TWN Trade & Development Series 9

The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South

Chakravarthi Raghavan

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The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South
is published by
Third World Network
228 Macalister Road
10400 Penang, Malaysia

This is part of a series of papers on trade and development that the Third World Network is publishing on issues that are of public concern for countries of the South in particular and for the international community and public in general. The aim of the Papers is to generate discussion and contribute to the search for appropriate policies towards development that is oriented to fulfilling human needs, social equity and environmental sustainability.

Printed by Jutaprint
2 Solok Sungei Pinang 3, Sg. Pinang
11600 Penang, Malaysia.

ISBN: 983-9747-43-6

NOTE

This paper was initially prepared as a draft for discussion for an informal meeting of developing countries engaged in the WTO Dispute Settlement Understanding (DSU) review process. The author has benefited from comments, helpful and critical, from delegates who were present, as also from other comments on the draft, including from Bhagirath Lal Das, Murray Gibbs, Martin Khor and Vinod Rege. Improvements to the original draft are due to them, and any failings entirely the responsibility of the author.

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Preface

The Dispute Settlement Understanding (DSU) has been the flagship of the World Trade Organization (WTO), proclaimed as the most important pillar of the rules-based WTO system. The developing countries, in particular, had expected that the new dispute settlement process would help the weaker trading partners in enforcing the rights and obligations under the various WTO agreements. In fact, the supposed benefits of such an effective dispute settlement system were one of the main persuasive factors for several developing countries to agree to the Uruguay Round agreements. Though the DSU has brought about some degree of predictability and efficiency in the resolution of disputes, the utility of the system in actual operation has fallen far short of the initial expectations and euphoria. Furthermore, in some respects, it has operated against the interests of the developing countries.

Mr Chakravarthi Raghavan's paper analyzes in detail the problems that have come to the fore in the last five years of the operation of the system. It cites some specific cases to highlight the problems. In fact, his analysis of the issues suggests an urgency in bringing about improvement in the system. It needs the serious attention of the General Council of the WTO, in particular, that of the developing-country Members.

The dispute settlement process is very costly for the developing countries. Most of the time, they have to call upon the assistance of the law firms of major developed countries which charge heavy fees. The developing countries would therefore not be as prompt and willing to initiate the dispute settlement process for exercise of their rights as would a developed country. Hence there is a basic imbalance in rights and

obligations between a developing country and a developed country, because of a vast differential between the capacities of these two sets of countries to invoke the enforcement process.

There are several other handicaps for the developing countries in the system. The relief granted by the system is generally very much delayed, as it may take up to about 30 months from the time the dispute settlement process was started. And this delay may be very detrimental to the developing countries. With weak trade linkages in their external economy, they are likely to suffer irreparable damage by the time they get full remedy.

And in really difficult cases, the only remedy they may get is in the form of permission to retaliate against the erring country. Obviously, such a remedy is impractical, because a developing country will naturally hesitate to take retaliatory action against a developed country in view of the economic and political costs involved.

Moreover, even if the remedy is available, it is usually through corrective action by the erring country after approval of the panel report by the Dispute Settlement Body. There is no retrospective relief from the time the incorrect measure was applied by the erring country. In the case of a developing country, this gap in relief may be very costly.

Apart from all these systemic problems, a major new problem is emerging in the operation of the panel and appeal process. The panels and the Appellate Body (AB) very often engage in very substantial interpretations of the provisions of the WTO agreements. By coincidence, it has so happened that in a large number of cases, these interpretations have enhanced the obligations which are mostly those of the developing countries and enhanced the rights which are mostly exercised by the developed countries. In some cases, the panels and AB have gone to the extent of adjudicating as between two conflicting provisions of the agreements. One important case in point is the Indonesia car subsidy

case. Indonesia had been granting some facilities for the use of domestic products, which was permissible under the Agreement on Subsidies. But the panel came to a finding through a very circuitous process of reasoning which held that the practice violated the Agreement on Trade-Related Investment Measures (TRIMs). The panel's final opinion was that even though the measure was permissible under one agreement, it could not be allowed as it violated another agreement.

Then came a strange ruling in the US S.301 case. The panel found that this provision of the US trade law was not in accordance with the WTO agreements. Yet it did not suggest corrective action because it took note of the fact that the US administration had given an undertaking that it would not use this provision of the law in contravention of the obligations under the WTO. The Marrakesh Agreement Establishing the WTO clearly lays down in Article XVI.4 that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Accordingly, the countries were required to amend their laws, regulations and administrative procedures before 1 January 1995, when they became Members of the WTO. As such, even if the administration gives an undertaking to use a law in a particular manner, there is no diminution in the obligations as the very existence of such a law is in violation of this obligation. But the panel in this case has not seen fit to enforce this mandatory obligation.

The implications of these cases and some others have been explained and analyzed in detail in Mr Raghavan's paper.

Laws are only as good as their enforcement. Hence it is very necessary that the DSU be reformed to remove the various deficiencies in it. Also, the developing countries have to take some actions on their own to utilize the system in a more effective way. The following four-tier approach may be desirable.

I. The developing countries should enhance their domestic legal capability to handle the dispute settlement process in the WTO on their own without having to call upon the assistance of lawyers of the major developed-country centres. In some cases, it may also be appropriate to build up regional capability to be utilized by a set of developing countries.

II. The developing countries should start initiatives in the General Council for improvements in the dispute settlement process for which no amendment to the DSU is required. For example, the following issues may be raised:

- The General Council should give guidelines to the panels and AB in respect of the interpretations of the agreements. There should be specific instruction that the panels and AB should not undertake substantive interpretations. In particular, when a conflict between two provisions of the agreements is noticed, the panel/AB should refer the matter to the General Council for an authoritative interpretation rather than itself undertake the exercise of determining which provision is more binding.

- When a developing country's stand has been found to be correct and the other party in the dispute is a developed country, the panel should be asked to determine the cost to be paid to the developing country by the developed country. The General Council should have a general decision for payment of such costs to the developing countries.

- When the panel/AB has found that the action of a developed country has brought harm to a developing country, the erring developed country should give compensation to the developing country for the loss suffered by the latter from the time the offending action was initiated by the developed country. The General Council should take a general decision to this effect.

III. The developing countries should place proposals in the General Council for improvement of the DSU. For example, the following issues may be initiated and pursued:

- In case a developing country has to take retaliatory measures against a developed country, there should be a mechanism for joint retaliation by all the Members.

