THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT MECHANISM

Paper by the Commonwealth Secretariat

Introduction

1. Conscious of the shortcomings and weaknesses of the General Agreement on Tariffs and Trade (GATT) dispute settlement mechanism, the trade negotiators set out during the Uruguay Round to design and implement a new dispute settlement system which would command the respect and confidence of members. The new World Trade Organisation (WTO) dispute settlement mechanism is contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and has been refered to as the "central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy"[1]

2. Article 3:2 of the DSU itself describes the new mechanism as the central element in providing security and predictability of the multilateral trading system. Article 3:1 is reassuring as it commits members to "adhere to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947", just like the WTO is to be "guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES"[2]. But the DSU also aims to overcome the legal and procedural difficulties associated with the old GATT. As the DSU forms an integral part of the WTO Agreement, adherence to it is mandatory i.e. the DSU is binding on all WTO members.[3]

3. Since the entry into force of the DSU in 1995 as part of the WTO Agreement, the WTO has received more than 100 trade disputes, 37 of these proceeding to a dispute settlement panel.[4] The function of the panels is to make an objective determination on the facts and of the applicability and conformity with the agreements indicated in Appendix 1 to the DSU, basically the entire WTO Agreement.[5]

4. The DSU establishes a separate Dispute Settlement Body (DSB) which is charged with the responsibility of settling all trade disputes arising from the operation of the WTO Agreement.[6] The DSB has the sole authority to establish panels, adopt panel and appellate reports, maintain surveillance of implementation of rulings and recommendations, and authorise retaliatory measures in cases of non-implementation of recommendations.[7] It should be noted that it is the WTO General Council which convenes as the DSB when it meets to settle disputes between members.[8]

Features of the New Dispute Settlement Mechanism

5. The DSU is very comprehensive, and as such reduces the scope for differing positions among members, who have undertaken not to resort to unilateral

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1 Renatoi Ruggerio, WTO Director General, 17 Aporil 1997, quoted in WTO, Settling Disputes, 19 December 1997 <http:/www.wto.org/wto/about/dispute1.htm >

2 Article XVI:1 of the WTO Agreement

3 Article II:2 of the WTO Agreement

4 Overview of the State- of- play of WTO disputes, 9 November 1998, <http:/www.wto.org/wto/about/dispute1.htm >

5 Article 11.1 of DSU.

6 Article 2.1.

7 Idem

8 Article IV: 3 of WTO Agreement.

measures, but to seek the redress of a violation of obligations or other nullification or impairment of benefits in accordance with the procedures of the DSU.[9] It makes provision for alternative dispute settlement mechanisms such as conciliation, mediation and arbitration, and reinforces the panel process.[10] It emphasises the importance of consultations in securing dispute resolution, requiring a member to enter into consultations within 30 days of a request from another member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. The DSU requires that the panel be established unless the DSB decides by consensus against establishment.[11]

6. The DSU also has specific rules and deadlines for deciding the terms of reference[12] and composition of panels[13]. Standard terms of reference will apply unless the parties agree to special terms within 20 days of the panel's establishment. If the parties do not agree on the composition of the panel within the same 20 days, the composition can be decided by the Director-General in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. The Secretariat maintains a list of experts suggested by delegations, nominated by the DSB.

7. In addition to rules relating to panel procedures, the DSU also sets out procedures for multiple complaints, involvement of third parties to the dispute, confidentiality of the information furnished during the panel proceedings, interim and final reports of the panel and their adoption by the DSB, appellate review procedures, report of the Appellate Body, its circulation and adoption by the DSU, time frame for the DSU decisions and surveillance and implementation of the DSB rulings/ recommendations.[14]

8. One major improvement introduced by the DSU was the abolition of the right of members to block the panel process. Under the new rules, the establishment of a panel is almost automatic, as the DSB is obliged to establish a panel after the request appears for the second time on its agenda unless the DSB by consensus decides against.[15]

9. The concept of appellate review is an important feature of the DSU. An Appellate Body was established which is composed of 7 members, three of whom serve on any one case.[16] The new Appellate Body could be said to bring in more professionalism to the system.[17] The Appellate Body members are required to be individuals with proven legal expertise and possessing adequate knowledge of the covered Agreements.[18] They are required to act independently of the countries to which they belong.[19] An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[20]

10. The stricter time-frame imposed under the DSU for various stages with a view of reducing unnecessary delays is an enormous improvement to the GATT dispute settlement system. As pointed out, there are now time limits for responding to a request for consultations, entering into actual

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9 See Article 23.1 of the DSU.

