TWN Trade & Development Series 43

The WTO and Its Existential Crisis

Chakravarthi Raghavan

TWN
Third World Network

The WTO and Its Existential Crisis

Chakravarthi Raghavan

TWN
Third World Network

The WTO and Its Existential Crisis

is published by
Third World Network
131 Jalan Macalister
10400 Penang, Malaysia
www.twn.my

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

ISBN: 978-967-0747-35-4

CONTENTS

Foreword *by C. Rammanohar Reddy* *v*

1 **WTO-MTS Facing Existential Threat, Needs Political Decisions** *1*

2 **Time for WTO to Take Up Overdue Review of DSU** *9*

3 **WTO Faces Hard Choices, No Magic-Wand Solutions** *17*

4 **The WTO, Its Secretariat and Bias Against the South** *28*

5 **Dispute Panels, AB Must Abide by Principles of Natural Justice** *42*

Annex: The Panel and Appeal Process at the WTO *by Bhagirath Lal Das* *55*

NOTE AND ACKNOWLEDGMENTS

An earlier version of this paper was published over five parts in the *South-North Development Monitor* (*SUNS*) [Nos. 8873 (25 March 2019), 8882 (5 April 2019), 8892 (23 April 2019), 8894 (25 April 2019) and 8898 (2 May 2019)].

The author acknowledges that he has benefited from comments and suggestions on earlier drafts from some former trade officials and negotiators, in particular Bhagirath Lal Das and B.K. Zutshi, both of whom were formerly Ambassadors of India to the GATT. He is also grateful to Kanaga Raja for his research assistance. Any errors of omission and commission are entirely those of the author.

FOREWORD

IN the past quarter-century of its existence, the World Trade Organization – multilateral trading system (WTO-MTS) has faced many crises, almost always because of the adamant and insensitive positions taken by the United States and the European Union. Now it faces an “existential crisis”, as Chakravarthi Raghavan puts it.

The US’ blocking of new appointments to the WTO’s Appellate Body threatens to make the Dispute Settlement Body (DSB) dysfunctional within the next few months. The objective of the US – which is party to over 40% of the disputes at the DSB – is not to reform the DSB but to use its stance as a crowbar (to use the words of a US Trade Representative from decades ago) to remodel the WTO, aided by the WTO secretariat, to suit its own interests.

Yet, ironically, as Raghavan points out, it is in the interest of the larger membership of the WTO to carry out a comprehensive review of the Dispute Settlement Understanding (DSU). While it has many infirmities, the DSU was arguably one of the few positive outcomes of the Marrakesh Agreement that established the WTO. Yet, it is badly in need of a review. Indeed, a review was mandated within five years of the signing of the Marrakesh Agreement and then included in the Doha agenda, but it has never been carried out.

The problem has been that both the DSB panels and the Appellate Body have tended over the years to go well beyond their duties and actually “create law”. A comprehensive review by the WTO body and not one dictated by the US will go some way towards restoring the original purpose of the DSU.

Raghavan says that at this point the WTO membership has only two options. One is to surrender meekly to the US diktat and end up with a WTO that sits in the pocket of the US. The other is for either the Ministerial Conference or General Council of the WTO to “call the US bluff” and demand that the US either abide by the rules or withdraw from the WTO. The choice is clear.

Raghavan has been tracking and writing on the multilateral trading system from before the birth of the WTO. He brings to this detailed discussion his immense knowledge of the WTO dispute settlement process, which could possibly be the envy of the WTO secretariat as well. In this detailed analysis, he refers to innumerable DSB cases over the years, and concludes with a number of suggestions for reform.

It would be hard to find a more comprehensive analysis of an issue that now threatens to weaken if not undermine altogether the WTO.

C. Rammanohar Reddy
Editor, *The India Forum*

1 WTO-MTS Facing Existential Threat, Needs Political Decisions

THE World Trade Organization (WTO) and its multilateral trading system (MTS) is facing an existential threat, and it is time that member states face up to this systemic crisis and resolve it at the highest decision-making level, namely, the Ministerial Conference and, when the Conference is not in session, the General Council.

In that role, the Ministerial Conference or General Council must adopt authoritative interpretations of Article 17.2 of the WTO's Dispute Settlement Understanding (DSU), and also make clear that dispute settlement panels and the Appellate Body (AB) cannot in their rulings usurp this role of "interpretation" while "clarifying" existing provisions of the WTO agreements.

What began seemingly as US grievances over the WTO's dispute settlement process and the functioning of the AB has now clearly turned out to be a case of the US holding the WTO-MTS and its membership to ransom so that the WTO trade accords may be rewritten, tilting the scales once again against developing countries in order to benefit the US and arrest, if not reverse, the decline in its dominance of the world economy.

Despite its awesome military power, the US has now become uncompetitive in the trading sector (in goods, services including financial services, and intellectual property and innovation) and is adopting tactics to reverse the process, characterizing it all as "modernizing" the WTO. (It is unfortunate that trade officials in some developing countries have taken to mouthing the same slogan!)

Viewing the US grievances at face value when it began blocking the process for filling vacancies in the AB, a number of law academics, some former trade negotiators and other trade specialists have put forward a variety of possible solutions. Many member states have also made several proposals at the WTO. These include referring the US stance on AB vacancies as a violation of its obligations, flowing from the collective and individual good-faith obligation of WTO members to fill vacancies as and when they arise (vide DSU Article 17.2); members resorting to arbitration (thus bypassing the AB process); non-US members agreeing to a separate protocol (with suitable changes to the DSU) to settle their disputes; and the US withdrawing consent to the DSU's dispute settlement (and reverting to GATT 1947). This last doesn't stand a moment's scrutiny: it ignores both Article XV of the WTO's foundational Marrakesh Agreement, and GATT 1994 not being a successor to GATT 1947.

Apart from questions of their legality under the WTO, these suggestions would, from a practical point of view, be grossly unfair to members involved in disputes with the US, since these disputes would never get resolved. The US is involved as a complainant or respondent in almost half of disputes (judging from the disputes at the WTO hitherto).

Even if the idea behind these suggested solutions is to bring public pressure to bear on the US to change its stance, it will not work. Since the time of Ronald Reagan in the White House, the US has sincerely believed in its "exceptional" status, adopting as an appellation of honour the pejorative characterization used by the Soviet dictator Joseph Stalin when drumming the US communist leaders of that era out of the world communist movement. Whether it is the Democrats or the Republicans in power, the US truly believes that it is the source of the postwar order and thus international law-giver, without itself having to abide by it.

The pronouncements of the administration (and leading lights in the US Congress) leave little doubt that US "grievances" with the rulings and recommendations of the AB are not the real issue but merely a smokescreen.

While blocking consensus for filling up the AB vacancies, and speaking in general terms against the AB, the US has not so far put forward any suggestions or proposals of its own. Rather, it has been adopting the old Soviet (Stalinist-era) style of saying "*Nyet*" but not spelling out what it actually wants and will support.

The reality is that the US wants to bring about drastic changes to the multilateral trading system to ensure that its own markets can be kept closed while those of other members, in particular the developing countries, are opened up to US exports of goods and services.