- There should be a rethink about the utility and desirability of having a standing Appellate Body. A continuing body of this type is bound to develop and perpetuate certain leanings and orientations, which may not be a healthy practice, given the fact that its recommendations are in the nature of final pronouncements on the issues in question. If a second look is necessary after a panel has given its recommendation, the task may be entrusted to yet another panel which would give its findings as the standing AB does at present. The advantage of this approach will be that there will be a second look and, at the same time, there will be no pre-fixed ideas and leanings as can be associated with a standing body.

IV. The developing countries should move to undo the harm done so far by the substantive interpretations of the panels and AB. The General Council should be requested to pronounce that these interpretations will not guide the future work of the dispute settlement process.

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The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South

A. INTRODUCTION

FIVE YEARS of the workings of the dispute settlement process at the World Trade Organization (under its Dispute Settlement Understanding (DSU), administered by the Dispute Settlement Body (DSB)), and the rulings by dispute panels and the standing Appellate Body have begun to attract some attention among the public – civil society – academics, business groups, non-governmental organization (NGO) activists, parliamentarians and trade experts.[1] Some of these comments have focused on the outcomes of rulings, and others on the technical-legal aspects. However, while there is now a growing volume of literature challenging and critically questioning claims that the WTO and the Uruguay Round agreements have benefited the developing world, the dispute settlement system has not attracted as much attention and/or is viewed mainly in terms of a pure legalistic approach.

The aim of this paper is to focus public attention and generate wider debate and understanding in the developing world and the wider development community on questions and issues concerning the dispute settlement process of the WTO, that are being talked about in private or informally, and to promote informed discussions on needed changes in the system before it becomes too oppressive.

Some tentative, and perhaps provocative, ideas to deal with the controversies now openly coming to the fore are also suggested.

B. BACKGROUND TO THE DISCUSSION ON THE DSU SYSTEM

In discussions among the wider public (other than among trade officials), some of the Northern environment NGOs have focused on their right to present briefs to dispute settlement panels and "observe" and "participate" in the process. And the WTO secretariat, and the US and EU governments, have sought "cosmetic" changes to cater to these groups.

But most of the NGOs from the South, and even development NGOs of the North, have been focusing on and looking at the problem from the perspective of development, democratic decision-making and transparency of the WTO processes (of rule-making and administration). Some of the recent dispute settlement rulings and their consequences have begun to attract attention in the South – for their consequences with respect to development options and the transnational-corporation domination of their economies. These concerns have also begun to surface in the DSB proceedings (held, as the proceedings of other WTO bodies, in private).

There are two almost opposing views about the Uruguay Round negotiations and their outcome. One is the "official" view, which trumpets the 'largest developing-country participation' in and parliamentary approvals etc of the outcome of the multilateral negotiations, the billions of dollars' worth of trade benefits and welfare gains for developing countries – though not much is now heard about the US$200-500 billion gains that were bruited about in 1992 and 1993 by the Organization for Economic Cooperation and Development (OECD), the World Bank, the General Agreement on Tariffs and Trade (GATT) and other bodies[2] – and the benefits of a rules-based system as opposed to one based on power.

The other, contrary view is that in most developing countries, there was no wide involvement of the public or even domestic enterprises either in the negotiating process or in the subsequent approvals which were presented in terms of "there is no alternative"; nor was there any assessment of costs and benefits to each country before approval. And hard-pressed trade negotiators of developing countries (often numbering just two or three for each

country and trying to deal with several informal and formal meetings at the same time, without much legal expertise of their own on hand) negotiated and reached accords against such a backdrop.

When the Uruguay Round negotiations were concluded at the official-level meeting of the Trade Negotiations Committee (TNC) in December 1993, developing-country negotiators had pointed to the dispute settlement system as one element on the plus side for them. They viewed it as a central element in the "rules-based" multilateral trading system – for the trade certainty and security that came from the element of automaticity in settling disputes and the time-bound nature of the process, as well as its outlawing of US unilateral trade sanctions and threats. They even took satisfaction from the fact that while the DSU provided for cross-retaliation, this had been brought under discipline, to be resorted to against them only as a last resort.[3]

In the sparse debates inside developing countries on the ratification of the Marrakesh agreements of the WTO, the rules-based WTO system and the safeguards of the DSU were used as a powerful argument to win the acceptance or acquiescence of domestic constituencies – various sections within the governments, the parliaments and the public at large who were dissatisfied with or opposed to the outcome of the Round itself.

This "positive" assessment of the DSU is still being repeated. But increasingly over the last 3-4 years, there have been some second thoughts surfacing even within the narrow circle of trade diplomats; and, more importantly, voices are being raised by Third World trade experts with some experience of trade negotiations, trade policy and administration.[4]

When the Marrakesh agreements were signed in 1994, no negotiating history was drawn up and placed before the Parties who negotiated and signed that accord, and none was approved by them. In terms of the Vienna Convention on the Law of Treaties, there is thus no "negotiating history" that could be used to interpret the rules or to seek clarification and guidance for interpreting them. It is known that the GATT secretariat had toyed with the idea of drawing up a negotiating history (as was done for the Tokyo Round of multilateral trade negotiations under GATT 1947, a provisional treaty) but

eventually decided against it since it was clear its version of the negotiating history may be challenged. Only the formal proposals were de-restricted and made public at Marrakesh. But none of the informal papers in informal discussions (in some of which even the secretariat was not present) was ever made public.

Some of these discussions were, however, reported contemporaneously in the *South-North Development Monitor (SUNS)*; the reports have recently been put together on a CD-ROM[5] and provide an unofficial history of sorts.

But the secretariat's internal notes now seem to be surfacing in various ways in the dispute panel process and are being used, while the views of negotiators, drawn from their own files and knowledge, are rejected.[6]

Until very recently, trade diplomats in Geneva and in capitals continued to hold the view that the WTO and the DSU have prevented US unilateralism – even though the US administration officials (the US Trade Representative (USTR)), in testimony in 1994 to Congress and letters to Congressional leaders in the House and Senate and in other statements leading to the enactment by Congress of trade legislation to give effect to the Marrakesh Agreement Establishing the WTO, had said the US would retain its "S.301" family of laws and asserted the US' right to use unilateral sanctions and threats.

(The "S.301" family of laws (S.301, "Special 301" and "Super 301") refers to Sections 301-310 of the US Trade Act of 1974, as amended and expanded by the US Trade and Competitiveness Act of 1988. These enable the initiation of a complaint by an individual or enterprise, or self-initiation by the USTR, that the rights of the US under any bilateral, plurilateral or multilateral trade agrement are being violated. "Special 301" provisions relate to purported violations of intellectual property rights, and "Super 301" provisions to a general catch-all of "unfair trade practices." The procedures and powers provide for unilateral determination of such violations, asking the trading partner concerned to negotiate and remove the restrictions or face penalties in the form of trade sanctions.)

