# A CRITICAL ANALYSIS OF THE DEVELOPING COUNTRIES PARTICIPATION IN THE WTO DISPUTE SETTLEMENT MECHANISM

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**Abstract**

Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO) is often regarded as one of the most significant accomplishments of the multilateral trading framework. Many trust that the WTO DSM has presented more noteworthy "legalism" and gives a more "rule oriented" framework in respect to the "power oriented" structures. The rule- based approach adopted by WTO for the adjudication is a theoretical initiative by the WTO although the same cannot be guaranteed in practice as well. Various implementation problems are created for developing countries that are caused by their lack of institutional capacity and by their problems in accessing knowledge. The dispute resolution system adopted by WTO has to be studied and discrepancies have to be looked into, if any; when developing nations take recourse of the same. The objective behind the study is to have a foresighted view of the power that developed and developing nations have/exert and how it results in having an impact on the decision making in trade disputes at an international front with the help of various case studies. Three-fourth of the WTO members are developing and least–developed countries. Hence, a study done in the developing nation's perspective is of great importance for the proper working of the WTO itself. The dispute settlement mechanism being one of the main endeavours of the WTO whereby it aids in settling disputes and reducing trade related tensions among the participant nations which could be developed, developing or least developing nations. Dispute settlement is sometimes described as the jewel in the WTO's crown. It's the central pillar of the multilateral trading system and a unique contribution to the stability of the economy globally. WTO dispute settlement focuses countries' attention on the rules. Once a verdict has been announced, countries concentrate on complying with the rules, and perhaps later renegotiating them rather than declaring war on each other. Another interesting observation being that presently, developing nations are more active in the WTO disputes as per the information given on their website, although more participation does not guarantee that it shall surely lead to benefit for the developing nations as well. The scrutiny of the dispute settlement mechanism shall be done where by the objective shall be to result in the optimum performance of the settlement mechanism resulting in ideal adjudication.

## I Introduction

WITH THE advent of globalization, the WTO has been instituted with the objective to ease out the trade activities between the nations. Its main function is to make sure

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that trade transactions occur freely without any constraints. Interestingly, all WTO agreements include various provisions specially for developing nations that comprise of prioritizing trading opportunities and various benefits to support the infrastructure of the developing nations in order to handle the trade related work. The WTO has the provision for settlement of disputes in order to sort out the various international trade disputes. The WTO dispute settlement mechanism is fairly based on certain rules that help in making the trading system between the various international nations more stable and organized. It helps them take up legal recourse in case of any non-adherence of the already agreed upon rules by the nation states. The objective here is not to adjudicate by passing a judgment but to bring both the parties to an amicable settlement. The disputes usually arise based on non-conformity by one of the parties of any policy measure of trade that has been set out by WTO. Usually the process is inclusive of consultations, establishment of panels in case of unsuccessful consultations and lastly, appeals if the losing parties are dissatisfied. Each appeal can be upheld, modified or reversed based on the decision given by the panel which has to be accepted or rejected by the dispute settlement body. Although the procedure has been let out in the rules, another aspect that needs equal emphasis is the practical implementation of the decisions through the dispute settlement mechanism of the WTO. The research paper starts with providing details about developing nations, their criteria of classification and procedure followed for dispute resolution by General Agreement on Tariffs and Trade (GATT/ WTO). Various critical issues in context of the participation of the developing nations are also discussed. The paper also looks into the need for reforms and seeks to provide suggestions for the same.

## II Developing countries and GATT/ WTO settlement mechanism

"Developing Nations" is a term that has not been given any concrete definition. The status of the countries is decided as per the classification done by World Bank. The classification of a few states as economically created does not recommend a static standard that once achieved stays consistent. The thought of economic advancement is dynamic: It gives relative economic pointers that at any given time might be utilized to assess the level of performance of states. Henceforth, models of technology or degrees of abundance that used to be high, if kept up amid times of innovative progression, may well be considered as characteristic of stagnation.[1] The WTO has segregated the countries into four categories which are; *firstly* industrialised nations such as United States, European Union, Japan, Canada, Australia, New Zealand, Switzerland and Norway; *secondly* economies in transition which are mostly previous eastern bloc countries with beforehand order economies; *thirdly* lesser -developed nations

1 P.E. Bondzi-Simpson (ed.), "Confronting the Dilemmas of Development Through Law" in *The Law and Economic Development in the Third World* (New York, Praeger, 1992).

which are 32 in number and have a per capita Gross Domestic Product (GDP) under 1,000 USD and *lastly*, developing nations which are all the nations that do not fall under the above mentioned three classifications and have assigned themselves in that capacity which include India, Brazil, Costa Rica, China and South Africa to name a few. Members announce for themselves whether they are "developed" or "developing" countries.[2] However, other members can challenge the decision of a member to make use of provisions available to developing countries.[3]

The fundamental pointers utilized as a part of assessing the level of economic advancement of states, as endorsed by the World Bank, are per capita GDP, development rate of GDP annually, yearly rate of inflation and life expectancy.[4] However, the Association for Economic Cooperation and Development (OECD) utilizes the GDP criterion to recognize distinctive kinds of developing nations.[5] Other economic markers utilized worldwide look into the level of industrialisation of a country and the accessibility and moderateness of social administrations, for example, instruction and wellbeing.

The true test for the developing nations is to balance out their own individual demands and give out strong responses to other's demands considering the disadvantages international agreements bring along with it hereby accommodating a common standard. The advantages for global regulation may end up being much less for the developing countries as they might face risk from other stronger countries in relation to international agreement negotiations, the significance they have in global flows might be negligible, there might be fixed costs which are higher than the developed nations in context of interventions. Although one cannot ignore that it also opens doors for the developing nations to directly approach an international platform rather than creating and adapting a national one.

## III GATT/WTO dispute settlement mechanism: Genesis and basic features

Before the Uruguay Round which took place from 1986-1994, trade was never considered an essential constituent of economic strategy. Developing countries were never even considered a priority in context of GATT negotiations before that.[6] The

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2 Who are the Developing Countries in the WTO, World Trade Organisation, *Available at*: http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited on May 29, 2019).

3 *Ibid*.

4 The World Bank in its annual reports called World Debt Tables: External Debt of Developing Countries(Washington D.C. IBRD) uses these indicators in its evaluation of developing countries.

5 OECD Report external debt statistics: the debt and other external liabilities of developing, CMEA and certain other countries and territories (1989).

6 Sheila Page, *The GATT Uruguay Round: Effects on Developing Countries* (Overseas Development Institute, London, 1991).

scenario has definitely changed since then whereby more developing countries have started actively participating in the WTO negotiations and are being given better recognition in order to have their voices being heard. The same can also be said about increase in the rate at which the developing nations approach the WTO for dispute resolution. One of the basic reasons for the same can be attributed to the increase in the trade activities at a global level. The Uruguay Round negotiations almost took time span of six years. It started with industrial countries trying to reduce their barriers to exports related to important sectors such as clothing, textiles and agriculture from the southern part of the world.

