developing countries suffer from relative lack of legal expertise, and finances, and extra-legal constraints on account of power imbalances. Developing countries can design their strategies in the following manners:

- Develop better coordination with the private sector to assist in bringing cases to their attention and in developing factual and legal arguments.
- Make better use of the Advisory Centre on WTO Law. As a repeat player in the WTO litigation, the Advisory Centre can develop expertise and defend developing country interests more cost-effectively. Developing countries could explore expanding the Advisory Centre, or pooling their resources through regional WTO centres that could complement it.
- Forge alliances with constituencies within developed countries such as northern consumer and other non-governmental groups. These developed country constituencies could assist them through wielding domestic political pressure (as they have done to counter the US and the EC pressure over pharmaceutical patent protection) and through providing free assistance in developing factual and legal arguments in the WTO cases.

NOTES

[1] Source: www.wto.org

[2] SIDA (2004), Trade Brief on the WTO Dispute Settlement, April.

[3] *Ibid.*

[4] Horn Henrick, Mavroidis (2006), *The WTO Dispute Settlement System 1995-2004: Some Descriptive Statistics.*

[5] *Ibid.*

[6] Busch, Marc L., and Eric Reinhardt (2003), "Developing Countries and GATT/WTO Dispute Settlement", *Journal of World Trade* 37(4), pp. 719-735.

[7] *Ibid.*

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US Mulls to Challenge China Web Censorship at WTO Talks

THE Obama administration is weighing the merits of taking China's censorship of Google Inc to the WTO as an unfair barrier to trade, a move that could further raise diplomatic tensions. The US Trade Representative's office is consulting with industry groups about China's Internet policies, spokeswoman Carol Guthrie said.

Two groups with links to Google, the Computer & Communications Industry Association and the First Amendment Coalition, have told the trade office that China's restrictions on Web access and content discriminate against US Internet companies and online commerce.

"There is a little bit of a Cold War going on here," said Michael DeGolyer, a professor of government and international studies at Hong Kong Baptist University. "This is a way of putting pressure on China in a way that is going to be popular with many countries."

Google's problems in China have been at the forefront of a series of diplomatic spats with the US that also include a proposed $6.4 billion arms sale to Taiwan. China's foreign ministry spokesman Qin Gang said that the US is 'entirely' to blame for strained ties and should respect the Asian nation's "core interests."

Going to the WTO is "well worth consideration," Nicole Wong, Deputy General Counsel of Google, operator of the most popular Internet search site, told reporters after a congressional hearing in Washington. Using censorship "in a manner that favours domestic Internet companies goes against basic international trade principles," Wong told lawmakers.

Google will stop censoring results as required by the government in China, the company said on 12 January after what it called an infiltration of its technology and the e-mail accounts of Chinese human rights activists. The Obama administration sided with Google Inc. Secretary of state Hillary Clinton said on 20 January that China is among countries "walling themselves off" from progress by restricting Web access.

Google rose $8.37, or 1.6 per cent to $541.06 in Nasdaq Stock Market composite trading and has dropped 13 per cent this year. While going to the WTO would put a spotlight on China's Internet policies, it wouldn't be likely to provide a speedy resolution.

Trade disputes before the WTO can take two years or more to litigate and appeal. "It's a shrewd strategy," said Susan Aaronson, a professor of trade policy at George Washington University in Washington. "Yes, it's slower, but you force them to defend this in a public setting, and China is going to look bad."

(*The Financial Express*, 4 March 2010)

Settling Trade Disputes: When Partners Attack

China will test the WTO's Dispute-Settlement System

IN 2009 China overtook Germany to become the world's largest exporter. Exactly half the trade disputes that were filed at the WTO last year involved China. These facts are not unrelated. As Pascal Lamy, the WTO's chief pointed out in January, the scope for trade friction increases as countries trade more. Disputes between China and other countries are only to be expected.

Mr. Lamy did not have to wait long for evidence to back up his claim. On 8 February China complained to the WTO about the European Union's anti-dumping duties on Chinese-made shoes. This latest fracas over footwear follows recent complaints by the Chinese about restrictions on its exports of steel fasteners, car tyres and poultry. Having initiated just two disputes between joining the WTO in 2001 and September 2008, China has complained to the WTO another five times since then. Marc Busch of Georgetown University in Washington, DC, says that China has moved from "learning by watching", where it mainly observed others' trade tussles, to being an active participant in formal dispute settlement.

China's increasing propensity to bring disputes to the WTO is part of a broader shift. Although the average number of formal disputes per year has fallen since 2001, this is principally because rich countries spend less time fighting each other. Between the WTO's founding in 1995 and the end of 2000, America and the EU initiated exactly half of the cases brought to the WTO. But between 2001 and 2008 they brought only 27.2 per cent of cases. Over half were initiated by developing countries.

That emerging markets, whose share of world trade is growing, feel confident enough in the dispute-settlement system to use it, which is a welcome step. The alternative—a series of escalating retaliations unconstrained by any rules—is far worse. The question is whether the WTO's mechanisms are up to the task of defusing rising trade tensions with China.

There are grounds for confidence. Unlike dispute settlement under the previous world trade regime, countries cannot simply brush away verdicts handed down by the WTO. If a country fails to comply with a ruling, the WTO can permit the complainant to hit back, for instance by restricting its adversary's access to its own market. Crucially, even when it does give permission to strike back, the WTO limits the amount of retaliation based on the damage caused, preventing small skirmishes over a few million dollars of trade from becoming outright trade wars. Mr. Busch points out that nearly 70 per cent of disputes are settled by negotiation, presumably to the satisfaction of both parties.

The credible threat of the WTO-authorized retaliation also deters countries from using trade barriers that are likely to be challenged. Chad Bown, a trade economist at the World Bank, has found America was less likely to slap anti-dumping duties on trading partners who were themselves big markets for the American exporters. This does point to one obvious problem with the system: an aggrieved country with too small a market credibly threaten serious retaliation against a big country which has limited leverage. Even if it has cause for complaint, such a country is unlikely to file a case.

That ought not to be a big problem for China and America or the EU, which value each other's markets. But Mr. Bown argues that America or the EU may still find disputes with China tricky. Countries often threaten to target their retaliation against politically-sensitive products, hoping that their manufacturers will convince their own governments to change course. But this sort of strategy may be more difficult in a dispute with undemocratic China. Exports derived from subsidiaries of American-based multinationals are clearly not good targets for retaliation. American consumers will be unhappy if disputes raise the prices of cheap Chinese exports. For its part, China may not import enough consumer goods to make its threats of retaliation credible.

(*www.economist.com*, 11 February 2010)

US Asked to Drag China to WTO Over Google Dispute

SOME groups are calling on the United States to challenge China's "firewall" before the WTO, as a bilateral row over cyberattacks on Google adds to trade tensions.

As President Barack Obama awaits answers from Beijing on the cyberstrikes, Washington is being asked to contest China's Internet censorship as a breach of global trade rules to which the Asian giant, as a WTO member, is subject.

"The US can argue that China's 'Great Firewall', a system of filters and bottlenecks that effectively shutters the country within its own intranet, is an illegal restraint on international trade because it bars foreign companies from competing, via the Internet, in the vast Chinese market," argues Peter

Scheer, Executive Director of the First Amendment Coalition.

The nonprofit US-based free speech group has petitioned US Trade Representative (USTR) Ron Kirk, to invoke WTO treaties to curtail China's censorship of the Internet.

China's action to halt Internet commerce at its "borders" is akin to a government regulation requiring perishable agricultural exports from the US to sit for days on China's docks prior to transhipment to internal distribution facilities, Mr. Scheer said.

"This is a very complex area that we continue to think through, in consultation with interested groups including the First Amendment Coalition and have not made any decisions one way or another," USTR spokeswoman Debbie Mesloh told AFP.

Asked on the prospect of a WTO action if China, for example, did not respond to a US request for a thorough and transparent probe of Google's claims, Mr. Mesloh said, "This is an issue of broad concern to the Administration – going far beyond USTR.

China has the highest number of online users at nearly 400 million, surpassing even the United States, making it among the most appealing markets for foreign technology companies.

When China acceded to the WTO in 2001, it agreed to give unlimited access and equal treatment to foreign-based or foreign-owned businesses in many categories of services, including online services, according to a recent report of the European Centre for International Political Economy in Brussels. These services count as imports to which China is supposed to be opening itself, even if they are delivered over a wire instead of in a shipping crate," it said. "The online market in China is simply too big for Europe and the US to let trade-distorting regulations pass without action. Victories at the WTO on this front would be wins both for commerce and for civil rights," the report said.

The United States and China are also locked in other trade disputes ranging from tyres, steel and poultry to patents, Hollywood films and currency. The WTO has ruled against China in several cases that were brought before the Geneva-based global trade watchdog.

In the latest case, the Appellate Body, the final authority of WTO dispute settlement, turned down last month an appeal by China in a dispute over its restrictions on the distribution of US printed books, films and music.

Beijing is now forced to either open that market or face retaliatory tariffs. China has also increasingly turned to the WTO, mounting challenges to an American ban on Chinese poultry imports and US anti-dumping policy.

Mr. Scheer underlined the "considerable" advantages of a WTO strategy over the Internet censorship issue following the cyberattacks on Google. "China in other recent trade disputes has shown it will abide by WTO rulings it disagrees with (reserving its right to request WTO rulings, to China's benefit, in other matters)," he said.

"For the US government, playing the WTO card also demonstrates seriousness about curbing the Chinese censorship, while confining the dispute to an international legal process and avoiding a direct confrontation with China."

(*The Economic Times*, 24 January 2010)

India and Reform of the WTO's Dispute Settlement Mechanism

THE WTO Dispute Settlement Understanding (DSU) introduced a fundamental change in the transition from the GATT to the WTO. The diplomatic management of disputes under the GATT was exchanged for a highly legalized system of dispute resolution, with binding decisions being effectively enforced through retaliation and counter-measures. The DSU works on the basis of the rule of reverse consensus. A decision issued by a WTO panel or the Apellate Body is automatically adopted unless all WTO members agree by consensus not to do so.

The dispute settlement mechanism of the WTO has been very effective in enforcing compliance with WTO commitments and has been instrumental in making the WTO a powerful and effective trade regime. Developing country members are important beneficiaries of the DSU as it has allowed them to challenge the WTO-illegal measures of powerful trading partners and compel withdrawal of such measures against the threat of retaliation.

A review of the DSU is already mandated by a 1994 ministerial decision annexed to the Marrakesh Agreement. The negotiations on review of the DSU are going on, but have not been completed. The Doha declaration mandated that the negotiations should continue in special sessions of the DSB. India is an active participant in these negotiations. Research is needed on these negotiations to provide analytical and research support for the participation of Indian negotiators in the policy-making process. A Chair's draft on these negotiations is available. It identifies the following issues – third party rights; panel composition (need for a permanent panel roster); remand; mutually agreed solutions; confidentiality; sequencing; transparency and amicus-curie briefs; SDT and developing country interests; flexibility and member-control and the need for effective compliance and the discussion on retaliation versus monetary compensation. These issues can be researched based upon an empirical assessment of Indian participation in the DSU. What have been the challenges and what is needed to help India make even better use of the DSU? The research would require legal doctrinal and qualitative empirical analysis. The normative framework would bring issues pertaining to challenges of developing country participation and effective use of the DSU to bear upon the analysis.

(http://indiainthewto.wordpress.com, 9 January 2010)

EU Ends 16-Year Banana Trade Battle

THE European Union ended one of the world's longest-running trade battles as it agreed to cut import tariffs on bananas from Latin America grown by US corporations like Dole Food Co., Fresh Del Monte Produce Inc. and Chiquita Brands International Inc.

The settlement, which national lawmakers are expected to ratify within four months, trade officials say, means less-expensive bananas for Europeans, more profit for US fruit companies and lower revenue for some former EU colonies. It ends a 16-year-old trade dispute over access to the EU's $6.7 billion banana market, the world's largest.

Since 1993, when it set up its tariff-free zone, the EU has offered the best import rates to 12 former colonies, places like Cameroon, Ivory Coast and Belize.

The deal upset governments in countries such as Colombia, Costa Rica and Guatemala, where US companies run industrial fruit plantations. Five Latin American countries, backed by the US, filed their first formal trade complaint at the World Trade Organization in 1993. As the dispute escalated, other countries joined the battle against the EU tariffs.

Since then, the EU has offered tariff cuts several times. Each time, the Latin American nations found them insufficient and filed another WTO complaint. In 1999, the WTO authorized the US to impose $191.4 million of trade sanctions on the EU. The last WTO ruling, again upholding the complaint, was issued in early 2008. Trade ministers tried, and failed, to secure a deal as part of the Doha Round of trade talks.

Finally, this year, the four groups involved found common ground in a separate deal. Delegates from the EU, US, former EU colonies and the Latin American banana powers met in Geneva over 100 times for a total of 400 hours of talks, WTO officials say.

The deal: The EU will reduce tariffs on bananas from Latin American countries to •114 ($167) a ton in 2017 from •176 today, in return for Latin American countries dropping their WTO case. The EU's former colonies will continue to receive virtually tariff-free access for its EU banana shipments, and will get a one-time cash payment of •200 million.

The Secretariat of the African, Caribbean and Pacific Group of States, which represents former colonies, didn't respond to a request for comment.

Ecuador, the world's largest banana exporter, hailed the deal as a victory "for all Latin American nations." The head of the Ecuadorean Banana Exporters' Association, Eduardo Ledesma, said "this is a great victory for both producers and consumers."

WTO Director-General Pascal Lamy welcomed the end of "one of the most technically complex, politically sensitive and commercially meaningful legal disputes ever brought to the WTO".

Banana imports from the former colonies will fall 14 per cent costing them $40 million a year, and imports from other countries will increase 17 per cent according to a study by the Geneva-based International Centre for Sustainable Trade and Development. Banana prices in Europe will fall 12 per cent, the study added.