At the time of the implementation process of the WTO Agreement in the US, many developing-country officials had suggested in private conversations that the public pronouncements of the US officials were aimed at Congress, and did not and could not change the WTO rules. But few make such bold assertions now and many, at formal and informal meetings, are raising these questions.

In January 1999, the EC raised a dispute on Sections 301-310 of the US Trade Act. The panel has handed down a ruling that the US law may be a violation, but that WTO Members and the trading community could be satisfied with the US administration's "Statement of Administrative Action" (SAA) to Congress and a Congressional approval of this as part of the US Uruguay Round Agreements Act 1994 (the US implementation law to give effect to the Uruguay Round agreements), and the assurances and statements made by the US before the panel, as assuring trade security. This is a ruling so blatantly based on politics rather than a legal interpretation of rules that it strengthens the view of critics that the WTO, behind its outward veneer of being a "rules-based organization" with a credible dispute settlement system upholding the rights of the weak as much as those of the strong, is basically a power-based institution, in terms of not only its negotiated agreements but also their administration.[7]

Several of the contradictions and vague or misleading formulations in agreements now coming to the fore in the dispute process were evident even in December 1993. When these were pointed out then, the response of trade diplomats was that they could be attended to in the legal-scrutiny stage. But in fact nothing was changed during scrutiny, on the ground that if something was changed, everything would unravel. It was then said that the authoritative-interpretation provisions of the WTO (Article IX.2 of the Marrakesh Agreement vesting exclusive authority to provide authoritative interpretations in the Ministerial Conference and, when the Conference is not in session, the General Council) could be used to remove these problems. But the experience of the banana dispute, and attempts therein to get an authoritative interpretation on US assertions of unilateral rights, show this is not easy.[8]

Even before Marrakesh, and ever since the WTO came into being, trade diplomats and WTO officials have been constantly repeating – as if repetition will make it a reality – the mantra or incantation about the rules-based nature of the WTO multilateral trading system, viewing the DSU as a central element in ensuring their rights.

Nearly six years after Marrakesh, and in the sixth year of the WTO, in the light of the workings of the DSU, the picture is, however, at best a very mixed one – with some advantages but far more emerging signs of disadvantages of the DSU and the WTO for the developing world.

In the context of the future of the WTO, and developing-country policy- and decision-making processes, Third World experts have suggested the need for a new institutional mechanism and approach to trade policy formulation and decision-making in countries.[9] This is a much wider issue and is beyond the scope of this paper. But it is clear that in most countries, the WTO, and its current and future reach, can no longer be handled without informed debate and involvement of various sections of government and the public, and the issue is just flagged here.

The WTO came into being on 1 January 1995. For most of the developing countries, while some obligations kicked in from day one, the full range of obligations of the WTO and its annexed agreements became effective only from 1 January 2000.

But even before all the obligations fully kick in – and the WTO's remit reaches into several sectors and spheres hitherto viewed as being within the scope of domestic economic policy- and decision-making – and their effects begin to be felt within countries, the growing perception of the WTO's reach is already creating a backlash and opposition within countries, including among business and industry.

The workings of the DSU and its implications have to be judged against this background and context. Most of the DSU provisions reflect the GATT practice, at least since the 1989 Mid-Term Review under the Uruguay

Round. The new provisions in the DSU that were incorporated into the Marrakesh Agreement Establishing the WTO are those providing for an Appellate Body to hear appeals on law and for the automatic adoption of panel and Appellate Body reports through the "negative-consensus" requirement (under which reports and recommendations of a panel or the Appellate Body are required to be adopted by the DSB unless it "decides by consensus not to adopt the report" – in practice, there is no possibility of there being such a negative decision by consensus since it will require the agreement of the party benefiting from the report), and the procedure for surveillance of implementation.

C. PROBLEMS RELATING TO THE DSU SYSTEM

The experience so far of the DSU and its functioning has thrown up a number of problems, which can be grouped under three sets of issues:

Technical or structural issues

1. There are what may be called technical or structural issues arising out of the DSU itself. Many of these have been identified, and some solutions suggested by Mr Bhagirath Lal Das.[10]

Problems relating to Articles 21, 22 and 23 of the DSU

2.1.1. The recent banana disputes have thrown up problems relating to Articles 21, 22 and 23 of the DSU. The reconvened banana panel has given its rulings and the EC has accepted them (though their implementation is running into problems because the banana exporters are divided), while the US went ahead and imposed trade retaliation.[11] These raise several issues – some arising out of the substantive rules, others out of the way the DSU process is bundling up the rules and interpreting them. The conflicts under Art. 21, 22 and 23 have not been resolved. The reconvened banana panel, also functioning as arbitrators in the dispute, did not address these questions, though

they were raised by the EC and other intervenors. It avoided the issue and contented itself by pointing to the ongoing DSU review process as an avenue for settling them.

2.1.2. The period set by the Marrakesh Ministerial Decision[12] for review of the DSU ended in July 1999. Informally, talks for reviewing and changing some of the DSU provisions had been going on even thereafter, for resolving the conflicts and doubts arising from the wording of Art. 21, 22 and 23. Some informal texts, evolved among a group of countries, were due to be presented for adoption at the Seattle Ministerial Conference in December 1999. But with the collapse of that conference, the fate of these informal texts was not clear at the end of 1999.

2.1.3. While the developing countries want a clarification to eschew US unilateral determination as to whether another party has or has not implemented a ruling, they are not ready to accept some other changes that the US and the EC want (such as enabling NGOs to file *amicus curiae* briefs and thus opening the floodgates to Northern NGOs – which are often well-financed by corporate donations to battle the developing world and support US unilateralism on grounds of alleged environmental protection – and the industry and trade bodies of transnational corporations themselves).

2.1.4. Under Art. 21.5 of the DSU, any disagreement as to whether or not a WTO Member has complied with a ruling and DSB recommendation is to be referred to the original panel, to be reconvened, and that body has to give a ruling within 90 days of the referral to it.

2.1.5. Under Art. 22.2, 22.3 and 22.6, if a DSB recommendation based on a panel ruling to a Member to bring its trade measure into conformity is not complied with within the reasonable period given to it, then the other party in the dispute can seek authority from the WTO (the DSB in this case) to withdraw concessions and benefits equivalent to the level of nullification or impairment amount of trade damage. If there

be a dispute about the amount of damage, it is to be referred to an arbitrator, preferably the original panel or, failing that, an arbitrator appointed by the WTO Director-General (DG), and the arbitrator has to give a ruling within 60 days. The authorization by the DSB for withdrawal of concessions is to be automatic (subject, as in other DSU matters, to there being no negative consensus).