**The initial stage**

Dispute settlement as per GATT was instituted as an informal procedure whereby the process was simple. Article XXIII paragraph 1 mentions about there being a right to consultation in various circumstances which could be in case of failure of the parties to follow the GATT obligations, impairment or nullification of GATT benefits. The other paragraph looks into the issues where the consultations end up failing to settle matters, the dispute shall be given off to the parties to the contract and appropriate recommendations shall be made for the same.[7] This recommendation shall be given by the working party, after which it shall be given by the standing panel of experts and then, it shall be looked into by the concerned panel chosen for each of the cases. A report is drawn up with various recommendations and rulings that have to be adopted by contracting parties.

In the 1960s, the panelists started being named in the panel reports and the panel proceedings ended up becoming more and more structured. In fact, the third parties were also given the participation role of expressing their opinions. Panel reports also started being cited in the form of precedents. It was at this time only that GATT shifted to decision being done by majority to consensus. In the 1970s, the Tokyo Round ended up providing framework understanding on dispute- settlement rules and there were seven new agreements on trade barriers which were notably the "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT."[8]

An agreement was reached at the midterm review in December, 1988 related to the decision on "Improvements to the GATT Dispute Settlement Rules and Procedures".[9] It led to establishment of panel to be done automatically and the condition of

7 The General Agreement on Tariffs and Trade, 1947 art. 22 and 23.

8 *Pre-WTO Legal Texts, World Trade Organization*, *Available at*: http://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm (last visited on June 15, 2019).

9 *The Uruguay Round*, World Trade Organisation, *Available at*: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm. (last visited on June 10, 2019).

establishment of a panel being done only in the case where both the parties were not able to come to a settlement after negotiation. The third parties were also given a right to express their point of view on the matter. The problem related to terms of reference was sorted out by providing a right to standard terms of reference alongside with the GATT as a reference point to be looked into. The midterm review although did retain the consensus adoption of the reports of the panel.

There were a lot of repercussions that were being looked into and various issues of confusion also in those times. It was such that cross retaliation was a big issue in relation to the new trade objective which pertained to "intellectual property rights" and trade related to services whereby the developed and developing countries could not come to a consensus as to whether the non-compliance of the rules should trigger retaliation against the goods that were being exported. There were issues whereby the terms of reference of GATT panel were restricted to certain laws and the panels were also limited to apply only certain laws.

It was only during the 1990s that negotiators agreed as to what was stated in the final Uruguay Round which comprised of clubbing of the dispute settlement system which included cross retaliation, strengthening of the system of dispute settlement, dispute settlement automaticity and emergence of a new appellate body. The "Dunkel Draft" included written matter related to dispute settlement as per GATT, written information about issues on system integration and it also included an agreement establishing a multilateral trade organization in the draft form. Other than the above-mentioned texts, the Uruguay Round negotiations were taken up by the negotiating group of various institutions that was being chaired by Uruguay's Ambassador Julio Lacarte. The group worked on texts which lead to the final outcome in the form of the DSU text which is called as the Dispute Settlement Understanding and WTO Agreement in the year 1993 Final Act. Both of these texts were revised in the Uruguay Rounds as per the final legal drafting process.[10] The WTO Agreement and the DSU were attached in its Annexure 2 which would later be opened for signature on April 15, 1994 at Marrakesh. The Uruguay Round was helpful in building up an extensive list of work for the Doha negotiations.

On November 14, 2001 members of the WTO reassembled for the Fourth Ministerial Conference in Doha, Qatar.It was launched after the launching failure at Seattle in 1999. It recognized the need for all the nations to derive benefit from the multiple opportunities that multi trading system brought along with it. The Doha Ministerial Declaration also mentioned that it recognized the particular vulnerability of the least developed nations and the various difficulties they faced in the economy at a global level. It laid emphasis on looking into the issues of marginalization of the countries

10 *Ibid.*

which were least developed and bringing in improvement for maximizing their participation in the multilateral trading system. [11]

The Doha Declaration constituted multiple concessions to developing countries, such as rollbacks of developing country obligations negotiated during the Uruguay Round, while some obligations were extinguished altogether.[12] Moreover, new interpretations and clarifications on rules and obligations were promulgated that were more in favor of developing countries.[13] A major issue that was looked into was based on the trade facilitation that was meant to easing out the various procedures related to clearances of exports and imports. It also meant looking into the aim being that of cutting on import taxes, restrictions to be put on the countries subsidy use relating to agriculture and also pertaining to various barriers as per regulations that would affect the multilateral trading system.[14]

There have been instances where the developing countries have substantially increased their participation since the Doha round although technical issues and lack of staff are a few issues they still have to deal with. Interestingly, there have been occurrences where developing countries have been able to block negotiations in case of unsatisfactory proposals like that of Cancun. The number of proposals put forth by developing countries has also increased over the last few years. This does not negate out that there happens to be no issues with the developing countries when it comes to negotiations especially when looking at countries with lesser negotiation capacity. The actual difficulties are not in context of areas like Non Agricultural Market Access (NAMA) and agriculture to name a few where developing nations have created large coalitions such as G20, G90 *etc*. but in more technical areas such the interests of these nations are not well comprehended which may act as a constraint in their participation ability. [15] Looking at the other side, Doha ended up producing a final declaration related to intellectual property rights and also on policy implementation but did not coherently provide much insight about various issues that brought forth arguments among the participating states.

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11 *Doha Ministerial Declaration*, World Trade Organization, *Available at*: http://www.wto.org/english/thewto_ e/minist_e/min01_e/mindecl_e.htm(last visited on June 15, 2019).

12 Peter M. Gerhart, "Slow Transformations: The WTO as a Distributive Organization" *Int'l Law Rev.* 46 (2002) (arguing that the Doha Round may mark the WTO's transformation from an organization concerned about the creation of wealth to an organization concerned also about the fair distribution of wealth).

13 *Ibid.*

14 *Doha Round Trade Talks – Explainer*, *The Guardian*, Sep. 3, 2012.

15 Sheila Page, Massimiliano Calì *et al., Development Package at the WTO? What do developing countries want from the Doha Round?*, (Overseas Development Institute, 2008), *Available at*: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2572.pdf (last visited on June 20, 2019).

**Dispute settlement understanding**

The DSU looks out for providing a comprehensive and integrated channel to resolve disputes and this has to be done in a quick and predictable time frame. The dispute settlement process shall be administered and looked into by Dispute Settlement Body (DSB) whose duties shall be carried out by WTO General Council. The General Council meeting also called as GC or the DSU has to meet after small intervals of time in order to carry out their functions. The DSU acts as an enforcement mechanism for all the multi-lateral trade agreements which actas binding on every member of WTO. It will be such that the substantive law shall be as mentioned in the agreements and the rules and techniques for dispute settlement shall be governed by the DSU.

Presently, the dispute settlement process is initiated by a request for consultations. In case of non-resolution of the matter within sixty days of the request or no response from any of the parties, the party which has filed the complaint can request for setting up of a panel. The panel is established by the DSB over a specified short period of time unless the DSB has agreed to it by consensus otherwise. The panel shall constitute of standard terms of reference in case the parties do not conclude within twenty days. The parties will then agree upon the panelists who are selected independently, having diverse background and an equally impressive amount of experience. The WTO maintains a rooster of the panelists. In case of any such situation where the parties are unable to agree upon the selection of panel, the WTO Director- General may form a part of the panel after consultation with the parties. It could also be so on the request of any of the parties.