Ed Loyd, a Chiquita spokesman, said the agreement would save Chiquita about $12 million a year for every •10 reduction in the tariff. He said the ruling would benefit the Cincinnati company more than most of its competitors because it is the market leader in Europe and sources nearly all of the bananas it sells in Europe from Latin America.

The EU's old colonies "will face challenges in adjusting to the new situation," said Karel De Gucht, the EU's trade commissioner. "But the EU will do its best to help," he added.

This trade dispute became a flashpoint for development organizations who often saw it as a case of US corporations trying to outmuscle struggling farmers in developing countries.

(http://online.wsj.com/article/SB126089161812692163.htm1, 16 December 2009)

India Gives EU Another Chance to Settle Drug Seizure Case

INDIA has decided to hold one last round of consultation with the European Union on the steps it is taking to stop the wrongful exercise. Seizures violate international patent pact confiscation of pharmaceutical consignments from India at European ports before asking the World Trade Organization (WTO) to set up a dispute settlement panel to resolve the issue.

Preparations for filing a case against the EU, however, continues as India wants the issue to be settled as soon as possible. "We have not yet asked for the setting up of a dispute settlement panel to decide on the case," a government official has said.

India is holding consultations with the EU while it is preparing for the case to give the bloc a last chance to settle the issue out of the WTO court, he said.

In 2009 there have been a number of seizures of generic or off-patent drugs being exported from India to other developing countries in Europe following complaints made by European pharmaceutical companies that hold European patents to these medicines. "These seizures violate the international patent agreement, TRIPS, as the drugs being confiscated are off-patent both in India and the countries it was being exported to," the official said.

Reputed Indian drug manufacturers including Dr. Reddy's Laboratories and Aurobindo Pharma have all faced such seizures in countries like Netherlands and France while their consignments were in transit to destinations in Africa and Latin America. "These seizures affect manufacturers' reputation and also stops them from meeting delivery deadlines," the official said.

Africa and Latin America are major markets for India's low cost drugs used for treatment of diseases like HIV/AIDS, tuberculosis and malaria. The two continents account for more than 15 per cent of India's total annual pharmaceutical exports of nearly Rs 40,000 crore.

The official said the government was continuing to work closely with intellectual property experts who have been appointed to give their advice on the case. "We are preparing a water-tight case. If EU is not able to satisfactorily settle the issue through bilateral consultations, we will not wait for long before filing a case at the WTO," the official said.

(*The Economic Times*, 26 December 2009)

Dispute Settlement: WTO Disputes Reach 400 Mark

ON the eve of its 15th "birthday", the WTO earlier this month reached the milestone of having the 400th trade dispute brought to the body's dispute settlement mechanism. "This is surely a vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes in other areas of international political or economic relations," said Director-General Pascal Lamy to mark the occasion.

Since coming into existence in January 1995, the WTO's 153 members initiated an average of

approximately 27 disputes per year under the provisions of the Dispute Settlement Understanding, the WTO treaty governing the settlement of all disputes among the organization's members.

"This is surely a vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes in other areas of international political or economic relations," said WTO Director-General Pascal Lamy to mark the occasion. "All the political muscle-flexing and grandiloquence is discarded at the door once the case enters the WTO."

Of the 400 cases filed so far, approximately half have eventually been settled directly between the parties, under the system's mandatory consultation requirements, without going to litigation. Of the remainder, 169 have been the subject of panel and, where appealed, Appellate Body proceedings, 17 are currently in adjudication, and 12 are still the subject of active consultation between the parties.

"The dispute settlement system is widely considered to be the jewel in the crown of the WTO," said DG Lamy. "Some critics claim that the system is monopolized by the developed countries, especially the US and EC. Certainly, these two trading giants are the most frequent users of the system. This is not surprising since they are the world's biggest traders, as is increasingly the case with China. But the figures also show that developing countries do not play coy hand-maidens to their richer trading partners. During the period 1995-2009, developing countries have been complainants in more than 45 per cent of all cases, and have been respondents in more than 42 per cent of the cases.

"No trade negotiator enters a negotiation without some assurance that the agreements he negotiates will be underpinned by a credible dispute settlement system. The ongoing review of the functioning of the WTO's dispute settlement system has given rise to many proposals for clarification and improvement. But WTO Members agree that, as the bedrock of the multilateral trading system, the dispute settlement system will not be subject to any seismic shift in its fundamental structure as a result of the Members' deliberations," said DG Lamy.

WTO MEMBERS INVOLVED IN DISPUTES
(Total No. of Disputes: 400 as of 2 November 2009)

Member	*Complainant*	*Respondent*
Antigua and Barbuda	1	0
Argentina	15	16
Australia	7	10
Bangladesh	1	0
Belgium	0	3
Brazil	24	14
Canada	33	15
Chile	10	13
China	6	17
Chinese Taipei	3	0
Colombia	5	3
Costa Rica	4	0
Croatia	0	1
Czech Rep	1	2
Denmark	0	1
Dominican Republic	0	3
Ecuador	3	3
Egypt	0	4
European Communities	81	66
France	0	3
Germany	0	1
Greece	0	2
Guatemala	7	2
Honduras	6	0
Hong Kong, China	1	0
Hungary	5	2
India	18	20
Indonesia	4	4
Ireland	0	3
Japan	13	15
Korea	13	14
Malaysia	1	1
Mexico	21	14
Netherlands	0	1
New Zealand	7	0
Nicaragua	1	2
Norway	3	0
Pakistan	3	2
Panama	5	1
Peru	2	4
Philippines	5	5
Poland	3	1
Portugal	0	1
Romania	0	2
Singapore	1	0
Slovak Rep	0	3
South Africa	0	3

Member	Complainant	Respondent
Spain	0	1
Sri Lanka	1	0
Sweden	0	1
Switzerland	4	0
Thailand	13	3
Trinidad & Tobago	0	2
Turkey	2	8
United Kingdom	0	2
United States	93	107
Uruguay	1	1
Venezuela	1	2

Summary of Disputes (as of 2 November 2009)

To date, 400 disputes have been brought to the WTO, of which:

- 84 appear to have been resolved bilaterally but for which no outcome notified to WTO
- 95 were resolved bilaterally for which outcome notified to WTO
- 23 were resolved bilaterally after a panel was established but before the panel was composed
- 12 are currently the subject of active consultations between parties
- 186 went into litigation

Disputes Per Year

Year	Disputes	Year	Disputes
1995	25	2003	26
1996	39	2004	19
1997	50	2005	11
1998	41	2006	21
1999	30	2007	13
2000	34	2008	19
2001	23	2009 (as of 2 Nov.)	12
2002	37		

(www.wto.org., 6 November 2009)

Lamy Hails Accord Ending Long-Running Banana Dispute

DIRECTOR General Pascal Lamy applauded the successful efforts of Latin American banana producing nations, the United States and the European Union to end their long-running dispute over trade in bananas.

"I welcome the news that a comprehensive agreement on bananas has now been reached. This has been one of the most technically complex, politically sensitive and commercially meaningful legal disputes ever brought to the WTO. It has also been one of the longest running 'sagas' in the history of the post-WWII multilateral trading system," he said.

"After lengthy consultations, legal examinations, negotiations, and gentle prodding by an "honest broker", a solution has been found. This proves there is no trade issue which lies beyond the reach of WTO members when they exhibit goodwill and a spirit of compromise. I hope that the same pragmatism, creativity and diplomacy will help move forward the Doha Round negotiations."

(www.wto.org, 15 December 2009)

EU Requests WTO Panel on Chinese Export Restrictions on Raw Materials

THE European Union has requested the establishment of a WTO panel on Chinese export restrictions on a number of key raw materials, which it considers are in clear breach of international trade rules. The EU has raised the issue with China repeatedly, including through formal WTO consultations, but without success. The EU has now turned to the WTO dispute settlement process to ensure China's compliance with its international obligations. The United States and Mexico have also requested a panel on the same issue.

EU Trade Commissioner Catherine Ashton said: "China's restrictions on raw materials continue to distort competition and increase global prices, making conditions for our companies even more difficult in this economic climate. I regret that the formal consultation process and significant EU engagement on this issue has not led to an amicable solution which would have been our preferred course of action."

European industries have raised concerns for a number of years on export restrictions – quotas, export duties and minimum export prices – which China applies on key raw materials, such as yellow phosphorous, bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide and zinc. Some of these resources cannot be found elsewhere.

Restrictions on raw materials give Chinese companies an unfair advantage, as downstream industries in China have access to cheaper materials

than their competitors outside China. The chemical, steel and non-ferrous metal industries, as well as their downstream clients, are the main sectors concerned.

The EU considers that these restrictions are in violation not only of general WTO rules, but also of specific commitments that China signed up to as part of the WTO Accession Protocol, which set out either prohibitions against the use of export duties or strict caps on a limited number of products, as well as disciplining the use of export licensing and binding minimum export prices.

The panel focuses on a first batch of measures and products. However, the EU's concerns are not limited to these measures and further legal action cannot be ruled out if these concerns are not effectively addressed.

EU-China trade has increased dramatically in recent years and now totals over EUR 300 billion. China is now the EU's 2nd trading partner behind the US and the biggest source of EU imports. China's non-tariff trade barriers mean that EU companies are denied business opportunities in China worth at least EUR 20 billion a year.

(http://trade.ec.europa.eu/doclib/press/index.cfm?id=481, 4 November 2009)

EU Threatens to Approach WTO If India Fails to Cut State Taxes on Imported Liquor

THE EU has threatened to approach the WTO again if India does not remove the inter-state tariff disparities. "We want India to get rid of its taxes on wines and spirits in different states to allow easier access to the European wines, failing which we will approach the WTO again," Michael Mann, spokesperson for the EU Commissioner for Agriculture and Rural Development said.

Some of the Indian states impose very high tariffs on imported wines and spirits and EU feels that duties imposed by Maharashtra, Karnataka, Andhra Pradesh and Tamil Nadu on foreign liquor do not conform to 'National Treatment', which is critical to WTO norm that mandates that a country has to treat imported products at par with those produced domestically. According to EU, these four states account for consumption of half of the imported liquor. The issue was discussed at a bilateral meeting between Commerce Minister Shri Anand Sharma and EU Trade Commissioner Catherine Ashton at the sidelines of an informal meeting of trade ministers on the Doha Round of talks held in Delhi during the first week of September.

Although India has taken some steps to cut down its import tariffs on wines and spirits at the national level - which has earlier avoided a face-off between India and EU at the WTO - but still much more needs to be done to bring down the duties and taxes in different states.

Ms. Catherine Ashton had said that the EU was in favour of sorting the issue out without getting involved in any litigation at the Geneva based headquarters of the WTO. "My preferred solution again is to work this out outside WTO. Countries always have the right to go into the dispute settlement process. It is only at the back of our mind. Actually, I think, we might be able to sort this out," Ms. Ashton had said. EU has long been complaining about high tariffs for imported wines and spirits in India, saying that they are not compliant with WTO rules. It has asked the WTO for setting up an investigation panel, following which India had lowered additional tariffs on wines and spirits. Later, EU dropped out of the investigations after an assurance from India that it will take steps to lower duties at the state level as well.

EU has offered to 70 per cent cut on trade distorting domestic subsidies, 60 per cent reduction on average agriculture import tariff and complete elimination of agriculture export subsidies by 2013.

(*The Financial Express*, 15 October 2009)

Tackling Non-transparent Barriers

WITH the lowering of tariffs across the globe, non-tariff barriers (NTBs) are increasingly being used by developed countries to restrict the inflow of goods. Sometimes NTBs are meant to address legitimate concerns of human, plant and animal health and safety, environmental concerns, or target unfair trade practices such as dumping and subsidies.

However, often these measures are disguised attempts to shield the domestic industries from

competition. This has negated possible gains that developing countries could have extracted through lower tariffs and unless NTBs are tackled, even zero tariffs will not give market access.

Taking advantage of the flexibilities in the WTO rules, NTBs have proliferated, especially those concerning standards, labelling and testing/ certification/licensing requirements. Many NTBs are especially targeted on products where the developing countries have a comparative advantage — food products, chemicals, pharmaceuticals, textiles, leather, engineering products, etc.

Studies have corroborated that a significant proportion of Indian exports are affected by such NTBs. There are moves in some developed countries to bring in import restrictions on non-trade issues such as animal welfare, labour norms and climate issues.

The NTBs often serve to address the irrationally low risk perception level (much lower than prescribed by corresponding international standard), and which is often based on the testing limits of instruments.

Sometimes an importing country even insists on a specific method for testing with the only manufacturer of equipment being located in that country. On certain products different countries seek different testing requirement — on Indian mangoes, the US insists for irradiation requirement while Japan seeks VHT requirement.

Production systems of industries need continuous adaptation as standards imposed on imports are made progressively stricter. The NTB requirements increase the transaction cost and this may be sufficient to put the small exporters out of business. Repeated seizures/destructions of exported goods also hurt the country's image.

The flexibilities in the WTO agreements make it difficult to discipline such NTBs. Still there are mechanisms under the current dispensation to deal with NTBs bilaterally and multilaterally. But the government has been unable to effectively use this avenue. Why?

The problem of NTBs is especially compounded because of dearth of data and specific information on country-specific NTBs and their impact on trade, industry and consumers. Although, the details of all notified regulations by the WTO members have been now electronically tabulated by the government, the primary data on specific problems faced in respect of an NTB can only come from the industry and trade.

While the Indian industry is quick to highlight the tariff barriers on exports and/or aggressively defend the import tariff on the Indian border, the response to NTBs is lukewarm.

The enlightened few definitely raise the NTB issue but are not very forthcoming when it comes to providing specific transaction details that can arm the government to fight the NTBs bilaterally or in the multilateral forum of WTO, viz. the SPS/TBT Committee (under WTO rules, only the government can take the issues on behalf of industry), and in WTO's Dispute Settlement Forum, if other efforts fail.

The Indian industry is also unable to provide scientific evidence against certain irrational requirements concerning the standards and testing procedures, although this could yield positive results.