2.1.6. Art. 23.1 requires Members to seek redress on complaints of violations by recourse to the DSU, and to abide by the rulings and recommendations. Art. 23.2 requires Members not to make any determination of their own about violations, but to do so only through recourse to the DSU. There is specific mention of Art. 21 on the reasonable period of time to comply, and of Art. 22 on seeking authority to withdraw concessions. And the aforementioned panel ruling on the US S.301[13] has only added to the confusion.

2.1.7. The banana dispute brought to the fore the US claim that it could determine for itself whether the other side has complied, and that if it reaches a negative view, it can seek authorization straight away under Art. 22.6 to suspend concessions (without going through the Art. 21.5 process to determine compliance).

2.1.8. Publicly, at the DSB, the US has said that there is no reason to change the rules and that both Art. 21 and Art. 22 can coexist without any sequencing set.

2.2.1. The way the reconvened banana panel in Art. 21.5 proceedings has taken on board new issues (raised by Ecuador), and not merely its original ruling and the EC measures to comply with it, has also raised some fundamental questions and problems.

2.2.2. These have been raised by some of the countries not parties to the dispute in the DSB.[14] They are not addressed in any detail here, excepting to draw attention to the issues that need to be dealt with in the review process.

Issues relating to DSU system and interpretation of WTO agreements

3.1. Another set of issues thrown up by the workings of the dispute settlement system appears to arise from the manner in which the WTO and its annexed agreements have been interpreted, with the overall result of expanding the obligations of developing countries or creating new ones, and reducing developing countries' rights.

3.2. It is no secret, neither to the trade negotiators of that time nor to those who closely followed the negotiations from outside, that the various WTO agreements were negotiated in separate groups and sub-groups and finalized only towards the end, and then put together.

3.3. When the Uruguay Round accords were being negotiated in 1993, it was on the basis of the Draft Final Act (DFA) text, more popularly known as the Dunkel texts, tabled by then GATT DG Arthur Dunkel.[15] There was a stipulation at the TNC by Dunkel that it was a package and could be reopened or changed only by consensus. It was not a prior decision of the TNC asking him to produce such a package. But in presenting his package of compromises, he put forward his view of the consensus needed.

3.4. However, in Nov-Dec 1993, the DFA texts were reopened, without any prior TNC consensus, wherever it suited US and EC interests (in the areas of agriculture, anti-dumping, subsidies and services); major changes were effected towards the end and presented to the others in bits and pieces, virtually on a take-it-or-leave-it basis. This was also true of the DSU and the institutional framework for implementing the agreements (in terms of Part III of the Punta del Este Declaration launching the Uruguay Round), namely, the WTO Agreement itself. Until the very end (in December 1993), no one, not even the major industrial powers, had a clear idea of the final outcome: of a WTO treaty to which were to be annexed the various agreements in the areas of goods (the only portion of the Punta del Este Declaration covered by the 'single-undertaking concept'), services and trade-

related aspects of intellectual property rights; the Dispute Settlement Understanding for resolving disputes in all these areas; and the Trade Policy Review Mechanism. The plurilateral agreements, which create obligations only for signatories, were also annexed to the WTO Agreement.

3.5. The DSU itself, while recognizing that it is a central element in providing security and predictability to the multilateral trading system (Art. 3.2), makes clear that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

3.6. The WTO Agreement is thus a framework agreement to which have been annexed the various Uruguay Round multilateral agreements, in Annexes 1A, 1B and 1C, and the DSU, in Annex 2, without any particular hierarchy among the agreements being created.

3.7. The general interpretative note to Annex 1A (which comprises agreements in the area of trade in goods) makes clear that those who negotiated and concluded the agreements did envisage some possible conflicts within the goods sector, and provides that:

> "In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another Agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as 'the WTO Agreement'), the provisions of the other agreement shall prevail to the extent of the conflict."

3.8. And while the annexed WTO agreements were presented as a package of agreements all of which had to be accepted by everyone, there was no indication or statement that the obligations under GATT 1994, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) were cumulative or in any way hierarchical.

3.9. But the panel system and the Appellate Body, in their interpretations – as in the Indonesia car dispute, the India balance-of-payments (BOP) dispute and the Brazil aircraft-subsidy dispute[16] – have used the DSU (which specifically provides that it creates no new rights or obligations) to make the WTO and its annexed agreements an overarching framework of rights and obligations, and have created new obligations.

3.10. Over and above the various provisions in various agreements about dispute settlement (references to Art. XXII and XXIII of GATT 1994, often with some qualifications), the panels and Appellate Body have used the DSU provisions to extend the dispute settlement rights of complainants from the industrial world and the obligations of developing countries under individual agreements.

3.11. This has been evident in the banana cases, the Indonesia car dispute, the shrimp-turtle case, the Costa Rica and India textiles cases against the US, the Brazil vs Canada subsidy dispute on aircraft exports, and in the BOP rulings against India.[17]

3.12. This was certainly not the intention of the negotiators and is a clear violation of the text in Art. 3.2 of the DSU, which in unambiguous language provides (in its last sentence) that:

> "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[18]

3.13. Guided by the WTO secretariat and, in appeals, by the Appellate Body secretariat, the panels and Appellate Body have been taking advantage of the DSU rules that their rulings have to be adopted and can be set aside only by consensus, and have simply ignored the DSU provisions in the above sentence in Art. 3.2.

3.14. By claiming to be following the duty of a treaty interpreter to interpret the provisions of agreements in such a way as to avoid

conflicts, the panels, Appellate Body and the DSB (in adopting the rulings) have been gradually creating new obligations and whittling away the rights of developing countries.

3.15. In any domestic jurisdiction, judges on courts who give such interpretations to extend their own jurisdiction, contrary to constitutional and legal provisions, would by now have invited impeachment proceedings in parliaments. But this cannot happen in the WTO because of the "undemocratic" consensus decision-making system and the negative-consensus requirement at the DSB.

Extremely legalistic approach to trade disputes and negative implications for developing countries

4.1. The earlier GATT dispute settlement system required the reports of panels and their recommendations to be adopted by the Contracting Parties, and the GATT practice was one of adoption by consensus. Thus a panel report and recommendation clarifying or interpreting the provisions (and even extending the obligations through interpretation as in the case of Art. III of GATT 1994 - the national-treatment principle), once adopted by the CPs by consensus, were decisions of CPs that were deliberate, at least in theory.

4.2. The ability of the major industrial powers to block the adoption of rulings and recommendations had, however, created frustration among developing countries, which therefore welcomed the current DSU decision-making process.