After the panel is formed, it receives two rounds of briefs and two substantive meetings are held with the parties. A draft report inclusive of the legal findings is made whereby panel provides the parties an opportunity to comment on the same. This final report has to be issued to the parties within six months since the date of referral. The DSB shall be considering the report for adoption and based on that, the report has to be adopted within a time limit of 60 days since when the report was circulated to the members leaving aside a situation where there is a consensus to not consider the report or one of the parties to the report has decided to appeal.[16]

The DSU also establishes a seven-member appellate body which consists of members having immense knowledge in international trade serving long duration of terms. The appellate panel shall be given 60 days to deliver the report. The DSB has to adopt it and the parties have to accept it within a time frame of thirty days after the report has been circulated except in cases where there is consensus to reject it. It is at this time that the compliance process begins.

16 *Introduction to the WTO Dispute Settlement System*, World Trade Organization *Available at*: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p3_e.ht (last visited on June 20, 2019).

If the panel concludes that the member's measures are not in consistency with the rules, it shall recommend the member to look into the compliance that has to be followed. The losing party shall have to mention to the panel how it plans on adhering to the compliance and within what time frame does it plan on doing it. The time frame could be immediate or within a stipulated time. The deadline for the compliance is to be determined by the party itself or through an agreement or binding arbitration. Although, it cannot exceed the time limit of fifteen months since when the panel or report of appellate body has been adopted. If the deadline has not been complied with, the losing party has to negotiate with the other party regarding the compensation. After 20 days from the expiry of deadline, any party that invokes the dispute settlement procedure may propose suspension of concessions in case the compensation has not been agreed upon where the retaliation cannot exceed the trade damage. There can be instances where benefits under one agreement can be suspended as retaliation for the violation that has been done in some other case pertaining to the party. This is referred to as "cross- retaliation."[17]

The concession's suspension or different obligations are normally alluded to as "retaliation", as concessions or different obligations are suspended just when the member complained against neglects to actualize the rulings of the DSB. The suspension can take various structures, at the same time, as far as trade in merchandise, includes transitory increases in duty rates by the complaining member on certain chose items from the rebellious member. The DSU clarifies that seeking and applying retaliatory measures is the alternative of "final resort", just to be connected when every single other road has been depleted. As a general control, complaining parties must first look to suspend concessions or different obligations concerning the same sector or sectors as that in which panel or Appellate Body has discovered an infringement, invalidation or hindrance.[18]

DSU results in solving the basic issues that act as hindrances in international settlement of disputes as per looking into the jurisdiction issues, selection of panel, terms of reference being standard, provision of retaliation and cross retaliation. DSU is also instrumental in proving a standard set of rules that need to be considered when adjudicating the trade disputes by integrating the overlapping regulations that are present in the WTO system. It can be apprehended that in the coming future, the cases shall become more and more complex. The panels will have to look into the deciding factors all the more keenly and with more and more precision due to the increase in complexities. It shall result in more demand on panels/appellate body and the governments which are litigating to come up with the best possible legal advice and policy results not ignoring the immense deadline adherence.

17 Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement, art. 22.3 (c).

18 *Ibid*.

The DSU has been one of the features in the transition of GATT from informal negotiations to a more formal, quasi- judicial procedure. This organized procedure shall be instrumental in providing more transparency to the procedure so that it can be accepted as quasi-binding precedent rather than merely being termed as *sui generis* conciliation. Although, it does not mean that this is the end to the regulation aspects of dispute settlement procedure in WTO.

Any dispute settlement typically takes around twelve to sixteen months. In cases where the dispute pertains to perishable goods, the consultations should be entered into within ten days after the receipt of the request.[19] If no such action is taken within twenty days from receipt of request, the party may even request for establishment of a panel and every effort shall be made by the appellate board to fast-track the proceedings. [20]

The WTO mechanism is not merely meant to resolve trade disputes and provide free market but also took decisions to protect the environment. This statement can be asserted based on the 'shrimp- turtle' case[21] where United States (US) wanted to impose measures in order to prohibit shrimp importation in 1998 from various developing countries like Malaysia, Pakistan, Malaysia and Thailand.[22] US had claimed that there needs to be a specific technology for protecting sea turtles when harvesting shrimps. US also claimed that the main reason for filing the complaint was to protect the sea turtle from extinction. The DSB refused the claim of US because the actual intention of US was to protect its own economy rather than protecting the environment.[23]The significant point in the case was WTO recognized that sovereignty and trade should not be viewed as an obstacle for environment protection and WTO offered a greater role for environmentalist to express their opinion of WTO cases and it explains the importance of the DSBs legal decision not just in trade disputes, but for creating customary in international environmental law, too.[24]

**Prohibitions against unilateral determinations**

WTO members have consented to utilize the multilateral framework for settling their WTO trade question as opposed to turning to unilateral engagements.[25] If members

19 *Supra* note 17, art. 4.8 and 4.9.

20 *Ibid.*

21 Qaraman Mohammed Hasan and Mofaq Khalid Ibrahim, "The Role of Advisory Centre on World Trade Organization Law (ACWL) in Supporting Developing Countries Regarding the Dispute Settlement Mechanism" 3 *International J. of S Scs and Edu Stds* (2016).

22 T. Koivurova, *Introduction to International Environmental Law.* (Routledge, London, 2013).

23 L. de La Fayette, "United States-Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia" 96(3) *American Journal of International Law*, 685- 692 (2002).

24 *Id*. at 9.

25 *Supra* note 17. art. 23.

somehow managed to act singularly, this would have evident drawbacks that are notable from the historical backdrop of the multilateral exchanging framework. Envision that one member blames another member for breaking WTO rules. As a unilateral reaction, the charging member could choose to take a countermeasure that is to encroach WTO obligations concerning the other member (by raising trade obstructions). Under customary international law, that member could contend that it has acted legitimately on the grounds that its own particular infringement is legitimized as a countermeasure in light of the other member's infringement that had happened first. The DSU commands the utilization of a multilateral arrangement of dispute settlement to which WTO members must have plan of action when they look for review against another member under the WTO Agreement.[26] This applies to circumstances in which a member trusts that another member disregards the WTO Agreement or generally invalidates or hinders benefits under the WTO Agreements or obstructs the achievement of a goal of one of the agreements. The DSU not only rejects the unilateral system but also blocks the utilization of other forums for determination of WTO related disputes.

**Compulsory nature**

The dispute settlement framework is obligatory. All WTO members are liable to it as they have all signed and confirmed the WTO Agreement as a solitary undertaking, of which the DSU is a section. The DSU subjects all WTO members to the dispute settlement framework for all disputes emerging under the WTO Agreement. There is no requirement for the parties to a dispute to acknowledge the purview of the WTO dispute settlement framework in a different statement or agreement. Accordingly, every member appreciates guaranteed access to the dispute settlement framework and no responding member may get away from that jurisdiction.