For *bona fide* standards and testing requirements, the only option is to upgrade the systems to comply with the requirements. If the specific difficulties due to technological or economic limitations are brought to the notice of the government, it could, where possible, design schemes to assist in required upgradation, or seek capacity building support from the importing country, especially developed countries (permitted under WTO rules). A specific dispensation could be sought where possible. Another place where the industry and trade intervention is critical is at the stage of framing of standards by international bodies such as Codex, ISO, IEC, etc., so that the resultant international standards duly reflect the concerns of developing countries, permitting the government to later insist on use of such standards.

The government is trying to negotiate a horizontal mechanism to deal with all sorts of NTBs as part of NAMA negotiations at the WTO. It is also trying to create a framework for dealing with possible NTBs through bilateral SPS/TBT agreements under FTAs, especially focussing on the use of international standards, reliance on Indian test results, including self-certification by suppliers,

appeal mechanism for rejected consignments, prescribe timelines to resolve the SPS/TBT issues, etc.

However, here again, unless the industry and trade take the pain to apprise the government of the range of their problems and participate actively in the negotiations, the effort of government may fall short.

Further, the reliance on private standards by retail chains in the EU, US, etc., that lack transparency and rational basis, are increasingly determining the market access. The industry needs to point at the specific trade concerns arising from such standards so that the government can appropriately raise the issues in the SPS/TBT committee.

Currently, except for food products, India has few mandatory standards. To deal with our trading partners on an equal footing and force them to concede bilateral concessions, we need to create our own mandatory standards and testing requirements. This will also be in consumer interest. However, the biggest barrier in this direction is that according to the WTO's National Treatment principle such requirements would also apply to domestic production and unless the Indian industry exhibits competency to comply with these requirements, the government may be reluctant to promulgate them.

The industry on its own volition should come to the government with a roadmap for sequencing in mandatory standards in areas of its strength. To deal with NTBs comprehensively through the WTO rules, we will possibly need an NTB round to succeed the Doha Round, as and when it is concluded. However, till such time, the industry needs to work in tandem with the government to tackle the NTBs under the current dispensation. A strong technical cell housed in the industry associations could help in this endeavour.

(*The Economic Times*, 29 September 2009)

Brazil, India to Oppose EU at WTO

BRAZIL would join India in invoking dispute settlement proceedings against the EU at the WTO over Brussels' alleged violation of global trade rules by detaining on the high seas the generic drugs exported by Indian companies to other developing countries, a senior Indian trade official has said.

The two developing countries raised the issue early this year when the Dutch Customs authorities detained Indian generic drugs at the behest of leading western pharmaceutical giants. Though they charged the EU with violating WTO's core global rules concerning freedom of transit, they refrained from raising an outright trade dispute until now.

Senior trade officials from India and Brazil held talks to explore if they could raise a joint trade dispute. Given the importance of generic drugs for poor countries, the two have now decided to raise the dispute to ensure that big pharma companies are not able to raise fresh barriers.

Dutch and German Customs inspectors have stopped Indian generic drugs used to treat heart ailments, AIDS, Alzheimer's disease, and medicines used for hypertension on the ground that they violated the EU's patent laws. The repeated recourse to detaining Indian medicines was carried out at the request of companies like Sanofi-Aventis SA, Novartis AG and Eli Lilly & Co.

Despite attempts to amicably resolve the dispute, the two sides are yet to reach a blanket pact to ensure free transit for the Indian generic drugs. Consequently, Indian generic manufacturers are forced to divert shipments to avoid any legal or material challenge by the Customs authorities in the EU member countries. Besides, the Indian companies are forced to cough up high charges for directing their shipments through other routes, analysts said.

India and Brazil are expected to raise the trade dispute against the EU under Article V of GATT 1947 concerning Freedom of Transit, which says "there shall be freedom of transit through the territory of each contracting party, *via* the routes most convenient for international transit". Further, India will also cite violation of Article VIII of GATT 1947, which deals with fees and formalities connected with importation and exportation.

The two countries would also challenge the EU under the Doha TRIPs and Public Health Agreement and other provision of the trade-related intellectual property rights, the Indian official said.

Unconfirmed reports suggest that the Dutch Customs authorities have not released a consignment of generic drugs shipped by Cipla.

Similarly, the Dutch Customs authorities have detained a 50-kg, $52,500-shipment of generic blood-thinner clopidogrel exported by a Chandigarh-based generic company, analysts said.

(www.business-standard.com, 22 September 2009)

EU to Drag India to WTO Seeking Market for Wines and Spirits

THE European Union said it will drag India to WTO for the second time in less than two years seeking removal of high tariff on wines and spirits, particularly in Goa, Maharashtra and Tamil Nadu. The EU will "request WTO consolations with India on its domestic tax regime for spirits and wines", EU said in a statement.

It said the EU would seek clarifications from India on the way tax legislation and other measures on market access for wines and spirits are applied in states such as Goa, Tamil Nadu and Maharashtra. The customs for imported wines and spirits is as high as 150 per cent in India. Discriminatory internal taxation in some Indian states adds further to this burden for importers, the EU statement said.

It said Maharashtra imposes special fee on imported wines but exempts local wines and spirits from excise duty. Goa adds an import and label-recording fee to the cost of imported wines and spirits. "This is a breach of the WTO's national treatment principle which requires the WTO members treat imports and domestic goods the same," EU said.

The request for consultations follows a similar challenge which the EU had posed to India in the WTO 2007 which was later suspended. When a country makes a request for consultations, it formally initiates a dispute under the WTO Dispute Settlement Mechanism. If the consultation do not resolve the issues within 60 days, the EU may seek establishment of a dispute settlement panel like it did in 2007.

The Indian market for alcoholic products is one of the largest in the world with 130 million nine-litre cases. Goa, Maharashtra and Tamil Nadu are among India's largest markets for wines and spirits.

(www.mydigitalfc.com, 22 September 2009)

WTO Sets Up Panel in EU High-Tech Imports Dispute

THE WTO set up a panel to examine a dispute over the European Union's tariffs on high-tech goods, a WTO spokeswoman said. The United States, Japan and Taiwan say the EU, officially known at the WTO as the European Communities (EC), is violating a 1996 WTO deal to limit barriers on trade in high-tech goods such as satellite boxes, flat panel computer monitors and digital scanners & printers. "The EC's actions not only impede trade in these products, they also threaten to undermine tariff commitments on information technology products, which are so important to trade and investment in both developing and developed countries," the United States told the WTO's dispute settlement body.

The row centres on the interpretation of the WTO's Information Technology Agreement (ITA), which eliminated duties on a range of high-tech goods from July 1997 to encourage trade. But since 2005 the EU has re-imposed duties on new versions of computer screens, multi-function printers and TV set-top boxes that can access the Internet, classifying those as consumer products rather than simply high-tech goods. Washington estimates that global exports of the products covered by the WTO dispute, which are made by companies like Hewlett-Packard Co of the United States or Canon Inc and Ricoh Co Ltd of Japan, total more than $70 billion. Brussels called for the ITA to be overhauled and updated to add new products and include more markets than the current 70 economies that have signed up to date. Taiwan welcomed the EU's proposal, but said the products in the dispute were covered by the current ITA and so were entitled to duty-free treatment.

"As one of the largest suppliers of IT products in the world, our trade interests have been seriously injured by the EC's measures," Taiwan said in a statement to the WTO. The EU expressed regret that the other countries had not agreed to a review of the ITA as provided for in the agreement. "We remain confident that the products in question in these disputes are correctly classified and receive the tariff treatment provided for in the EC schedules of concessions, and we are consequently ready to defend our position before a panel," it said in a

statement. The EU rejected the initial but under WTO rules could not block it a second time.

(*The Financial Express*, 24 September 2008)

EU Seeks to Settle Trade Row with India Amicably

THE European Union said it would prefer to resolve two commercial disputes with India without engaging in a legal battle at the WTO. The first dispute involves seizure of Indian generic drugs in transit at some EU-based ports, including Amsterdam, which were bound for certain Third World countries, on the grounds of patents infringement. The second is related to levy of duties on foreign liquor by some Indian states, which the EU claims does not conform to international trade norms. Both the issues, if not settled by diplomatic channels, could lead to a fullscale court battle at the dispute settlement board under the WTO, which looks into alleged complaints of unfair trade practices among members countries.

Speaking to a select group of media, European Union trade commissioner Catherine Ashton said the EU would like to settle the issues outside the ambit of any international legal arbitration. When asked about the drug seizures at EU ports, Ms. Ashton said, "Till now India has not talked about any complaint to us. There are only rumours. I would prefer to talk without going through that process (in WTO) as we have some ideas on it. My technical people have got some ideas. We are in touch with member states about this too."

She stressed if India felt that the measures and ideas proposed by the EU to prevent future drug seizures did not work, it could call for establishing a dispute settlement panel at the WTO. Commenting on the Union's sensitivities over state levies on imported wines and spirits in India, Ms. Ashton said, "We are not at the end of it yet but we are talking. We wanted to get the legal team here before I came here. My preferred solution again is to work this out outside the WTO. Countries always have the right to go into the dispute settlement process. It is only at the back of our mind. Actually, I think, we might be able to sort this out."

Ms. Ashton pointed out that India was an important trading partner of the EU and both were working towards deepening economic engagement through a duty-free trade deal involving goods, services and investment.

The drug seizures have been taking place because of the EU's stringent patent infringement laws, which mandate that products involving intellectual property rights have to be patented in the country of production or the nation for which it is bound. India maintains the drugs were not meant for the EU and were in transit through some ports located in its member nations.

The economic bloc's problems on state levies on foreign liquor has roots in the high import duties that were charged by India on imported tipple. The EU had been complaining since 1998 against the high import duties charged by India on foreign liquor and threatened to call for setting up of a trade dispute panel at the WTO. To accommodate the EU's concerns and to avoid an international legal battle, India scrapped the additional duties on foreign liquor. Subsequently, EU did not take its complaint forward and the panel was not set up but the trade bloc then started having problems with the state levies on imported wines and spirits.

For instance, while the norms for detention say goods cannot be detained for more than 20 days, in some of the cases, goods were detained for 36 days. Also, while goods cannot be sent back as per the guidelines, but they sent back the goods, the officials claimed.

However, Calab Gabriel, an IPR lawyer and partner, K&S Partners, said, "When such drug consignments are transported through the EU territory, the authorities there can detain it if it amounts to infringing the monopoly rights such as patents in the EU. The affected Indian drug companies may have to negotiate with the patent holders in EU and give an undertaking, including paying damages in order to wriggle out of the situation."

Meanwhile, in a related development, the Directorate General of Foreign Trade in the commerce ministry has asked exporters of drugs & pharmaceuticals to submit, at the time of shipment, documents including Certificates of Analysis issued by the manufacturer, approved laboratory of the importing country or by a laboratory approved by Drugs Controller. The notification was aimed at

strengthening the enforcement mechanism available under the Drugs and Cosmetics Act, 1940, to ensure that counterfeit drugs do not get exported out of the country.

(*The Financial Express*, 6 September 2009)

WTO Talks Highlight Emerging Nations' Power

WHEN ministers from over 30 countries gathered at the WTO headquarters in Geneva and failed to arrive at a consensus on market-opening commitments in agriculture and industrial goods in the first few days, WTO Director General Pascal Lamy resorted to a short cut to achieve a breakthrough quickly.

He formed a core group of seven countries that included representatives of both developing and developed countries. This select group included India, Brazil, China, the EU, the US, Japan and Australia. Significantly, Mr. Lamy said later that a similar core group around 15 years ago would have included the US, the EU, Canada and Japan as they were the important players then, but now it had to be a group of seven including "big brothers" like India, Brazil and China. "This is because the world has changed," he admitted.

The growing clout of the BRIC (Brazil, Russia, India and China) countries was evident even more in the WTO talks as India and China stood up to enormous pressure from the US to weaken the Special Safeguard Mechanism (SSM). The SSM enables developing countries to impose additional duties to protect the livelihood of poor farmers from import surges of farm products and their fall in prices. The issue eventually led to the failure of the marathon negotiations on the ninth day.

Of course, it is another story that Brazil broke ranks with other developing country allies in this aspect due to their aggressive interests in the farm export business. Significantly, Brazil's agri-exports were worth over $58 billion last year.

But the leadership of developing countries taken up by both India and China to protect hundreds of millions of poor farmers had the backing of around 100 countries including the G-33 (the group of countries including India, Indonesia, Cuba, Philippines and Venezuela, all with defensive interests in agriculture), African Group comprising all African WTO members, the ACP group including African, Carribean and Pacific nations, and the small and vulnerable economies (SVEs).

Goldman Sachs, that coined the acronym BRIC in 2001, had predicted last year that India's GDP per capita in US dollar terms will quadruple by 2020 from the 2007-level, and also the country's economy will overtake the US in dollar terms by 2043. Besides, the economic output of the BRIC countries will be more than the powerful G-7 in 2032. It is worth noting that despite having a GDP of over $2 trillion, Russia is yet to get WTO membership.

In spite of BRIC's increasing influence in WTO talks, many experts are doubtful whether it would translate into any immediate gains for these countries. Says Pradeep S. Mehta, Secretary General of CUTS International, an NGO tracking WTO talks: "Brazil, India and China would lose only very marginally even if the Doha Round talks were to fail ultimately. Besides, the South-South trade (or the trade between the developing countries) is growing as against traditional rich OECD (Organization for Economic Co-operation and Development) markets."Noting the growing South-South trade, the United Nations Conference on Trade and Development (UNCTAD) took the initiative to hold negotiations of the Global System of Trade Preferences (GSTP) among developing countries. Currently, there are 43 developing country members of GSTP, but it does not include China and South Africa.

"Already the third round of GSTP talks is getting closer to completion. When it is completed, the developing country-to-developing country market access issues will be taken care of," says Dr. Nagesh Kumar, Director General of the New Delhi-based think-tank Research and Information System for Developing Countries (RIS).