4.3. **But the WTO system has now swung to the other extreme by bringing to bear an extremely legalistic (and, in the latest US S.301 case, a 'political') approach to trade dispute matters that fall in the overall sphere of socio-politico-economy.**

4.3.A. The panel ruling in the US S.301 case has other disquieting features. A panel is expected to give a finding as to whether the actions or omissions under scrutiny are inconsistent (or not) with an obligation

under the particular agreement. In all the rulings in disputes up till then, the panels had given a clear finding – though sometimes there could be disagreement with their views.

But in this case, the panel has fudged the issue of whether or not S.301-310 of the US Trade Act of 1974, as amended (19 U.S.C paragraphs 2411-2420), is in compliance. Instead of giving a finding on the basis of the law, the panel has brought in extraneous facts about the US administration's expression of intent on how it would administer the provisions, and the US statements to the same effect before the panel.

In the dispute raised by the US against India over the latter's TRIPS obligations (to provide a mailbox mechanism to receive patent applications), the panel and the Appellate Body ruled out the expressed intention of the Indian government to implement the transition provisions through administrative orders. Both the panel and the Appellate Body insisted that only a provision of law could be considered adequate. What was given prominence, and on the basis of which the ruling went against India, was the existence or absence of a law. The firm intention of the government to implement its obligations through administrative actions was given no weight.

But in the S.301 case against the US, the intentions of the administration expressed to and accepted by Congress (but not through law) and the US assurances to the panel have been given weight, and a conclusion drawn that other WTO Members could get 'trade security' from this!

4.4. Some panels, in disputes where the industrial countries too would be affected, have tried to distinguish between their role to rule between parties to the dispute, and that of the WTO bodies to look at issues involving all WTO Members.[19] But these observations are slightly peripheral, though they do point to the contradictions of the process.

4.5. **The way the dispute settlement system is functioning has given rise to the view that it has helped advance the interests of the major corporations and the major countries where these are headquartered, in effect promoting a normative version of neoliberal globalization (and harmonization of domestic economic policies to conform to one view) that is knocking down the pillars of the global market system, as the UN Economic Commission for Europe (UN-ECE) *Economic Survey 1999* No. 1 has pointed out.**[20]

4.6. Another question posed is on the way the rules are worded such that the major industrial powers can use the absolute right under the "security exception" to shield themselves; the major industrial powers are also enabled to invoke the standard of review provisions of the anti-dumping rules to prevent any panel or WTO judgements challenging their conclusions based on appreciation of "facts", but are, on the other hand, enabled to use the other provisions to intrude into the developing-country markets for their corporations.

4.7. As pointed out above, under the DSU and its negative-consensus approach, a panel's decisions are automatically accepted. While this thus provides certainty and security in so far as the disputants are concerned, in fact, given the way the panels and Appellate Bodies are functioning, new obligations are being created.

4.8. The criticism now voiced is that panel reports have now made the WTO's annexed agreements a "cumulative" obligation – something that is not specified in the WTO Agreement itself.

4.9. **The implications of this are far-reaching and negative for developing countries and their development.**

4.10. In the Indonesia car case[21], the obligations of Art. III of GATT 1994 and those under the Agreement on Trade-Related Investment Measures (TRIMs) have been cumulated by interpreting the reference in the TRIMs Agreement to Art. III (of GATT 1994) to mean the

"**substance** (emphasis added) of Art. III". The TRIMs Agreement, in Art. 2.1, says: ".... no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994." And Art. 2.2 of the TRIMs Agreement says: "An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is annexed to this Agreement."

4.11. There is no mention whatsoever in the TRIMs Agreement about "substance", and yet the panel has imported this term into the Agreement to reconcile the conflict between the provisions of GATT 1994 and the annexed agreements (where Indonesia's rights under the TRIMs and Subsidies Agreements would have prevailed over the provisions of GATT 1994), and rule in favour of the US, the EC and Japan (and their auto industries), saying that Indonesia has a cumulative obligation to obey both!

4.12. The panel in this case, and the Appellate Body too in other cases, have repeatedly asserted (their right?) that treaties have to be interpreted, as far as possible, on the assumption that no contradictions were intended by the treaty signatories, and only in the event of a contradiction can the other options kick in.

4.13. This may appear on the face of it to be reasonable, but is nevertheless a perverse assertion. For it is not in accord with the actual facts of the negotiations on the TRIMs, Subsidies and other WTO agreements that took place mostly in private, among small groups of countries.

4.14. And the problems in the Indonesia case were compounded by the International Monetary Fund's (IMF) conditions, in its loans to Indonesia, that Indonesia should not only abandon its national car project but shall also accept the ruling. The social and political turmoil of the financial crisis that afflicted Indonesia and the ouster

of the Suharto regime enabled the IMF and the industrial world (with help from the WTO) to get the ruling accepted without demur. No doubt at some future point the ruling would be used and cited by the secretariat in guiding some other panel against a developing country.

4.15. And the way Indonesia came up at the DSB to announce its acceptance of the ruling caught unawares most other developing-country Members who had appeared before the panel as interested third parties and thus did not even reserve their positions at the DSB – though such reservations do not in any case seem to weigh heavily with panels and the Appellate Body, which continue merrily in their ways.

4.16. **It is clear that the DSU and the procedures and processes for adopting rulings need to provide some remedies or safeguards for other Members. Perhaps a way out could be to provide clearly that rulings and recommendations, when adopted, create no new rights or obligations for Members, and that the effect of a ruling is only binding on the two parties to the dispute in the particular case.**

4.17. **Unless, as in the old GATT 1947, the General Council adopts by positive consensus a panel's interpretation of the rules, it should have no other effect, nor should it be cited or its arguments and conclusions "adopted" by other panels. This will ensure a finality to disputes between parties, but without creating new rights and obligations for the Members as a whole, a preserve to be left for clear and unambiguous decision of Members by amendments or agreed interpretations.**

4.18. In the banana tangle, the GATT and GATS obligations have been similarly made cumulative.

4.19. No one can support or defend the European Community, its executive Commission and their byzantine and non-transparent ways of

trade policy formulation, decision and administration. And if it had been merely a dispute involving the corporate interests of US and EC banana traders, no one would have been worried.

4.20. But there are other troubling aspects.

4.21. While the ruling in theory is against the EC (and its complicated banana import regime), in fact the rights of one group of developing countries have been taken away, ostensibly to favour another set of developing countries but really to advance the interests of a US transnational.

