A Quarterly Trade Magazine of Centad

Vol-2 Issue 3 July - Sept 2006

TRADING UP

Centad
Centre for Trade & Development

Dispute Settlement in WTO

Equalising the Unequals

Contents

Editorial

DSU Reforms: A Must for Trade Justice

Editor: Dr. Samar Verma
Executive Editor: Dr. Biplove Choudhary
Editorial Board: Prabhash Ranjan, Robin Koshy, Parashar Kulkarni, Kasturi Das, L. M. Philip and K. M. Gopakumar
Research Assistance: Yamini Srivastava

Cartoons: Sharad Sharma, World Comics

Caricatures: New Concept Information Systems

Published by
Centre for Trade & Development (Centad)
406, Bhikaiji Cama Bhavan,
Bhikaiji Cama Place, New Delhi - 110066, India

Tel: + 91 - 11 - 41459226
Fax: + 91 - 11 - 41459227
Email: centad@centad.org
Web: www.centad.org

Design and printing: New Concept Information Systems

DSU Reforms: A Must for Trade Justice

The Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU) forms the backbone of the WTO regime. It is often showcased as the symbol of rules- based multilateral trading system. There is little doubt that the Dispute Settlement Body (DSB) of the WTO is the most powerful and effective international judicial body. Unlike other international tribunals DSB is equipped with measures to ensure compliance with its decisions. It has worked reasonably well in the last 10 years. Small countries have taken up and won disputes against large WTO members. Till date there have been 121 adopted panel decisions and 78 adopted appellate body decisions. The DSB decisions have contributed to the development of related jurisprudence. With Doha talks suspended, there is a widespread apprehension that the DSB would be flooded as negotiations take place by litigation.

However, there are certain functional and structural aspects of the DSB which have attracted the attention of scholars and member countries during the last decade. One important issue deserving immediate attention relates to the poor countries' accessibility to DSB system. The cost of litigation at the DSB forces many countries- especially developing and least developing countries- to settle disputes through a political route rather than approach the DSB. Another important issue is the poor compliance record of developed countries with reference to the Dispute Settlement Body decisions. Moreover the ultimate remedy against noncompliance is retaliation through withdrawal of concessions, which in practice is an impractical option for two-thirds of WTO membership.

Can the DSB do justice to developing countries while the WTO Agreements themselves are rigged in favour of developed countries? What is the impact of DSB decisions on the future development of international trade law? Even though technically, the DSB decisions set no precedents, for practical purposes it may end up doing so and bypass the political process of international trade law making. DSU is being reviewed now in an attempt to address some of these concerns. However, negotiations have demonstrated the familiar story of missed deadlines and lack of convergence of views, while the developed countries are trying to further tailor the DSB to their advantage.

The focus of this issue of Trading Up is on the DSU of WTO. It attempts to capture the relevant issues and analysis, differing perceptions and salient facts on the DSU and its functioning. This issue also carries a special write-up on the market access demands of the developed countries which has been one of the causes of trade talks suspension. As always, I eagerly look forward to your comments, criticisms and suggestions towards improvement of the magazine.

■ Dr. Samar Verma
Head- Global Economic Justice Team
Oxfam GB
Oxford

Dispute Settlement in the WTO: A Case for Review

Prabhash Ranjan

It is often argued that the efficacy of rule of law always depends on how effective is its dispute settlement machinery. Stated differently, if disputes in a particular legal system are settled amicably and judiciously within a stipulated period of time, then one can assume that the writ of rule of law runs well in that system. However, if the disputes take a long time to settle or if the process and procedure followed to settle a dispute lack transparency or if the due process of law is not followed, then the effectiveness of rule of law in that system comes under question. In such a system the enforcement of law would be poor and hence there would be possibilities of law being breached more often than not. This, in turn, would adversely affect the rights of the subjects of such a legal regime.

The dispute settlement machinery in the World Trade Organisation (WTO) also needs to be assessed on these parameters. Since the WTO is a rule-based trading regime, the dispute settlement system is its heart that pumps blood to the whole system. A rule based system will be dead if countries have no effective recourse when their rights are infringed. So the quest here is to find out how healthy is the heart of the WTO? But before one examines this a brief flashback in the history may be appropriate.

A Brief Background

Often crowned as the jewel of the WTO, the dispute settlement body (DSB) has an interesting history. In the early stages of the multilateral trading regime that formally came into existence after the adoption of the General Agreement on Tariffs and Trade (GATT) in 1948, the system of dispute settlement was weak and non-detailed. The GATT text only had a semblance of dispute settlement by allowing a country to complain if a benefit accruing to it was nullified or impaired. This complaint or dispute was settled diplomatically and did not involve any judicial process. In fact, from 1950 to 1970, R E Hudec, a noted trade commentator, argued that the process of settling disputes was wrapped in layers of diplomatic vagueness and misdirection. Hence, it is clear that in the early phases of the multilateral trading regime, the dispute settlement system was not functioning well, which, in turn, weakened the efficacy of the rule-based trading regime.

The story change after 1970 with slow but gradual movement from a diplomatic to a judicial way of settling disputes. However, this shift was not a major turnaround as the process was still haunted by certain handicaps. A major lacunae related to the power of a single country to block a particular ruling. The dispute settlement system, before the WTO came into existence, followed what is known as the 'positive consensus' rule. According to this rule, any ruling given by the panel will be binding only if all the countries unanimously accepted it. Even if one country did not approve the report, it would not get adopted. Hence, the country that lost the dispute would often block the adoption of the report, The system was also troubled with inordinate delays, as no time bound procedure was followed. This also eroded the faith of countries in the dispute settlement system.

Dispute Settlement in a New Avatar

However, this rule was changed during the Uruguay Round (UR) of negotiations that led to the formation of the WTO. The UR negotiations converted the 'positive consensus' rule to a 'negative consensus' rule. Accordingly, it was agreed that the reports of the panel will be adopted unless or until all the countries unanimously decide not to adopt the report. In other words, one country or two countries or a group of countries were not in a position to block the adoption of a report unlike the practice in the pre-WTO era.

Hence, a turnaround of sorts in the process of settling disputes in the multilateral trading regime was brought about in the UR negotiations. The culmination of the UR resulted in the adoption of an Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which, apart from adopting the 'negative consensus' rule, also established the Appellate Body (a permanent judicial body to hear appeals from the panels) and laid down an elaborate time frame for settling disputes, allowing the

Table 1: WTO Dispute Settlement Statistics (1995 – 2003)									
Item	1995	1996	1997	1998	1999	2000	2001	2002	2003
Request for Consultations	25	39	50	41	34	23	37	26	19
Panels Composed	4	9	13	11	19	7	12	8	10
Panel Reports Adopted	-	2	5	12	9	15	13	11	8
AB Reports Adopted	-	2	5	8	7	8	9	6	5

Source: 'Key Issues in WTO Dispute Settlement', Rufus Yerxa and Bruce Wilson (eds.), Cambridge University Press.

countries to retaliate i.e. impose counter-measures if the violating country did not bring its measures in conformity with its WTO obligations (For a detailed account of the DSB please read the Trade Works section).

This was a qualitative change. Since then the dispute settlement system of the WTO has worked well, as some numbers will suggest. In the first 10 years of its existence about 300 cases have been brought to the DSB. This number is much higher than what the dispute settlement system under GATT had in 40 years. This indicates that countries have more faith in the present system in the WTO than they had under the dispute settlement system under GATT. Apart from these numbers the other heartening fact is that in the last 10 years many smaller countries have won cases against powerful and rich countries like the US and the EC. In fact, the US has taken a very strong beating at the DSB by losing many cases. The victory of smaller countries over bigger powers has certainly played an important role in developing the faith of these countries not just in the DSB but also in the multilateral trading regime. (For a quick statistical snapshot of the DSB please look at Table 1).

However, these numbers should not elude us from the other side of the story. The last 10 years have also revealed certain weaknesses in the DSU. These weaknesses or limitations have necessitated a review of the DSU. Before we turn our attention to these weaknesses it is imperative to note that the original drafters through a ministerial declaration provided a built-in mechanism for the review of the DSU within four years of its formation in 1995. This was a very wise move as nobody knew how the new system will work. According to this ministerial declaration, the review was supposed to get over by 1 January 1999. However, this deadline was missed. Countries gave themselves an additional six months to complete the review. Nonetheless, history was repeated after six months with the deadline being missed once again.