In his latest testimony to the US Senate Finance Committee (on 12 March 2019), the US Trade Representative Robert Lighthizer enunciated these intentions clearly. The US, he said, will continue to block appointments to the AB "in order to force members to deal with much-needed WTO reforms ... It's the only way to get countries' attention."[1]

In the same testimony, Lighthizer also did other WTO members a service by identifying the WTO Director-General (DG) Roberto Azevedo as being closely aligned and acting with the US to achieve the latter's aims, contrary to the DG's obligations (in terms of Article VI.4 of the Marrakesh Agreement) to function as an independent head of the WTO secretariat and for all its members.

The US has also suggested that the DG should be able to play an active role in the WTO functions and processes. This would be a major departure from the policy followed by members, including in particular the US itself, right

[1] *Financial Times*, 13 March 2019; "US, working closely with DG, pushing for WTO reforms", *SUNS*, No. 8866, 14 March 2019, http://www.twn.my/title2/wto.info/2019/ti190309.htm.

from the inception of the WTO-MTS, not to give any role to the DG in substantive decision-making. Instead, the members insisted that they themselves discharge the three functions of negotiating agreements (legislative), administering the agreements (executive) and dispute settlement (judicial).

In the final stages of the Uruguay Round negotiations, the then GATT DG, Peter Sutherland, went twice before a key group of 10-15 countries negotiating the details of the soon-to-be-established WTO, pleading for the WTO head to be given a role akin to that of the heads of other international organizations. His pleas were politely turned down by the US and others. Only the EU was willing to countenance some such role (and even then, not akin to that of heads of other international organizations), as Sutherland himself told this writer at that time.

After the WTO treaty was settled at official level in 1993 (and adopted without any change at Marrakesh), Sutherland tried to reopen the issue but the US was firm in its opposition (and ensured other key nations did not yield). This was said at the time to have been one of the reasons why Sutherland did not want to continue as WTO DG and quit early.

Those who negotiated the WTO treaty, wanting the new organization to begin without legal links to the past (the Havana Charter and its International Trade Organization, and its temporary offshoot GATT 1947), decided that GATT 1994 (as part of the WTO) was distinct and separate from GATT 1947 (and wound up GATT 1947 in 1995-96).

It is for this reason that the WTO has been characterized as being *sui generis* among intergovernmental organizations.

(GATT 1947, which functioned before the WTO, was just a provisional arrangement, not an organization – its organizational structure and secretariat existing merely as part of the UN General Assembly's Interim Committee for the International Trade Organization to bring into being the 1948 Havana Charter.)

"Empowering" the WTO as now proposed by the US will emasculate the dispute settlement system and for all practical purposes destroy the organization.

In light of this, WTO members, developing countries in particular, have only two choices:

1. They can yield to the blackmail tactics of the US and once again allow it to bend the multilateral trading system to make it an even more unlevel playing field for developing countries, in effect consigning the latter to forever being hewers of wood and drawers of water.

2. Or, they can call the US bluff, take up the issue at the highest political decision-making level in the WTO (the Ministerial Conference and, in between its sessions, the General Council), and tell the US to either abide in good faith by the rules of the WTO-MTS (with all their rights and obligations) or withdraw from the WTO.[2]

Launched at Punta del Este in 1986 (after 3-4 years of exploratory and preparatory talks), grounded at Brussels in 1990 (barely escaping a crash-landing) and refloated in Geneva in 1991 (but stalled for most of 1992 pending the US presidential elections), the Uruguay Round negotiations were concluded at official level in Geneva in November-December 1993, and signed and sealed in April 1994 in the Marrakesh Agreement, which came into force in 1995.

[2] See Chakravarthi Raghavan, "Contemplating the unthinkable, a WTO without the US", *SUNS*, No. 8590, 6 December 2017, http://twn.my/title2/wto.info/2017/ti171206.htm; and "Three-pronged assault on WTO-MTS by the US", *SUNS*, No. 8670, 26 April 2018, http://twn.my/title2/wto.info/2018/ti180419.htm.

Under the treaty, the developing countries paid a heavy advance price, undertaking commitments in the areas of trade in goods, trade in services and intellectual property rights. They got very little but felt they still had gained something through a rules-based MTS and an integrated dispute settlement system (the DSU). In retrospect at least, it is clear that they allowed themselves to be fobbed off with promises, just as in previous trade talks.

(The twists and turns of the Uruguay Round have been set out in detail in Chakravarthi Raghavan, *The Third World in the Third Millennium CE*, Vol. 2, 2014, pp. 3-179.)

While the WTO-MTS has served it well, the US has made no secret of its disdain for multilateralism ever since Donald Trump entered the White House. With Lighthizer as the US Trade Representative, it has been busy trying to bury the multilateral Doha Development Round trade negotiations launched at Doha in 2001.

Having already pocketed some results, in particular the adoption of the Trade Facilitation Agreement, the US – and the EU – are reneging not only on their promises and commitments made at Doha but also on their own treaty commitments in 1994 at Marrakesh. (If they persist on this course, there will soon come a time when developing-country parties to the treaty are bound to exercise their own rights under public international law and refuse to be bound by the other parts of the treaty and agreements.)

For example, under Article 20 of the WTO Agreement on Agriculture, the US, the EU and the highly industrialized countries undertook to reverse nearly five decades of protection of their domestic agriculture markets and dumping of heavily subsidized agriculture exports, particularly in developing-country markets. They have since reneged on this commitment to progressive and "fundamental reforms" towards a "fair and market-oriented" agriculture system.

Worse still, they are now trying to capture the agriculture markets of the developing world through their highly subsidized agricultural products. Though they claim to have virtually eliminated all their trade-distorting domestic support programmes, their ostensibly non-distorting “Green Box” support programmes (in the case of cotton in the US, dairy farming in Canada and sugar in the EU) have been adjudged as enabling subsidized exports.

With regard to the dispute settlement system, the US stance against the AB began under the Obama administration when it vetoed the reappointment of a Korean AB member for another four-year term, underscoring his purported views (as member of a division bench of the AB) in a dispute which the US lost. But the Obama administration did not raise systemic issues.

This changed under the Trump administration, when the US began blocking the process for filling vacancies in the AB. At a series of meetings of the WTO’s Dispute Settlement Body over the last two years, it adopted “salami” tactics of voicing various complaints over the AB’s functioning but never advancing any proposals of its own or engaging with other members in serious good-faith negotiations to change the DSU. It has merely kept saying that the changes proposed by other members did not meet its complaints.

To be sure, some of the grievances voiced by the US about the DSU and the AB are legitimate to some extent. They had in fact been raised by developing countries as long ago as 1997-98, when the AB, instead of “clarifying” the existing provisions of WTO agreements “in accordance with customary rules of interpretation of public international law” (DSU Article 3.2), had engaged in interpretations, thereby creating cumulative obligations for developing countries.

At that juncture, the US was cheerleading these outcomes. It is only now, after the AB has ruled against its attempts to protect individual US enterprises by misusing the WTO’s anti-dumping and countervailing-duty rules, that the US has begun crying foul.

Nevertheless, the functioning of the dispute settlement system is a legitimate area for WTO members to revisit, fulfilling a long-delayed review of the DSU that was supposed to have been taken up in 1999. That mandate was renewed at Doha but the review is languishing still, since until recently both the US and the EU saw the system to be functioning to their advantage.

WTO members could agree to take up and complete this work expeditiously, but separating it from the systemic issue of the obligation to fill up vacancies on the AB (under Article 17.2 of the DSU). This last would require the Ministerial Conference or the General Council (when the Ministerial Conference is not in session) to provide an “authoritative interpretation” of the individual and collective obligations of members under Article 17.2.