Lakshmi Puri, acting Deputy Secretary General, UNCTAD, says the GSTP countries account for $1.8 trillion in exports and $1.6 trillion in imports. "They account for 50 per cent of South-South trade. Total intra-GSTP exports is $813 billion and in Asia 25 per cent is intra-GSTP trade," she adds. The GSTP can facilitate South-South trade liberalization and also help countries like India gain market access in other important developing country markets in

Latin America, Asia, Africa and the Caribbean without having to enter into bilateral trade agreements with each of them, experts say. This way, GSTP can also save countries like India from making major concessions to developed countries at WTO.

According to UNCTAD, the share of developing countries in world trade tripled from 1995 to $3.7 trillion, or around 36 per cent now. Also, South-South merchandise exports, as a share of total world merchandise exports, stood at 17 per cent in 2006, from 10 per cent around 10 years ago. Interestingly, in 2006, more than 46 per cent of developing country merchandise exports were bound for other developing countries, UNCTAD says. The share of inter-regional trade in total South-South trade also showed an increasing trend and has reached 18 per cent in 2005.

Ms. Puri says that from just 38 per cent in 1995, presently around 53 per cent of India's merchandise exports are currently bound to other developing countries. "While India's total merchandise trade with developed countries of the world has grown at an annually averaged rate of 12 per cent between 1995 and 2005, its South-South trade has grown faster, at 17 per cent," she points out. Although India's foreign trade has increased by over 270 per cent from 1995 to 2005, its trade with developed countries has grown by only 176 per cent over this period as against the 323 per cent rise in trade with the South, she adds.

On the other hand, RIS in a recent policy brief had quoted a World Bank study saying out of the projected the gains of a successful Doha Round global trade deal of $96 billion, developing countries can garner a share of only $16 billion. "The developing country benefits are just 0.16 per cent of the GDP. In per capita terms, that amounts to $3.13, or less than a penny per day per capita for those in developing countries," the RIS says.

This mean a poor worker or farmer earning $100 a month would see an increase of just 16 cents in 2015, it says, adding that projected per capita income gains of rich countries were 25 times of that made by developing nations. At the recent talks in Geneva, the US has agreed to commit at the WTO level to bring down their overall trade distorting subsidies to $14.4 billion. But this is more than twice the amount of subsidies they are currently giving to their farmers, which is $7 billion, Dr. Kumar points out. RIS also says the total tariff losses in industrial goods for developing countries would amount to $63.4 billion, which is around four times of the projected gains.

But according to Mr. Lamy, a global trade deal would result in reduction of import tariffs across the world by half the amount of what is today. "There would be savings in the order to $150 billion in tariffs," he had said, highlighting that developing countries would be the beneficiaries of two-third of this amount.

Shri Mehta says that, however, despite insignificant gains, India, Brazil and China would continue to support WTO due to its rules-based system that will help solve international trade disputes. Even Russia, which is not yet a WTO member and therefore has no vote to support or veto issues, has a big delegation in WTO and participates as an observer, he says. WTO's dispute settlement system seems to be saving its grace as of now.

(*The Financial Express*, 27 August 2008)

US, EU File WTO Case against China over Exports

THE European Union and the US launched WTO action against China, accusing it of restricting raw materials exports to feed its domestic market, the EU commission announced.

In Washington, US Trade Representative Ron Kirk accused China of pursuing a "troubling" industrial policy. The two Western powers requested for WTO dispute settlement consultations with China regarding Beijing's export restraints on numerous important raw materials.

"China's measures appear to be part of a troubling industrial policy aimed at providing substantial competitive advantages for the Chinese industries using these inputs," Mr. Kirk told reporters in Washington.

European industries have raised concerns for a number of years on such export restrictions — quotas, export duties and minimum export prices — which China applies on key raw materials,

including yellow phosphorous, bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide and zinc. Some of these resources cannot be found elsewhere, said the European Commission, the EU's executive arm.

"The EU has requested WTO consultations with China regarding China's export restrictions on a number of key raw materials, which it considers are in clear breach of international trade rules," the Commission said in a statement. "The EU has raised the issue with China repeatedly over the past years without success."

EU Trade Commissioner Catherine Ashton complained: "The Chinese restrictions on raw materials distort competition and increase global prices, making things even more difficult for our companies in this economic downturn." She added: "I hope that we can find an amicable solution to this issue through the consultation process."

China defended its moves to restrict exports of some raw materials, saying it was acting to protect the environment. "Taxing exports of some high energy-consuming and pollutant goods is to improve the world's trade environment and China's export structure, and to further enhance environmental protection measures," Chinese Commerce Ministry spokesman Yao Jian had said.

In its accession to the WTO, China agreed to restrict the number of products subject to export tariffs, the EU Commission said. "These restrictions appear to be in violation not only of general WTO rules, but also of specific commitments that China signed up to as part of the WTO Accession Protocol," it added.

(*The Indian Express*, 24 June 2009)

India may Take Drug Seizure Issue to WTO

INDIA is considering taking the issue of seizures of drug consignments by European customs to the dispute settlement body (DSB) of the WTO.

This comes in the wake of drug seizures continuing unabated at European ports with 16 consignments of domestic generics held up at the Dutch port alone over last year, on grounds of suspected trademark infringement.

After voicing its concerns with EU and WHO separately, India is now considering legal options as the issue is a trade dispute between governments.

Sources said that India intervened and raised its protest strongly at the TRIPS (Trade-related aspects of Intellectual Property Rights) council meeting held in Geneva amongst WTO member countries, saying that EC regulations were being misused to create non-tariff barriers to trade and block generics being exported to developing countries.

Citing the most recent seizure of popular antibiotic Amoxicillin in Frankfurt, India is understood to have said that "since seizures have been recurring at different ports and on different grounds, it is therefore clear that rather than just being a problem of implementing a law by Dutch customs authorities, it is the EC regulation 1383/2003 itself that is problematic and can be misused, and has been misused, to create barriers to legitimate trade".

Europe is a very important transit route between India and Latin America and Africa. Widespread and repeated seizures by the EU have had an adverse impact on legitimate trade of generic medicines between India and other developing countries. The extent of the problem is indicated by multiple seizures first at the Dutch port and more recently at Frankfurt. The seizures have delayed and even prevented medicines from reaching patients in several countries like Peru, Columbia, Ecuador, Mexico, Portugal, Spain, Brazil and Nigeria.

"If the EU cares about patients in developing countries then their domestic regulation 1383/2003 has to be reviewed and amended in order to avoid seizures of legitimate generic medicines in transit by European customs authorities", told Leena Menghaney, MSF Access to Essential Medicines Campaign.

"The multitude of allegations and spread across several EC ports, imply an emerging pattern to disrupt and create barriers to legitimate trade of generic drugs and to challenge the Doha Declaration on Public Health. The basic principle of transparency of procedures has also been violated by the inability of the authorities to share and

explain the specific cause of action under EU regulations", India's counsellor to the WTO said at the meeting recently.

The issue is more serious than what was generally perceived with the discovery that there were 16 consignments seized at Dutch ports alone last year on the basis of EU regulation 1383/2003.

"This may be the tip of the iceberg. We do not know of other seizures which may have happened at other European ports", industry experts pointed out adding that trade of generic drugs is completely legitimate.

D.G. Shah, secretary general of Indian Pharmaceutical Alliance says, "It is time that the government steps in and takes effective steps to protect India's exports of pharmaceuticals".

The grounds stated by the EC include counterfeits, fake drugs, substandard, potentially dangerous products, patent violations and so on. "These are serious allegations and we take serious exception to such unsubstantiated and wild allegations. The fact that the drugs were subsequently released are a proof that the allegations were baseless", the counsellor is believed to have said at the meeting.

(*The Times of India*, 12 June 2009)

China's Coming of Age in the WTO War

IN a massive shift, China is getting more aggressive about launching WTO disputes. Amid the global economic slump, the US may find itself getting dragged to the WTO's court more often.

Gone are the days when China shied away from launching suits against other countries before the WTO top court. Facing a distressed export sector and rising protectionism amid the global economic crisis, the Chinese government will get more comfortable and aggressive about lodging WTO complaints against the US, scholars and lawyers say.

This entailed a massive attitude shift for Beijing, from seeing the WTO disputes as a failure of bilateral diplomacy to wielding the WTO dispute settlement mechanism as an extremely useful, and necessary, instrument of foreign trade policy. For Beijing, a more mature role as WTO plaintiff is also part and parcel of its growing assertiveness in the global economic order this year.

(http://www.forbes.com, 20 April 2009)

Capitalizing on DSU: The Challenge for China and Major Developing Countries

SINCE China's entry into the WTO, this country placed a strong emphasis on not only increasing trade opportunities, but also on using the dispute settlement system (DSU) in the WTO to help establish more stable and predictable trade relations with its partners. Yet, developing countries—including major members such as China and Brazil—struggle to capitalise on DSU because of its complexity and intense resource-demands. In response, ICTSD and the China Society for the WTO Development Studies organized a dialogue event to examine the DSU structure, identify major challenges faced by developing country members, and draw on lessons from case studies. The dialogue aimed to use these shared experiences to identify new strategies for strengthening DSU and developing countries' benefit from the system.

The legalized mechanism of dispute settlement in the WTO is complex and resource-demanding, raising concerns about the capacity and ability of developing countries to effectively utilize the system to safeguard their trading rights and secure their development objectives. Developing country WTO Members thus need to make cost-effective adjustments if they are to gain from DSU.

To identify strategies for improving developing countries' ability to capitalize on DSU and global trading systems, the dialogue focussed on sharing dispute settlement experiences with specific attention on major developing countries like China, Brazil and India. Participants examined the structure of DSU as it relates to these countries and draw on lessons from case studies. They undertook a thorough analysis of the major legal, financial, institutional and technical resource challenges faced by developing countries. Finally, the event considered the reforms proposed as part of the review of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes

and the larger Doha Development Round of trade negotiations.

Through these exercises, the dialogue aimed to identify and explore new strategies that promote inter-governmental and private-public coordination and cooperation. It is hoped that a list of recommendations and future strategies aimed at improving the multilateral trading system and strengthening developing countries' capacities to capitalze on DSU will be established at the dialogue's conclusion. This will then be distributed among policy makers, negotiators, governments and other key stakeholders.

(http://ictsd.org/i/events/dialogues/7928)

Wine Duty: US Takes India to WTO

THE United States has approached the WTO against India over the high customs duty it imposes on import of wine and distilled spirits.

India, however, said it wants the issue to be resolved before the matter goes to the dispute settlement mechanism at the multilateral body.

The US had informed of its decision to go to WTO with a complaint against India. The EU has already filed a complaint and has threatened to press for a dispute settlement panel to begin litigations. The US and EU were entitled to complain against India but discussions were on within the government and solution would be found out.

On top of its basic customs duties, India imposes an "additional duty" and an "extra additional duty" on imports of wine and distilled spirits, resulting in aggregated duties on these imports ranging from approximately 150 to 550 per cent.

In WTO, India had committed that its tariffs on wine and spirits would not exceed 150 per cent. Under WTO rules, parties that do not resolve an issue through consultations may refer the matter to a WTO disputes settlement panel.

The European Union had also requested the WTO dispute settlement consultations on India's duties on wine and distilled spirits. The US had requested to join these consultations but India had denied this request.

India applies an additional duty ranging from 20 to 75 per cent *ad valorem* on wine and 25 to 150 per cent *ad valorem* on distilled spirits. The extra additional duty is four per cent *ad valorem.*

In cases where wine and distilled spirits may enter India under special duty-free rules, such as for airport duty free and use in luxury hotels, US exports of these products to India have gone up by 350 and 200 per cent respectively between 2000 and 2005.

However, because of the high duties imposed on the vast majority of American wines and spirits, total exports to India remain low.

(http://www.rediff.com)

China Files WTO Complaint over US Tyre Tariffs

THE Chinese government filed a formal complaint to the WTO over steep US tariffs imposed on Chinese-made tyres. Under the WTO's dispute settlement system, the two countries will now have 60 days to try to resolve the dispute through consultations. If consultations fail, China can go further by requesting a WTO panel to investigate and rule on the case.

"China put forward a formal request for consultations with the US under the WTO dispute settlement mechanism on the US special safeguard measures against Chinese tyres," the Chinese mission to the Geneva-based body said in a statement. "China believes that the above-mentioned measure by the US, which runs counter to the relevant WTO rules, is a wrong practice abusing trade remedies," the statement said.

"China's request with the US for consultations is based on the normal practice of WTO members under the dispute settlement mechanism and concrete action by China to protect its own interests," it added.

The Chinese mission also expressed hope that "all sides will understand its determination to firmly fight against trade protectionism so as to commonly safeguard the multilateral trading system by respecting WTO rules." US President Barack Obama approved punitive tariffs up to 35 per cent on all car and light truck tires from China in a so-called attempt to "remedy the clear disruption to the US tyre industry." China had quickly denounced the

US move as a serious act of trade protectionism which violates WTO regulations.

(http://beta.thehindu.com/business)

Developing Countries Disadvantaged in the WTO: Prof B.S. Chimni

PROFESSOR B.S. Chimni, vice-chancellor of West Bengal National University of Juridical Sciences, Kolkata, India, speaks to Centad about the implications of the WTO's dispute settlement body for developing countries:

Q: The dispute settlement mechanism of the WTO was hailed as the jewel in the crown at the time of the formation of the WTO. Having observed its functioning over the past 10 years, do you think it has lived up to that expectation?

The general consensus is that the WTO dispute settlement system (DSS) has worked reasonably well in the last 10 years. From the perspective of developing countries, a multilateral DSS is better than a bilateral DSS in which powerful trading states will always have the advantage. But this understanding needs to be viewed against the background of the fact that the multilateral trade rules themselves are often biased against developing countries. A rigid and legalistic multilateral DSS may only entrench them further.

There are also some other worrisome developments. *First*, given the wide range of ambiguities that characterize the WTO agreements, scholarly writings play an important role in shaping the interpretations of the WTO appellate body (AB) and the panels. In this regard, the absence of scholarly work from the developing world has meant that interpretations that are in the interests of northern states and citizens tend to prevail. Cases on the interface between trade and the environment (for example, the shrimp-turtle case) and the EC preferences case are instances in point.