10 Article 4 idem.

11 Article 6 idem.

12 Article 7 idem

13 Article 8 idem

14 Articles 9-22 idem

15 Article 6.1

16 Article 17.1

17 Briggs, Inye N, et al, *Paper prepared for Seminar on Dispute settlement*, Trade Policy Course, World Trade Organisation, 14 November 1997.

18 Article 17.3

19 Article 8.9

20 Article 17.6

consultations, the DSB action on the request for establishment of panels, composition of panels, panel procedures, provision for appeal against panel reports, appellate review procedures, consideration and adoption of the panel and appellate reports by the DSB and their implementation by the parties concerned.

How successful has the DSU been?

11. Measuring the success of the DSU is very difficult, as it has only been in operation since 1995. As indicated in the table below, there have been 150 requests for consultation since 1995. Of that number some have gone to panel hearings, while others have been either withdrawn or settled between the parties. This means that an average of 50 cases were initiated each year, with an average of 5-6 cases actually heard and completed annually.

	Consultation Requests	Distinct Matters	Active Cases	Completed Cases	Settled or Inactive Cases
Number	150	114	19	17	28

12. It is interesting to note that between 1947 and 1995, only 300 cases were initiated under the old GATT system. In other words, on average six cases were initiated each year. The colossal number of cases initiated in the first three years of the establishment of the WTO could be interpreted as confidence in the new dispute settlement system. Developing countries have also been active in the process accounting for 40 per cent of all cases under the DSU.[21] If the frequency of its invocation by members and the involvement of developing countries is anything to go by, then a persuasive argument could be made that it has been a success.

The DSU Special Provisions for Developing Countries

13. Throughout the DSU, developing countries have special rights.[22] They may request a shorter duration for panel proceedings or an extension of the period for consultations. Special consideration is requested during the consultations stage[23], during the panel proceedings,[24] and the implementation stage,[25] and should a panel be established between a developed and a developing country, the latter may request a panellist from a developing country to examine the case.[26] Importantly, Article 27 of the DSU envisages that developing countries may now request the service of a legal assistant to help them with their legal dispute. [27]

Participation of Developing Countries in the WTO Dispute Settlement

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21 "Disputes Reach Century Mark" in *WTO Focus*. No.21, August 1997,p.1

22 Articles 3.12 and 24

23 Article 4.10

24 Article 12.10,11

25 Article 21.7,8

26 Article 8.10

27 Article 27.2 provides that .... the Secretariat shall make available a qualified legal expert from the WTO Technical co-operation services to any developing country Member which so requests. This expert shall assist the developing country member in a manner ensuring the continued impartiality of the Secretariat.

14. Out of the 150 requests for consultations since entry into force of the WTO, about 40 of those requests were initiated by developing country members and more than 20 involved developing country members as respondents.[28] In the African region there is no record of any developing countries which have utilised the WTO dispute settlement in a substantive manner. However, Cote d' Ivoire did intervene in the *Bananas* case as a third party. Nigeria also intervened as a third party in the recently adopted Appellate Body decision regarding the *Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp case)*. Apart from these two countries no other African country has utilised the WTO dispute settlement mechanism in a substantive way.

15. In contrast, Asian developing countries have tended to use the WTO dispute settlement more frequently. India is an example of a key Asian developing country that uses the WTO dispute settlement mechanism quite regularly. Other Asian developing countries have also been active in utilising the WTO dispute settlement mechanism. For instance, in the *Shrimp case* India was joined by Malaysia, Pakistan and Thailand in a complaint against a ban imposed by the United States under its law on the importation of shrimp and shrimp products from these countries.