4.22. The Lomé Treaty (the agreement between the EU and the African, Caribbean and Pacific (ACP) countries under which the preferences for ACP bananas were granted) has been interpreted by the panel and Appellate Body as requiring the EC to provide tariff preferences, and thus an obligation for which the EC has been given a waiver.

4.23. But the "development" provisions of Lomé, on what the EC should do to promote development of the ACP countries, have been interpreted as not being an obligation and thus not covered by the waiver. In effect, these provisions have been as good as thrown into Lake Geneva.

4.24. Further, in the banana ruling, the view that every WTO Member has an interest in the compliance of other Members with their obligations has been widely interpreted, just to provide a ruling that the US' "GATT right" has been violated and an impairment suffered in terms of the EC's violation of its GATS obligations – all to enable the US to retaliate against the EC's failure on GATS (*vis-a-vis* the US) by imposing sanctions on goods.

4.25. Every WTO Member, the panel ruled, has a systemic interest in ensuring that every other Member carry out the obligations it has undertaken. This is probably not an objectionable view *per se*.

4.26. But should this systemic interest be satisfied by allowing the Member to raise and agitate on a systemic issue before the concerned WTO body (the Goods Council or the WTO General Council), or should any Member be permitted the right to raise a dispute, whether or not any of its actual trade or other economic interests have been affected, that is, whether or not it has suffered trade damage as a result of nullification and impairment of any benefits accruing to it directly or indirectly under the agreements?

4.27. And the banana panel contradicted itself in a sense by saying – in its ruling as a reconvened panel (when Ecuador challenged the new EC regime) and in its award, as an arbitrator, in judging the value of US trade impairment (on the US request for trade-retaliation authorization) – that while the US had a right to raise a dispute whether or not it had an actual trade interest, in order to assess the trade damages for the purpose of taking retaliatory measures (the only real sanction under the DSU), it had to show its "trade damage" (suffered by Chiquita (a US banana transnational) and the US directly under GATS in terms of banana trade, and not indirectly in supplies of goods and services inputs to the countries in the Chiquita banana empire in Central and Latin America). The panel assessed this damage and then allowed the US to retaliate against the EC goods trade.

4.28. Thus, the panel, the Appellate Body, and the reconvened panel at the end, used this argument of systemic interest to enable the US to agitate for, in terms of GATT 1994, the rights of the Chiquita banana trading company (exporting to the EC bananas purchased in Latin America) at the WTO, even though the only US right violated was under GATS. And the reconvened panel took on board Ecuador's new claims to rule on the new EC regime and, as arbitrators, used it to award the US "trade damages" under GATS and enable the US to retaliate against the goods trade of the EC.[22]

4.29. During the entire process, the US media was full of reports of Chiquita contributing to the election funds of both major political

parties and the US Presidential campaign (1996) immediately after the US lodged the banana complaint. There were also other reports about the electioneering soft-money funds raised by using the Lincoln Bedroom in the White House as an overnight guest room for the rich who contributed to the Democratic campaign chest. These reports have brought out how the powerful countries have become tools of corporations, and the WTO system is being used to support this.

4.30. And if every Member has a "systemic" interest in any other Member's carrying out its obligations, then no diplomat or trade negotiator or official of any Member-country would be eligible to be chosen or appointed to a panel.

4.31. And the central hope of every Member that US "unilateral threats" have been outlawed has been dashed, without so much as a murmur from the DSB.

4.32. Part of the problem arises from the fact that the WTO General Council's right to interpret the provisions of the WTO agreements has been made into a nullity by the dogma of decisions by consensus.

4.33. It is not clear how this situation can be remedied, more so when changes to the DSU themselves require consensus.

4.34. On the one hand, it is useful to have the security of an automatic DSU process. On the other hand, given the way rights and obligations are being interpreted by the panels and Appellate Body, the rights of developing countries are being reduced or made empty of content, and their obligations increased.

4.35. **A middle way has to be found or the dispute settlement process will become an oppressive instrument that will bring down the WTO system.**

4.36. **One way out could be to consider the suggestion that countries give up their "embrace" of consensus and use the voting procedures to provide an authoritative interpretation in the General Council, without affecting the rights of parties in a dispute as decided in the panel ruling.**

4.37. **Another suggestion from some trade experts is that while panel and Appellate Body reports and rulings should continue to be adopted by the negative-consensus rule, binding the parties to the dispute in the particular dispute, only a positive-consensus decision of the DSB (separated, if needed, from the adoption of the panel recommendation for resolving the dispute) could create any precedent or allow the panel and Appellate Body reports to even be cited, or their reasoning and arguments used in future, in any other dispute.**

4.38. **The WTO and the GATT, when it suits the interests of the major powers (and when a departure from the theories of free trade is needed), often talk of adopting pragmatic compromises.**

4.39. **The two suggestions above, or a mixture of both, should be considered as feasible pragmatic compromises and accepted by the majors without any loss of face for them.**

4.40. While the panel rulings have been reducing the rights of developing countries, as in the Indonesia car dispute, the India BOP case, and the shifting of the burden of proof (through the Costa Rican and Indian cases against the US on the Agreement on Textiles and Clothing (ATC)), the rights of the developed countries, particularly those of the US, have been increased by such rulings as the gasahol ruling and the shrimp-turtle ruling.

4.41. During the Uruguay Round, at the Brussels Ministerial meet and subsequently, the specific efforts of some to include "environment" specifically under the Art. XX (of GATT 1994) exceptions (which enable Members to take measures for certain specified purposes and

reasons even if such measures are inconsistent with GATT 1994 provisions) failed – probably because the efforts of Europe and the US to put in a broad "environment" exception were countered by some developing countries' seeking to put in a "development" or "sustainable development" exception. It was this that ultimately resulted in some references to these in the WTO preamble instead.

4.42. Yet the Appellate Body in the shrimp-turtle dispute has used the theory of "evolutionary" interpretation (of the then under-5-year-old treaty) to achieve the same end. An "evolution" in legal doctrines between 1994 and 1999 is indeed mind-boggling.

4.43. In the India BOP case, in its efforts to reduce the BOP rights of developing countries, the panel has gone "dictionary-hunting" for the "ordinary meaning" of the term "thereupon": "if the *Oxford English Dictionary* does not support the view the panel wants to provide, use *Webster's*" seems to be the approach.

4.44. It is a fact that most of the drafting and negotiations in the GATT were conducted in English, with the texts translated into French and Spanish (the two other official languages) afterwards.

4.45. Anyone with some knowledge of macroeconomics and development economics could understand that the effects of policies and measures on the BOP are not "immediate" but come about in the medium term.