Second, while time schedules are set in the Dispute Settlement Understanding (DSU), the goal of prompt settlement of disputes is still to be achieved. Safeguard cases are an example. It takes nearly three years to settle them, causing much damage when it is noted that all existing WTO remedies are prospective.

Finally, as scholars like Peter Drahos have noted, bilateral dispute settlement systems are being established through the means of free trade agreements (FTAs) around the same normative universe as that of WTO rules. This may, in the long run, undermine the WTO DSS by effectively offering multiple dispute settlement fora to the more powerful states. They will invoke that which is most suitable to realizing their "trade" interests.

Q: Critics of the dispute settlement body (DSB) in the WTO have argued that it has not been able to achieve compliance, especially by developed countries. Do you agree with this criticism of the DSB? Do you think the retaliatory mechanism given in the DSB comes in the way of developing countries retaliating against developed countries?

I would tend to agree that developing countries are at a disadvantage when it comes to retaliating against the major trading partners, as the act of retaliation lacks credibility. There is also the fear of big trading partners reacting by withdrawing unilateral trade preferences or suspending foreign aid. Thought can, therefore, be given to variations of a decade-old proposal that would permit some form of collective retaliation by developing countries.

Q: Many developing countries and least developed countries are unable to approach the DSB due to the high litigation costs and lack of expertise at the domestic level. What is the solution to this problem?

Lack of expertise is a serious problem even for major developing countries like India and Brazil that have been active users of the WTO DSS. Brazil has tried to address the problem through innovative methods like public-private partnership to enhance its long-term capabilities. Too much reliance should not be placed on foreign experts and law firms, or else indigenous expertise will never be developed. In this respect, it is important that developing countries take part in a large number of cases, especially as third party, in order to generate greater understanding of the system.

On the issue of litigation costs, there is little doubt that steep legal fees can pose an insuperable barrier. In a number of cases, developing countries have had to spend over $1,000,000 by way of legal fees. The Advisory Centre for the WTO Law does provide subsidized assistance, but it is not all that cheap or entirely effective. Thought may be given to a proposal to award costs to a developing country when it wins a case.

Q: Do you foresee the possibility of more and more disputes coming to the DSB in future, especially in today's scenario where the Doha Round of talks has been suspended?

It is difficult to predict the number of disputes that will come before the DSB. On the one hand, the fact that a settled jurisprudence is emerging will mean fewer cases. On the other hand, states may pursue the dispute settlement route to delay bringing their laws in line with obligations under the WTO agreements, or to safeguard special interests.

Q: What should be the strategy of developing countries such as India in the ongoing negotiations on DSB in the suspended Doha Round?

India should, first, carefully assess its record before the DSB. While India has lost some cases (the patent and the QR cases) it has also been able to use the DSS to gain market access (for example, the EC bed linen case). From this it may be concluded that India is quite satisfied with the workings of the WTO DSS. Consequently, India has proposed minimal changes to the existing DSU (for example, calling for only one six-year term for AB members) to strengthen the system.

I would, however, recommend that thought be given to bringing about a structural change in the WTO DSS in order to strengthen it in favour of developing countries. It has been my argument for some time that India seek an extension of the national deference principle contained in Article 17.6 of the Antidumping Agreement to all other WTO agreements, as a special and deferential treatment for developing countries.

The national deference principle allows a state to implement its WTO obligations in a more flexible way, as it deems lawful any interpretation that falls within the definition of being a "permissible interpretation" of the concerned obligation even if a WTO panel or the AB reaches a different conclusion. This would make it possible for developing countries to safeguard the interests of their people through availing of a more flexible mode of interpretation of obligations that have been undertaken.

(http://www.centad.org/focus_31.asp)

The WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law

THE dispute settlement mechanism (DSM) of the WTO is a novelty in international law in so many respects. Although it is an improvement on the old GATT dispute settlement mechanism, it is quite different in nature from other international mechanisms available for resolving international disputes between States. Unlike other mechanisms, its rules and procedures, especially the provisions relating to the appellate body, follow the principles of common law rather than civil law.

This mechanism is a blend of diplomacy, negotiation, mediation, arbitration and adjudication. It is neither fully judicial nor completely a non-judicial mechanism.

However, this is not a perfect mechanism by any means. It is not free of constraints, deficiencies and some inherent weaknesses. Critics argue that the Dispute Settlement Body (DSB) is not as effective as it appears to be on the surface especially when it comes to enforcing the rulings of the DSB against major powers.

They also argue that it does not provide effective remedy for those non-State business actors which suffer from injustices and distortions in international trade. It is in this context that this research project aims to examine the framework of the dispute settlement system within the WTO and explore its weaknesses and ways to overcome them.

(www.law.leeds.ac.uk/research/projects/wto-dispute-mechanism.php)

Credibility of DSB Seems Reasonably Well Established: John H. Jackson

JOHN H. Jackson, Professor at Georgetown University Law Centre in Washington, US, and an expert on international economic law, shares his views with Centad on dispute settlement at the WTO:

Q: The dispute settlement mechanism of the WTO has emerged as a strong and efficient resolution mechanism in the contemporary world. How would you rate the dispute settlement body (DSB) of the WTO compared to other multilateral dispute resolution mechanisms such as the International Court of Justice?

I agree that the dispute settlement mechanism of the WTO has proven to be very strong and efficient, and in many ways very powerful. In fact, it is probably the most powerful international juridical institution (or tribunal) that exists at the international level, in an institution that has broad competence (more than very narrow technical matters). It is interesting to compare it with the International Court of Justice. The WTO dispute settlement procedure, since it was created at the time that the Marrakesh (Uruguay Round) treaty came into force on 1 January 1995, has more than 349 cases instituted. A large number of these cases do not go on to an actual panel proceeding, suggesting that there is quite a bit of case settlement going on. Nevertheless, the system has already produced 121 adopted panel reports and 78 adopted appellate body reports.

The appellate body procedure is quite unique and has lent an enormous amount of credibility to the analytical rigour of the process. These adopted reports all together provide more than 30,000 pages of jurisprudence. It is notable that this has occurred in slightly more than 10 years, and is many times the amount of case handling that the International Court of Justice can claim for the same period (or even longer). Of course, the issues before the International Court of Justice are quite different from those before the WTO, and the procedure for the International Court of Justice is less precise and a bit more political in structure than that of the WTO dispute settlement system. Nevertheless, the quality of jurisprudence of the WTO is very high, when observers compare it with other international tribunals, and also high in comparison with other international or national supreme courts like the European Court of Justice. I am not trying to rank those, mind you. I am simply saying that the quality and workmanship as well as rigour and analytical elements of the WTO jurisprudence can hold their own against any of those other juridical institutions.

Q: Some scholars have argued that the DSB of the WTO should also be used to enforce non-WTO obligations of WTO member countries. And that the entire body of public international law should be applicable law for the WTO. How do you respond to this argument?

The question of how non-WTO obligations should relate to the juridical activity of the WTO is quite complex. I think, politically, it is not going to be possible to go very far in that direction in the near future. In addition, I doubt that it is wise for the WTO dispute settlement system to reach out and try to embrace the entire body of public international law, partly because the WTO dispute settlement system is relatively short on resources, particularly compared to some other international juridical bodies such as the International Court of Justice.

But there will inevitably be some issues where, if the WTO dispute settlement system does not give recognition to non-WTO obligations (which might be used as a defence in the WTO case), an element of injustice occurs. In addition, it could add to the burden of the disputants because they might have to take a portion of the case to another tribunal, which would not be very efficient.

I think the answer to the question is that the WTO dispute settlement system will have to look at situations involving non-WTO obligations on a case-by-case basis and proceed very cautiously to embrace such non-WTO obligations only in rather special cases.

Q: The panels and the appellate body (AB) have been criticized by some scholars for displaying judicial activism. Is this charge appropriate, or is it an exaggeration? Do you think that panels and the AB should pursue some judicial activism in their functioning?

Judicial activism is a rubric that is often hurled at juridical institutions, both at the nation state and the international level. There is a great grey area about judicial activism. Clearly, a juridical institution ought not to be overtly and aggressively attempting to "make law" in a legislative sense. However, many critics argue that such a juridical institution should not try to fill gaps and in some cases should be much more constrained in the way they interpret the material.

This is a viewpoint that can be quite damaging to any juridical institution, particularly when the subject matter of the juridical institution is treaty language. When a treaty has been negotiated by a hundred or more members, and applies to 150 or more members, it is inevitable that there will be gaps and ambiguities. To argue that the juridical institution that has been set up by the members precisely to resolve some of these problems should be timid or unduly restrictive in how it goes about the task of gap-filling and ambiguity-resolving, is really to manifest a hostility to the whole notion of the importance of the juridical institution, which after all is designed to provide predictability and security to millions of entrepreneurs who depend on the rules and need some direction and resolution of disputes on the meaning of treaty language.

So, in reference to the way in which the question has been formulated, I think it is inevitable for an international juridical institution such as the WTO and its panels and appellate body to pursue some "judicial activism" in its functioning. The more the WTO as a total institution, including its decision-making and negotiation processes, seems paralyzed, the more members will seek to take their cases to the dispute settlement system where they, in fact, seem to be able to make some progress in correcting some of the flaws of the institution and its members. Consequently, there is a tension between the dispute settlement system and the non-dispute settlement system, and this should lead members of the WTO to be more responsible in developing the organization's negotiating and decision-making procedures, by which the parties, members of the WTO, can express and negotiate and resolve their differences in a situation that is somewhat different from and perhaps more constructive than litigation.

Q: What do you think are the main flaws of the DSB? And how should these flaws be corrected?

It is not easy, maybe even impossible, to list the "main flaws" of the DSB in any complete inventory. A few items might be mentioned, however, based on observations of a number of astute persons. Of course, there is often controversy about whether a certain attribute is, in fact, a flaw or a beneficial attribute. But the jurisprudence of the WTO seems unduly "textual", although there is an indication that some early members of the appellate body thought that this was an appropriate way to gain credibility as being objective. As time goes by, however, the credibility of the WTO dispute settlement system seems reasonably well established and, therefore, a bit of experimentation or leeway in the way the treaty text is handled to achieve a resolution of problems that could otherwise be very inefficient for the WTO, is worthy and supportable.

Another problem that some have observed has been (at least at the panel level) the very elaborate length of the opinions, and sometimes the tediousness of the recited detail. This length and detail often occurs when the case involves a number of small issues, which can be as many as 40 or more in a particular case. Panels have sometimes felt it necessary to handle each one of these small issues with a fairly fulsome written rationale, when it might be possible, as a matter of style, to enunciate some principles and then indicate how those principles might be carried out in specific detailed situations.

There is also some criticism of the dispute settlement panels and appellate body, regarding the way they handle preparatory work of the treaties. This, of course, is a troublesome question and has been debated for many decades, if not longer, in general international law. But there are some situations in the WTO, particularly relating to safeguards and the "unforeseeable criteria" for certain measures, in which the dispute settlement

reports seem to have ignored important features of the intent of the parties reflected in the preparatory work.

Q: Developed countries such as the US and the EC have a poor track record in terms of complying with the rulings of the DSB. What kind of impact does such non-compliance have on the WTO? Do you approve of more stringent rules in the DSB to stop such abuses by developed countries?

The question assumes that the US and the EC have a poor track record in terms of compliance, and it may be possible to make the judgment that the track record of the US and the EC is somewhat less compliant than other cases in the WTO. However, overall, the track record of compliance appears to be very good, even including the US and the EC. The director of the legal service of the WTO has stated, at a conference, his opinion, that seems quite persuasive, that the compliance record on the whole has been quite good.

Of course, the US and the EC are among the largest economies under the supervision of the WTO. And so it is not surprising that each of these entities has a very large number of cases in which they have been disputants (either complainants or respondents). Because they have had such a large number each, it is not surprising that there have been at least a few cases in which it can be said that the degree of compliance has not been too salutary. If this were more typical and more frequent, it could have an impact on the credibility of the total dispute settlement system and would, therefore, undermine some of the policy goals of having the dispute settlement system. Personally, I do not think we are at that point yet.

With respect to the US, it has been observed that for the most part when it can comply by executive action without recourse to congressional action, the US does comply. The US has stated that its policy is always to comply. The difficulty for the US has come when it has had to obtain congressional legislative action in order to comply appropriately. Nevertheless, even in some of those cases there have been recent actions by the Congress to comply, and I believe the trend towards good compliance will be more manifest as time goes by, and the governments of the world become more

familiar with the processes and the policy reasons for compliance with the dispute settlement reports. I understand that there are various ideas for more "stringent rules" in the DSB to stop "abuses" by developed countries, but I do not think those are necessary yet.

I doubt that more stringent rules would be a very effective way, in the longer run, to achieve better compliance. In the Sutherland Report of the consultative body, established by the then WTO director-general Dr Supachai, the group reported considerable satisfaction with the WTO dispute settlement system and warned against certain proposed changes, suggesting that the main goal at present for the DSS is to "do no harm".

(http://www.centad.org/focus_30.asp)

The WTO Dispute Settlement Mechanism and Developing Countries*

DEVELOPING countries need access to foreign markets if they are to reap the benefits of globalization. Multilateral negotiations under the World Trade Organization (WTO) play a pivotal role in facilitating market access.[1] Yet, throughout the global economy, pressures for protectionism abound, threatening to roll back these gains. As a result, the WTO's dispute settlement mechanism is widely seen as one of the most critical – and successful-features of the trade regime. Using this mechanism, WTO member-states can shine the spotlight of international legal scrutiny on the protectionist practices of their trading partners. This rule-of-law system is especially important for developing countries, which typically lack the market size to exert much influence through more power-oriented trade diplomacy. Indeed, some poorer countries have used the WTO dispute settlement system to great effect, proving the system's worth from a development perspective.[2] Nonetheless, the technical and legal complexity of this regime makes it difficult for other developing countries to effectively use the system, many of which have never filed a WTO dispute, despite having repeated grounds to do so. In this issues brief, we elaborate this point by describing: (a) how WTO dispute settlement works; (b) the prospective benefits and hurdles to effective use of the regime by developing countries; and (c) some potential directions for technical assistance and capacity-building, focusing on WTO dispute settlement, in particular.