Otherwise, the US tactics will result, before the end of the year, in the AB not being able to muster the minimum of three members to constitute a division bench to hear and dispose of appeals on points of law arising out of dispute settlement panel rulings.

As noted earlier, this will not, however, mean a reversion of the dispute settlement system to its GATT 1947 situation, as some academics have suggested. The various provisions of the DSU, including abatement of panel rulings pending AB rulings, will still be valid and operative. Thus, panel reports cannot be adopted if any party to a dispute notifies the Dispute Settlement Body of its intention to appeal, since the AB would be unable to hear the appeal. The dispute settlement system will be paralyzed and no dispute will ever be resolved through the Dispute Settlement Body.

Developing countries will lose out, but the even bigger losers will be the US, the EU, other major industrialized countries and their corporations, which would not be able, for example, to enforce their global monopoly rights provided under the WTO’s intellectual property rules. Not even the combined military might of the US and its allies can prevail over others in today’s world to ensure this global monopoly to US, EU and Japanese corporations.

2 Time for WTO to Take Up Overdue Review of DSU

AS pointed out at the outset, the WTO and its multilateral trading system is facing an existential threat which, unless taken up and resolved at the highest political decision-making levels of the WTO membership, will see the WTO system atrophy and wither away.

In this light, after resolving the threat to the system posed by the US blockage of a process to fill four current vacancies in the AB – a mandatory obligation under Article 17.2 of the DSU – WTO member states must discharge the obligation cast on them at Marrakesh in 1994 to undertake a complete review of the DSU and decide to either continue it as it is or with changes to its rules or to terminate and replace it with something else.

The review and changes to the existing DSU would need decisions by consensus, without it being linked collaterally to other changes desired by any WTO member or group of members. These changes may need amendments to the DSU and/or the WTO, and will be subject to the amendment procedures prescribed in the WTO's founding treaty and its annexed agreements.

In concluding the Uruguay Round of multilateral trade negotiations at Marrakesh in 1994 with the Marrakesh Agreement and its annexed agreements, the ministers of the participating countries with plenipotentiary powers also took some decisions and understandings that are integral parts of the adopted treaty, set out in the "Legal Texts".[3] Among these is the Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes.[4]

The Marrakesh Agreement committed all parties to sign on to all the agreements, and bring their own domestic laws and regulations into compliance with their obligations under the Agreement. It also set out, under each of the "agreements, decisions and understandings", a commitment by members to undertake further negotiations in a number of areas.

These further negotiations on issues that were unresolved in the Marrakesh Agreement are a continuing collective obligation of the WTO members and cannot just be jettisoned without necessary decisions at the highest level.

The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes invited the Ministerial Conference of the WTO to undertake a "full review" of the DSU within four years after the WTO's entry into force and "to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures."

Such a review was to have been made at the WTO's Seattle Ministerial Conference in 1999 but could not be done as the conference met and ended in confusion amid Clinton administration-organized street demonstrations and protests.

(In the preparations for the Seattle meeting, the informal group of developing countries in the WTO had undertaken its own review in a small committee chaired by Egyptian Ambassador to the WTO Mounir Zahran. The group sought and drew on the expertise of former negotiators and others.

---

3 *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, GATT Secretariat, 1994 (hereafter referred to as Legal Texts).

4 Legal Texts, p. 465.

(Disclosure: The writer participated in this exercise at the request of the group, and contributed an analysis of various rulings under the WTO dispute settlement system and their implications. The analysis was discussed at a meeting of the informal group in the run-up to the Seattle conference. In this light, it was revised and subsequently published as a monograph, "The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South".[5] The analysis and several of its recommendations are still relevant and valid today.)

After the Seattle fiasco, when a new round of multilateral trade negotiations – the Doha Work Programme, otherwise known as the Doha Development Round – was launched in 2001 at the Doha Ministerial Conference, the mandate for the DSU review was reiterated. (However, the review was delinked from the rest of the work programme[6] so that it could be undertaken without any attempt by any WTO member to use this as a trade-off for concessions by other members in other areas.)

This decision has not been overruled or changed in any way by subsequent Ministerial Conferences and is thus still in force.

Nevertheless, the review was never carried out in good faith, the negotiations being constantly sidetracked by the US and the EU. The two have been the major beneficiaries of the dispute settlement process and the functioning of dispute panels and the AB. On the other hand, developing nations and their development prospects have been the long-ignored victims.

Taking advantage of the DSU provision for the effectively automatic adoption of their rulings, and advised by the WTO secretariat (servicing them) in violation of all principles of natural justice, the dispute panels and the AB have sometimes handed down rulings in what is seen as a rule-less manner

---

5 Chakravarthi Raghavan (2000), "The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South", TWN Trade and Development Series No. 9, Penang: Third World Network (https://www.twn.my/title/tilting.htm).

6 Doha Ministerial Declaration, 14 November 2001, paragraphs 30 and 47.

and even running contrary to the specific provisions of the Marrakesh Agreement.

In the nearly two decades of off-and-on negotiations on the DSU review, except for a few minor procedural tweaks, both the US and the EU have opposed any substantive changes. The review has neither been completed nor concluded, and remains on the agenda of informal negotiating sessions of the WTO's Dispute Settlement Body.

Meanwhile, by blocking consensus for filling the four existing vacancies on the AB, the US under the Trump administration has now created a situation whereby, before the end of the year, the AB will become non-functional for lack of three members to constitute a division bench to hear and dispose of appeals. Though the US has done so for mala fide collateral purposes, namely, to force other WTO members to effect so-called WTO reforms, it has done the developing countries a great service by bringing the DSU review prominently back onto the WTO agenda.

This is an opportunity that developing countries miss at their own peril. The future of the WTO-MTS will be irreparably damaged if they do not take up this opportunity to ensure a complete review of the DSU – to meet not only the issues now being flagged by the US, but also their own, much earlier criticisms of the dispute settlement system, including the functioning of the secretariats of the WTO in "servicing" panels and the AB.

In this process, the developing countries should refuse to engage in any formal or informal talks that would in any way link the DSU review to negotiations and trade-offs in any other area, or to taking up any new agenda of the US or its allies the EU, Australia and others.[7]

---

7 See *SUNS*, No. 8878, 1 April 2019, http://twn.my/title2/wto.info/2019/ti190402.htm.

The DSU review should be taken up after the Ministerial Conference – or, when the Conference is not in session, the General Council – considers the current threat to the WTO-MTS posed by the failure to fill the vacancies in the AB, and provides authoritative interpretations of Article 17.2 of the DSU to make clear that it is an obligation of the WTO members as a whole as well as of individual members to implement Article 17.2 in good faith.

(Article 17.2 reads, in full: “The Dispute Settlement Body shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor’s term.”)

On this particular matter, the Ministerial Conference/General Council should strive to act by consensus, but if no consensus can be achieved, to then decide by voting, as provided for in Article IX.2 of the Marrakesh Agreement: “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.”

The DSU is in Annex 2 (not Annex 1) to the Marrakesh Agreement. As such, the relevant parts of Article IX.2 above for an authoritative interpretation of DSU Article 17.2 are the first and third sentences of Article IX.2.