4.46. But the panel in fact seems to have ignored this. And the preferred meaning (in the BOP case) is sought to be buttressed by references to the French and Spanish texts (which were in fact readied, scrutinized and approved at the scrutiny stage by those countries using the French and Spanish languages respectively).

4.47. And an argument of perverse economics, or an exhibition of economic ignorance bordering on economic illiteracy, has been used by

the Appellate Body in the BOP case to say that macroeconomics is different from development policy, and that while developing countries cannot be asked to change their development policy, they can be asked to change their macroeconomic policy, since the latter is not mentioned in Art. XVIII.B.11 of GATT 1994 (which states that "... no contracting party shall be required to withdraw or modify [BOP] restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.") The inequities of the WTO/GATT have thus been compounded since this means that a developed country has a right not to be asked to change its macroeconomic policy (Art. XII.3.d of GATT 1994), but a developing country has no such rights!

4.48. And while no dictionary is mentioned, the Appellate Body has in the shrimp-turtle case turned the ordinary meaning of "to seek" (the right of panels to seek information from others) into an obligation "to receive" – so as to enable NGOs to file briefs and these briefs to be used by panels – and has even ventured further to deal with a brief that had not even been filed.

4.49. Knowing full well that the WTO membership in the Committee on Trade and Environment and the General Council has declined to accept such a right for NGOs, the Appellate Body provides an opening by saying "to seek," an active verb, means "to receive," a passive action on the part of a recipient.

4.50. In theory, Members can make statements at the DSB reiterating their positions or repudiating a panel view, hoping that future panels would bear these in mind.

4.51. However, there is in practice little time for others to even read the panel reports (which are becoming longer and longer), leave aside comment on them. Unless the process in terms of the binding nature of panel decisions on the parties to a dispute, is separated from the other implications of a ruling (as set out above), the balance of rights

and obligations that Members and parliaments accepted in signing on to the Marrakesh Agreement will be (and is already being) taken away.

4.52. The restoration of this balance is the first order of priority.

The role of the secretariat

5.1. Even under GATT 1947, a tendency had begun for the GATT secretariat to guide panels in their rulings – though disputes and panels were not so frequent then, and in any event consensus was needed for rulings to be adopted. This tendency began after the Tokyo Round – from about the 1980s, during Arthur Dunkel's stewardship as DG.[23] But under the WTO, it appears to have gone further, buttressed by the fact that the secretariat knows that once it gets its view across through the panel and Appellate Body process, it cannot be set aside or challenged, because of the consensus needed to set it aside.

5.2. The secretariat has a large voice in choosing panellists. Names of persons to be put on the roster of panellists are approved by the General Council (Art. 8.4 of the DSU). But under Art. 8.6 of the DSU, it is the secretariat that picks names out of the roster and initially suggests the names to the parties to a dispute, who "shall not oppose nominations except for compelling reasons." If ultimately the parties are unable to agree mutually on the composition of the panel, under Art. 8.7 the Director-General shall name the panellists. An intriguing outcome of these processes has been that some individuals have served more than five times on panels.

5.3. The selection of the Appellate Body in 1995 was largely done in such a way that only after the US cleared the seven names for appointment were they presented to the others – in effect daring them to withhold consensus.[24]

5.4. And though the Appellate Body is not a court of record, it is gradually being made into one (that is, its rulings become precedents as a statement of law to be followed by panels in all future disputes); on top of it all, it is behaving as if it is the highest court (of appeal and record) in a country that has the right to interpret laws and regulations adopted by legislatures. The Appellate Body has been given no such right; the right of authoritative interpretation is vested exclusively in the Ministerial Conference and/or the General Council. Yet the panels and Appellate Body continue to talk of the "treaty interpreter's" authority and duty to harmoniously interpret and reconcile contradictory language in agreements.

5.5. Whereas under the old GATT, whatever guidance the secretariat gave, acceptance of the panel rulings had to be obtained from the CPs, now they are automatically accepted. And the secretariat is clearly feeling its way, playing a role behind the scenes, in gradually extending the rights of corporations and the obligations of developing countries, and whittling away the rights of developing countries. This seems to be done by providing panels with guidance on what negotiators had intended in the texts – a negotiating history of sorts and notes to panels – but behind the backs of the parties to the dispute.

5.6. The analogy drawn to justify this secretariat role, namely, with the practice of "clerks" of the US Supreme Court in doing research and providing briefs to judges, does not stand a moment's scrutiny. The panels are also guided by the secretariat in the drawing-up of reports.

5.7. Some panellists in private have told this writer that when they tried to adopt a different view (even to the extent of threatening to table a minority view in a panel report, and there is nothing in the DSU to prevent it), the secretariat often asked them why they wanted to do so, since they would not be there to defend their views! And there was the implied 'threat' that they would never have a chance to serve on another panel.

5.8. Perhaps a limited solution could be to organically and structurally separate the secretariat that services the panel processes, from the WTO secretariat and its legal and substantive divisions; and insist that no notes or material can be provided by the WTO legal or substantive divisions without their being made available to the parties simultaneously and enabling parties to express their views to the panels. And no such notes or information should be provided to panels after the hearings are over.

5.9. Some experts note that given the nature of international power relations, any international secretariat is bound to look over its shoulders and see how the US and the EC react to its actions. But while an organically separated outside secretariat may look to the US or the EC in servicing a panel, it will not have the ideological hang-ups of the WTO secretariat.

5.10. The idea is worth trying anyhow in order to restore some credibility and ensure a public image of impartiality, before the cry to wind up the WTO dispute settlement system and the WTO itself gathers momentum in developing countries.

5.11. At present, the WTO secretariat in effect has become party to the disputes, and a partisan one at that. Voices questioning its impartiality are being raised among WTO Members and the public. And it is not even in the interest of the WTO secretariat to be in the firing line.

5.12. The only arguments against an organically separate secretariat to purely service panels seem to concern the issue of "costs" – an argument also used to select as panellists more than once those perceived to be compliant and those in Geneva missions or in Europe or near about. This is not a just or acceptable argument against change and for the status quo.

Changes in DSU should be given priority

6.1. These and other issues and questions raise the further question of whether changes in the DSU should be a precondition, even ahead of addressing issues pertaining to the implementation of the existing WTO agreements, for the launch of any new round of trade negotiations.

There is a very strong case for this.

6.2. Firstly, this is the only leverage that developing countries have to force some changes to make the DSU equitable and just.

6.3. Secondly, and even more important, unless they set right these basic problems, any future agreement, when added on to the WTO annex, would become yet another cumulative obligation, to be interpreted by panels and the Appellate Body to suit the interests of the majors and their corporations while exacerbating the situation of developing countries.