The puppet show

After this missed deadline it was only in 2001 in the Doha ministerial conference of the WTO that the countries met and agreed on another review agenda. This review agenda was a part of the overall agenda to launch a fresh round of negotiations. The only difference was that the review of the DSU was not part of the single undertaking. In other words, countries could conclude the review on the DSU independent of the review process of other WTO agreements. The deadline that countries agreed for completing the review of the DSU was May 2003 unlike the deadline for all other issues that was end of December 2004. However, as it always happens in the WTO, the May 2003 deadline was missed and the members gave themselves one more year. While it is important to remember that the chairperson of the DSU review process, Ambassador Peter Balas, did circulate a text in an attempt to build consensus amongst the member countries, but in vain. This text came to be known as the Balas text (discussed later in the article). At the end of that one year in May 2004 countries found that there was no agreement regarding the changes that need to be made in the DSU and hence the deadline to finish the review was once again missed.

All these delays may make one sit up and ask why countries are not able to agree regarding the changes that need to be made in the DSU. Broadly, there are three reasons responsible for this state of affairs. First, there are sharp differences between developed and developing countries on many reform issues that will be discussed in this article later. Second, although the review of the DSU is not a part of the single undertaking process, one should not forget that this review is taking place along with the negotiations on other WTO issues, which are perhaps more contentious such as agriculture, industrial tariffs etc. In fact, issues like agriculture are bread and butter issues for many developing countries. Hence, the limited negotiating capital and energies that these countries have is employed to negotiate a better deal on agriculture or market access in industrial sector. The focus on DSU is, relatively speaking, less and hence the process of reviewing the DSU is languishing. Third, and this reason is linked to the second reason, since there is no movement or agreement on agriculture or other contentious issues there is not enough political will or political urgency to complete the review of the DSU. Realistically speaking, one should not expect the review of the DSU to get over till countries are able to strike deals on agriculture and industrial tariffs.

Substantive Issues

Coming back to the actual examination of the DSU of the WTO, certain problems have surfaced during the last 10 years of its functioning. Some of these major substantive issues are discussed below.

Sequencing

In 1998-99 in a dispute between the EC and the US, Canada and Ecuador on bananas, a very import lacuna of the DSU got highlighted. This lacuna is known as the issue of 'sequencing'.

Let us understand what this lacuna is all about. If a country is found by the panel or the AB to be in violation of its WTO obligations, then that country is asked to comply and bring its measures in conformity with its WTO obligations immediately. If immediate compliance is not possible then this country is given a reasonable period of time to implement the ruling. However, if at the end of the reasonable period, there are disagreements over compliance between the contesting countries, then the matter is referred to the original panel to decide whether the violating country (guilty party) has complied or not. There is absolutely no problem up to this point. However, the problem surface because there is another provision in the DSU that allows the complaining country to request for imposition of counter-measures against the violating country if this country has not complied with the ruling at the end of the reasonable period. This DSU rules do not require this country to wait for the compliance panel to tell whether the violating country has complied or not. So, retaliation is possible pending the decision of the compliance panel. In other words, it leads to situations where request for counter-measures are made without the violation by the other country being fully established.

In this regard, a group of seven countries comprising of Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway, popularly known as the G7 countries in the DSU negotiations have made a proposal arguing that the compliance proceedings should be first completed before the issue of imposing counter-measures arises. The Balas text also proposed that before the complainant country could seek the authorisation to retaliate, the compliance proceedings should be over i.e. it should have been found whether the violating country has complied with the ruling of the panel or the AB.

The problem in fixing this lacuna is that the US, in its own wisdom, does not think that there is a 'sequencing' problem in the DSU. Hence, when one country is not even willing to admit that there is a problem, it is foolhardy to accept that country to negotiate for a solution that the G7 is offering.

Think twice before you retaliate. You will harm yourself!

Retaliation

The issue of imposing counter-measures, which many argue is a major strength of the WTO, also poses certain problems. Before one deals with the problems in the application of counter-measures it is imperative to remember that all the countries are expected to act in good faith when it comes to implementing the rulings given by the panel or the AB. In other words, countries are expected to abide by these rulings. It is only when a country does not abide by the ruling; the other country can impose counter-measures, which in the DSU are known as 'suspending the concessions' or ask for compensation from the violating country. The imposing of the counter-measures i.e. suspending the concession is expected to make the other country comply and bring its measure in conformity with its WTO obligation. Thus, suspending the concessions is the last resort and is supposed to act as deterrent for countries to comply with the rulings. However, countries, mainly the US, have often not acted in good faith and have either not complied with the rulings or have complied after a long time.

The retaliatory mechanism also poses certain problems which came to surface when, in a case against the EC; Ecuador was allowed to retaliate since the EC refused to comply with the ruling. However, Ecuador did not retaliate, as it perhaps thought that retaliating against the EC would cause more harm than good. In such a scenario, where a country thinks that economically it does not make sense for it to retaliate. The DSU is absolutely clueless about the way out. It may happen that the non- complying country may continue to keep its measure in violation of its WTO obligations and the affected country may not be able to do anything about it.

The other flaw in the retaliatory scheme is that countries that want to retaliate have to first retaliate only in the same goods or sector that is the subject matter of the dispute. If retaliation in the same goods or sector is not possible or will not lead to the desired result it can retaliate in another goods or sector. If even this is not possible the country can retaliate in any other agreement. Hence, if the dispute is on textiles, a country cannot retaliate on intellectual property rights (IPR) in the first place. It can retaliate in IPR only if it is able to prove that the retaliation in textiles is not possible or will not lead to the desired result.

India has proposed that this step by step retaliatory process should be dismantled and the retaliating country should

be allowed to retaliate in any sector or agreement without having to prove that the retaliation in the same sector or goods will not lead to the desired result. This has also been challenged by the US.

Post-Retaliation

Another substantive issue haunting the DSU, came to limelight during a case between the EC and the US and Canada. In this particular case the US and Canada imposed sanctions against the EC, as it did not bring its measure in conformity with the WTO obligations. However, later the EC claimed that it had brought its measure in conformity but the US and Canada refused to withdraw the sanctions. Hence, in such a scenario, where a country initially did not comply with the rulings and allowed the other country to get authorisation to impose counter-measures, complies at a later stage but the other country (retaliating country) disagrees, the DSU is oblivious of what recourse needs to be adopted. This shortcoming is known as the 'post-retaliation' trauma.

Other issues

Apart from these substantive issues; there are other important issues that merit attention. One such issue is 'remand'. The present rules of the DSU allow the AB to hear cases in appeal from the panels. But the AB can hear the appeal only on substantive legal issues WTO law and not on facts. Hence, no appeal to the AB could be made to clarify the facts of the case that the panel may not have established or overlooked and which may be central to that particular dispute. Thus if the facts are incomplete or not properly established which cripples the AB to complete its legal analysis, the AB will not give any ruling and the only frustrating option left to the complaining country is to seek the formation of a new panel. In order to overcome this shortcoming the G7 countries have proposed that if the AB finds that some facts are missing or have not been established it should be able to send back (remand) the case to the original panel. This proposal has also been made in the Balas text although no agreement has been reached.

Another interesting proposal that developing countries like India have made is regarding the litigation costs. For developing countries fighting a case in the DSB is an expensive affair mainly because these countries lack human resource and technical expertise. Hence, these countries rely on foreign expertise, which comes a huge price. Countries like India have said that in cases that are filed by developed countries against developing countries and where developing countries are found not to be in violation of their WTO obligations, developed countries should pay the litigation costs to developing countries. Similarly, if a developing country wins a dispute against a developed country, the latter should compensate the former.

The issue of *amicus curiae* or 'friends of court' also merits attention. The AB in the past has received amicus curiae briefs from many non-governmental or research organisations. These briefs are supposed to give some important information or facts regarding the case that may help the panel or the AB to decide the case and hence are known as friends of court. However, countries like India are against this practice. The argument is that non- governmental organisations in developed countries are in an advantageous position in terms of having access to all kinds of information unlike the organisations in developing countries. Hence, if such a practice is continued then developed countries will have an edge over developing countries where the two are involved in a legal battle. Given the asymmetry in the knowledge and expertise terrain of developed and developing countries, the Indian position is quite valid.

Conclusion

There is no doubt that the dispute settlement system of the WTO has worked well. However, a number of limitations have also cropped up in the last 10 years, as the article has identified. Cropping up of problems is in itself not surprising. However, what is surprising is the inordinate delay in fixing up the problems. It is imperative to fix these problems in order to further strengthen the dispute settlement system of the WTO. A stronger dispute settlement system is the key to a vibrant multilateral trading regime. However, with the present suspension of the Doha talks and with bigger stumbling blocks like agriculture and industrial tariffs lying in the way, the review of the DSU, it seems, is going to take a while.

■ References: 'Key Issues in WTO Dispute Settlement,' Rufus Yerxa and Bruce Wilson (eds.), (Cambridge: Cambridge University Press, 2005).