In this and in the DSU review, it is essential to bear in mind a few details as context:

The various multilateral trade agreements in Annex 1 to the Marrakesh Agreement – agreements on trade in goods (Annex 1A), trade in services (Annex 1B) and intellectual property (Annex 1C) – were negotiated over a seven-year period in the Uruguay Round among different groups of nations in various negotiating groups (1986-90) and at the level of the Trade Negotiations Committee (1991-93). This sometimes resulted in the same concept or agreed view being formulated in different language in the various agreements on trade in goods in Annex 1A.

In contrast, the Marrakesh Agreement itself and the DSU (Annex 2) were fashioned only towards the end of the Uruguay Round negotiations in 1993. These two were first agreed upon by the US and the EU at ministerial-level talks and settled (at official level) in detail by more or less the same group of countries and delegates (though aided by different advisors).

In the process outlined above, three different terms have been used in the Marrakesh Agreement and the DSU. These are: “clarify” in Article 3.2 of the DSU; “authoritative interpretation” in Article IX.2 of the Marrakesh Agreement; and “amendment” in Article X of the Marrakesh Agreement.

Though the terms “clarify” and “interpret” are generally used loosely as synonyms, in the WTO and DSU context, where two different terms have been used, in terms of the “ordinary meaning” under the Vienna Convention on the Law of Treaties, it is clear that the intent was, and is, to relate to two different functions: “clarify” as a function of panels and the AB, and “interpret” as a function of the Ministerial Conference/General Council.

It is time to ensure that the AB, which often talks of its duty as “treaty interpreter”, functions in accordance with the Marrakesh Agreement intent. Where the language used in a WTO agreement is ambiguous and needs “interpretation”, the AB, rather than taking this upon itself, must ask the

Ministerial Conference/General Council to provide an "authoritative interpretation".

The Marrakesh Agreement and the DSU, along with the various multilateral trade agreements in Annex 1, were concluded at official level in November-December 1993. Until this stage, none of the negotiators had a clear idea of how the various agreements under the Uruguay Round would be dealt with – whether as one agreement or several agreements – nor of the nature of the organization that would come into being to service and administer these agreements.

It was only at this stage (after the Marrakesh Agreement was agreed upon to be a single treaty with annexes), when the use of varying language to express the same intent in various agreements in Annex 1A was brought up by some developing countries, that the negotiators decided to append a General Interpretative Note to Annex 1A: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A … the provision of the other agreement shall prevail to the extent of the conflict."[8]

Early in 1994, when the ambiguity and/or variation in language used in various agreements was again brought up at the stage of the legal scrutiny of texts concluded at official level, Canada (generally viewed then by others as reflecting US views) insisted that any effort to reconcile the texts would lead to the unravelling of the entire package and should not be undertaken. Rather, Canada suggested, these matters could be left to be sorted out by dispute panels and the AB. This view prevailed.

However, with the US cheerleading, panels and the AB, tasked with "clarifying existing provisions" (DSU Article 3.2), have from the beginning disregarded the overriding interpretative note to Annex 1A and made it inutile.

8 Legal Texts, p. 20.

As set out above, before taking up the DSU review, the Ministerial Conference/General Council needs to provide an authoritative interpretation of Article 17.2 of the DSU in order to deal with the AB vacancies. Article 17.2 is perhaps the only Article or rule in the Marrakesh Agreement and its annexes that sets out, in the mandatory "shall", both the collective and individual obligations of members to implement in good faith.

If there can be any doubt left in anyone's mind on the US' lack of good faith in blocking the process to fill the AB vacancies, the recent testimony by the US Trade Representative Robert Lighthizer to the US Senate Finance Committee – namely, that the US objections are intended to force other members to radically change the WTO-MTS to suit its current needs – should dispel such uncertainty.

As noted in Chapter 1, a number of former trade negotiators, trade law academics and some members of the WTO have, taking the US objections at face value, put forward various suggestions for resolving the deadlock over the AB appointments.[9] The US has neither responded in detail to these suggestions nor spelt out the changes it wants.

In practical terms, unless the US agrees in good faith with or without changes to any or all of them, most of the proposed solutions, such as arbitration, will result in the over 40% of disputes involving the US (as either complainant or respondent) remaining unresolved. Such a dispute settlement system ill serves the collectivity of the WTO.

---

9 Some of the proposals that have been advanced to resolve the AB impasse include: (a) "Taking recourse to the DSU to save dispute settlement at the WTO" (Parts A & B), https://worldtradelaw.typepad.com/ielpblog/2019/03/guest-post-taking-recourse-to-the-dsu-to-save-dispute-settlement-at-the-wto-.html, and https://worldtradelaw.typepad.com/ielpblog/2019/03/guest-post-taking-recourse-to-the-dsu-to-save-dispute-settlement-at-the-wto-part-b.html; (b) five papers and writings cited by Clement Marquet in footnote 8 to his paper "The Appellate Body in dire straits: Taking a step back on consent to jurisdiction", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3220525; (c) https://worldtradelaw.typepad.com/ielpblog/2019/03/would-speeding-up-wto-dispute-settlement-help-with-the-appellate-body-crisis.html, and https://worldtradelaw.typepad.com/ielpblog/2019/03/planning-for-life-without-the-appellate-body.html; (d) Raghavan (2000), op. cit.

3 WTO Faces Hard Choices, No Magic-Wand Solutions

WHILE the WTO-MTS is facing an existential threat that needs to be tackled as the highest priority, no one should be under any illusion that the political decisions to be taken will act like a magic wand.

Hard choices need to be made. WTO members other than the US have to decide whether they want a "World Trade Order" or a "US Trade Order",[10] a trade order whose rules will keep changing depending on the whims of the occupant of the White House at that juncture.

In making a choice for a world trade order, members perhaps also need to get over the League of Nations syndrome and experiences of the interwar years, when a British premier tried to appease the German chancellor but merely whetted the latter's appetite. War came in a few months, ending with millions dead and wounded, many parts of the world devastated, and with the victors as badly affected as the vanquished.

To end the impasse in filling the four current vacancies on the AB and enable the AB to function and resolve trade disputes, an authoritative interpretation of Article 17.2 of the DSU by the WTO's General Council has been advocated, as set out in Chapter 2. However, in practice, this may not solve the problem.

10 https://www.thehindubusinessline.com/opinion/world-trade-order-or-us-trade-order/article26835713.ece

The interpretation will make it incumbent on the WTO membership to act, both individually and collectively, and "appoint persons to serve on the Appellate Body". But any member, like the US at present, will be fully within its right and discretion not to agree to a particular appointment. The duty of appointing persons to serve on the AB does not prohibit a member from disagreeing in individual cases. There can be no restriction on the repetition of this process.

The concept of implementation in "good faith" will be difficult to invoke if a member says a particular candidate is "unsuitable" and even if it does so again and again. It is not guaranteed that after the rejection of, say, the third candidate, the next person has to be acceptable.

The US has discovered a lacuna in the DSU and is using it.

Ironically, the strength of the DSU – namely, "negative consensus" among WTO members for adoption of dispute settlement rulings but positive consensus on all other matters – is being applied to make the DSU ineffective and the WTO-MTS an endangered species.

The US has made no secret of its intent of using the AB impasse as a lever to force the other members to change the WTO rules. It may continue with such tactics, denying consensus on each and every AB candidate, in order to achieve other objectives, including US Trade Representative Robert Lighthizer's aim of reverting to the GATT 1947 practice of adopting rulings by positive consensus too. This last is not possible except through an amendment of the DSU, which would need consensus and acceptance by all members.