**Consultations**

The objective behind consultations in the DSU is related to the settlement of disputes between the members in such a way that turns out to be consistent with the WTO Agreement.[27] The first stage of dispute resolution is based on formal consultation between the parties.[28] It provides the parties with an opportunity to look into the matter and try to come up to a conclusion without having to resort to one with the intervention of the court in any way.[29] Only in case, the mandatory consultations have not been able to come up to a conclusion within a time period of sixty days, the complainant can request for a panel to adjudicate.[30] The parties can leave aside the

26 *Id.,* art. 23.1.

27 *Id.*, art 3.7.

28 *Id.*, art. 4.

29 *Id.*, art. 4.5.

30 *Id.*, art. 4.7.

procedure of consultation by mutual agreement[31] in case they resort to another alternate dispute resolution procedure being that of arbitration. The parties can still come to a mutually agreed upon settlement by coming to common grounds at any stage of the proceedings even though it could be at any later stage when the proceedings were carried out.

A large number of disputes have not moved beyond process of consultations, mainly because a settlement was reached into or the party which had filed the complaint ended up taking the case back. Recent trends have shown that consultations are an effective mechanism to resolve disputes when it comes to a settlement.[32] It acts as a non-judicial process of dispute settlement in WTO whereby the parties are allowed to clarify the facts that have led to the issue and also to look into the clarity regarding the claims that have been made by the complainant. Hence, it shall not be wrong to state that consultations end up serving to act as the initial foundation for settlement of the dispute or regarding other proceedings that come under the ambit of DSU.

Where the consultations do not yield an acceptable outcome for the complainant, the procedure initiated at the panel level offers the complainant the possibility to maintain its rights or secure its advantages under the WTO Agreement. This procedure is similarly critical for the respondent as a chance to protect itself since it might differ with the complainant on either the realities or the right understanding of commitments or advantages under the WTO Agreement. The dispute settlement is proposed to determine a lawful decision and the two parties must acknowledge any decisions as authoritative (in spite of the fact that they are constantly ready to attempt to settle the dispute amicably whenever they wish to).

**Establishment of a panel**

The substance of the demand for establishment of one panel is pivotal. The demand for establishment of panel must be done in definite nature and is routed to Chairman of DSB. Under article 7.1 of DSU, this demand decides the typical terms of reference for examination of panel of the issue. It is in this manner essential to draft the demand for the establishment of panel along with adequate exactness in order to abstain from having respondent bring out preparatory objections in contradiction of singular claims or having panel decrease to manage on specific parts of the objection. Giving "a short synopsis of the lawful premise of the protest adequate to exhibit the issue plainly" implies that the lawful cases, however not arguments should all be indicated adequately in the demand for the establishment of panel.

31 *Id*., art. 25.2

32 Robert Alilovic, "Consultations under the WTO's Dispute Settlement System" 9 *Dalhousie Journal of Legal Studies* 279-301(2000).

Panels constitute standard terms of reference except parties to dispute object generally within time frame of 20 days from establishment of panel.[33] In any event excluding the ones where the standard terms of reference are settled upon, any of the Members may bring any point up in that regard in DSB as per article 7.3 of DSU.

Panels constitute of three persons unless the parties to dispute concur, within ten days from establishment of the panel, to a panel made up of five panelists.[34] The secretariat proposes nominations for the panel to the parties to the dispute.[35] Potential candidates must meet certain prerequisites as far as expertise and independence are concerned.[36] Panelists might be selected from an indicative rundown of governmental and non-governmental individuals nominated by WTO members, albeit other names can be considered too. The WTO Secretariat maintains this list[37] and intermittently updates it according to any modifications or additions put together by WTO members. The appointed panelists must satisfy their appointment in full independence. Individuals are disallowed from providing the panelists any directives or pursuing to influence them in context of the issues put before panel.[38]Once settled and formed, the panel now exists in the form of collegial body and can begin its work. The principal errand for the panel is to draw up suitable timetable forwork.[39] The procedure is set out in article 12 of DSU along with appendix 3 to the DSU yet offers a certain level of adaptability. The panel can take after various procedures in the wake of consulting the parties.[40]

Various members have a chance to be heard by selected panels and to make composed entries in the form of third parties, regardless of whether they have not taken part in consultations. With a precise end goal to take part in the panel procedure, the Members must end up having a substantial interest in relation to the issue before the selected panel and they should inform the interest to DSB. Third parties show their perspectives orally to the panel amid the substantive meeting. Third parties have no rights past thus in spite of the fact that a panel can and often does broaden the privileges of support of third parties in singular cases.

In drawing up the procedures related to working for a specific dispute, selected panels once in a while ask for the parties and third parties to submit executive summaries of their submissions. To some degree, these summaries are used in drafting certain sections of the panel report.

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33 *Supra* note 17, art 7.1.

34 *Id*., art. 8.5.

35 *Id*., art. 8.6

36 *Id*., art. 8.1 and 8.2

37 *Id*., art. 8.4

38 *Id*., art. 8.9

39 *Id*., art. 12.3

40 *Id.,* art. 12.1, para11 of appen 3.

After the main submissions, the panel convenes the first oral hearing which mostly happens in WTO headquarters in Geneva. The parties, third parties to the dispute, the secretariat staff supporting the panel, the panelists and the interpreters are qualified for the meeting.[41] After the oral articulations, the parties and third parties are invited to respond to questions from the panel and from the other parties with a specific end goal to elucidate all the lawful and truthful issues.[42] The parties are usually asked to submit written responses within a deadline of a few days. Roughly a month after the principal panel meeting, the parties simultaneously submit written rebuttals, additionally called the second written submissions.

In instances of numerous complaints on a similar issue where a single panel is built up, the written submissions of every one of the complainants must be made accessible to the other complainantsand every complainant has the privilege to be available when any of the other complainants shows its perspectives to the panel.[43] In instances of emergency, the panel endeavors to issue the report to the parties within time frame of three months from the specific date of its composition as per article 12.8 of DSU. At the point when the panel considers that it can't issue its report within time frame of six months (or three months if there should arise an occurrence of earnestness), it must inform DSB in writing of the details for the deferral and give an approximation of the period within which it will issue its concerned report.

Panels may suspend their work whenever at the demand of complaining party for a time frame not exceeding 12 months. Such suspensions regularly serve to enable the parties to find a mutual beneficialsolution whichhas the inclination of the DSU.[44] In case, the suspension surpasses 12 months, the authority for the formation of the panel lapses.[45] Then the dispute settlement proceedings would need to be started from the very beginning again.

In spite of the fact that the panel report constitutes the findings and observations ruling on the substance of the dispute, it only becomes compulsory when DSB has accepted it. The DSU provides that it must obtain the report not sooner than 20 days yet not later than time frame of 60 days after the date of its distribution to the members, unless the party to the dispute officially notifies the DSB of its decision to appeal or DSB decides by unanimity against the adoption of the report.[46]

41 *Available at*:https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm(last visited on June 20, 2019).

42 Para 8 of the Working Procedures in appen 3

43 *Supra* note 17, art. 9.2.

44 *Id*., art. 3.7.

45 *Id*., art. 12.12.

46 *Id*., art. 16.4.