16. In the Caribbean region, the continuing saga of the *Bananas case* between the European Union (EU) and the United States, highlighted not only the reliance of small developing economies on the preferential trade arrangements under Lomé, but more importantly it provided small island developing countries such as St Lucia with the opportunity under the WTO Dispute Settlement mechanism to challenge the economic might of the United States. In the South Pacific region, there is no evidence of any developing or least developed countries having invoked or used the dispute settlement system.

17. But why do few developing countries in the African, Caribbean and Pacific regions use the WTO dispute settlement mechanism infrequently compared to other developing countries in Asia? This paper does not propose to provide a definitive answer to that question. However, it is submitted that one of the main reasons for this seems to lie in the fact that trade from these three regions only accounts for a small percentage of world trade. On the other hand, the percentage for Asian trade accounting for global trade is relatively higher.

18. The nature of the multilateral trading system also seems to suggest that those countries which have more at stake in terms of their trade interests will tend to utilise the WTO dispute settlement mechanism a lot more than those countries which have less.

Problems of Developing Countries under the WTO Dispute Settlement System

19. Notwithstanding the greater involvement of developing countries in the dispute settlement system of the WTO, there still remain some acute problems that have to be addressed. As previously noted, out of a total 150 requests for consultations since the establishment of the WTO, developing countries account for about 40 of these cases. However, some critics argue that these figures should not be interpreted as a sign of the confidence of developing countries in the system as there are real problems developing countries face in utilising the dispute settlement process. These problems could be grouped under two headings - systemic and practical problems.

Systemic problems

20. These problems arise mainly because of the inherent weaknesses in the dispute settlement mechanism and the structural difficulties faced by developing countries. Among them are unlevelled bargaining power and the inability of developing countries to respond forcefully should a developed country fail to implement the rulings of the DSB.

21. Developing countries, especially the least developed, often view the invocation of

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[28] Overview of the State- of- play of WTO disputes, 9 November 1998, <*http:/www.wto.org/wto/about/dispute1.htm*>

dispute settlement as a kind of confrontational act[29] against the developed country trading partners. The possibility of losing the preferential treatment accorded them may explain why developing countries have in the past been hesitant in invoking the dispute settlement mechanism. However, it must be noted that a number of key developing countries have been asserting their rights under the dispute settlement system.

22. This is especially true for high-income developing countries such as Korea and the bigger developing countries including Argentina, Thailand, India and Brazil. In some of the cases that have been initiated by developing countries such as the *Gasoline case*, the *Bananas case* and the *Shrimp case*, they have pooled their resources together in terms of exchanging information and supporting each other's claims.

23. The other aspect is the state of administration in many developing countries. Invoking the dispute settlement system commences, in the usual course of things, with a complaint from the private, sometimes from the public, sectors to the government of the member country. Where the general functioning of government is unsatisfactory, for instance because the bureaucracy puts off potential complainants or because the relevant authorities to receive the complaints are only remotely keen in protecting the national interest due perhaps to the pervasive antipathy associated with low pay and inadequate training, the likelihood of complaints filtering through to the WTO is quite small.

Practical problems

24. Developing countries still face a severe shortage of personnel in the public service who are properly qualified in international economic law. The reasons include a lopsided preference of the private sector by the few qualified, the brain drain that draws some overseas, unattractive terms of service, relatively ineffective or inefficient recruitment procedures, excessive use of very short-term consultancy and retainerships in WTO matters which does not generate a continuity or institutional memory within the government, and in some cases a prioritisation that does not give adequate prominence to WTO matters. The training needs of developing countries still remain critical.

25. Thus one of the key problems facing some of the developing countries, especially the smaller developing countries, is the lack of legal expertise or limited capacity in terms of legally qualified lawyers dealing with WTO related matters. The implication of this problem is that those developing countries, which do not have the necessary expertise will often have to pay hefty legal fees for lawyers from Washington or Brussels to represent their interests if they are to utilise the dispute settlement mechanism.

26. The use of private lawyers in panel hearings was considered in the *Bananas case* where the panel upheld an objection by the United States and other complainants in the case that private lawyers were not allowed to appear in the panel hearings. When the matter was appealed, the Appellate Body overturned the decision of the panel on this point and accepted that the member governments could use private lawyers to represent their interests.