Andy Stoler, who was deputy representative in the US mission to the GATT when the WTO rules, including the DSU, were being negotiated and settled at official level in 1993, and who later became WTO Deputy Director-General, has now put forward a suggestion[11] to meet the US grievances.

[11] https://worldtradelaw.typepad.com/ielpblog/2019/04/dsu-reform-proposals-from-andy-stoler.html

Under this proposal, if the US (or any other party) is dissatisfied with an AB ruling, it could prefer another appeal to “a panel of arbitrators” comprising the chairpersons of the Dispute Settlement Body (DSB), General Council and Trade Policy Review Body (TPRB). If one of the three arbitrators is from a country involved in the dispute at hand, he or she will be substituted by a person nominated by the WTO Director-General.

This is as bizarre a suggestion as one can get to appease the US! All the more so since it was Stoler, as a US deputy representative during negotiation of the WTO rules, who had contacted other key delegations to ensure (in the face of lobbying by the then GATT DG Peter Sutherland) that the WTO DG would have no powers akin to those of executive heads of other international organizations, except for particular tasks that he or she may be asked to undertake from time to time. The DG is thus, for example, only empowered under Article 8.7 of the DSU to name a chair and dispute panel members if the two parties to the dispute cannot agree.

As for Stoler’s suggestion for the three designated chairpersons to be “arbitrators to rule on the AB rulings”, the only mandate currently in the WTO rulebook for these three chairs is to hold office for a year, chair their respective meetings and conduct business, but subject to their rulings being challenged from the floor and reversed by vote.

In 1995, when a similar group (the WTO DG and the chairs of the DSB and the Councils for Goods, Services and TRIPS) undertook the task of interviewing candidates, consulting delegations and ultimately presenting a slate of seven names to be elected to the AB, they had privileged the US alone to exercise a veto. As a result, the slate named by them that was elected was viewed by members as “US agents”.

Judging from that experience, it would be bizarre to empower the DSB, General Council and TPRB chairs to act as “arbitrators” – a sort of super-AB! This must be rejected.

Instead, if there is unanimity among the rest of the WTO members, the General Council or Ministerial Conference can and should "invite" the US to either implement DSU Article 17.2 in good faith or withdraw from the WTO.

However, though the US appears isolated on its stand over the AB, the EU, Australia and others are in fact using the AB impasse to promote their own agendas, including plurilateral negotiations on new issues and their so-called "reform agenda" to further tilt the WTO rules against developing countries and development. As a result, unless the US changes its mind, the AB could become non-functional.

The dispute settlement system may still be able to function in disputes where the disputants agree in advance that they will not lodge an appeal after a panel ruling is issued but accept the ruling (or agree to refer the points of law to an arbitrator they can both agree upon). However, in disputes involving the US (over 40% of disputes so far) or others involving the EU, it is unlikely that any developing country involved will oblige and agree to arbitration on points of law against panel rulings; it would merely give notice of appeal and abate the ruling.

The way forward may hence be by direct action of the members. If the DSU is ineffective, it is so for the US too. The willing members and those affected by US unilateral actions may apply their own unilateral measures against the US, and the US will not have the option to get relief under the DSU. This will not be an optimal solution as it may generate a series of actions and counter-actions, but perhaps the only way by which the US can be tackled on this issue.

Recently, well-known US economist Dani Rodrik suggested, in relation to the US-China trade war, a policy of "peaceful coexistence" for the two.[12]

[12] https://www.project-syndicate.org/commentary/sino-american-peaceful-economic-coexistence-by-dani-rodrik-2019-04

Equally needed for others, in particular the developing countries, is "non-alignment" vis-a-vis the two trade giants. They need policy space to craft their own economic and trade policies for development. They need the kind of policy space that Rodrik notes prevailed in the pre-WTO era under GATT 1947, rather than the current "hyper-globalism" under the WTO.

Rodrik's may be more or less a lone or minority voice in mainstream trade economics, where the "free trade theologians" hold sway. However, most developing countries in fact need such policy space vis-a-vis not only the US but China too. Both now seem to be attempting to oligopolize the global data economy via WTO rules, and are aided by the WTO secretariat, the IMF, the World Bank and many parts of the UN system.

(Interestingly, speaking to senior civil servants in February 2000 at the time of the Asian financial crisis, Malaysian Prime Minister Mahathir Mohamad had charged the superpowers and giant corporations with making use of "globalization" and technology "to conquer the world all over again, this time without the use of arms." Leaders of international institutions, he added, stressed that globalization was aimed at helping developing countries, "but so far no developing country has benefited from globalization."[13])

If by a miracle, the US changes its position and cooperates in filling up the four current AB vacancies (and two more to arise before the end of 2019), a complete review of the DSU must then be undertaken as the next order of priority and completed with changes to the rules.

In this process, not only the US complaints now being voiced vaguely must be taken up, but, even more so, the much earlier complaints by developing countries which were the principal victims of rulings by dispute panels and the AB. These must be discussed and decisions arrived at as per the Marrakesh decision to undertake a complete review of the DSU.

---

[13] *SUNS*, No. 4125, 25 February 2000.

In the early years of the WTO, thanks to the DSU rule on adoption of rulings by negative consensus, panels and the AB abused the mandate to "clarify existing provisions" of the WTO agreements and instead piled up new obligations on developing countries, sometimes contrary to the "ordinary meaning" of language used in the agreements, and made inutile specific provisions.

For example, panels and the AB have acted contrary to the overriding interpretative note to Annex 1A of the Marrakesh Agreement. Annex 1A comprises: GATT 1994 and six Understandings related to the various specified Articles of GATT 1994; the Marrakesh Protocol to GATT 1994[14] (schedules of tariff concessions and bound rates of tariffs of members and other particulars set in the protocol); and 12 agreements on various aspects of trade in goods.

This Annex 1A[15] has the following general interpretative note: "In the event of 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…, the provision of the other agreement *shall* [emphasis added] prevail to the extent of the conflict."

In abundant caution, the DSU (Article 3.2) further makes clear that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. In addition, the Marrakesh Agreement (Article IX) stipulates that it is the Ministerial Conference and General Council which have exclusive jurisdiction to provide "authoritative interpretations" (but this authority "shall not be used in a manner that would undermine the amendment provisions in Article X").

---

14 Legal Texts, pp. 37-38.
15 Legal Texts, p. 20.

There are various agreements in Annexes 1 (1A, 1B and 1C), 2 and 3 of the Marrakesh Agreement, but no other provision akin to that in Annex 1A on the sum total of rights and obligations of members under the Marrakesh Agreement and the agreements in the three annexes.

Under customary rules of interpretation of public international law, when a country is a party to several agreements, it is expected to implement all of them in good faith. Also, the specific obligations in one treaty override the general in another; a subsequent agreement between the same parties on the same subject overrides the earlier one, etc. Where there is some ambiguity of language in an agreement, customary interpretations allow a reference to the "negotiating history" to understand the "intent".

In the case of the Uruguay Round negotiations to establish the WTO and its agreements, no negotiating history was presented to the plenipotentiaries at Marrakesh in April 1994 and none was approved by them, unlike in the case of the earlier Tokyo Round.

At the time of Marrakesh, then GATT DG Peter Sutherland told this writer that the secretariat had collected "notes" from its various divisions and had been preparing a draft negotiating history, but this idea was given up as there was some opposition from a few countries.