**Appeals**

Aside from article 16.4 of DSU whichmentions about notification of a party's decision to record an appeal, article 17 is the sole article dealing particularly with the function, structure and procedures of appellate body. Additionally, the appellate body has implemented its own working procedures for appellate review based on mandate and in accordance with the procedure specified in article 17.9 of DSU (in this section on appellate review alluded to as "working procedures"). The appellate body illustrated its working procedures for the first run through in 1996 and they have also been revised a few times since the last time effective from May 1, 2003. Rule 16 (1) of working procedures allows an appellate body division in specific situations to receive additional procedures for a specific appeal in which the necessity to do as such emerges.

Article 16.4 of the DSU infers that the panel report must be appealed before it is adopted by the DSB. The article does not specify a reasonable deadline for the filing of an appeal. Rather the litigant must advise the DSB of its decision to appeal before the adoption of the panel report. This adoption may happen, at the earliest, on the twentieth day after the circulation of the panel report and it must (without an appeal and of a negative consensus against adoption) happen within 60 days after the circulation. For any day between those limits, the adoption of the panel report can be set on the plan of the DSB.[47] Since the appeal must be documented before adoption really occurs, the effective deadline for filing an appeal is adjustable and could be as short as time of 20 days, however it can likewise be longer, *e.g.,* time period of 60 days. Third parties can't appeal panel report.[48] Third parties may make written suggestions to the appellate body and the appellate body might hear them out.[49]

**Non-implementation**

The implementation has to be done by the losing member and in case, the losing member is unable to act in consonance with the obligations of WTO within already accepted time frame, the complainant can ask for remedy due to non-adherence to the obligations as per the report. The complainant can resort to temporary measures which can be such that of suspension of WTO obligations or also in the form of compensation.

Due to non-compliance with the "losing member", negotiations have to be done in order to negotiate about the acceptable compensation with the party that has complained. This compensation does not essentially mean compensation in monetary terms; it could also be compensation in the form of a benefit which could be a tariff

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47 *Ibid.*

48 Third parties are not directly affected by the decision given as they are not found to a responsible for the breach in the contended WTO law.

49 *Supra* note 17, art. 17.4.

reduction. The compensation has to be agreed upon by both the parties and it has to be consistent with the agreements that are covered in the concerned dispute. The consistency of the compensation with the covered agreements is one of the biggest reasons as to why the parties are not able to finalize a mutually agreed upon compensation. The fact that the parties have conformed to the agreements gives effect to the "Most Favored Nation" obligation as per "Article I of GATT 1994" which implies that other WTO members could also end up benefiting from the compensation that has been given to one of the parties which could be in the form of tariff reduction or any other way. In the end, compensation ends up not being a favorable option for both the parties as it does not provide the complainant with any exclusive benefit and the other party has to make the benefit uniform for all which could be in relation to tariff reduction.

In relation to suspension of obligations as countermeasures by the member, if within a time span of 20 days from the expiry of time limit, the parties have not decided on the compensation, the DSB can be asked by the complainant to levy trade sanctions against the respondent who has failed to execute it. It is referred to as "suspending concessions or other obligations under the covered agreements."[50]

## IV Critical issues of participation of developing countries

While considering the issues related to anticipation of "developing countries" in the "WTO Dispute Settlement Mechanism", the first aspect which needs to be seen is as to whether the developing nations end up having difficulties in initiating international trade disputes. It cannot be ignored that as per international law, there are various theories that mention about rule-based approach to be followed in dispute settlement and there should be a reduction in the role thatbargaining power plays in dispute settlement.[51] The negotiating power in hands of developing countries is lesser as compared to the developed countries due to their inability to enforce retaliation. It has been observed that states having greater retaliatory power in restricting imports from a defendant mostly end up filing and initiating the dispute. The developing nations may still feel unsure of themselves and think twice before initiating a dispute in the WTO forum. They feel the hesitance in initiating the case against any developed country or more powerful country as it would result in losing of concessions and they also fear losing preferential trade relationship, if any.

## V Pressing and emergent basic issues

Financial resources or political capacity could also be a reason why developing nations usually might not end up initiating international trade law dispute in the WTO. The

50 *Supra* note 17, art. 22.2.

51 John H. Jackson, *The World Trading System: Law and policy of international economic relations* (2nd edn. The MIT Press 1997).

concern regarding the legal formalities when fighting case in the WTO forum cannot be ignored. It has been argued that capacity constraints are more important rather the having power considerations when looking initiation of dispute against any country. Usually when developing countries end up initiating a dispute, it is mostly against a developed country which goes against the assumption that developing nations fear taking on the developed nations. A proper observation done results in considering that economic parameter may not be the sole reason as to how the participation of the developing nations can be looked into in regards to the WTO dispute settlement mechanism. It is equally interesting to realize that there are many nations that have immense economic resources but have still never initiated any trade dispute in the WTO. It would be difficult to explain as to how Thailand which is a developing nation has filed 13 WTO complaints[52] till 2018 although it's adjacent country Malaysia has filed just one.

One cannot ignore that the amount of basic information that is required when instituting a WTO complaint also results in economic costs and requires certain set of experience. This includes having legal set of knowledge about the WTO procedures and rules that have to be followed by the government and the industry. It has been observed that nations which end up using the forum to file their cases or even defend the complaints made against them end up having better confidence when resorting to WTO for resolution of any trade dispute. As the repeat players have already been part of the proceedings, they have better aptitude to deal with the process and procedure of WTO trade dispute making them more self-assured to structure out their strategy in the dispute.[53] Hence, they will have more knowledge and experience. It results in the bureaucracy becoming more evolved in coping up with such disputes, streamlining the expenses and budget that needs to be sorted out for these issues along with the organizational capacity for the same. It has been observed that participation of a country is directly proportional to the amount of knowledge that has been gained by the country in context of the WTO dispute settlement mechanism.

Another aspect that needs consideration is the institutionalization of the economic cost mechanism so that WTO proceedings are not delayed in the future. Looking at Costa Rica, it is observed that even one case filling can ease WTO complaint fillings for the nation. The Costa Rican government won a panel ruling against US. US had complied with it. This proceeding instilled confidence in the government as to how WTO complaints have to be proceeded with. It led Costa Rica to file four more cases

52 *Available at:* https://www.wto.org/english/thewto_e/countries_e/thailand_e.htm (last visited on July 20, 2019).

53 Marc. Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" 9 *Law and Society Review* 95–160 (1974).

as complainant and it is also a third party to 15 cases.[54] Many countries join the WTO disputes as a third party which results in lessening the initial costs like China became a member of WTO in 2010 and participated as third party in a case related to US safeguards on steel imports by joining eight countries which included Japan, EU and other developing countries. The countries also gain awareness and knowledge about the WTO process by becoming defendants in the cases. In case of any country receiving any request for consultation in the WTO, it is a first-hand experience for the nation in understanding the operations of WTO hereby making it much easier for that country to initiate a case later on, if need be.

Another aspect that requires proper attention is that at times, the cost of instituting or filing a complaint shall be much less than the cost the country shall have to incur in case it does not take recourse of the WTO dispute settlement mechanism. Taking the example of Ecuador where the losses from the EU would amount to more than $500,000 a day totally justifies the above made point. Ecuador being the largest banana exporter in the world, rushed to WTO forum in order to file a complaint against EU.