ICTSD and IISD, Doha 'Briefing Series, Dispute Settlement', www.ictsd.org/pubs/dohabriefings/Hong_Kong_update/8-DSU.pdf (visited on 21 September 2006)

■ Prabhash Ranjan is pursuing LLM at the School of Oriental and African Studies (SOAS), University of London. Views are personal. He may be contacted at: pragmaticranjan@yahoo.com.

Credibility of DSB seems Reasonably Well Established

Prof John H. Jackson, an eminent expert on International Economic Law, shares with Centad his views on Dispute Settlement at WTO

Centad: The dispute settlement mechanism of the WTO has emerged as a very strong and efficient resolution mechanism in the contemporary world. How would you rate the DSB of the WTO when compared with other multilateral dispute resolution mechanisms such as the International Court of Justice?

John H. Jackson: 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 to 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 January 1, 1995, has more than 349 cases instituted. A large number of those 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 rigor 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 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 the jurisprudence of the WTO is very high, when observers compare it with other international tribunals,

and also high in comparison to other international or national supreme courts like the European Court of Justice. I am not trying to rank those, mind you, but I am simply saying that the quality and workmanship as well as rigor and analytical elements of the WTO jurisprudence can hold their own with any of those other juridical institutions.

Centad: 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?

John H. Jackson: 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 not 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 of resources and particularly short of resources compared to some other international juridical bodies such as the World Court. But there will inevitably be some issues where it would occur that if the WTO Dispute Settlement system does not give recognition to non-WTO obligations (which might be used as defenses in the WTO case) there could be an element of injustice that occurs, and in addition it could add to the burdens of the disputants because they might have to take a portion of a case to another tribunal which would not be very efficient. I think the answer to the question is that the WTO dispute settlement 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.

Centad: The panels and the AB have been criticised by some scholars for displaying judicial activism? Is this charge appropriate or is it an exaggeration/aberration? Do you think that panels and the AB should pursue some judicial activism in their functioning?

John H. Jackson: 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 gray 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 of the critics argue that such a juridical institution should not even try to fill gaps or 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 which has been set up by the members precisely to resolve some of these problems should be timid or unduly restrictive in how they go about their 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 the millions of entrepreneurs who depend upon the rules and need some direction and resolution of disputes about the meaning of treaty language.

So in reference to the way in which the question has been formulated, I think it is inevitable for the international juridical institution such as the WTO and its panels and appellate body to pursue some "judicial activism" in their functioning. The more that the WTO as a total institution, including its decision-making and negotiation processes seem paralysed, the more the 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 the members of the WTO to be more responsible in developing negotiating and decision-making procedures of the organisation by which the parties, the 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.

Centad: What do you think are the main flaws of the DSB of the WTO and how should these flaws be corrected?

John H. Jackson: Of course, it is not easy or possibly not even possible 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 in some cases whether it would be more of a beneficial attribute. But the jurisprudence of the WTO seems unduly "textual", although there is 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 forward, 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 those 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.

It is also true that there is 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 a debated question 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.

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

John H. Jackson: 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 in some conference talks 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 of the economies which are under the supervision of the WTO, and so it is not surprising that each of those entities have a very large number of cases in which they have been disputants (either complainants or respondents). Because they've had such a large number each, it is not surprising that there have been at least a few cases in which it can be found that the degree of compliance has not been so salutary. If this were more typical and more frequent than the situation is now, this could have an impact on the credibility of the total dispute settlement system and this 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 United States it has been observed that for the most part when the it can comply by executive action without recourse to congressional action, the US does comply. The US has stated 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 appropriately comply. 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 on 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 particularly necessary yet.

I am dubious 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 WTO Director General Supachai, the group reported about considerable satisfaction with the WTO DS system, and warned against certain proposed changes, suggesting that the main goal at present for the DS system is to "do no harm."

■ Prof John H. Jackson is a Professor at Georgetown University Law Centre, Washington, US.

Ensuring Compliance with WTO Rulings

Ravindra Pratap

The effectiveness of a system greatly depends upon compliance with its authoritative rulings. The WTO considers prompt compliance with recommendations or rulings of the Dispute Settlement Body (DSB) essential to ensure effective resolution of disputes. While securing prompt compliance has been doubtful, the WTO has been able to secure compliance in most cases. EC–Banana, EC–Hormones, US–FSC, Canada–Dairy and US–CDSOA Act cases have turned out to be particularly notorious. Major issues thrown up for appraisal include sequencing of the determination of compliance/non-compliance and request for suspension of concession, optimisation of compensation, cross-sector suspension of concessions, and litigation costs.

There is general agreement for the practice to allow the compliance procedure to be complete before a request may be made for the suspension of concessions. It is unrealistic to believe that an agreement would always be reached between the parties on the sequencing question. Hence the need for explicit DSU provision for prior completion of the Article 21.5 procedure and for maintaining the prior consultations requirement for a compliance panel request. Further, it would expedite panel determination of compliance/non-compliance if there is requirement to notify the DSB on compliance before the expiry of the reasonable period of time (RPT) and the time for completion of this exercise is not raised from 90 to 120 days, as proposed by many developing country members. In any case, it should be mandatory for panels to give attention to matters affecting the interests of developing country members in relation to measures which have been subject to dispute settlement. Given their limited response abilities, it is only reasonable that developing countries get at least a 30 months RPT in exceptional cases instead of the usual 15 months. Consultations at some point in time must be mandatory before a request for the establishment of a compliance panel may be made.

WTO's remedies are prospective. They are not available for the lost trade. The role of compensation is limited. It is merely a mechanism to ensure compliance with recommendations of the DSB. Among the many suggestions to improve compliance is the suggestion that financial compensation does not restrict trade, helps to compensate injured members and industries, avoids hurting third countries, and can contribute to more effective compliance. While these are merits of this argument, it only makes a developing country member vulnerable when it is to give compensation without improving its prospects for ensuring a more conforming compliance from a developed country who may be more forthcoming in giving compensation but less willing to withdraw a WTO-inconsistent measure. This would encourage the possibility of buying-out non-compliance by those who can. This has happened in the EC–Hormones case, where the EC preferred compensation and is making no attempt to bring the inconsistent measure into conformity with its WTO obligations. Experience does not allow a developing country member to hope for better developmental effects of a financial compensation than of implementation of the terms of trade.

While the option in the Balás text for the complaining party to request either consultations for trade or other compensation or a DSB authorisation for suspension of concessions and other obligations under the covered agreement does give a developing country member to decide on a more realistic remedy for non-compliance, it has nothing in it to guard against the possibility of buying out non-compliance. Periodic payment of compensation that increases over time hardly allays this concern. Moreover, it has been seen that since compensation has to be agreed between the complainant and the respondent, the former is likely to demand it for those products in which it has a comparative advantage as compared to their other producers. Thus, the MFN rule observance in giving compensation is more apparent than real.

The WTO's ultimate remedy for non-compliance is suspension of concessions, i.e. withdrawal of trade concessions owed to, or closing its market for the products of, the losing country. However, in such a scenario the winning developing

Ensuring compliance from developed countries: a far cry!

country member might end up in closing the losing country market for its products. In other words, the effectiveness of this remedy depends more on the size of the market than on the enforceability of rules for securing compliance. Therefore, in a dispute in which the complaining party is a developing country member and the party, which has failed to bring its measures into conformity with the covered agreements is a developed country member, the complainant shall have the right to seek authorisation for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements.

Bringing and defending cases at the WTO have at times been prohibitively expensive for many a developing country member. In the absence of provision to compensate for lost trade there is all the more reason that there is provision for litigation costs. While it is for a member to invoke the dispute settlement procedures, whenever the member alleges nullification or impairment, it is for the system to ensure that the balance of the member's rights and obligations is restored if found to have been disturbed. If the balance is not considered to have been disturbed when restored within a reasonable period of time (RPT) and if no compensation is due unless compliance is incomplete within an RPT, a proposal for costs of obtaining DSB recommendations and rulings has to rest on the S&D treatment, and it should be so, since the DSU admits of the special and differential (S&D) treatment, although it makes no provision for such costs.

However, the DSU nowhere envisages either that DSB recommendations and rulings shall not be duly complied with or that an affected party prefer a mutually agreed solution to withdrawal of a WTO-inconsistent measure, much less necessarily requires a member to exercise its judgement as to whether action under its procedures would be fruitful if action is considered for compliance and not for bringing a case. And if the balance between the rights and obligations of members is not considered to have been disturbed when restored within an RPT, it follows that compliance with DSB recommendations and rulings not ensured within an RPT would be deemed to have disturbed the balance. DSU provision for compensation in the absence of compliance within an RPT brings home the point. Thus, it is not just a fault found with compliance, but also a systemic presumption of actual damage as from the end of an RPT that affords a basis for claiming costs of litigating non-compliance independently of the S&D treatment. The position that "the award of litigation costs is binding on the parties and not subject to appeal" defeats its own rationale behind the proposal. If either the fault of a developed country

Contd. on page 17

Developing Countries Disadvantaged in the DSB

Prof B.S. Chimni, a renowned international legal scholar speaks to Centad on disputes at WTO

Centad: The dispute settlement mechanism of the WTO was hailed as the jewel in the crown at the time of the formation of the WTO. Do you think that it has lived up to that expectation after having seen it function for more than 10 years?