1. How WTO Dispute Settlement Works

A WTO dispute proceeds through three main stages: consultation; formal litigation; and, if necessary, implementation. All disputes start with a request for consultations, in which the member government bringing the case to the WTO (*the complainant*) sets out its objections to the trade measure(s) of another member government (*the defendant*). The two sides are then required to consult for 60 days with the goal of negotiating a mutually satisfactory solution to the dispute. Interestingly, a large proportion of cases are successfully resolved during consultations; 46 per cent of all disputes brought to the WTO end at this stage, and three-quarters of those yield at least partial concessions from the defendant.[3]

If consultations do not result in a mutually satisfactory solution, the complainant can request a panel proceeding, marking the start of the formal litigation stage. Panels are comprised of three to five persons with a background in trade law, agreed to by the parties on a case-by-case basis. There are typically two rounds of testimony, including from other countries (*third parties*) that notify the WTO of a "substantial" interest in the case. The panel then circulates an "interim report," offering both sides an opportunity to comment and seek clarification. The complainant and defendant can still negotiate a settlement at this point. In fact, another 13 per cent of all cases end at this stage *before* a ruling is rendered. If not, the panel issues

* This note was written by Marc L. Busch, Associate Professor, Queen's School of Business, Queen's University, Kingston, Ontario, Canada and Eric Reinhardt, Associate Professor, Department of Political Science, Emory University, Atlanta, Georgia, USA, February 2004.

its final report, which is then adopted by the WTO, unless one of two things happens. *First*, the two sides can agree *not* to adopt the panel report for whatever reason, although to date this has not happened. *Second*, one or both sides (but not third parties) can appeal the panel's report, which happens frequently (i.e., in 73% of panel rulings).

The Appellate Body (AB) handles these appeals. Unlike panels, the AB is a standing body of jurists which is designed to ensure greater consistency across its rulings. The AB is tasked with hearing testimony from the parties, and any third parties, on how the panel may have erred in its legal reasoning. The AB can uphold or overturn the panel in whole or in part, and its decision is final. If this verdict favours the defendant, the case typically ends. If this verdict, instead, favours the complainant, the dispute may proceed to the implementation stage.

When a defendant is ruled against, the panel and (or) AB calls for it to bring its measures into accordance with its WTO obligations. What this means in practice is, itself, often contested. If the complainant feels that the defendant has not taken appropriate steps, it can subsequently request a "compliance" panel. This panel, which is often comprised of the original panel members, must determine whether the defendant's efforts have, in fact, brought its measure(s) into compliance. If not – a judgment the defendant can appeal to the AB – the complainant can request a second panel to set the level at which it can "retaliate" against the defendant. This typically involves imposing tariffs on the defendant's exports. It is essential to note two things about retaliation. *First*, requests for authorization to retaliate are rare. Indeed, complainants have asked for authorization to retaliate in just seven of the hundreds of cases handled by the WTO. *Second*, it is up to the complainant, and not the WTO, to follow through on this authorization to retaliate, and this is rarer still. Of the six requests authorized to date (the seventh was pending at the time of this writing), complainants have retaliated in only three cases.

What is remarkable is that, despite its blend of law and politics, the system works, and works quite well. In fact, two-thirds of the disputes brought for adjudication in Geneva are resolved to the full satisfaction of the complainant. But is this true for all members? In particular, is the system useful for developing countries, most notably in disputes against developed countries? The answer is clearly "yes," although more can be done to help developing countries make better use of the system.

2. WTO Dispute Settlement from a Development Perspective

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

The conventional wisdom, of course, is that developing countries face substantial hurdles in using WTO dispute settlement.[4] Foremost among these is their lack of market size with which to credibly threaten retaliation for noncompliance. In other words, the concern is that even with a legal victory in hand, a developing country may not be able to compel the defendant to liberalize, since its threat to retaliate lacks credibility. This may deter developing countries from filing complaints in the first place. A developing country might also be reluctant to initiate a dispute because of fears of reprisals, such as the suspension of foreign aid or unilateral trade preferences.

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

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

With these obstacles in mind, it might seem that developing countries stand to benefit little from WTO dispute settlement. But this is far from true. Poorer complainants have filed and won concessions from large industrialized states in a wide variety of disputes, with millions of dollars at stake. These cases have involved exports of underwear (Costa Rica v. US), shrimp (Thailand and Pakistan v. US), wool shirts (India v. US), gasoline (Venezuela and Brazil v. US), sardines (Peru v. European Communities) and poultry (Brazil v. European Communities), among other products.

Why, despite their lack of a credible threat to retaliate, have these developing countries succeeded in making effective use of WTO dispute settlement? The reason is that these complainants, like their wealthier counterparts, have benefited from the fact that defendants worry about the normative condemnation that goes along with a legal defeat, rather than threats of direct retaliation per se. In other words, defendants prefer to avoid being found "noncompliant" because such a label may damage their prospects of gaining compliance when they, in turn, file as complainants. In this way, defendant governments may value the integrity of the multilateral trade regime over the outcome of a single case. This means that poor complainants can use legal victories at the WTO to weigh in on the domestic political debates over free trade within defendant countries, as they look to gain market access. In short, the effectiveness of WTO dispute settlement derives more from these intangibles than from trade sanctions, which are rare, and which could never have been a credible factor in the dozens of cases in which wealthy defendants have conceded to poor complainants.

Viewed from this perspective, the emphasis on retaliation at the WTO is misplaced. While it is true that larger countries can more credibly threaten to retaliate, threats of retaliation are not the key to the system. As Robert Hudec explained, other provisions of the WTO "make legal complaints *without retaliation* quite a bit more effective than they were" under GATT. He further observed that the inability of poor countries to retaliate "is a problem, but it is a separate problem that has nothing to do with the utility of the dispute settlement procedure for a developing country complainant."[5] The evidence, to which we now turn, bears out Hudec's discerning insight.

In looking at the evidence, the first thing to note is that most WTO disputes are among a few members that account for the bulk of international trade, most notably the US and Europe. By comparison, developing countries have had little experience with dispute settlement. But, as Table 1 indicates, this disparity is largely explained by differences in trade volumes. Consistent with this explanation, a few developing countries, such as Brazil and India, have launched a relatively large number of disputes, while others, like China, are increasingly active in dispute settlement as third parties, seeking to gain experience with the system.

Nonetheless, the record of dispute outcomes testifies to the acuteness of the legal capacity problem for the smaller and poorer countries in the developing world. Table 2 displays the data on dispute outcomes since 1995. To be sure, despite their weak market power, the poorest complainants have nonetheless managed to get larger defendants to concede fully in over 40 per cent of their cases. Yet their developed counterparts gain full concessions in nearly three-quarters of their complaints. As we show in a recent study (Busch and Reinhardt 2003), this is not just an artefact of differences in economic size.

Rather, while the system is clearly working for all complainants, it is working better for those with the know-how and savvy to take maximum advantage of the legal opportunities the system affords.

This is not to say that the legal decisions handed down by the WTO are *politically* biased against developing countries. Far from it. Developing countries, as it turns out, are no less likely to win a ruling than wealthier complainants.[6] Moreover, defendants are just as likely to comply with a ruling

won by a developing country as they are with a ruling won by a wealthier complainant.

Rather, the problem is that developing countries are far less likely than richer ones to induce a settlement *before* a ruling is issued. In other words, wealthier countries tend to resolve their disputes through negotiation, either in consultations or at the panel stage before a verdict, whereas poorer complainants are unable to get complainants to offer substantial concessions at these points in the process. In trade disputes between the United States and the European Union, for example, all cases yielding concessions have ended before the panel rules. In short, the benefits of adjudication disproportionately happen before formal litigation is complete, and often before it even commences. This is why it is especially important for developing countries to close the gap in "early settlement."

3. Priorities for Capacity-Building and Technical Assistance on Dispute Settlement

There are several priorities for capacity-building and technical assistance. *First*, developing countries need more access to information on the WTO-legality of the measures employed by their major trade partners. This information is vital not just in thinking about *how* to prosecute a case, but *whether* to prosecute a case. Institutions like the Agency for International Trade Information and Cooperation offer assistance to developing countries in interpreting trends in the global economy, and the Advisory Centre on WTO Law provides subsidized legal assistance. To close the early settlement gap, developing countries need to bridge the important contributions of these and other institutions, particularly with respect to evaluating the merits of a case *before* it is filed in

TABLE 1

WTO DISPUTE PARTICIPATION BY MEMBERS' LEVEL OF DEVELOPMENT

Member Income Category	*Number of WTO Members*	*Number of WTO Disputes as Complainant*	*Number of WTO Disputes as Defendant*	*Per cent of WTO Members' Total Exports*
Low	44 (34%)	20 (7%)	20 (7%)	3.8%
Lower-Middle	33 (26%)	48 (17%)	35 (12%)	12.4%
Upper-Middle	26 (20%)	35 (12%)	46 (16%)	10.2%
High	26 (20%)	183 (64%)	185 (65%)	73.6%
Total	129 (100%)	286 (100%)	286 (100%)	100%

Note: Dispute counts include all filed from 1995 through the end of 2002. Trade figures are from 2000 and count both goods and services but only external trade in the case of the European Community (EC). World Bank country classifications for 2002 are used. The "Number of WTO Members" column reports the 2002 figure and does not include the 15 members of the EC, as apart from the EC itself. Sixteen of the 20 "low income" complaints were filed by India alone; the other four were initiated by Indonesia and Pakistan.

Source: World Bank (2003); Busch and Reinhardt (2003).

TABLE 2

WTO DISPUTE OUTCOMES BY COMPLAINANT'S LEVEL OF DEVELOPMENT

		Level of Concessions			
		None	Partial	Full	Total
Complainant's Income Category	Low and Lower-Middle	8 (29%)	8 (29%)	12 (43%)	28
	Upper-Middle	4 (27%)	3 (20%)	8 (53%)	15
	High	20 (18%)	10 (9%)	82 (73%)	112
	Total	32	21	102	155

Note: Row percentages shown in parentheses. The table includes all WTO disputes begun from 1995 through 2000 and concluded by early 2003. Too few disputes with low income complainants occurred in this period for them to be counted separately. The association here is statistically significant (c2=11.96, 4 d.o.f., p=0.02).

Source: World Bank (2003); Busch and Reinhardt (2003).

Geneva, and articulating a negotiating strategy to win concessions *before* a legal verdict is issued. The long-term goal, of course, is to build-up this expertise in the capitals of developing countries, but in the short-term the focus might be on funding institutions like the Advisory Centre to increase staff and tackle this broader mandate, or develop others to fill this role.

Second, developing countries also require assistance monitoring compliance with the WTO verdicts that they win. Both domestic and foreign trade associations and consumer groups can play a key role in this respect. Indeed, these organizations have strong incentive to keep track of protectionist practices on behalf of their constituents, and often have information that governments need to monitor compliance. The challenge for developing countries is not only to sponsor domestic trade associations and consumer groups, but to forge contacts with foreign ones. Peru, for example, was assisted by a British consumer group in challenging Europe's trade restrictions on sardines, an ally that will prove crucial in monitoring future compliance.[7] Forging alliances with foreign trade associations and consumer groups is also a highly cost-effective strategies for making better use of WTO dispute settlement, since resources are shared across a wide variety of organizations with local expertise.

Why should wealthy countries invest in capacity building and technical assistance for developing countries? The answer is simple: it is in their own best interest to do so. If developing countries are less successful in WTO dispute settlement, this only incites cheating in the system more generally, which in turn hurts wealthier countries, not just poorer ones. Lesser success in dispute settlement would also have a chilling effect on the willingness of developing countries to negotiate future trade rounds. Investing in capacity building and technical assistance should thus be a priority for the WTO membership as a whole, particularly as a means to closing the early settlement gap.

NOTES

[1] For example, the largest developed countries have tended to reserve their deepest concessions on agriculture, a sector of central interest to many developing country exporters, for the multilateral forum, not bilateral trade agreements.

[2] Of course, some developing countries also have access to dispute settlement procedures in preferential trade agreements. Such bilateral or regional mechanisms, however, have yielded fewer benefits in practice. This is because they cover fewer partners, and often do not have the same in-depth coverage of areas that are especially salient for developing countries, like agriculture.

[3] This and all subsequently cited figures on WTO dispute participation, escalation, and outcomes, are derived from the dataset on WTO disputes maintained by the authors, as updated and reported most recently in Busch and Reinhardt (2003). Full definitions of the means of counting disputes and coding outcomes are in Busch and Reinhardt (2002).

[4] Hoekman and Mavroidis (2000).

[5] Hudec (2002), p. 84. Emphasis added.

[6] Both groups win rulings about 60 per cent of the time, with only a little variation from that figure depending on how you define the "development" categories.

[7] Shaffer and Mosoti (2002), p. 16.

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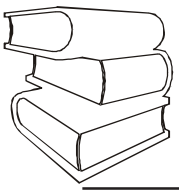

BOOKS/ARTICLES NOTES

BOOK

Key Issues in the WTO Dispute Settlement: The First Ten Years by Rufus Yerxa and Bruce Wilson (eds.), New York City: Cambridge University Press, 2005, pp. 328.

THIS volume of essays about the World Trade Organization's (WTO) dispute settlement system is different from the other volumes as it presents an insider's perspective. This volume contains contributions from an extraordinary group of the WTO law practitioners and scholars. The volume tries to reflect over the first decade of the dispute settlement system with the help of hands-on experience and to take stock of the lessons to be learnt. The editors have created an interesting book as experienced group of practitioners has examined the broad range of the WTO dispute settlement issues. Although the essays in the book are not very descriptive but the contributors have given depth to them by reflecting over the variety of the WTO and dispute settlement issues through the example of the past decade. The volume is divided into three parts. Part I consists of the introduction and general considerations; Part II is about processes and institutions; and Part III addresses systemic and other issues. Although as many as 24 authors have written 22 essays on the issues related to the WTO, the contributions by the authors doesn't seem too repetitive.