In spite of this, the secretariat (the legal and substantive divisions of the WTO secretariat for panels, and the separate AB secretariat for the AB), being required to "service" panels and the AB, have briefed them, behind the backs of the parties to the dispute, by relying on internal notes "to provide the background to the ambiguous language" used in agreements. Rulings have been handed down based on this, invariably against the major developing nations.

In fact, the only materials on record that can be referred to for deducing the "intent" of any ambiguous language in the agreements are official documents which were derestricted at Marrakesh. These comprised proposals issued to participants in the Uruguay Round negotiations and minutes of meetings of Uruguay Round negotiating groups approved by the participants; they were available to plenipotentiaries at Marrakesh and were derestricted and made public.

The secretariat's own internal notes (and some publications of official documents with comments drawn by authors/editors from US internal notes made available to them) are impermissible sources to be drawn upon by the secretariat as "negotiating history" when it services the panels and the AB.

Despite all the above considerations, panels and the AB in a series of disputes raised by the US against individual developing countries (and in the banana dispute against the EU), contrary to customary rules of interpretation, ruled that the rights and obligations in agreements were "cumulative", even though the WTO and its agreements have no such provision. The AB said that it would "so clarify and reconcile" the various agreements as to ensure no conflict, so that a member would be obliged to observe all the obligations of all the agreements. A veritable Daniel come to judgement!

These panel and AB reports showed glaringly questionable reasoning but were claimed to be based on "public international law interpretations" codified in the Vienna Convention on the Law of Treaties (VCLT).

[The US never ratified the VCLT, and as a result, neither did some others. When the US Senate refused "advice and consent" to the VCLT, the US State Department announced that the US nevertheless abided by public international law. Hence, the DSU (Article 3) only mentions "customary rules of interpretation of public international law" and not the VCLT. Panels and the AB however do not even make this distinction, but often cite the VCLT.]

At the time such rulings were being handed down, the US, the main beneficiary, was the cheerleader, often joined by the EU and Japan. Developing countries, and not only those which were parties to the disputes in question, protested and detailed their objections on record at the DSB, but they were ignored. Media briefings by the secretariat (DSB meetings, as all other WTO meetings, are not open to the media) most often did not even mention or detail the objections unless prodded.

[All these have been reported contemporaneously in various issues of the *South-North Development Monitor* (*SUNS*) and adverted to in C. Raghavan (2000), “The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South”.[16] Some major complaints have been detailed in *SUNS* issues.[17]]

WTO DG Roberto Azevedo, speaking on 11 April at the Peterson Institute, noted US-China efforts to end their trade conflicts and spoke of the two having similar views in some areas.[18]

One of the main goals of (current) reform efforts at the WTO was to reinvigorate the negotiating bodies of the WTO, he said, referring in this connection to the plurilateral initiatives that groups of WTO members launched at the Buenos Aires Ministerial Conference in 2017. The rise of plurilateral negotiations, he claimed, was at least in part due to negotiation fatigue. Multilateral negotiations were not necessarily over, but members were no longer looking for those grand bargains. “The WTO has decided to bring an end to such rounds and act as a continuous forum for negotiation,” he is reported as having added.

However, not only has there been no such decision, but there is still a binding 2004 decision of the General Council in force which makes clear that until the single undertaking of the Doha Work Programme is completed, no other item will be on the WTO negotiating agenda. Only the General Council or Ministerial Conference can reverse it specifically, not the DG.

---

16 https://www.twn. my/title/tilting.htm

17 *SUNS*, No. 8258, 9 June 2016, http://www.twn.my/title2/wto.info/2016/ti160605.htm; and *SUNS*, No. 8259, 10 June 2016, http://www.twn.my/title2/wto.info/2016/ti160618.htm.

18 *Inside US Trade*, 16 April 2019.

Azevedo's chef de cabinet, Tim Yeend, went further than his boss when speaking at a UN Financing for Development event. He is cited as saying that trade would help to reduce poverty more "if it can work with new areas", pointing to such issues as "increased cooperation on e-commerce", investment facilitation and domestic regulation in services.[19]

His views were challenged from the floor by Deborah James of the Our World Is Not For Sale civil society network, who said the WTO had not delivered on allowing developing countries to use trade for their development. The issue of WTO reform, she said, included an attempt to take away from developing countries the right to use the very policy tools that developed countries had used in their own development.

James commended in this regard a new document co-published by the United Nations Conference on Trade and Development (UNCTAD), "A New Multilateralism for Shared Prosperity: Geneva Principles for a Global Green New Deal". She opposed another misguided expansion of the WTO disguised as "e-commerce for development." "These proposed digital trade rules are actually about rewriting the rules of the digital economy of the future, to allow monopolistic corporations to further capture and exploit the most valuable resource of the world, data, for free," she said, calling this "a new digital colonialism".

Yeend responded that there was no consensus or clear direction other than that WTO members agreed on the "need to strengthen rules in the WTO and the system".

It was not clear from the response where and when there was a WTO consensus and mandate for "increased cooperation on e-commerce" and investment facilitation.

---

19 Email to author from Deborah James, Center for Economic and Policy Research, Washington DC.

All these suggest the need for WTO reforms to ensure the WTO secretariat serves all members instead of promoting the interests of a few, and even more, that it should have no role in the DSU review and reform process (other than the normal servicing of such meetings).

4 The WTO, Its Secretariat and Bias Against the South

ALMOST from its inception, with Renato Ruggiero (of Italy) as DG from May 1995, the double standards of the WTO, its leadership and secretariat began to become evident.

This initial bias has steadily increased over the years, with every DG making his predecessor look better. It has now reached a stage where current DG Roberto Azevedo and senior officials of the WTO secretariat he heads not only openly side with the US to promote its ever-changing agendas and stances, but are also publicly commended for it by the US, without any disclaimers from the secretariat.

Before Ruggiero became DG, there was a short interlude from 1 January (when the WTO came into being) to 30 April 1995 when the late Peter Sutherland, the DG of GATT 1947 (during whose tenure the Uruguay Round trade negotiations were successfully concluded, with the Marrakesh Agreement establishing the WTO signed in April 1994), had functioned during the transition from the GATT to the WTO. During that brief tenure of his, the secretariat had functioned on behalf of all member states. But since then, it has been openly partisan.

Those that concluded the Uruguay Round negotiations which established the WTO had taken the correct and wise decision that in a member-driven, rules-based organization like the WTO with contractual rights and obligations for members, there could be no scope for any initiative from the head of the independent secretariat. In fact, it was the US at that stage that had vehemently opposed any such role for the WTO DG.

Ensuring that the WTO DG and the secretariat he/she leads strictly abide by their independent mandate, and ending the present impasse in filling vacancies in the AB in order to secure a fully functioning and binding dispute settlement system, are among the highest priorities now facing the WTO-MTS and its members.

The solutions might need amendments to the Marrakesh Agreement. If the US does not agree to abide by and implement the amendments to the treaty in good faith (if the amendments are carried out against its wishes), it should be invited to withdraw from the WTO.

In the feudal Middle Ages, the sovereigns of Europe saw themselves as law-givers but as being above the law themselves. But after two sovereigns of that era (Charles I in Britain and Louis XVI in France) "lost their heads" in the wake of revolutions, this doctrine slowly gave way to rule of law.

There is no time-machine to take us back a few centuries to enable the US to function like sovereigns of that era. Otherwise, with a "transactional" US President and a US Trade Representative who wants a dispute settlement system that applies to all others but not the US, the WTO-MTS will be broken beyond repair.