The developing nations have started taking recourse of Advisory Centre on WTO Law. The centre provides a team constituting of trained lawyers who make sure that legal opinions are given for the developing nations. It is equally important to realize that representation legal fee is also adjusted and modified as per the income level of the nation. The centre also organises a training course for six months for the delegates present in Geneva and provides sponsorship for seminars related to WTO dispute settlement. Lack of knowledge about the dispute settlement process results in increase in the costs of initiating a dispute. It has been argued that the dispute across WTO Members is proportionate to the framework of global import and export thereby implying that trade in greater volumes to a greater number of trading partners leads to a greater number of potential trade related issues and making the WTO members more vulnerable to initiate disputes. [55]

The lack of retaliatory power leads to lesser participation of the developing nations as it would result in suffering more lose than gain when taking up retaliatory measures against the developed countries. Compliance inducing measures of retaliation are not impactful either as they don't form a major part of economic trade volume globally making the retaliation merely insignificant.

It has been observed that richer country members which get the panel or appellate body ruling in their favour mostly enforce it by requesting authorization which is done

54 *Available at:* https://www.wto.org/english/thewto_e/countries_e/costa_rica_e.htm (last visited on June 30, 2019).

55 Henrik Horn, Petros C. Mavroidis and Hakan Nordström, "Is the use of the WTO dispute settlement system biased?" *Centre for Economic Policy Research Paper* (2009), *Available at:* http://www.econ-law.se/Papers/Disputes000117.PDF(last visited on June 30, 2019).

by suspending concessions against developing nations but developing nations are majorly reluctant about suspension of concessions when against the developed nations. [56] Hence, the developed nations substantiate their threat of retaliatory measures but the smaller economies might feel ineffective to either retaliate or threaten any retaliation against a developed nation.[57] Developing nations lack the capacity to retaliate in order to enforce the panel or Appellate body decisions. Various Sub- Saharan African countries like Burkina Faso, Chad, Benin and Mali have never brought any case against United States to the WTO in relation to the cotton subsidies which are varying with the WTO agreements as per the *United States – Cotton*[58] case. Later on, Chad and Benin did become third party to this case. It shall not be wrong to say that most active developing nations have been active participants in the DSU review although whether they have utilized the WTO dispute settlement mechanism is something that needs to be pondered upon. At times, retaliatory measures could not end in providing any impactful relief to aggrieved party but instead result in isolation of the nation from the international trade based on its action on enforcing retaliation.

**Compensation**

The DSU permits voluntary compensation which can be used as an alternative to the retaliatory measure that has been used in WTO. Although article 22.1 places a limit as to how compensation can be asked. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time.[59] However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.[60]

Trade compensation was given in the case of *Japan- Taxes on Alcoholic Beverages*[61]in which Japan agreed to the application of reduced tariff rates on certain items till the time full implementation of the appellate body report was not done. So, it makes one conclude that the current option of compensation is not a preferred system and not opted by the nations as a preferable resort. Compensation is also bifurcated into two components which are mandatory trade compensation and financial compensation.

56 K. Bagwell, P. Mavroidis, R. Staiger, "The Case for Tradable Remedies in WTO Dispute Settlement" *World Bank Policy Research Working Pape*r No. 3314, 8-12 (2004).

57 Bryan Mercurio, "Retaliatory Trade Measures in the WTO Settlement Understanding: Are there Alternatives:" 6 *Frontiers of Economics and Globalization* 397-442 (2009).

58 United States — Subsidies on Upland Cotton-WT/DS267, *Available at*: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited on May 31, 2019).

59 *Supra* note 17, art. 22.1.

60 *Ibid.*

61 *Available at*: wto.org/english/tratop-e/dispu_e/cases_e/ds8_e.htm (last visited on June 10, 2019).

Mandatory trade compensation results in creation of more trade rather than restricting it. It does not act in the process of intensification of the loss to the nation that has trade issues. It has also been suggested that members end up nominating or pre-establishing the various sectors and types of trade compensation and in case the member ends up failing to comply and act upon the rulings of the DSB, this trade compensation in the decided upon sectors can be brought into effect.[62] This compensation remains in process till the time the concerned member does not adhere to the proper compliance with WTO obligations and modifies its inconsistent measures.

Trade compensation although does result in harm to the innocent industries in case of the non-complaint member. Reduction of tariff rates results in exposing an innocent industry to stronger foreign competition which is a step that needs to be taken up only in case after proper analysis of the situation have been looked upon and the objectives and economic stand of the affected industries has been observed properly.

Financial compensation is also used as an alternate to the traditional retaliatory method whereby the most positive feature of this compensation is based on the fact that just like trade compensation, this is also not trade restrictive and does not contradict with WTO principles. Monetary compensation would be a more attractive option for the developing nations and the interesting part being that the financial compensation is imposed on the government rather than any individual which results in being a fair thing to do as the main duty to abide by the WTO obligations is that of the government and not the concerned industry except in the case of dumping. An argument against financial compensation is that this can be used as a way for the developed countries to violate the WTO obligations and continue to carry on the violations by paying financial compensation to the affected states. Another issue that needs consideration is based on the consistency that financial compensation has with MFN principle which has been confirmed in *EC-Poultry*[63] by the appellate body. It needs to be administered that the financial compensation that is being given does reach out to the industry that has been impacted and not solely to the government of the country, the affected industry belongs to. It is equally important to realise and decide upon the eligibility of the Member states that shall receive financial compensation, the calculation of the financial compensation along with the time period within which it shall be paid.

**Collective retaliation**

Various developing countries came up with a proposal of having a system of collective retaliation where the collective group of developing countries would be authorized to

62 Z. Robert, "Lawrence, Crimes and Punishments? Retaliation Under the WTO" *Institute For International Economics Journal* (2003).

63 European Communities — Measures Affecting Importation of Certain Poultry Products-WT/DS69/AB/R, *Available at*:https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds69_e.htm (last visited on June 30, 2019).

retaliate collectively against the member who has not complied with the WTO obligations. This would act like a collective retaliatory method whereby the developing countries would end up having a greater retaliatory power than that of a single member. As per the equivalence- based approach, all the members that constitute the retaliatory group would share the suspension value and would be able to suspend concessions as authorized by DSB. The most-favored-nation (MFN) based retaliatory method resulted in allowing each member to apply suspensions up to a level of harm inflicted upon the member that has complained to apply suspension. The biggest issue that arises with MFN based collective retaliation is that it acts as a punitive remedy whereby it means to potentially respond to suspensions from various members and this retaliation from each member is equal to the level of harm that has been caused to the member that has initiated the complaint.

**Cross retaliation**

Another possibility is the use of cross- retaliation. Article 22.3 of DSU puts limits on the retaliatory measures that cover the same sector and the agreements as first violation unless it would not be effective or practicable for the member that has complained to retaliate at the issue within the sector. Article 22.3 mentions that "[T]he complaining country should first seek to retaliate in the same sector where the violation has occurred. If that is not practicable or effective it can seek to retaliate in another sector but under the same agreement where the violation has occurred. And if that is also impracticable or ineffective it can seek to retaliate under another agreement." Cross- retaliation has been granted in *EC- Bananas,*[64] *US- Gambling*[65]and *Canada- Aircraft.*[66] The complainants contended that it would not be practicable in the significance of article 22.3(b) and (c) of the DSU to suspend concessions in a similar area or agreement for various reasons, a large portion of which identify with inadequate trade amount in the segment at issue.