Prof Chimni: The general consensus is that the WTO dispute settlement system has worked reasonably well in the last ten years. From the perspective of developing countries a multilateral dispute settlement system (DSS) is better than a bilateral dispute settlement system in which powerful trading states will always have an advantage. But this understanding needs to be viewed in the background of the fact that the multilateral trade rules themselves are often biased against the 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 characterise 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. The cases on the interface between trade and environment (e.g., the Shrimp Turtle case) and the EC Preferences case are instances in point. Secondly, 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 forums to the more powerful states. They will invoke that which is most suitable to realising their "trade" interests.

Centad: The critics of the 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 to retaliate against developed countries?

Prof Chimni: I would tend to agree that the 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 the big trading partner reacting by withdrawing unilateral trade preferences or suspending foreign aid. Thought can, therefore, be given to variations of a decades old proposal that would permit some form of collective retaliation by developing countries.

Centad: Many developing countries and least developed countries are not able to approach the DSB due to the high litigating costs and lack of expertise at the domestic level. What in your view is the solution to this problem?

Prof Chimni: The lack of expertise is a serious problem even for major developing countries like India and Brazil who 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. Far too much reliance should not be placed on foreign experts and law firms as otherwise 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, so as 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 a developing country has had to spend over $ 1,000,000 by way of legal fees. The Advisory Centre for WTO Law does provide subsidised 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.

Centad: Do you foresee the possibility of more and more disputes coming to the DSB of the WTO in future, especially in today's scenario where the Doha round of talks have been suspended?

Prof Chimni: It is difficult to predict the number of disputes that would come before the DSB. On the one hand, the fact that a settled jurisprudence is emerging would mean lesser number of 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.

Centad: What in your view should be the strategy of developing countries like India in the ongoing negotiations on DSB in the suspended Doha round?

Prof Chimni: India should at 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 (EC Bed Linen case). From this it may be concluded that India is quite satisfied with the working of the WTO DSS. Consequently, India has proposed only minimal changes to the existing DSU (like, 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 should seek the extension of the national deference principle contained in Article 17.6 of the Anti-Dumping 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 a concerned obligation even if a WTO Panel or AB reaches a different conclusion. This would make it possible for developing countries to safeguard the interests of their people through availing a more flexible mode of interpretation of the obligations that have been undertaken.

■ Prof B.S.Chimni is Vice-Chancellor of West Bengal National University of Juridicial Sciences, Kolkata, West Bengal, India.

Trade justice: at what cost?

Doha End-game: Saying Yes to Market Access and No to Development?

Biplove Choudhary

The multilateral trade talks stand imperilled. On 24 July 2006, the Doha trade negotiations were 'suspended' and 'time out' called. While the stalemate was brewing for some time, the proverbial last straw was the failure of the critical G-6 countries (US, EU, Brazil, India, Japan and Australia) meeting in Geneva to agree on an acceptable way forward. Gaps between the key trading nations on the issues of market access and domestic support in agriculture were so wide that the meeting could not take up any other item on the agenda. It may be recalled that even earlier, the G-8 meet held on July 15-17 at St. Petersburg, had failed to take tough decisions and offer political guidance to the negotiators. In the interregnum, although a string of high profile meets and consultations have been held amongst key players, the deadlock persists.

At least for the moment there is no shared script for the endgame and the round continues to flounder. The jury is still out on what it would take to bring the actors back to the table. There is a view rooted in the history of multilateral trade negotiations and of previous stalemates that periods of deadlock are neither new nor unusual especially since the Doha agenda is the one of the most ambitious one by far and it was always going to be an uphill task to conclude it as per the deadlines set.

With this background, it is pertinent to ponder about the nature of the stalemate and consider afresh the overall direction in which the round is headed. Alluding to the aggressive demands of market access by developed countries, Kamal Nath, India's Commerce Minister, has asserted that the gap really is one of 'mindsets' and not of 'numbers'. Doubtless, completion of the round per se is important, but it cannot be at the cost of its contents, Nath avers. The 'mindset' is encapsulated in the hypocritical approach of persisting with the structural flaws and distortions in global trade while raising the market access ambitions to unrealistic levels. . This mindset, maintains Nath, is tragically turning the 'Development Round' on its head to that of a 'Market Access Round' much against the Doha mandate and the subsequent July 2004 Framework and the Hong Kong Ministerial Declaration (HKMD). Let us now briefly now turn to this 'market access above all else' twist in the Doha tale.

Recent statements and communications emanating from the US have pitched for a market-opening outcome as the central objective of the round. It has also been reported that this stand is reflective of the Congressional mandate and business lobbies pushing for greater market access while voicing their opposition to a potential 'Doha lite' or a minimalist deal. As far as developing countries go, this attitude represents a hardening of the negotiating stance rather than a display of flexibility and accommodation of their legitimate demands.

The hardening of stance is typified in agriculture, which is the key to the round and of expectations that an agreement here would trigger a chain reaction to a deal on Non- Agricultural Market Access (NAMA), popularly known as industrial products and services.

It will be pertinent to look at what the agriculture proposals of developed countries have on offer? Analysts have noted that the current reduction proposals of the US do not ensure any effective reduction in the Overall Trade Distorting Support (OTDS). OTDS includes subsidies classified under the Amber Box, de minimis and Blue Box. This has practically robbed the proposal of any meaningful development content. Economic simulations carried out by the WTO to assess the main agriculture proposals from the US, the EU, G-10 and G-20 brought out shocking results. It was found that as per the 'bold' and 'historic' US proposal, agriculture spending could legally increase to $22.5 billion a year, from last year's $ 19.6 billion, by a simple re-categorisation of existing payments! If the reduction commitments of developed

countries only yield marginal and not effective cuts as is mandated by Paragraph 5 of the HKMD, it would only be a move to underwrite the status quo in the highly distorted global agriculture trade. As far as market access goes, developing countries like India are barely in a position to afford steep reduction in tariffs due to the predominant position of the agricultural sector affording livelihood to millions of small and marginal farmers. Such concerns are central to the developmental needs of the majority of the WTO membership but do not find any serious reflection and acceptance in the proposals. Moreover, tariffs are the only protection available to farmers of developing countries, since other safeguard mechanisms in the Agreement on Agriculture can be used only by developed countries.

Also, developed countries are in an overdrive to further dilute the provisions relating to Special Safeguard Mechanisms (SSM) and Special Products (SP) in agriculture. Thus, the US communication on SPs to the WTO member countries noted that the SP designation should be limited to no more than five tariff lines at the detailed duty level (i.e. the level actually applied in a member's schedule) and sought to further squeeze it in other ways. Considering the widely shared view that SPs are critical to securing food and livelihood security and rural development needs in developing countries, it would be hard not to see the US proposal as anything but a mockery of the Development Round.

As far as industrial goods are concerned, the relatively moderate formula for tariff cut proposed by Argentina, Brazil and India has been abandoned for steeper cuts, which have left the Indian industry deeply worried. Centad calculations show that existing US proposals on the table would serve to bring down bound tariff rate of 100 percent to a mere 13 percent, a reduction of 87 percent for certain industrial products in India. The so-called 'flexibilities', whereby certain products can be kept out of the tariff reduction process, can at best protect around 500 tariff lines- a ridiculously low number considering that in fisheries, textiles and clothing alone, sensitive sectors by any account, there are close to 1400 lines in India!

The HKMD put forth quite an aggressive agenda for services while purportedly making fundamental changes in the very architecture of GATS. The content of Annex C of the HKMD on services as well as the manner in which the Annex was finalised triggered extensive debate. In particular, serious concerns emerged as to whether the plurilateral 'request-offer' approach, endorsed by Annex C, is at all development-friendly. Until the breakdown, movement in services was seen as conditional upon progress in other areas especially agriculture.

As things stand now, for the talks to resume, developed countries would need to make a substantive retreat from

Contd. on page 20

Contd. page from 13

Ensuring Compliance with WTO Rulings

member or no fault of a developing country member is the basis for claiming litigation costs, how could the same be claimed unless either is definitively established? Such costs are considerable for most developing countries and have been comparable in certain anti-dumping cases to the duties paid or losses incurred from the lost trade.