6.4. The brief experience so far of the workings of the Appellate Body suggests that it should be abolished as a standing body; the task of taking a second look at any ruling (on issues of law or even overall issues affecting other Members apart from the parties to the dispute) may best be left to the General Council, assisted in this regard by an ad hoc panel or body. Trade experts with experience of the GATT system, like Mr. Bhagirath Lal Das, are now suggesting this, and developing countries should pay serious attention to this.

6.5 The establishment of a standing Appellate Body has now proved to be a bad experiment, a fifth wheel to the coach put in at the instance of the EC but which, like all fifth wheels, is derailing and overturning the coach.[28]

D. SUMMARY OF PROPOSALS

The following is a summary of the proposals set out in both the preface and the paper:

Proposals made in preface

1. The developing countries should enhance their domestic legal capability to handle the WTO dispute settlement process on their own without having to call upon the assistance of developed-country lawyers. In some cases, it may also be appropriate to build up regional capability to be utilized by a set of developing countries.

2. The developing countries should start initiatives in the General Council for improvements in the dispute settlement process for which no amendment to the DSU is required. For example, the following issues may be raised:

- The General Council should give guidelines to the panels and Appellate Body in respect of the interpretations of the agreements. There should be specific instruction that the panels and Appellate Body should not undertake substantive interpretations. In particular, when a conflict between two provisions of the agreements is noticed, the panel/Appellate Body should refer the matter to the General Council for an authoritative interpretation rather than itself undertake the exercise of determining which provision is more binding.

- When a developing country's stand has been found to be correct and the other party in the dispute is a developed country, the panel should be asked to determine the cost to be paid to the developing country by the developed country. The General Council should have a general decision for payment of such costs to the developing countries.

- When the panel/Appellate Body has found that the action of a developed country has brought harm to a developing country, the erring developed country should give compensation to the developing country for the loss suffered by the latter from the time the offending action was initiated by the developed country. The General Council should take a general decision to this effect.

3. The developing countries should place proposals in the General Council for improvement of the DSU. For example, the following issues may be pursued:

- In case a developing country has to take retaliatory measures against a developed country, there should be a mechanism for joint retaliation by all the Members.

- There should be a rethink about the utility and desirability of having a standing Appellate Body. If a second look is necessary after a panel has given its recommendation, the task may be entrusted to yet another panel which would give its findings as the standing Appellate Body does at present.

4. The developing countries should move to undo the harm done so far by the substantive interpretations of the panels and Appellate Body. The General Council should be requested to pronounce that these interpretations will not guide the future work of the dispute settlement process.

Proposals made in paper

1. It should be provided clearly that rulings and recommendations, when adopted, create no new rights or obligations for Members, and that the effect of a ruling is only binding on the two parties to the dispute in the particular case.

2. Unless, as in the old GATT 1947, the General Council adopts by positive consensus a panel's interpretation of the rules, it should have no other effect, nor should it be cited or its arguments and conclusions "adopted" by other panels. This will ensure a finality to disputes between parties, but without creating new rights and obligations for the Members as a whole, a preserve to be left for clear and unambiguous decision of Members by amendments or agreed interpretations.

3. The suggestion should be considered that countries give up their "embrace" of consensus and use the voting procedures to provide an authoritative interpretation in the General Council, without affecting the rights of parties in a dispute as decided in the panel ruling.

4. Another suggestion is that while panel and Appellate Body reports and rulings should continue to be adopted by the negative-consensus rule, binding the parties to the dispute in the particular dispute, only a positive-consensus decision of the DSB (separated, if needed, from the adoption of the panel recommendation for resolving the dispute) could create any precedent or allow the panel and Appellate Body reports to even be cited, or their reasoning and arguments used in future, in any other dispute.

5. The secretariat that services the panel processes could be organically and structurally separated from the WTO secretariat and its legal and substantive divisions. No notes or material should be provided by the WTO legal or substantive divisions without their being made available to the disputants simultaneously and enabling the latter to express their views to the panels. And no such notes or information should be provided to panels after the hearings are over.

6. There is a very strong case for making changes in the DSU to set right the basic problems therein a precondition, even ahead of addressing issues pertaining to the implementation of the existing WTO agreements, for the launch of any new round of trade negotiations.

7. The Appellate Body should be abolished as a standing body. The task of taking a second look at any ruling (on issues of law or even overall issues affecting other Members apart from the parties to the dispute) may best be left to the General Council, assisted in this regard by an ad hoc panel or body.

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7. Raghavan (1999t; 2000b; 2000c).
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9. Das (1998c).
10. Das (1998a), Chap. 2; Das (1999a).
11. Raghavan (1999a; 1999e; 1999f; 1999g; 1999k; 1999l; 1999n).
12. GATT (1994), p. 465.
13. Raghavan (1999t; 2000b; 2000c).
14. Raghavan (1999n).
15. Raghavan (1992a).
16. On Indonesia car dispute – see Das (1998b) and Raghavan (1998a). On India BOP dispute – see Raghavan (1999h; 1999i; 1999j; 1999p; 1999q). On Brazil aircraft-subsidy dispute – see Raghavan (1999p).
17. On banana case – see Raghavan (1997d; 1997f; 1997g; 1999a; 1999b; 1999c; 1999d; 1999e; 1999f; 1999g; 1999k; 1999l; 1999n). On Indonesia car dispute - see Das (1998b) and Raghavan (1998a). On shrimp-turtle case - see Raghavan (1998b; 1998c; 1998d). On Costa Rica textiles case – see Raghavan (1997b; 1997c). On India textiles case – see Raghavan (1997b) and TWN (1997a; 1997b). On Brazil-Canada aircraft-subsidy dispute – see Raghavan (1999p). On India BOP case - see Raghavan (1999h; 1999i; 1999j; 1999p; 1999q).
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19. Raghavan (1999o; 1999p; 1999r; 1999s).
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About the Author of this Paper

Chakravarthi Raghavan has been the Chief Editor of the *South-North Development Monitor (SUNS)*, a daily bulletin specializing in trade and development issues, since its establishment in 1980. He is also Editor of *Third World Economics* (a fortnightly magazine). Since 1978, he has been closely monitoring and analyzing UNCTAD, GATT and WTO activities and negotiations, environment negotiations, and other UN economic activities and meetings. Formerly, he was in the Press Trust of India, including having served as its Editor-in-Chief (1971-76). He is the author of the book, *Recolonisation: GATT, the Uruguay Round and the Third World*, as well as numerous papers and articles on trade, development and other issues. He was presented the Group of 77/UNDP award for TCDC/ECDC (Technical Cooperation Among Developing Countries/Economic Cooperation Among Developing Countries) for 1997.

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