Part I comprises just two essays, first one is the "The Power of the WTO Dispute Settlement System" and the second one is "The WTO Dispute Settlement and General International Law". It provides sufficient knowledge about dispute settlement in the WTO and general laws related to the issue. Part II is interesting as it provides chronological steps in a "WTO case"; i.e. each phase, from initiation of the complaint through to the request for suspension of concessions. The article named "Consultations and the Panel Process in the WTO Dispute Settlement System" by Gabrielle Marceau's in particular, is very informative for any outsider, as it provides detailed information to understand and get familiar with the realm of the WTO dispute settlement system. However, the article also contains valuable information for more experienced scholar as a type of road-map regarding many difficult topics, such as non-violation complaints, rules of conduct, including confidentiality, and the use of experts. Bruce Wilson's article includes a description of the WTO Secretariat's role in proceedings. For the outsider, this type of information is useful, but elaboration on the issue will be more helpful for the reader. Jesse Kreier's essay on "Contingent Trade Remedies and WTO Dispute Settlement: Some Particularities" provides knowledge of remedies and valuable information. The articles by Peter Van Den Bossche, Brendan McGivern and Valerie Hughes investigate into different matters related to the Appellate Body of the WTO. The remaining articles in Part II deal with the measures, countermeasures, rules and regulations of the dispute settlement body.

The essays in Part III deal with individual issues in the dispute settlement system and appeal to the more advanced scholars. One of the best examples is probably the thorough analysis of the concept of jurisdiction by Joel Trachtman, in which he enumerates issues to be analyzed: (1) jurisdiction over claims; (2) jurisdiction to apply law (including the often puzzling issue of what applicable law is within the WTO-system); (3) deference to other fora; (4) ripeness, mandatory and discretionary legislation, claims against legislation as such, and exhaustion of local remedies; (5) jurisdiction over persons; (6) jurisdiction of the Appellate Body, and (7) compliance and remedies. This type of systematic analysis, or outline of issues regarding jurisdiction, will perhaps not assist the senior researcher, but

will undoubtedly assist more junior researchers in structuring their "approach" to jurisdiction in international dispute resolution systems, in particular that of the WTO. Professor Trachtman's essay is, moreover, one of those that make use of the most references. Another very good example is Andrew Mitchell's fascinating analysis of due process leading back to the roots of this principle in the common law system in the UK, but also in Australian and American law. Matthias Oesch's essay in Part III of the volume is good for even non-experts, as he deals the issue which explains the concept in a straightforward manner.

The volume is full of insiders' stories. Peter Van den Bossche introduces the fascinating historical background on how nobody foresaw that the Appellate Body would become "The World Trade Court". Van den Bossche explains everything from the line-up of the original Appellate Body members, to how WTO law was understood to be part of public international law, and how the Appellate Body clarified its style of interpretation and adherence to the Vienna Convention of the Law of Treaties – to more practical points, such as the notion of "collegiality". Valerie Hughes' article on the US Steel Safeguards proceedings is also valuable for its insider's perspective. The article provides a lot of practical information about how appellate proceedings take place in the WTO. The article deals with small story about practicalities which are particularly invaluable and describe the practical problem of finding meeting rooms to fit approximately 100 people that were supposed to be present during the US steel safeguards hearing, as well as other logistical issues. The WTO has improved its external transparency greatly by de-restricting documents much more quickly than was previously the case. Therefore, not only do government officials have access to the latest minutes of the meetings, but also the general public. But it is one thing to read the minutes of the meetings, it is another to attend the meetings; sensing the atmosphere as well as attending the informal meetings for which minutes are not taken. In his piece on the implementation of panel and Appellate Body rulings, Brendan McGivern's clear and concise opinion on the way in which surveillance of implementation in the DSB has provided the results one might have hoped for is an excellent example. The essay by Scott Andersen named as "Administration of Evidence in WTO Dispute Settlement Proceedings" deals with the issues related to the administrative evidences. While the essay by Olivier Prost portrays valuable information on the confidentiality issues under the DSU, it also tries to focus on the issue related to the process versus confidentiality. Werner Zdouc, who is now the Director of the Appellate Body, offers insights into different Member proposals regarding the "Reasonable Period of Time", after having introduced this requirement generally. Other good examples of DSU-review issues are presented by Brendan McGivern, who explains what sequencing is and how it became a problem during the EC Bananas III dispute. Read together with David Evan's and Celso de Tarso Pereira's description of the same problem, the volume equips the reader to understand the "basics" of the sequencing issue, and how it has been temporarily solved. Evans and de Tarso Pereira also introduce the reader to the issue of remand or lack thereof in the DSU. The lack of a remand procedure has become such an obvious flaw in the DSU that most Members would probably be in agreement. As the authors point out, the procedure was obviously needed in the Canada Dairy proceedings, which had to start over again because of the insufficient factual basis established by the panel. In conclusion, the book finds its strength in presenting the stories of true insiders as well as a useful introduction to the system for the people who are not involved directly in the system related to the WTO. The book is also good for the more experienced WTO lawyer or researcher due to its rare nature and interesting blend of research, analysis and description of practical experiences with the dispute settlement system.

ARTICLES

An Impressive Dispute Settlement System by Edwin M. Adams, *The Financial Express*, 26 January 2005.

THE article at its outset mentions about the successful operation of the WTO dispute settlement system. It says that in the process of completing ten years, the number of complainants in the dispute settlement system from developing countries has increased as compared to the number of the complainants from the US and the EU. Mentioning about the statistics the article states that prior to the 2002 complaints, 60 per cent disputes have been settled. Therefore, it appears that most disputes are settled or become moot because the major complain ceases to exist or the complainants freely choose not to pursue the case. The article mentions that out of the 74 remaining disputes where panels were established and have reported or are actively working; only five of those 74 cases are pending. It also mentions that the successful implementation rate of dispute settlement is 83 per cent, which is better record than that of the International Court of Justice. But the article states that it must be admitted that of all of the goals of dispute settlement, the WTO is weakest on promptness. Mentioning about the problem of the developing countries, the article says that though they have frequently used the system but many find the cost involved to be prohibitive.

The next section of the article mentions that the WTO dispute settlement system appears to be a quite effective mechanism through which its members are able to raise disputed trade issues and resolve them either amicably or through formal panel/appellate body proceedings. It also says that in the recent years there has been a growing problem of the US non-compliance with adverse WTO decisions. Therefore, it is crucial for the US, and the EC to implement adverse WTO decisions otherwise other WTO members may start to drag their feet on implementation as well. Taking the example of India, the article points out that as a complainant, roughly one-half of India's cases have involved challenges to measures restricting Indian textile, steel, shrimp, rice and clothing exports. As far as respondent countries are concerned, India's main targets have been the US (six cases) and the EC (five cases), which have, in turn, been the main complainants against India. The article also mentions about the Indian victory in the EC Bed Linen case and the US Textiles Origin case, where it generally had success in its affirmative use of dispute settlement.

Finally, the article mentions about the patents case which was difficult to implement for India and required to establish a so-called mail-box procedure so that pharmaceutical companies could preserve their patent priority on products that should become patentable in 2005. The procedure was not so controversial but controversy was on the idea that pharmaceuticals would eventually be patentable. The article concludes with the statement that India has been able to make rather effective use of the WTO dispute settlement system to pursue issues that matter to it and that affects important export sectors.

A Thoughtless Tax by Jagdish Bhagwati and Arvind Panagariya, *The Times of India*, 8 December 2009.

THE authors of the article have pointed out the issue of carbon tax and differences persisting between the developed and developing countries regarding the issue of carbon tax. They also mention about some better alternatives for carbon tax-equalizing tariffs in the article. In the introductory section of the article the authors mention that in the backdrop of the Copenhagen conference on climate change the proposals by the US Congress and France on carbon tax equalizing tariff are based on fears and have very little grounding in economic analysis. The article states that such actions are likely to be considered violative of the WTO rights of the developing countries on whom such tariffs would be imposed. Therefore, the WTO Dispute Settlement Mechanism will certainly provoke WTO-legal retaliation in several ways by countries that are hit with such tariffs. It says that the threat of such tariffs will certainly produce "local warming" at Copenhagen and undermine the progress to a satisfactory conclusion of a new climate change treaty. The authors state that the developed world like the US and the EU demand that unless developing countries cut their emission, developed countries should not be asked to cut their emissions.

The next section of the article mentions about the fear of trade uncompetitiveness of one's industries if other countries do not have an identical burden sounds more reasonable. The article takes the reference of the empirical analysis at Brookings Institution by Warren McKibbin and Peter Wilcoxen, under the leadership of economist Lael Brainard, which has demonstrated that uncompetitiveness is a much-exaggerated fear. It further mentions that the Netherlands Bureau for Economic Policy Analysis concluded recently that raising import tariffs on imports from low-carbon-tax countries would have little impact on total carbon emissions. Mentioning about the Carbon tariff, the article says that calculating the carbon content of a product is as arbitrary as calculating the "local content" and source of origin in implementing preferential trade agreements for cheaper market access. As it involves imposing tariffs rather than exemptions from tariffs and therefore will be more contentious and productive of disharmony.

The final section of the article provides three alternatives to the carbon-tax-equalizing tariffs, where it says that the use of such carbon tariffs must be effectively ruled out and it cannot be done by mere advocacy and hope that governments will become more enlightened. It says that Copenhagen accord must contain a moratorium under which no such tariffs would be levied, foregoing therefore the use of Articles II, III and XX at the WTO to do so. It also suggests that under the 1995 Subsidies and Countervailing Measures Code at the WTO, the use of green subsidies unless they are strictly across-the-board is actionable and therefore we need to get a waiver from the SCM Code; or we need to amend it. Finally, the article suggests that we can unite behind the proposal to free trade in environment friendly products and services, which is close to a turnover of half a trillion US dollars.

China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement by Chad P. Bown, Working Paper No. 13349, August 2007.
Source: http://www.nber.org/papers/w13349

THE paper assesses China's integration into the global trading system by examining areas of international political-economic "friction" associated with its increased trade. It also provides evidence that the WTO members are also discriminating against China's exports by substituting use of new import-restricting "China-safeguard" policy instruments. This paper is divided into six sections. The first section introduces about the paper while second section mentions about the foreign use of antidumping against China's exports. Third section of the paper points out about the consistent WTO policies that restrict imports from China. Fourth section of the paper mentions about China's imports and its own use of antidumping and safeguards. Fifth section of the article mentions about China's position in WTO dispute settlement as a complainant and as a respondent while the last section presents the conclusions.

The introductory section of the paper points out that from the broad perspective of economic theory, China's 2001 WTO accession might be motivated by the fact that China agreed to undertake substantial import liberalization in exchange for greater certainty with respect to market access for its exports. This section also mentions about number of newly compiled data sources that track areas of international political-economic tensions associated with China's increased trade. With respect to policies facing China's exports, the paper examined data on WTO members' use of antidumping import restrictions against the Chinese firms prior to and following its 2001 accession. The second section of the article mentions that although it is certainly not the only tool of protectionism, antidumping is increasingly one of the few WTO consistent instruments of protection. It remains available to policymakers as more and more countries bind their import tariffs under the WTO and take on other liberalization commitments. By using a number of measures across virtually all of the major antidumping users in the WTO system, second section of the paper finds that China's exporters faced substantial discriminatory treatment relative to other exporting country targets during the 1995-2001 periods. This section also points out that foreign user were more likely to target China's products that were benefiting from high Chinese import tariffs. The theory is that high-tariff products may have been targeted to assist negotiators extract market access commitments from China. It was unlikely that these countries were targeting such products with the strategic purpose of influencing China's tariff liberalization

commitments under its WTO accession negotiations. An alternative explanation is that the positive correlation simply reflects a common political economy pressure facing makers of the same product in China and these other developing countries. This section also points out that simply the political pressure manifests in different policy instruments and this makes sense since China did not have an active antidumping policy in place during most of the time period.

The third section examines WTO member use of a number of other trade policy instruments to assess the likelihood of such trade policy substitution. These include the transitional product-specific China safeguard, the WTO's "regular" safeguard policy and other negotiated safeguard-like trade restrictions such as the reemergence of "grey-area" measures and "voluntary" export restraints (VERs) that were banned by the WTO in prior contexts, and finally countervailing measures under "anti-subsidy" policies. The resort to such policies in addition to antidumping has arisen as the WTO members are now otherwise required to offer Chinese exporters MFN treatment through their tariff schedules. The next section points out the concern of China's own import market access liberalization commitments associated with its WTO accession. The section examines the issue of new market access in the midst of the political-economic pressure imposed by domestic, import-competing firms that call for the imposition of new trade restrictions. It also examines data on China's own new and growing use of antidumping as well as other import-restricting measures. This section describes the composition of sectors and foreign countries that are the targets of China's increasingly important antidumping use, as well as potential explanations for these targets. As far as the chemical industry is concerned there is some evidence from experience which shows that an additional 1 percentage point reduction in the MFN applied tariff rate during 2001-2002 is associated with a 1.7 to 2.3 percentage point increase in the probability that a given chemical product seeks an antidumping investigation over the subsequent 5-year period. It is also apparent that it may be the timing of the effect that matters, as there is no statistically significant relationship between the probability of a post-accession antidumping investigation and the size of the overall trade liberalization commitment made for the 1996-2005 time period.