The WTO is a significant advance over GATT, but it has not been able to effectively respond to the needs and concerns of developing country members who now use its dispute settlement system more than they did that of GATT. If much of the problem then was the lack of enforceable rules, it is now clearly the lack of sufficient means to fully benefit from them. The WTO witnessed quite early how a small country like Ecuador had to align with the United States to ensure compliance by the EC in the EC–Banana case. It is true that some of the compliance problem lies in the internal constitutional structure of the implementing country. Where full compliance requires legislative action, fear of delay is always looming. Thus, no matter how improved WTO remedies are made, compliance in the final analysis may also depend upon the mindset of powerful countries. But this should not be an argument not to improve and clarify compliance rules and procedures.

■ Dr. Ravindra Pratap is Lecturer at University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, Delhi, India.

Investment Flows to Developing Countries: A Word of Caution

Yamini Srivastava

North-South capital flows are now dominated by direct investment in productive capacity by transnational companies, purchases of shares by institutional individual investors and investment in various other kinds of financial instruments.The broad trend over the last few decades has been a decline in capital flows after the 1980s debt crisis, and a subsequent resurgence in the 1990s. However, there has been a difference in the nature of flows, with a change from predominantly debt flows to predominantly direct and equity investment. In India, too, this trend is reflected in the growing number of measures for increasing foreign direct and equity investment, such as increasing sectoral caps for investment, and suggestions for moving towards fuller capital account convertibility. The reaction of economists globally to these new flows has been overwhelmingly positive, especially in the case of direct investment.

However, this optimism is also being challenged, particularly in developing countries. The questions and challenges being raised suggest a re-consideration of conventional wisdom used to justify the link between increasing foreign direct and equity investment and the growth and development of economies.

In this book, David Woodward urges caution in the optimistic approach that is conventionally adopted towards foreign direct and equity investment flows in developing countries. His approach may offer a useful tool for analyzing the ongoing debates on foreign investment in India and other developing countries in different sectors and through different routes such as direct and equity investment.

The author starts with the fundamental assumption that imports are necessary for the development of economy and to sustain imports it is necessary that the country has enough foreign exchange.

He reiterates that the foreign exchange effects of capital flows are important because of the trade-off between the balance of payments and economic growth. The faster the economy grows, the faster the growth of imports; but there is a limit to how fast imports can grow without causing balance of payments problems. Where this limit lies depends on export earnings, capital inflows and the cost of servicing foreign liabilities.

According to the author, investment which generates new export production is virtually the only element of direct and equity investment which brings a significant foreign exchange benefit to the host country. However, in analysing the impact of such investment on the developing world as a whole, he states that this type of investment will impose foreign exchange costs on other developing countries by reducing the prices of their exports in world markets.These costs may even outweigh the benefits to the host country itself. If this is the case, the overall foreign exchange effect of direct investment on the developing world as a whole is likely to be strongly negative.

Woodward criticises direct and equity investment from the point of view of its relative disadvantages and instabilities as compared to loans and grants. However, while arguing that debt flows have been more stable than direct and equity investment flows, he recognises that these have also been subject to crises in the past. He uses this to draw an analogy with the current optimistic attitude prevailing towards equity and direct investment flows; as even in the case of debt flows there was a considerably positive attitude which preceded the debt crises of the 1980s.

Another criticism is that unlike debt, in direct and equity investment liabilities are incurred by the private rather than the public sector.This would add to the risk of crisis and the scope for the government to maintain control

over the build-up of liabilities is limited. This is in addition to another major risk that unlike debt, where there is a fixed repayment schedule; in direct and equity investment flows, investors can pull out whenever they wish and in the event of a crisis, each investor's interest is only in selling the shares before the others do.

The author also cautions that direct and equity investment flows often cause a transfer of ownership of the assets which make up the economies of developing countries from the people of those countries to transnational companies. However, criticism that can be raised against this view is that ownership in the hands of transnational companies may not always be at the cost of benefits to the people. It is not always possible to differentiate between the interests of the 'people' and of 'transnational companies' in a country. A significant proportion of wealth accrues to the people through these companies, be it through their ownership in them as shareholders, or by virtue of being employees, or by benefiting from the products and services that the company provides.

The author critically examines the risks and processes associated with foreign direct and equity investment. He breaks up the analysis among different types of direct and equity investments, where possible. For instance, direct investment involving construction of productive capacities, would have a greater developmental benefit over direct investment involving the purchase of existing capacities.

A basic concern arises from the fact that for investors to be confident about transferring their capital to another country, they need to be sure that it will be possible both to get the original capital back and that they will receive the income it generates. With investments being riskier in emerging markets because of their politico-economic environment, the price that investors are willing to pay for a particular investment is reduced, thereby increasing the expected rate of return. But for the host country to derive any benefit for itself, it must ensure a rapid build-up of the stock of inward investment, profit remittances and investment inflows. This might be unsustainable because of its dependence on factors that are temporary (such as the return of flight capital, low interest rates in developed countries, privatisation processes). As these temporary factors change, the inward net resource transfers will become more difficult to sustain. In the effort to attract inward investment, a rapid build-up of liabilities by developing countries may exceed their capacity to bear the burden, eventually leading to a crisis.

Another risk is that equity investment also involves the risk of herd-like behaviour of the investors associated with it, who have a tendency of moving into or out of markets at the same time. This adds on to the risk of crises spreading rapidly to other countries which the investors associate with the original country.

The global impact is not only at the time of crisis. To the extent that direct investment increases the world supply of the tradeable goods it produces, it will tend to reduce their prices in the international market. This, in turn, would have the effect of reducing the foreign exchange earnings of the country concerned.

The author also points to the fact that the incentives required to accelerate foreign investment into a country may come at great cost to the host nation. This would be because of the constraints that are placed on economic policy (due to the need to avoid policies that might discourage continued investment) and the pressure that can be exerted by transnational corporations. These could ultimately have the effect of undermining the sovereignty of the nation and reducing the welfare benefits for its population.

The author goes on to examine the Asian crisis of 1997 and arrives at the conclusion that the after-effects of the Asian crisis, and of the financial and policy responses to it, are likely to accelerate the advent of the next crisis considerably.

The author suggests that a more controlled process of competition for FDI flows is required than what operates at present, along with a more selective approach to FDI flows; in order to ensure a positive developmental impact at a sustainable foreign exchange cost.

Though reforms are to be primarily carried out at a national level, the author also suggests that the approach taken in the Multilateral Agreement on Investment (MAI) would need to be changed. He feels that the MAI primarily promotes the interest of investors whereas the approach should be to discourage mutually destructive competition so that the developmental benefits of FDI are maximised for developing host countries. This can be done through limiting the tax incentives and subsidies which can be

offered to direct investors; imposing minimum standards on technology transfer into the wider economy; establishing appropriate environmental policies; and applying general rules such as profit remittances, the repatriation of capital and local ownership.

With respect to capital account liberalisation, the author calls for more coordination and control for capital account movements so that countries do not take on unsustainable burdens of liabilities or become vulnerable to sudden reversal in capital flows.

The author has suggested two approaches with respect to the IMF's role in this. The most limited approach would be to avoid the extension of the IMF's mandate and to exclude provisions limiting restrictions on capital account transactions from future IMF programmes. Thus each country would have full discretion to impose restrictions on outflows at times of crisis and controls on inflows. Another approach is that the mandate for capital account restrictions could be written into the IMF's Articles of Agreement, but with a view to approving restrictions imposed by member countries, and thus giving them greater legitimacy and greater weight.

A specific mechanism that is suggested for regulating foreign exchange transactions is in the form of a global intervention fund financed by a very small tax (of perhaps 0.25 per cent) on all foreign exchange transactions (the Tobin tax).

In the end the author's view on direct and equity foreign investment seems to be an overly critical one. Although he does point to valid grounds for why debt investment would be more stable; his analogies between debt and equity investment point to the fact that much of the criticism raised is applicable to *both f*orms of investment. Further the criticism must be examined at a case-by-case level.

Debt flows and direct and equity investment flows do not offer either/or choices. In capital scarce countries, different and flexible options for choosing investment must be available. It is ultimately for the economic actors, including private enterprises, to decide what makes the most business sense for them, and in this they would be expected to rationally consider the pros and cons of different forms of capital available to them.

However, the author has raised very relevant considerations which examine the current framework for direct and equity investment critically. Such caution is necessary while examining current policies on increasing liberalisation in the realm of foreign direct investment and equity investment flows.

■ Key Reference: 'The Next Crisis? Direct and Equity investment in developing countries', by David Woodward (London and New York: Zed Books, 2001).