Conclusions

27. The new DSU is clearly a substantial improvement to the multilateral trading system and if it works even reasonably efficiently it should considerably enhance the predictability and rule-based nature of the trading system. Undoubtedly problems will be encountered, and practice will reveal that more evolution in the procedures will be required.[30] As the system evolves, it should be noted that it ought to encourage settlement by disputants, giving them assistance in the process of settlement, but it should encourage

[29] Article 3.10 urges that the dispute settlement system be invoked in good faith in an effort to resolve disputes, rather than requests being regarded as contentious acts.

[30] Jackson, John H. *The World Trading System*, law and policy of international economics relations, 1997 second edition, p.133

that settlement primarily with reference to existing rules rather than simply with reference to the relative economic or other power that the disputants possess.

28. If the new dispute settlement mechanism is to function properly and effectively, it should be designed so that as time goes by, greater and greater confidence will be placed in it, so it is more utilised and gradually greater responsibilities may be given to it. In that context members should refrain from imposing unilateral trade measures, as the effect of such an act is to undermine the principles that have been enshrined in the DSU.

29. The current stalemate between the United States and the EU on the question of EU compliance with the Appellate Body's decision in the *Bananas case*, where the United States recently threatened unilateral action is an example of where a developed country has responded forcefully and in doing so may undermine the DSB. This is the first case since the creation of the WTO where compliance with a WTO ruling has been disputed.

30. Given the importance of the DSU in the legal framework of the WTO, special efforts should be made to encourage more developing countries, especially Least Developed countries to make use of the system. While the WTO Secretariat provides some legal assistance to developing countries in preparation for their cases, this assistance is only limited to pre-panel work and does not extend to the provision of qualified legal representatives to developing country members for the entire duration of the case.

31. The question of whether the WTO should do more than providing pre-panel work to developing countries in preparing for their cases has prompted an increasing number of developing countries to seek other alternative ways of funding their participation in the dispute settlement system.

32. Several WTO member countries[31] have made a proposal for the establishment of an Advisory Centre on WTO Law, constituted as a foundation by WTO members in accordance with Swiss law,[32] to address the constraints of "limited expertise in WTO law, the high costs of hiring external legal advice and the limitations on the assistance that may be provided by the WTO Secretariat"[33] faced by developing countries and economies in transition. The Centre would therefore provide regular seminars on WTO jurisprudence, legal advice on WTO law, support in legal proceedings and internships for officials dealing with WTO legal issues.[34] Formally separate from the WTO, the Centre would safeguard the neutrality of the WTO Secretariat and "only developing countries and economies in transition would be eligible as users of the services provided".[35] If the necessary financial support from WTO members is obtained, as well as a tax exemption status, the Centre could be in operation in spring 1999.[36] However, the lack of funds means that the establishment of such a Centre may be later than sooner.

33. The proposed Centre is absolutely critical in the effort to integrate developing and least developed countries to the multilateral trading system, so they can benefit more from the tremendous opportunities opened by the Uruguay Round, in this way sharing in the objectives of the WTO such as raising leaving standards and generating employment.[37] In facilitating active use of the dispute settlement system, developing countries would be better placed to follow up their rights and correspondingly satisfy their obligations, which promotes the credibility and acceptability of the

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[31] Bangladesh, Colombia, Hong Kong China, The Netherlands, Norway, The Phillipines, South Africa, Turkey, United Kingdom and Venezuela.

[32] Executive Summary of the Proposal, paragraph 6

[33] Id, paragraph 2

[34] Id, paragraph 5

[35] Id, paragraph 6

[36] Id, paragraph 11

[37] Preamble to WTO Agreement

multilateral trading system on the part of developed and of developing countries.

Recommendations

34. Member countries may wish to recommend that the Secretariat continue its work in WTO related matters especially in facilitating continued training for government legal officers involved in the implementation of the WTO agreements.

35. As regards the WTO dispute settlement mechanism, member countries may wish to recommend that the Secretariat continue its work in collaboration with other relevant international and regional organisations in providing technical assistance to ensure that member countries, especially developing and least developed member countries which do not have the resources to protect their trading interest are given the necessary assistance.

36. Member countries are also urged to recognise the propriety and importance of the proposed Advisory Centre on WTO Law, and in this connection may wish to indicate their support for this proposal.