Agneshwar Sen
Roll. No 4225

Executive Summary

AN EVALUATION OF THE DISPUTE SETTLEMENT MECHANISM (DSM) OF THE WORLD TRADE ORGANISATION (WTO)

The World Trade Organization (WTO) is the multilateral international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their Parliaments. The WTO's core functions are to provide a forum for negotiating trade agreements, a forum for monitoring the trade regimes of its members and finally, a forum for settling trade disputes amongst its membership. A dispute may either be about violation a member's rights or it may be a denial of a benefit assured under the WTO disciplines by another member.

Dispute settlement in the WTO takes place under the aegis of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and is commonly known as the DSU or the DSM. It provides the legal setting for resolving trade related conflicts and also allows imposition of retaliatory measures in the event of non-compliance of a ruling. The DSU has thus given 'teeth' to the WTO, making its agreements effectively enforceable.

The Dispute Settlement Body, an organ of the WTO, consists of all member nations of the WTO and administers the DSU. It nominates "Panels" to adjudicate the disputes and it also possesses the right to either accept or reject the findings of the Panels. It also has the responsibility for monitoring the implementation of the eventual rulings.

Since establishment in 1995, the DSM has been regularly used resulting in new interpretations, derivations and in some cases creation of laws and understandings. Consequently, WTO law has increasingly become complex over the past 20 years. While most developed countries have the in-house legal expertise and the financial wherewithal that enable them to understand WTO law and to participate fully in the WTO legal system, most developing countries and certainly the least developed countries (LDCs) do not. The lack of capacity has serious implications for the WTO as an organisation, as increasingly the lesser-developed members can get alienated from the processes of WTO leading to a situation similar to what existed in the GATT days.

To address this situation, in 2001, the Advisory Centre for WTO Law (ACWL) was created with the objective is to provide the Least Developed Countries (LDC) and developing country members of the WTO with adequate legal capacity to help them to understand fully their rights and obligations under WTO law. It provides free advice and training on all aspects of WTO law, as well as assistance in WTO dispute settlement proceedings, to developing countries and LDCs that are Members of, or are in the process of acceding to, the WTO. The ACWL has provided these countries with free legal opinions, has conducted annual training courses for Geneva-based delegates, and has trained Government lawyers. In addition, it has assisted developing countries and LDCs in WTO dispute settlement proceedings at modest fees. Thus, it has become an organisation that pools the collective experience of developing countries and LDCs in WTO legal matters and makes that expertise available to each of those countries.

However, a vast majority of the WTO membership has never approached the DSM for resolution of its trade related grievances. This is a well-known issue and

examination of the relevant literature shows several limitations of the DSM. Many Members feel that improvements should be made to the DSU despite the general shared conviction that the DSU has served them well since it started operating in January 1995. Consequently, the DSB started a review in late 1997, and held a series of informal discussions on the basis of proposals and issues that members identified. Since then more than 80 WTO members have presented a large number of proposals, each of which contains several suggested changes. The proposals cover virtually all stages of the DSM as now existing. Some of the proposals address housekeeping issues while others seek to introduce new stages while still others suggest enhancing the special and differential treatment of developing and least-developed countries.

However, in this process there is no place or proposal for involving the private business entities in the DSM. This is despite the fact that the adverse impact of a WTO incompatible measure is primarily on the business entities of the affected country. They directly face the loss in their businesses, including closure. *De facto* they are the main affected party in the DSM processes, they benefit from it and also suffer its limitations, but without any direct role in it. In the present system, they can at best inform their government about the measure in another member state that is adversely affecting their trade, assist financially in mounting the dispute, and provide other background support. The relevant research questions examined on the basis of the DSM related data and statistics and relevant case studies are:

(i) Have the various initiatives of WTO Members to make the WTO DSM accessible to the lesser-developed country members' succeeded?
(ii) Is there a case to allow participation of the business entities of WTO members in the dispute resolution process, since they are the directly affected parties, suffering actual losses?

The statistical analysis carried show that there is an inbuilt bias in use of the DSM in favour of the bigger economies partially because they trade more have an inherent procedural advantage in the way the DSM is presently structured. The legalistic construct both in terms of law and procedures, leaving the political considerations aside, the cost is prohibitive. This is one of the reasons that only one third of WTO's membership have approached the DSM. Even in situations, such as with the global economic slowdown, where one would expect that the smaller countries would get more active in using the DSM to protect their economies from the actions brought in by the growing protectionism isn't really borne out through the data.

Recommendations therefore include that India must follow up, with support of developed members like EC and Canada, the proposals on a large number of procedural problems for medium to small economy members as well as for the rest of the membership such as sequencing, post retaliation etc. India, with other like minded countries, has circulated informal papers that *inter alia* include proposals to set up and manage a Dispute Settlement Trust Fund which will help developing members overcome or at least manage their financial limitation. To improve the participation of the smaller members, some form of 'small causes court' that will enable low value cases to come in for quick and timely disposal must also be considered. Indeed, there is also a need for a dedicated institutional mechanism to support removal of trade barriers from the perspective of traders rather than trading nations. To achieve this, the following recommendations are made:

A. **Set up the WTO Business Help Centre**: Set up an industry focused WTO Business Help Centre (WBHC). It could operate out of Geneva, with possibility of opening regional offices later. The WBHC will have the objective of providing legal advice for applicable rules and available dispute settlement recourse to them from

domain experts in trade law. This Centre should be constituted under the aegis of the WTO, like the ACWL, and have WTO members on its governing board. It will be funded by the national industry associations, but run professionally like the ACWL or World Economic Forum (WEF).

B. **Summary Dispute Procedures**: In addition to setting up a system for obtaining specific advice by individual business entities on their trade issues, it is also recommended to establish "Summary Dispute Procedures" for the economic entities facing trade barriers from developing countries. The intention is that once a trader is convinced about the legal advice provided by the WBHC, it is for the business entity to use the domestic political and trade forums to convince the government about launching a dispute in the WTO. Often, as has been seen in the literature reviewed by me, governments give cost as a reason to dither from launching disputes. Therefore, DSU needs to be supplemented by a new summary procedure to provide shortened procedures for a Panel report with only one Panelist who is mutually agreed between the disputing traders of the two countries rather than the WTO Members. The traders can directly present the case to the Panel and obtain documents, evidence and even witnesses if required, themselves (may also be sourced from their own governments) rather than operate through the formal channels of the WTO member. The Panel may follow a quick 2-month procedure, following all the principals of natural justice but not constrained by the complex government to government timelines or dealing with plenipotentiaries who are involved in other matters in the WTO.