## VI Crying need for reforms in the WTO dispute settlement system

WTO negotiators intend to encourage the developing countries to use the dispute settlement mechanism. Since its commencement, the dispute settlement framework

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64 WT/DS27/ARB/ECU, Mar.24, 2000, *Available at*: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language =E&CatalogueIdList=15172& Current CatalogueId Index=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRe (last visited on May 31, 2019).

65 WT/DS285/ARB ,21 Dec. 2007, *Available at*: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language= E&CatalogueIdList= 80129&Current CatalogueIdIndex= 0&FullTextHash=&HasEnglishRecord=True&Has(last visited on May 31, 2019).

66 Canada — Export Credits and Loan Guarantees for Regional Aircraft-WT/DS222, *Available at:* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds222_e.htm (last visited on June 28, 2019).

has evolved through understandings and working strategies. For the developing nations, one of issues that require concern is access and implementation of the decisions in dispute settlement mechanism. Another issue is regarding relevant domestic infrastructure which aids the national stakeholders to act as participants in the process of WTO dispute settlement process.

**Institution of fact- finding body**

There need to be reforms in procedural justice for fairness in the consultation, panel and appellate body process. Proper measures are required to streamline the consultation process, secure rights of the third party, provisions to join as co-respondent to name a few. There emerges a need to guarantee unprejudiced choices of any kind which would include the appointment of the panelists and appellate body judges and their unprejudiced views. It also brings forth more awareness about the pertinent developing countries issues among the panelists and appellate body lawyers.

With the passage of time, WTO disputes have started providing more importance to factual evidence rather than the simple *a priori* principles or tests which turns out to reflect what can be termed as WTO dispute settlement "legalization". This acts as a huge shift from the way trade disputes were settled in the time GATT was operational. The issues brought before DSB are more multifaceted and involve considerations of factual issues which are more complicated in nature. The importance that has been given to WTO fact finding is manifested in various ways. As per the case that has been instituted, the concerned parties are made to produce scientific or economic evidence based on the case. The evidence that is provided is complicated and hence, left within the scope of experts who are specialized in looking at the evidence. Cases brought under the agreements that are made as per "Application of Sanitary and Phytosanitary Measures (SPM)" also look into analysis of the facts. "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."[67] The experts have to make reports on the analysis of the evidence provided. Fact- finding is an expensive process and even if a private law firm is hired for the same, it acts as being equally expensive.

There needs to be creation of an institution that operates as a fact-finding body in the WTO. The basic work function of the fact-finding body shall be to clear out the present facts of the concerned case along with ascertaining the information that is missing and has a key role to play in the decision of the case. If such a fact – finding body is instituted, it can be done through recourse of article 27.2 of the DSU. Such institutional body needs to be operational under the supervision of the secretariat so that the interests of the developing nations could be better served.

67 *Supra* note 17 art, 13.2.

**Additional efforts by advisory centre on WTO Law (ACWL)**

The ACWL constitutes of a Technical Expertise Fund which looks into the budget of ACWL by operating externally. As per the records, Denmark, Norway and Netherlands have shelled out money for this fund through contributions of 373,160,250,000 and 85,000 Swiss Francs whereby the total being 708,160 Swiss Francs in the fund.[68] With just three members contribution towards the fund, the assets of technical expertise fund stay noteworthy. However, with WTO membership outperforming 150 countries, this insufficient participation is disillusioning. A similar contention can be made with respect to enthusiasts of the ACWL itself. Be that as it may, as the proposition in the following area contend, the absence of framework access for developing countries debilitates the authenticity of the whole framework. It can be contended, along these lines, that supporting the ACWL is really in light of a legitimate concern for all WTO members.

The ACWL has been criticized because it is thought that the centre does not provide a full legal advice for the developing countries.[69] Another dimension to this can be where it can be said that developing countries are themselves responsible as they would not join the ACWL specially the least developing countries. In case they become a member of the ACWL, they will have to pay half or less than half of the legal service fee as compared to the fee they pay to private legal firms. There countries do not participate actively in the dispute settlement mechanism. This itself results in less skills, exposure and experience as compared to developed nations.[70]

**Missing link between government and private industry**

Another issue that needs concern is about the lack of sufficient procedural mechanisms to start off WTO disputes.[71] As per the WTO law, the WTO forum can be used to bring or defend any complaint only if the nation is a member of WTO. No organization or private person can utilize this forum hereby bringing more instances of lobbying to take place and also inability of the trade related issues of private industry to be heard and resolved in case the government does not support it or does not agree to bring it forward to the WTO forum. Most developing countries have no such procedural mechanism where the private industry can bring into knowledge of the government of any such concerned issues.

68 *Available at:* http://www.acwl.ch/technical-expertise-fund/(last visited on June 29, 2019).

69 *Ibid*.

70 Soobramanien, Teddy Y., and Laura Gosset. "Small states in the multilateral trading system: An overview." *Small States in the Multilateral Trading System* 3 (2015); Gupta, Kulwant Rai. *A Study of World Trade Organisation*. (Atlantic Publishers & Dist, 2008).

71 Kristin Bohl, "Problems of Developing Country Access to WTO Dispute Settlement" 9 *Chi.-Kent J. Int'l & Comp. Law* 131 (2009).

Although, the US and the EC offer communication channels between private industry and concerned government. They also offer examples of various informal public-private partnerships. The petition mechanism adopted by US is referred to as section 301[72] and it starts with petition that is filed by a private firm or any trade association.[73]After the petition has been filed, the US trade representative looks into the execution aspect whereby it can itself initiate the investigation whereby it investigates the foreign trade barriers as per allegations in the petition. It results in creating a communication channel between the private party and the government.

In Europe, this mechanism is executed by "Trade Directorate General of the European Commission". The EC has two procedures whereby the first mechanism is through article 133 of European Treaty.[74] The second mechanism is through Trade Barrier Regulation (the "TBR"). Through composed endeavors administered by the TBR, European business groups and affiliations combine together with the EC to look into the potential cases. TBR cases can in some cases be accurately concentrated; the government relies upon input given by private industry.[75] The relationship framed in these circumstances, both authoritatively through the TBR and informally through alignment of interests, is the thing that developing countries need.

Observing how the issues of private parties in particular sectors are voicing their problems in trade to the concerned government in US and EC, it can be stated that such a mechanism can be used for other nations as well which could have variations based on the country's own particular needs and preference. In case, the government agrees to institute any such procedure, it implies that the government has obligated itself to respond to any such petition that has been filed. It shall include effective medium of exchange of information, collective actions through trade associations as a few of its requirements.

**Political will at issue**

A developing nation government fears that by initiating a dispute to the WTO, it will endanger the dependability of its exchanging connections. It is far-fetched that the government will move forward. In principle, the same may be said of any nation that is developing. As Doha Development Round has illustrated, contradictions over international trade policy touch off warmed debate. The trade connections shaped can be sensitive and countries may need to abstain from setting off the delicate ties

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72 19 U.S.C. § 2411 (1974).

73 19 U.S.C. § 2412(a) (1974).