■ Yamini Srivastava is a Research Consultant, Centre for Trade and Development (Centad), New Delhi, India.

Contd. page from 17

Doha End-game: Saying Yes to Market Access and No to Development?

their existing negotiating positions and take serious note of concerns raised by other countries. As the Brazilian Foreign Minister, Celso Amorin, put it, negotiations cannot proceed on the basis of a dollar for dollar exchange between reduction of agriculture subsidies and increase in market access. As noted in the UNCTAD's Trade and Development Report 2006, for maximum development potential of developing countries to be realised, rules and commitments governing international trade should be judged on the touchstone of their development needs and goals rather than whether they maximise market access and international trade per se. For the negotiations to be set back in motion, the Doha round needs a credible trigger which admits of the need to balance market access needs with its core developmental mandate. Above all, the talks need political will to rise up to the next level. As to how or when this would happen, the jury is still out.

■ Dr Biplove Choudhary is Centre Co-ordinator, Centre for Trade and Development (Centad) New Delhi, India.

Glaring Facts

Centad Team

Disputes Down and Trade Up!		
Year	**Cases filed from average of 2002**	**Trade as average of 1995-2002**
2003	75%	130%
2004	54%	158%
2005	32%	179%

Source: 1) http://www.wto.org/english/res_e/statis_e/statis_e.htm (visited on 20 September 2006)
2) http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 10 September 2006)

Peace Loving LDCs!		
No of Complaints filed by all countries	=	363
No of Complaints filed by LDCs	=	1
Percentage of Developed Countries reaching appellate	=	66%
Percentage of LDCs reaching appellate	=	0.00%

Source: http://www.wto.org/english/res_e/statis_e/statis_e.htm (visited on 20 September 2006)

	Dispute Cost to Poverty!		
One case in DS Litigation	= US$ 444,000		
	= 118	×	Gross per capita income of Sri Lanka
	= 154	×	Gross per capita income of India
	= 212	×	Gross per capita income of Pakistan
	= 251	×	Gross per capita income of Bangladesh
	= 313	×	Gross per capita income of Nepal

Source: 1) http://wage.wisc.edu/uploads/WTO%20Conference/nordstroem_update.pdf (visited on 20 September 2006)
2) http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf (visited on 15 September 2005)

Compliance – Does it Really Matter!		
Compliance: Does it really matter?		
Out of 363 complaint cases		
Article 22.6 compliance proceedings	=	4% (16 cases)
Full compliance	=	nil

Source: http://www.worldtradelaw.net/articles/charnovitzlastresort.pdf (visited on 20 September 2006)

Demystifying the Dispute Settlement System of the WTO

Centad Team*

What is the dispute settlement system in the World Trade Organisation (WTO)?

Dispute settlement system in the WTO is similar to a 'court of law' in a civil society. It comprises multilaterally agreed rules and procedures that provide the means to countries to settle their trade disputes. Trade disputes arise when one country violates any of the agreed provisions of any WTO agreement and this violation impairs or nullifies the benefit that would have otherwise come to another country. For example, if country 'A' imposes a tariff rate on country 'B' which is more than the rate that it imposes on all other member countries of the WTO (Most Favoured Nation rate), then, 'A' is violating the Most Favoured Nation rule (this rule requires that a member country of the WTO should extend equal treatment to all member countries) and is impairing the benefits to 'B' by illegally restricting its exports. This will result in a trade dispute between 'B' and 'A'. Now 'B' can use the dispute settlement system to settle this dispute. Settling the dispute, in this case, will mean, ensuring that 'A' starts complying with the Most Favoured Nation rule and hence imposing the same tariff rate on 'B' that it is imposing on other member countries. This will stop the restriction of exports of 'B' to 'A' and hence restore the benefits to 'B', which were earlier impaired because of higher tariff being imposed by country 'A'.

What is the significance of the dispute settlement system in the WTO?

Dispute settlement system of the WTO is significant in many ways:

1. Guarantor of Rights and Obligations - By providing the means to countries to settle their trade disputes, it acts as a guarantor for the rights and obligations of countries in the WTO. It characterises a rule-based multilateral trading regime. Countries in the WTO indulge in international trade for mutual benefits and gains based on agreed rules and procedures. For country 'A' to enjoy its right country 'B' has to fulfil its obligation and vice versa. In case of a country not fulfilling its obligation other member countries can challenge the action of this country in the dispute settlement body (DSB). The DSB will then ask this country to change its action and bring it in accordance with the agreed rules and procedures. Hence, the DSB enforces the rules of the WTO and maintains the sanctity of 'rule of law', which is the bedrock of the multilateral trading regime embodied in the WTO.

2. Provides stability and predictability – The DSB gives stability and predictability to the multilateral trading regime, as countries know that if their rights are infringed, then an effective recourse is available. This keeps countries interested in the system. Without effective dispute resolution machinery and proper enforcement mechanism a rule-based system will be less effective and countries will not have adequate faith in the system.

3. Protection against unilateral action - Since the DSB in the WTO comprises multilaterally agreed rules and procedures to settle disputes, every trade dispute has to be settled according to the procedure established by law. No country can act unilaterally against any other country without going through the DSB.

What makes the DSB in the WTO effective dispute resolution machinery?

The functioning of the DSB is governed by an agreement in the WTO called 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU) According to this agreement the DSB in the WTO is effective dispute resolution machinery for a variety of attributes:

1. Settling disputes in a stipulated time period - The DSB settles the disputes within a given time frame. The Dispute Settlement Undertaking (DSU) agreement lays down very

Errata: The Article titled 'The Expanding Horizon of RTA's in the Multlateral System' carried out in the last issue of Trading Up was an abridged version of Moana Bhagabati's article of the same title available at www.centad.org. The same was inadvertently credited to the Centad Team.

*Substantially contributed by Prabhash Ranjan

Dispute redressal: An uphill task for developing countries

detailed procedures and timetable for each stage of the dispute. This is contrary to the dispute settlement system in the General Agreement on Tariffs and Trade (GATT) before the WTO came into existence in 1995. In GATT there was no fixed time frame for a dispute to be settled and many disputes went on for years inconclusively. This made countries lose interest in the trading system.

Settling disputes within a stipulated time period implies that if a country approaches the DSB against any other country it has a fair idea of the amount of time that will be taken to settle the dispute. Further, settling disputes in a given time frame makes the whole system more efficient and predictable.

2. Losing country cannot block the ruling – Another important attribute of the DSB is that the losing country cannot block the ruling of the DSB. The DSU allows for the automatic adoption of the ruling unless or until there is a consensus amongst all the WTO member countries not to adopt the ruling. Hence, a ruling will not be adopted only if all 149-member countries decide against it. Even if one country is in favour of the ruling, it will be adopted. This is contrary to the system in GATT, before the WTO came into existence, where even a single country alone could block the ruling. This always meant that a losing country would invariably block the ruling and the opposing country could not do anything about it.

In the present system, if a losing country has to ensure the non-adoption of the ruling, then it has to convince all the member countries including its adversary country in the case to collectively vote against the ruling. This is virtually impossible and hence all the rulings will be adopted which means all the disputes will be settled one way or the other.

3. Retaliatory mechanism - The DSU has also put in place a retaliatory mechanism for cases where countries fail to comply with the rulings of the DSB. In such cases, the other country has the right to impose sanctions against the non-complying country (this is discussed below in greater detail).

How does the DSB settle disputes?

There are numerous stages of resolving disputes:

First Stage – Consultation: The first stage in settling the dispute is by entering into consultations. At this stage the complaining country notifies the DSB and makes a representation requesting the other country to enter into consultations. Such

representation and request has to be made in writing giving the reasons for the consultation, including the identification of the issues involved in the dispute.

The country that gets the request for consultations should sympathetically consider the request for consultations and reply within 10 days after the date of the receipt of the request. It is also required to enter into consultations within 30 days after the date of the receipt of the request. If the consultations fail to settle the dispute within 60 days after receipt of the request, the complaining party may request the establishment of the panel.

The rationale behind having consultations is to provide adequate opportunity to the disputing countries to settle their disputes by talking to each other. The primary role of the DSB is not to function as a judicial court that passes judgments but to settle disputes and hence it first allows countries to settle their differences without resort to judicial machinery. It is only if disputing countries are not able to resolve their differences by talking to each other, they move to the second stage, which is a judicial process.

Second Stage – Panel: Failure of consultations implies the formation of the panel (second stage). If consultations fail, the complaining party may make a written request to the DSB to form a panel. The DSB, after receiving such a request, will form a panel. A panel is like a tribunal that examines the evidence and decides who is right and who is wrong. The panel is required to dig facts that will assist the DSB in making recommendations or rulings to decide the dispute.