And whether any amendment to the Marrakesh Agreement is needed and carried out or not, if the US continues as now, the rest of the membership have to make up their minds whether to acquiesce or ask the US to withdraw from the WTO. Without an amendment, the US cannot be compelled to withdraw, but such a request nevertheless will be in the spirit of the second sentence[20] in Article X.3 of the Marrakesh Agreement.

[20] Legal Texts, p. 13.

This too is among the hard choices that the WTO and its members face.

The bias against the South at the WTO and the dancing to the tune of the US became evident as early as the first year of the WTO's establishment, in the process for selecting the initial slate of seven AB members.

During that process, candidates from 23 countries were interviewed and the selection from among them was made by a small committee made up of DG Ruggiero and the respective chairpersons of the Dispute Settlement Body (Australia), Council for Trade in Goods (Japan), Council for Trade in Services (Sweden) and Council for TRIPS (Hong Kong, then a separate customs territory under the UK).

WTO members were "consulted" and views ascertained on their preferred candidates and why, on the basis of "criteria agreed by the DSB". However, the US was effectively given the "privilege" of objecting/vetoing names (an option that was not posed to others).

Though that initial slate was accepted by consensus at the DSB, India and Switzerland, while not blocking the consensus, announced that they were not joining, and made statements on the record. Switzerland complained that the selection committee had not followed the criteria agreed upon and had taken a "restricted view" of the European entity. India detailed how one member alone had been given the option of saying "no" to individual candidates. The EU, while joining the consensus, also expressed its dissatisfaction.[21]

As a result, the AB became known as "pro-American". Everyone involved in that process must be held responsible, but the major ones were the DSB chairperson and the WTO DG; the two had enabled the Americans to exercise such a "privilege".

---

21 "WTO establishes Appellate Body", http://www.sunsonline.org/trade/process/followup/1995/11300095.htm.

Since then, in several of its rulings, the AB "interpreted" the WTO accords to be cumulative, increasing the obligations of developing countries and reducing to nullity some rights they thought they had secured in the Marrakesh treaty. Those rights arose from the decisions of GATT Contracting Parties (functioning in their collectivity under GATT Article XXIII) in disputes raised by the US and/or the EU under GATT 1947 and were thus part of the GATT acquis incorporated into GATT 1994 (in Annex 1A of the Marrakesh Agreement). In these several rulings, the AB opened up the markets of developing countries to the transnational corporations of the US.

Some egregious examples of questionable dispute settlement rulings (by dispute panels as well as the AB) are worth recalling:

1. In the Indonesia vs US, EU and Japan disputes (WT/DS54, DS55, DS59 and DS60), the panel ruled that when a number of international agreements are entered into by the same parties at the same time, there has to be a presumption that there are no conflicts. This despite the fact that a plain reading of the texts of Annex 1A and its general interpretative note, which is couched in mandatory "shall prevail" language, shows that conflicts had been envisaged by the negotiators of the agreements.

The panel arrived at its conclusion through circuitous arguments, ruling the Agreement on Trade-Related Investment Measures (TRIMs) to be a full-fledged goods agreement and making a specious distinction between the obligations of GATT 1994 (including its Article III) and the Agreement on Subsidies and Countervailing Measures (SCM), but not as between the TRIMs and SCM Agreements.

For this last, the reference to GATT Article III in Article 2 of the TRIMs Agreement was ruled to be a reference not to the Article as such, but only to its substantive contents! What "Article III" would mean without its contents was known only to the panellists (and the secretariat that "serviced" the panel), and not spelt out for the DSB and its members.

In no judicial, quasi-judicial or administrative proceedings anywhere in the world can the title of a law without its contents be cited as law or given any meaning.

Indonesia did not appeal the panel ruling but implemented it, bowing to the conditionalities attached to its then loan from the International Monetary Fund (IMF). The cumulative outcome of the ruling and a much-circulated photograph of Indonesian President Suharto signing the IMF loan agreement under the stern gaze of the IMF Managing Director, sealed Suharto's fate and brought about regime change.

There was a similar run of rulings against other developing countries, welcomed by the US. But when some rulings went against the US itself, particularly in relation to its anti-dumping measures (aimed at protecting specific industries and enterprises), it began to cry foul. This reached a crescendo in its veto of the reappointment to the AB of Seung Wha Chang of South Korea for his alleged role in rulings against the US.

2. In another set of rulings, despite its own so-called "collegiality" rule (whereby the AB empowered itself to have consultations at all stages between the three members of a division bench hearing an appeal, and the four other AB members), there were two different views in AB rulings on the same wording in two different accords in Annex 1A. These were more or less contemporaneous disputes.

In the Turkey vs India dispute (WT/DS34 – import restrictions by Turkey over textile and clothing products), the Uruguay Round Understanding on Article XXIV (on customs unions and free trade agreements), paragraph 12,[22] was involved. In the India vs US dispute over India's quantitative restrictions (QRs) imposed on balance-of-payments (BOP) grounds, the Uruguay Round Understanding on Article XVIII.B and its footnote 1[23] was involved.

[22] Legal Texts, p. 34.

[23] Legal Texts, p. 27.

Both Understandings, in identical language, ensure that the right of members to raise disputes under Articles XXII and XXIII "with respect to any matters arising from" Articles XXIV and XVIII.B is preserved.

In the India QR dispute, this language in the Understanding was ruled to provide jurisdiction to both the WTO's BOP Committee and dispute panels to hear and decide. This, when the US alone in the BOP Committee had blocked consensus on accepting India's contentions and programme for phasing out QRs, and then, with such a not-so-clean hand, invoked the provisions in the DSU to raise a dispute.

In the Turkey vs India case, the AB handed down a ruling contrary to this view on the same wording in the Understanding on Article XXIV. The AB ruled that the issue of compliance of a customs union with Article XXIV was for the relevant WTO body to decide, but that a panel or AB could go into the dispute only with respect "to any matters arising from the application of these provisions relating to customs unions ... or free trade areas."

Moreover, in the Turkey vs India dispute, in obiter dicta on points of law not raised in appeal by either India or Turkey, the AB opened the way for customs unions to depart from GATT obligations other than in the MFN provision in GATT Article I, but gave no ruling, merely expanding its own jurisdiction to decide in future cases!

3. In a dispute raised by India, Malaysia, Pakistan and Thailand against the US over restrictions on shrimp imports (WT/DS58/AB/R), the AB:[24]

(a) Cleared the way for non-governmental organizations (NGOs) to file amicus curiae briefs and intervene. In effect, it ruled that the panel's right to "seek" information also enabled it to use information it did "not seek" – thus making "seek" and "receive" synonyms in the WTO's dictionary. Despite its initial view promising to provide detailed reasons, the AB failed to do so.

---

24 *SUNS*, No. 4301, 14 October 1998.

While the DSU enables panels to "seek" information from any source, there is no such provision in relation to the AB, which is only mandated to decide "all points of law raised by parties" in the appeal.

Nevertheless, in a subsequent dispute on anti-dumping and subsidy issues vis-a-vis the US steel industry, the AB applied this to itself, accepting a brief filed by the US steel industry. This placed amicus curiae briefs from non-members of the WTO on a superior footing. Under the AB's own rules of procedure, only third parties to a dispute, giving notice to the AB, can file briefs. Other WTO members don't even have this right.