74 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, art. 133, Oct. 2, 1997, *Official Journal C* 340, Nov.10, 1997.

75 Even though lawyers view the TBR process as more transparent compared to that of art.133, the procedures set forth by art. 133 are still used more frequently

through problematic challenges. At the point when one nation relies upon another for an urgent trade relationship, now and then approaching the WTO doesn't seem like the most preferable option in its hands. Moreover, regardless of whether any nation brings up a case to WTO and wins, it does not certify that it will deliver beneficial trade results. Financial constraints joined with the dread of political and trade outcomes, also a large group of non-trade related issues, may make more inner hesitance to devoting time and money to WTO question in developing nations.

## VII Conclusion and suggestions

The various issues that are faced by the developing countries require a streamlined structure for their solution and proper strategy that needs to be implemented. The way in which the interest of developing members in the WTO dispute settlement framework is considered and encouraged is as much a measure of edified conduct as it is an impression of developing nation endeavors in partaking in the WTO dispute settlement framework. There are numerous viewpoints in which their participation can be additionally encouraged. The contribution for reform is as much an element of political contribution as it is of independent opinion of expert. For whatever span of time that the independent expert's role is not recognized, there will be questions that are centered around the capacity of the WTO dispute settlement framework to genuinely empower the developing members.

Developing countries are more in need for WTO membership in order for development assistance and not just merely for maintenance of the trading volumes. Developing nations have a more aggressive approach towards usage of the WTO dispute settlement procedure and it lands then up with a greater number of counter claims. It is weird to imagine that developing countries would choose not to file a complaint solely because of the fear of retaliation. It would go totally against the rule-based approach of the WTO and nullify the objectives of the WTO dispute settlement mechanism.

Following issues should be prioritized to in order to make the participation of developing and least developed countries (LDCs) more inclusive and efficient-

**Access to justice:**

i. To bring about increase in the resources related to WTO technical assistance[76] and also more efficiency in the operation and functioning of WTO Advisory Law Centre.

ii. Inclusion of advisory opinion provision in case a dispute arises between the organization WTO and the member.

76 *Supra* note 17, art. 27.

iii. Establishment of a faster time span procedure for issues that can be set up as small claims procedure.[77]

iv. Appointment of designation of WTO prosecutor[78] for the developing nations in case of dispute between the WTO and its member.

v. More structure and streamlined procedure as to how any third party can join the WTO dispute settlement proceedings.

vi. Facilitating participation of co-respondent.

**Procedural justice:**

I. There needs to be a code that has to be followed which:

i. incorporates the concerns of the developing countries related to the time frame, venue or other such related details.

ii. Incorporates mechanisms and strategies that aid in neutralizing the power concern by minimizing the potential of unnecessary and undue delinking of trade.

iii. Results in enablement of monitoring and review of the process of consultation through the means of process followed in the "Panel" and "Appellate Body".

II. There needs to be a differential time span for the proceedings taking place in the Panel and Appellate body.

III. Article 12. 10 of DSU needs to be applied in order to bring along the developing countries as a third party to the WTO proceedings.

**Quality of justice:**

i. Panel and appellate body judges need to be trained before they are appointed.

ii. The legal department and the appellate body should constitute more lawyers from the developing nations.

iii. There should be incentives provided in case the panellists are taken from developing countries.

**Implementation of justice:**

i. There needs to be more strict implementation of the DSB recommendations in context of the developing nations.

ii. There needs to be a provision where the counter measures can be transferred to a third party.

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77 Review of the DSU. Note by the WTO Secretariat. Compilation of Comments Submitted by Members -Rev 3. WTO Job No.6645.

78 B.M. Hoekman and P.C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance* 19 (1999).

iii. In lieu of suspension of concession, special drawing rights need to be allocated to the complainant by the IMF.

iv. In case of the developing country winning the case, the legal fee and the costs have to be awarded.

v. In case of developing nations, pecuniary damages need to be awarded.

vi. There needs to be WTO officials appointed who would be present during the negotiations that have to be done in a specified time frame in order to implement the panel/ appellate body recommendations.

vii. There needs to be easier strategy and framework for the cross- retaliation for the developing nations.

The deficiencies related to fact- finding in the WTO dispute settlement also needs to be looked into. There needs to be creation of an institution that operates as a fact finding body in the WTO. The basic work function of the fact finding body shall be to clear out the present facts of the concerned case along with ascertaining the information that is missing and has a key role to play in the decision of the case. If such a fact – finding body is instituted, it can be done through article 27.2 of the DSU. Such institutional body needs to be operational under the supervision of the secretariat so that the interests of the developing nations could be better served.

In reference to prevailing better access to justice, there can be an increase in the resources related to WTO technical assistance[79] and also more efficiency in the operation and functioning of WTO advisory law centre. There can be an inclusion of advisory opinion provision in case a dispute arises between the organization WTO and the member. There is an equal need to have a more structured and streamlined procedure for any third party to join the WTO dispute settlement procedure.

There needs to be a code that has to be followed which incorporates the concerns of the developing countries related to the time frame, venue or other such related details, incorporates mechanisms and strategies that aid in neutralizing the power concern by minimizing the potential of unnecessary and undue delinking of trade and results in enablement of monitoring and review of the process of consultation through the means of process followed in the "Panel" and "Appellate Body". The quality of the decisions can be enhanced by training the panel and appellate body before they have been appointed. More lawyers from the developing nations should be constituted in the legal department and the appellate body.

Strict implementation of DSB recommendations are needed in context of developing countries. Whenever the developing country wins the case, legal fee and cost should be provided. Pecuniary damages also need to be provided. WTO officials should be

79 *Supra* note 17, art. 27.

recruited who make sure that negotiations should be done in the provided time frame for implementing the panel or appellate body recommendations. Easier strategy and framework for cross retaliation for developing nations can improve efficiency of implementation of justice.

At present, the WTO does not have any proper formal discovery procedure for evidence gathering. The rules for the evidentiary submissions need to be time- framed and a big issue faced by developing countries is mainly based on the assumption that the opponent party might not wish to submit evidence and might not adhere to the time frame of submission of the evidence. Hence, it calls out not solely for making of concerned rules but certain penalties also given in case of non-adherence with the rules. Although, it cannot be ignored that the evidentiary submission process does result in increasing the dispute settlement costs which goes against the developing nations. As claims involving smaller trade stakes are not offset by smaller litigation costs or a reduced need for domestic WTO legal expertise and alternative dispute resolution tracks provided by the DSU do not substitute for a small claims procedure hence, establishment of a small claims body should be on a permanent basis whereby the issues that need to be considered are based on the availability of the panelists and the costs for the same.[80]

WTO litigation is basically rule based but still the crevices of political and economic hegemony impact the WTO dispute settlement procedure. It impacts and challenges the objectives of WTO dispute settlement which is something that should not happen. The suggestions mentioned do have certain level of difficulties in the implementation but it needs to be understood that it is much better to bring about the implementation of the above-mentioned suggestions rather than deviating from the objectives based on which the WTO dispute settlement was initiated.

80 Nordström, Håkan, and Gregory Shaffer. "Access to justice in the World Trade Organization: a case for a small claims procedure?." 7(4) *World Trade Review* 587-640(2008).