Finally, the fifth section of this paper examines that how China has been learning to manage trade frictions through the formal, multilateral auspices of WTO dispute settlement proceedings. The data indicates that, despite predictions based on its share of global trade and diversity of trading partners that might have led to expectations that China would be a frequent litigant in the WTO disputes, such activity did not materialize in the first five years after its accession. Instead, China has stood on the sideline of other countries' disputes learning about the process in anticipation. However, an outbreak of recently initiated disputes as well as other related policy changes and external shocks indicate that China's role in future WTO dispute settlement may be substantially altered. The concluding section mentions that while a number of other factors were also changing during the time period, including WTO members being required to otherwise offer China MFN treatment and China's own rising exports since 2001, there is no evidence that foreign discrimination *vis-a-vis* China via antidumping has improved. Furthermore, there are a number of additional trade policy instruments that have also developed since 2001 that countries are also resorting to so as to continue to discriminate against Chinese exports in certain products. Unlike other major users of antidumping that are each increasingly applying their measures in a discriminatory fashion, the paper also provides evidence that China applies such new trade restrictions in a much less discriminatory fashion. It also says that while it is somewhat surprising that China was not a frequent litigant in formal WTO dispute settlement activity in the early years after its accession, it is currently confronted by a number of WTO disputes.

In Breach of World Trade Rules,
(Editorial), *The Hindu*, 5 April 2006.

THE editorial points out the case of the Dispute Settlement Body of the World Trade Organization (WTO), which ruled certain illegal provisions of the US laws. It mentions that the point of interest in this matter for the wider world is not just the merits of the complaint, raised by the European Community that US laws allowed export subsidies

to its corporations operating overseas in violation of the GATT/WTO agreements. The editorial mentions the significance of the matter and says that the "Foreign Sales Corporation case" started with the raising of the dispute by the European Community as early as 1997. The author mentions that dispute resolution process of the WTO, which included consultations, constitution of a panel to hear disputes, appellate panel, compliance review panel and arbitration, was gone through to get the US to honour the first ruling that went against it. In the course of these proceedings, the US introduced two new laws, which were against the GATT/WTO agreements. The European Union had imposed retaliatory sanctions against the US, as allowed by the WTO regulations, by way of compensation for the damage to its interests arising from the US failure to honour the world trade body's verdict.

The author states that even the most ardent champion of the WTO system finds it difficult to align domestic interests and pressures with the WTO regime despite the fact that the US, as required by its Constitution, had got the Uruguay Round agreements ratified by Congress. The author also mentions the case related to the Byrd Amendment, which enabled the US manufacturers involved in anti-dumping complaints against imports. The refund of duties was challenged in the "Byrd Amendment case" in the WTO by major trade partners like the EU and also countries like India. The author mentions that the American law was again subject to a dispute regarding the time asked for by the US to enforce the ruling. There are few more landmark cases of other major trading powers evading implementation of decisions of the world body, although ultimately they fell in line. The author points out that the lesson from all this is that fair trade is easy to preach but difficult to practice within the framework of the nation-state system. On the positive side, it shows that unlike many other multilateral institutions, including the United Nations, the WTO is a forum where the mighty can lose a case as easily as humble members and the rule of (WTO) law, even if not entirely equitable, does prevail.

India may be Nearing Dispute Settlement with EU Over Generic Drug Seizures

by Kaitlin Mara, *Source: http://www.eatg.org/eatg/*, 29 August 2009.

THE article mentions about the ongoing concerns in India that their legitimate generic drug shipments are being delayed and therefore India appears to be moving closer to filing a dispute settlement complaint against the EU. Mentioning about the procedure of dispute panel formation the article says that first stage of a dispute is consultation between the parties and if there is no resolution between them then dispute panel formation can ultimately lead to the sanctions. Taking the reference of the WTO website, the article says that after filing the complaint if two countries are not able to settle the differences after sixty days without the help of the WTO secretariat then the complaining government can request for a panel. The accused party can block a request for a panel once, but not twice. The panel has to issue a final report on the case to the parties in six months, which can be appealed by either side. The countries which are found in violation are expected to begin implementing corrections immediately upon issuance of that conclusion.

Mentioning the issue of drug seizure the article says that the shipment of 500 kilos of a hypertension drug had been seized en route from Indian generic manufacturer Dr. Reddy's to its destination in Brazil. The drug was patented in neither its country of origin nor country of destination, but was held for 36 days in a Dutch port before being released and taken back to India. The article also mentions about six incidents of seizures of Indian drug consignments in EU, though they were meant for countries outside territory of EU. These include HIV/AIDS medicines meant for Nigeria. Even a consignment of a medicine called Losartan, which has IP rights in both at the point of origin (India) and at the destination point (Africa and Brazil) was detained in the EU. The article states that the EU has breached the provisions of trade-related aspects of intellectual property rights and General Agreement on Tariffs and Trade that covers international trade in goods. As the EU had also stopped drug consignments from Brazil and that country too along with India and a few other developing countries, had raised the matter at a

recent WTO meeting on intellectual property rights. According to the provisions under TRIPS, procedures mentioned therein shall be used, but not in a manner blocking legitimate trade by creation of trade barriers. The article says that the EU's step to raise barriers on international trade of generic medicines produced in India may be due to the heat of competition against established, branded and innovative companies who are holding the patents of these drugs.

The article also mentions about Article 7 which says that IP protection should contribute to transfer and dissemination of technology, while Article 8 allows members to take measures to protect public health and also to take additional measures which "unreasonably restrain trade or adversely affect the international transfer of technology."

The article finally mentions about the EU officials' statement regarding the proceedings of the case which says that such cases were the side effects of careful EU regulation of drugs necessary for public health. While one delegate, who led the EU delegation to the March TRIPS Council mentioned that the EU had caught millions of counterfeit pills and countries should be grateful to the EU for saving lives, as not everyone has the capacity to search for dangerous drugs. The article also points out the Directorate General of Foreign Trade in the commerce ministry opinion which states that the exporters of drugs and pharmaceuticals to submit the documents including Certificates of Analysis issued by the manufacturer and approval by a laboratory approved by Drugs Controller, at the time of shipment.

Say 'No' at Copenhagen by Arvind Panagariya, *The Economic Times*, 23 July 2009.

THE article at its outset points out the US secretary of state's views on carbon-emission reductions in order to combat global warming and India's environment minister response with equal force stating that emission caps would not cut ice in India. The article also mentions about the widespread criticisms of this response in the western press. It further points out about the switch in the US policy towards climate change as the House of Representatives recently passed the American Clean Energy and Security (ACES) Bill of 2009. The Bill provides for a "cap and trade" program that would place an annual cap on the overall carbon emissions in the US. Mentioning about the "cap and trade" program the article says that it has existed in Europe as a part of the Kyoto Protocol, an international treaty negotiated under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC).

It says that the program beginning in 2020 requires the US President to impose tariffs on selected carbon-intensive goods from countries that do not introduce caps on carbon emissions and specifically targets India and China by requiring the US Trade Representative to annually certify that these countries are adopting emission standards at least as vigorous as those prevailing in the US. The article also mentions about the ACES Bill with the insertion of the import duty provision and says that if the Bill becomes law, India will have to eventually challenge any carbon tariffs the US imposes on it in the WTO dispute settlement body. While UNFCCC, which is currently subscribed by 192 countries, says that the developed countries must periodically negotiate mitigation commitments to avoid "dangerous anthropogenic interference" with the climate system. It explicitly exempts developing countries from similar mitigation commitments. The article further says that though US had refused to ratify the Kyoto Protocol, it is now keen on a post-Kyoto climate change treaty and insists that China and India should undertake binding mitigation commitments. Mentioning India's infrastructure and poverty condition the article says that if India agrees to even cap its emissions at current levels, its growth process will be crippled. And with it, the country would lose any hope of bringing electricity to all households or of eliminating poverty. Therefore, India has every reason to refuse mitigation commitments for some decades to come. The article points out that Canada, US, Europe, Eurasia and Japan together account for more than 50 per cent of the current emissions while India's emission is only 4.4 per cent.

Finally, the article mentions that the UNFCCC, to which developed countries are signatory, explicitly recognizes that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries. It also says that per capita emissions in developing countries are still relatively low and that

the share of global emissions originating in developing countries will grow to meet their social and development needs. Therefore, the UNFCCC requires mitigation commitments only from developed countries.

It suggests that at Copenhagen, India should clearly indicate to the US that it would not sign an unjust and inequitable treaty permitting trade sanctions against other countries. Therefore, it would challenge any attempt at enforcing such sanctions against non-signatories in the WTO dispute settlement body; and that if necessary it would exercise its right to retaliate in the WTO-legal fashion.

Brazil's Victory by Jayati Ghosh, *Frontline*, Volume 26 - Issue 19, 12-25 September 2009.

THE article points out about the case brought by Brazil against the US on cotton subsidies, in which the judgment has finally been made by the Dispute Settlement Body. It says that Brazil made complaint about these subsidies in 2002 which was joined by a number of other developing countries including India. Despite the WTO's verdict, the US government continued with its subsidies, and while it changed the names of some and rearranged others. The article explains that the US even added some more subsidies, on the grounds that the earlier payments were WTO-compatible and the new payments came under the acceptable "Green Box" that is allowed under the WTO rules. Therefore, Brazil persisted with its complaint, which was supported by the WTO and it allowed Brazil to retaliate by imposing some trade sanctions on the US. The article further mentions about Brazil's complaint and the US confirmation to the existing subsidies and adding more in the Farm Bill.

The article mentions that the final verdict in this long saga has been pronounced, as the WTO agreed with Brazil that the US cotton subsidies violated various elements of the Agreement on Agriculture and caused "serious prejudice" to potential exports of cotton of other countries by depressing prices. The WTO also allowed Brazil to retaliate by suspending concessions or other obligations on the US trade equivalent to up to $147.3 million a year. Mentioning about the implications of the ruling the article points out that this specific issue has a much wider relevance to the agricultural negotiations in the Doha Round of the WTO talks. It also states that significant implications of this issue also include for the future pattern of trade disputes since it allows for cross-retaliation in services trade. In an earlier submission to the WTO, Brazil had claimed that an even larger amount, close to $12.5 billion, had been provided as cotton subsidies by the US government that amounts to more than 130 per cent of the value of production in the US.

The article points out that these subsidies artificially increased cotton production in the US, stimulated exports and, therefore, depressed the world market price of cotton. The US government had argued that this support was "decoupled" from production, and, therefore, eligible for the permissible Green Box, but actually it links payments to recent output levels.

The US argued that under WTO rules, these are not export subsidies because they do discriminate between exporters and domestic users. But actually, despite their relatively small size, these are among the most damaging subsidies, because they give US exporters a clear advantage over their competitors. The US government had further argued that it should be a beneficiary of the so-called "Peace Clause", which was agreed upon when the Agreement on Agriculture was adopted at the end of the Uruguay Round in 1994. But since the level of subsidies the US provided to cotton farming in 2001 was double that provided in 1992, the US had lost any claim to such "Peace Clause" protection. The article also points out that the US cotton subsidies in 2001 were more than the entire gross domestic product (GDP) of Burkina Faso, a country in which more than two million people depend on cotton production and over half of the cotton farmers live below the poverty line.

Finally, the article states that Brazil is not the only country suffering from the adverse impact of the US cotton subsidies, there are even the worst affected countries. But these countries are typically dependent upon the US for aid or debt relief, and, therefore, try to avoid antagonizing the US government. A crucial aspect of the ruling is that it allows Brazil to impose some sanctions on services and intellectual property activities as well. It concludes with the statement that Brazil is preparing to infringe patents on the US pharmaceutical

products as part of its retaliation, which will open up a whole new range of possibilities in terms of developing country responses at the WTO.

The Doha Round Impasse by Alok Ray, *The Hindu Business Line*, 27 August 2008.

THE article in the beginning mentions that in the midst of serious economic trouble no country wants the multilateral trade negotiation and dispute settlement mechanism of the WTO to break down as most of the countries are not in favour of trade liberalization. The article mentions that despite trade and commerce ministers meeting at Geneva to save the Doha Round, the trade talks broke down. The author states that the principal players responsible for the same included the EU, the US and the developing world, led by India and China. Both the sides had their opinion for unsuccessful round of the Doha trade talks. The Indian trade minister blamed US by saying that he cannot negotiate the livelihood concerns of millions of poor Indian farmers against the commercial interests of the US. The article questions that in the favourable economic and political conditions when Indo-US nuclear deal has survived, why trade talks could not succeed.

Mentioning the reason for restarting the trade talks the article points out four/five logics which include the difficulty to strike any complex multilateral WTO trade deal for the new US President. Its reason also include the new Indian government's reformist posture after the constraints imposed by the Left partners to the last coalition Indian government and exploring space for negotiating multilateral trade liberalization agreements when the world economic system is in trouble. The article states that out of the 20 issues only 2 contentious issues on which no agreement could be reached were the agricultural subsidies by the developed countries and the Special Products (SP) and the Special Safeguard Mechanism (SSM) for agricultural imports by the developing countries. The article also explains the differences in the position taken by the US and the EU in this connection.

While the EU is willing to cut back some of its agricultural subsidies provided countries such as India reduce restrictions on imports of industrial products and services, the US farm lobby is willing to allow reduction in farm subsidies only if the US agriculture gets additional market access in countries such as India. The article says that the Indian government is not going to liberalize imports in sensitive agricultural products, given the livelihood concerns of millions of small farmers and the potential political disagreement. There could be breakthrough if the developed countries eventually accept the unilateral cut in farm subsidies without expecting any significant reciprocal reduction in agricultural protection on the part of developing nations.

The final section of the article points out that the areas of disagreement in the manufacturing sector are mainly over the reciprocal tariff reductions. And whether such reductions in the form of small cuts on a wide front or larger cuts in some specific sectors would leave other sensitive areas (like the "infant" automobiles sector for India) unaffected. The article also states that no country especially the poorer and weaker nations want the multilateral trade negotiation and dispute settlement mechanism of the WTO to break down. Even in the US, politicians, including the Democrat President, Barack Obama, have voiced concern over the implications of NAFTA and other FTAs with the neighbouring nations. They also want to bring in other issues, such as labour and environmental standards, into the agreements. Mentioning about the recent WTO meeting in Delhi the article mentions that the proposal was mooted about a "sunset clause", setting a time limit on preferential tariffs allowed to members. It also suggests that at the end of the term, the same preferential tariffs will have to be extended to all WTO members. It also advocates the multilateralism, even if the regionalism is permitted temporarily.

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