A panel shall comprise three to five members, who could be a well-qualified individual either from the government or non-government organisation or someone who has served or presented a case to a panel, or who has taught or published on international trade law or policy, or served as a senior trade policy official of a member country. The members of a panel are chosen in consultation with the countries involved in the dispute. If the parties to the dispute do not agree on the choice of members of the panel, then the Director General of the WTO appoints the members of the panel.

The panel, after consultations with the parties to the dispute, will fix the timetable for the entire panel process. This timetable should be such that it accords sufficient time for the parties to make submissions to the panel. The panel shall issue its final report within six months from the date the panel was formed. In cases of urgency it will issue its reports within three months.

Once the panel has given its report to the DSB, it shall not be considered for adoption until 20 days after the date of circulation of the report. Within 60 days after the circulation of the report amongst the member countries, the report shall be adopted. Non-adoption of the report within 60 days can only happen because of two reasons. First, the DSB decides by consensus not to adopt the report. Secondly, the party to the dispute decides to appeal. . In such a case, the panel report shall not be considered for adoption by the DSB till the appeal is heard and decided.

Third Stage – Appellate Body (AB): Appealing in respect of the findings of the panel by a party to the dispute implies moving to the third stage of dispute resolution. In case of an appeal, the dispute comes to the AB. The AB is a permanent judicial body in the WTO established by the DSB. The main function of the AB is to hear the appeals from the panel cases. It comprises seven members with not more than three members hearing a particular appeal. Members of the AB are people who have recognised authority and demonstrated expertise in law, international trade and different WTO agreements. They should not be affiliated to any government.

The appeal to the AB should be on the interpretation of the law and not mere facts or request to re-examine the evidence. The AB has to complete its proceedings on the appeal within 60 days from the date the appealing country notifies its intention to appeal. If the AB thinks that it is not possible for it to submit its report within 60 days, it will have to inform the DSB about it in writing. However, in no case the AB proceedings can exceed 90 days. The AB has the right to reverse, uphold, change or modify the findings of the panel.

The AB reports will be adopted by the DSB and have to be unconditionally accepted by the parties to the dispute. In other words, the findings of the AB are final and there cannot be any appeal against its findings (AB in the WTO is like the apex court in any country or society). The only situation where the AB reports cannot be adopted by the DSB is when there is a consensus against adopting the report. In other words, all the member countries (including the country winning the dispute) have to reject the report for it to be not adopted by the DSB. The report will be adopted even if one member wants it to be adopted.

If the panel or the AB comes to the conclusion that a particular action of a country is in violation of a WTO provision, it will recommend that this particular country should bring its action in conformity with the WTO provisions. The adoption of the

panel or the AB report by the DSB implies that the dispute has been settled.

What happens after the dispute has been settled?

After the dispute is settled i.e. the panel or the AB has found out who is right and who is wrong, the next stage is to ensure that the parties to the dispute effectively implement the ruling. Effective implementation of the ruling implies that the country whose measure or action has been found to be inconsistent with the WTO provisions should correct its action. Such effective implementation is necessary for ensuring the efficacy of the DSB and hence maintaining the 'rule of law'.

Within 30 days after the adoption of the panel or the AB report, the country whose measure or action has been found to be inconsistent with the WTO provisions, will notify its intention regarding implementing the rulings or recommendations of the DSB. The country at fault is required to immediately comply with the rulings or recommendations of the DSB. If complying immediately is impracticable or not possible, then it will have to comply with the rulings within a reasonable time period. This reasonable time period to comply will be:

1. The time period proposed by the country that has to comply with the ruling provided that such time period is approved by the DSB. In case the DSB does not approve this proposed time period then,

2. The time period mutually agreed by the disputing countries within 45 days after the adoption of the ruling will be the reasonable time period. In case the disputing countries are not able to reach this agreement then,

3. The time period will be determined through the process of binding arbitration between the disputing countries within 90 days after the adoption of the panel or the AB report.

What happens if a country to the dispute fails to comply with the rulings of the DSB?

If the country at fault fails to comply with the ruling, then the other disputing country has the right to seek compensation from the non-complying country. One of the ways of compensating could be by providing access to the markets of the losing country at lower tariff rates.

In case no satisfactory compensation is worked out within 20 days after entering into negotiations for compensation, the country seeking the compensation may request the DSB to authorise it to retaliate against the non-complying country. Retaliation in the WTO is like inflicting a punitive action. However, it is important to bear in mind that the retaliatory mechanism is not meant to punish any country but only to urge the countries to comply with the ruling and the covered agreement. It is supposed to act like a deterrent against flouting the rulings of the DSB. The DSU agreement states that countries can retaliate by suspending the concessions (not honouring the obligations towards the non-complying country under the WTO agreements that would have otherwise been honoured in normal practice) to the flouting country.

This suspension of concessions can take place in three ways:
1. In the same sector - The complaining or the country that has won the dispute shall first suspend concessions in the same sector in which the other country has been found guilty of not fulfilling its obligations under the covered agreement.

2. Across different sector - If retaliating in the same sector is impracticable or will be ineffective, then the complaining country can retaliate in another sector. Retaliating in the same sector can be impracticable if there is a possibility of retaliating country being harmed rather than benefiting. Therefore, in case of retaliation being impracticable or ineffective in the same sector the complaining country can suspend concessions in some other sector.

3. Across different agreement - If suspending concessions in other sector is also found to be impracticable or ineffective, then the complaining country can suspend concessions under any other agreement of the WTO. So, for instance if the dispute involved GATS agreement and retaliating under GATS is impracticable or ineffective, then the complaining country can retaliate say, under the TRIPS agreement. Retaliation under the TRIPS agreement could be by de-recognising product patenting on pharmaceuticals or by not extending copyright protection to the products of the flouting country in the territory of the complaining country (Making it legal for domestic audio companies to sell copies of the latest Hollywood movie and hence not give copyright protection to this Hollywood movie, assuming the US is one of the guilty party).

Before retaliating or suspending the concessions the complaining country will seek authorisation from the DSB. This authorisation will be granted unless all the member countries of the WTO are against such authorisation. Further, the retaliation or suspension of concessions should be equivalent to the injury caused by the distortion of the flouting country.

Glossary

Centad Team

Adoption: According to the Dispute Settlement Understanding (DSU) of the World Trade Organisation (WTO) the reports of the Appellate Body or the Panel are not automatically implemented. These reports are submitted to the Dispute Settlement Body (DSB) and are implemented only if the DSB decides to accept the reports. The adoption in the DSU is quasi-automatic because it operates on the basis of 'reverse, or negative, consensus'. In other words once a report is circulated among members it must be accepted unless they decide to reject it through consensus. All Reports submitted by both panel and appellate body to the DSB till date has been adopted.

Amicus Curiae Brief: It is a submission made by a person/ organisation which is not a party to the dispute but has an interest in the matter. Such briefs at the domestic level, often help courts by providing additional inputs for decision making. The person/organisation submitting the brief to the DSB can provide both factual and legal perspectives in relation to the matter. However, the submission of an amicus curiae brief is not a right, but must be permitted by the Panel. The issue of amicus curiae briefs has been debated at the WTO as according to critics it allows the participation of private actors at a body which is created to resolve disputes between two or more sovereign states.

Appellate Body Report: These are decisions of the appellate body. In the normal course, the reports of the Appellate Body are adopted by the DSB within 30 days of its circulation to the WTO Members. DSB has the option of rejecting the adoption of the report if all the members agree for its non adoption.

Appellate Body: The Appellate Body is the supreme authority for settling a dispute arising out of any WTO Agreement. It is also called the World Trade Court. It is a part of the DSB established under the DSU and consists of seven independent persons, who share the task of reviewing the findings of a Dispute Panel at the request of one or more parties to the dispute concerned. The Members of the Appellate Body are elected for four years and they are eligible for a reappointment once. The main task of the body is to uphold, modify or reverse the legal findings and conclusion of the panel and will not reexamine the facts of panel report.

Compensation: If recommendations and rulings are not implemented by a Member within a reasonable period of time, the complaining party may seek compensation. Compensation is voluntary and must be consistent with the covered agreements. The possible forms of compensation include providing enhanced access to the market of the other Member, tariff reductions or cash compensation. Compensation is a temporary measure. Full implementation of a recommendation is preferred over compensation.

Compliance: This refers to the implementation process of an Appellate Body Report or a Panel Report after its adoption by the DSB.

Cross Retaliation: The retaliation is to be carried out in a systematic way. First, retaliation should be in the same sector. If the retaliation in the same sector is not practical or effective then the party can retaliate in different sectors of the same agreement. If this second alternative is also not practical or effective then only the party can retaliate in a different agreement. This third alternative is generally referred to as cross retaliation.

Dispute Settlement Body (DSB): This is the body created under the agreement on Understanding of Rules and Procedures Governing the Settlement of Disputes with the responsibility of overseeing the implementation of this Agreement as well as the Dispute Settlement Mechanism of the WTO. The DSB consists of all the Member countries of the WTO.

Dispute Settlement Understanding (DSU): This is the short form of the Agreement on Understanding on Rules and Procedures Governing the Settlement of Disputes, which is an Annex to the Agreement Establishing the World Trade Organisation (WTO). The DSU sets out the rules and basic procedures to settle disputes arising among the WTO Members regarding the violation or non fulfillment of obligations spells out any of the Agreements in the Final Act of Uruguay Round of Multilateral Trade negotiations. The DSU also prescribes a clear timeline for the settlement of disputes. Normally, it takes 15 months to deliver a decision even in the case of an appeal against the panel report. However, this

time line is flexible and if the dispute is of an urgent nature it can even be put on a fast track.

Dispute settlement: This refers to the process by which any trade disputes among WTO Members can be settled in the *WTO* following a specific set of rules and procedures, ranging from bilateral consultations, to mediation and arbitration, to the actual initiation and continuation of a trial-like proceeding in which the disputing parties get to present their evidence and argue their case before an panel of trade law experts acting as "judges."

Final report: This refers to the report of the panel which will be submitted to parties after the review process even in case of a request. The final report will be circulated to all WTO members after three weeks from the date of its submission to parties. If the panel concludes that there is a violation of any provisions of WTO agreement or an obligation, it recommends the party in violation to take measure to conform to WTO rules. The panel also may suggest the way in which it could be done.

Interim report: Before the final report is submitted, the panel submits a report containing its findings and conclusions to all the parties and gives them a time period of one week for review. This report is known as an interim report.

Negative consensus: This refers to the process of adoption of the reports of the Panel and Appellate Body at the DSB. Under the DSU rules, reports can be rejected only when all countries agree to reject the report. As a result, most of the times, Panel/ Appellate Body reports are adopted even if the affected party does not agree for the adoption of the agreement. Thus the WTO avoids a situation where a Member that loses the dispute blocks the implementation of the decisions. This is the critical provision which ensures implementation of the Panel/Appellate Body reports.

Nullification and impairment: This occurs when a WTO Member violates or fails to carry out its obligation of any of the WTO agreements and affects another member's actual or prospective benefits from trade.

Panel report: Decision of the Panel is called the Panel Report. The Panel Report gets adopted automatically within 60 days of its circulation to the WTO Members provided no party goes for appeal or the DSB decides to reject the report with a consensus of all members.

Panel: This refers to three to five persons representing in their individual capacity to hear and deliver the opinion on a dispute. Panel is the second stage of a dispute settlement process provided by DSU. The panel members are usually drawn from a list of governmental and non-governmental trade experts maintained by the WTO Secretariat. A panel is formed to settle a particular dispute at the request of a WTO Member. Panel is like a trial court and conducts hearings, accepts submissions from the parties to the dispute (including third parties), makes a report based on their findings and finally submits it to the DSB for adoption.

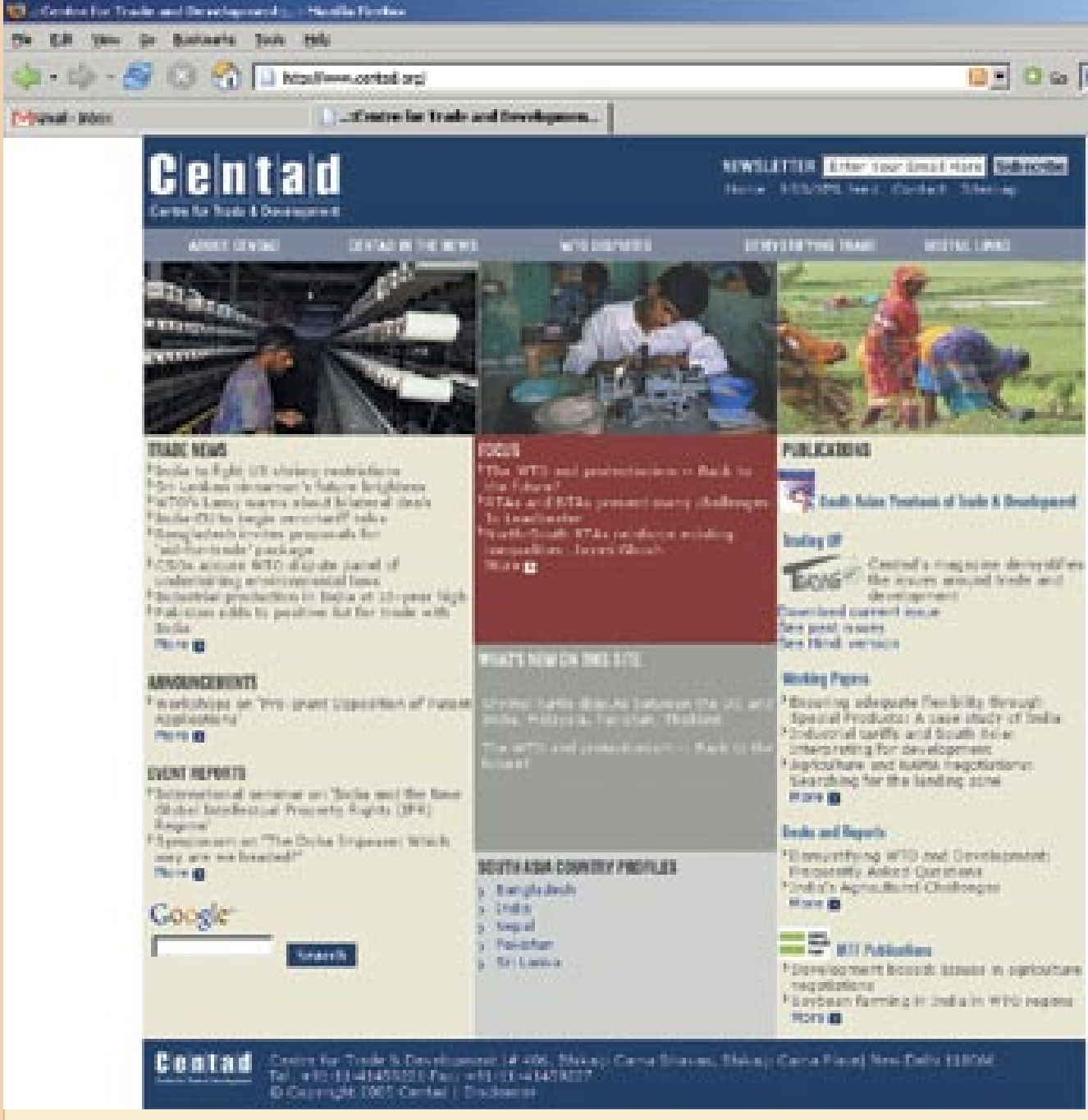
Sequencing problem: This refers to a lacuna in the procedural order in DSU when disputes are not settled and specifically in the time gap between compliance with the Panel report and possible counter-measures that can be taken against a Member. Procedural problems could arise because under the DSU, the time period for the Panel to make a report in the event of a disagreement over a Member's compliance with the DSB ruling, may exceed the time period provided for a complaining Member to request for other remedial measures such as compensation and the suspension of concessions. This may lead to the anomalous situation where the complaining Member approaching the Panel over the issues of non-compliance of the other Member with the DSB ruling, might miss its opportunity to request for compensation or suspension of concessions.

Request for consultation: Consultation or mediation is the first stage of dispute settlement under the DSU. Request for consultation is the first step in the initiation of dispute settlement proceedings requesting the other country to engage in the consultation. The request is served to the other party thorough the DSB.

Retaliation: If the Member concerned fails to provide satisfactory compensation, the other Member can approach the DSB seeking authorisation to suspend the application of concessions or other obligations to the Member concerned. This is known as retaliation. The suspension of concession or other obligations is carried out mainly by increasing tariffs on imports from a country that has injured its exports by violating its WTO commitments.

Review: After the interim report parties can request for a review of the interim report. The maximum time to complete the review is two weeks. During the review period, the panel may hold additional meetings with the two sides.

Rulings: The recommendations and legal interpretation pronounced by the panel/appellate body which gets adopted by DSB are termed as rulings.



EVENT ANNOUNCEMENT

South Asian Conference on Trade and Development, 2006

Multilateralism at Crossroads: Reaffirming Development Priorities

19-20 December, 2006

Park Hotel, New Delhi, India

For further information, contact:

Email: centad@centad.org

Website: www.centad.org