The AB even made the rather extraordinary claim that the DSU rules and procedures did not prohibit the AB from doing so, and hence it could! In the rules-based WTO system, one of its creations, the AB, thereby claimed the right to thus function as if enjoying "residuary powers" that are not prohibited.[25]

(b) Imported and expanded the scope of Article XX of the GATT on "exceptions" to set aside the panel ruling in the shrimp dispute as a "serious error" of legal reasoning, for not examining the ordinary meaning of Article XX.

There was no discussion (unlike in the Indonesia dispute ruling above) on whether this meant the "substance" or the entire Article XX, nor on the application of the Article XX measure.

Rather, the AB focused on the "design" of the measure and "a particular situation" where a member has taken unilateral measures which, by their nature, "could put the multilateral system at risk."

---

[25] See *SUNS* Nos. 4654, 4655 and 4666 for rulings and discussions; for the AB's claims, see "Ruleless Appellate Body and powerless DSB", *SUNS*, No. 4684, 9 June 2000.

The AB held that the treaty interpreter must interpret the treaty in the light of "contemporary concerns" of the community of nations about protection and conservation of the environment.

While Article XX of GATT 1947 (reflecting the understanding at that time on mineral and living resources) was not modified by GATT 1994 in the Uruguay Round, the AB conceded, the Marrakesh Agreement had "the objective of sustainable development" in its preamble, and the term "natural resource" used in Article XX(g) of GATT 1994 was not static but "by definition, evolutionary."

As a matter of fact, the 1992 UN Conference on Environment and Development (UNCED) had addressed a whole range of environment, conservation and development issues. Among others, UNCED adopted the UN Framework Convention on Climate Change, witnessed nations signing the Convention on Biological Diversity, and adopted other decisions and recommendations under the title "Agenda 21". However, the US and some others resisted any and all reference to these in the Marrakesh treaty and its annexed agreements including GATT 1994. Only the objective of "sustainable development" was allowed into the preamble of the treaty.

And yet, in the space of about five years, the WTO saw an "evolution" – a born-again Charles Darwin at the AB!

4. In a ruling (DS163/R) against South Korea in a dispute raised by the US on the plurilateral Government Procurement Agreement,[26] a dispute panel chaired by Michael Cartland, former Hong Kong representative to the GATT/WTO, gave an expanded interpretation of the rarely invoked "non-violation" clause in GATT Article XXIII.1(b), on the impairment or nullification of benefits to the US.

---

[26] *SUNS*, No. 4670, 18 May 2000.

The panel spoke of impairment to the US arising out of “reasonable expectation of an entitlement” to a benefit that had accrued “pursuant to the negotiation”, rather than “pursuant to a concession exchanged in the negotiations,” the traditional view of public international law (the *pacta sunt servanda* principle codified in Article 26 of the Vienna Convention on the Law of Treaties).

This enabled the panel to further find lack of “good faith” in negotiations or “treaty error” on the part of South Korea that could invalidate a part of the treaty (Government Procurement Agreement). This “treaty error”, the panel said, could be rectified by substituting the invalidated part of the treaty with a suitably worded DSB recommendation (adopting a panel ruling), and by this process a party would be enabled to withdraw reciprocal concessions.

This expanded view of *pacta sunt servanda* was achieved by delving into the negotiating history not of the Government Procurement Agreement, but of the VCLT itself, citing the statement of the International Law Commission when transmitting the draft VCLT to the UN General Assembly that adopted the VCLT.[27]

Strangely, the only relevant negotiating history of the VCLT – the initial mandates to the International Law Commission and discussions leading to it in the Sixth Committee of the UN General Assembly or the General Assembly itself, or the discussions on the Commission’s recommendations in the same Sixth Committee – does not seem to have figured in the panel’s discussion.

However, in the end the panel ruled against the US on the ground that the US had not exercised “due care” in the negotiating process! The US did not appeal, and the panel report was adopted, putting the DSB/WTO imprimatur on this expanded interpretation of the scope of “non-violation” complaints, “good faith” in negotiations, and the ability of panels to remedy “treaty error” and “lack of good faith”.

---

27 *SUNS*, No. 4670, 18 May 2000.

A legal high-wire act, without the normal safety net!

The manner in which the WTO dispute settlement process was being invoked and rulings handed down, elicited some criticism at that time from a former GATT law official, Frieder Roessler, a German national who had headed its legal division during the Uruguay Round negotiations and into the WTO.[28] Roessler later headed the Geneva-based Advisory Centre on WTO Law set up to help developing countries, in particular least developed countries, with legal assistance in disputes.

In a critique of the functioning of the dispute settlement system – in particular the way panels and the AB made use of the procedural rights in the DSU to virtually nullify the substantive rights and obligations of members under the agreements – Roessler said that the competence of panels and the AB could not be determined by themselves exclusively on an interpretation of the DSU, but only in the context of the complex institutional structure of the WTO and the division of decision-making among different organs, as set out in the Marrakesh treaty, reflecting legitimate, negotiated policy objectives.

Dispute panels, Roessler said, should respect the competence and discretionary powers of the political bodies established under the WTO agreements and should not reverse their determinations. And if a competent WTO body had not yet made its determination, panels should not step in and preempt that determination.

The role of panels should be limited to protecting WTO members against an abusive resort to provisions governing, for example, BOP measures and regional trade agreements – against measures that fall outside the discretionary authority of the BOP Committee or the Committee on Regional Trade Agreements.

---

[28] Frieder Roessler (2000), "The Institutional Balance between the Judicial and Political Organs of the WTO", in M. Brocken and R. Quick (eds.), *New Directions in International Economic Law*, Boston: Kluwer Law International, pp. 324-45.

The US voiced no criticism of the panels and the AB at that time, when they were siding with it. This "bias" of panels and the AB came into play during the 1996 US presidential election campaign (Bill Clinton vs Bob Dole), in which the WTO, the DSU and "loss of US sovereignty" was an issue: one of the campaign slogans was "Two strikes, and we are out". The panels and the AB seemed to be trying to ensure there was no such opportunity.

5. Appeals against panel rulings in two separate disputes (WT/DS98 and WT/DS121 – one against South Korea and the other against Argentina), both relating to the Agreement on Safeguards, were heard and rulings handed down at the same time by two different division benches of the AB.

Commenting on them critically, trade expert and former Indian Ambassador to the GATT Bhagirath Lal Das pointed incidentally to an "extraordinary coincidence" in the two AB reports: six paragraphs in each having the same wording – paragraphs 84, 85, 86, 87 (part), 88 and 89 in the South Korea case report; and paragraphs 91, 92, 93, 94 (part), 95 (part) and 96 in the Argentina case report.[29]

Das said: "The members of the AB divisions in these two cases were two totally different sets of members ... Each of these reports is signed by the respective sets of three members each. It is surprising how these two different sets of persons ended up writing exactly the same language in some parts of their respective reports. The AB is like a judicial body in the WTO. One has to presume that the AB in a case writes its own reports and does not get it written by some other persons. This presumption seems to be hit by the exact convergence of the language in some parts of the two reports as mentioned above."

---

29 The article by Das is reproduced in full in the Annex to this paper.

After Das's article, WTO officials explained to this writer about the "collegiality" rule under the AB's working procedures. This rule was not in the public domain then. It was only later, during the time of the US veto of a second term for the AB member Seung Wha Chang, that a letter by the six remaining AB members to the DSB chairperson brought it on public record: the division bench of three hearing an appeal invariably consults and interacts throughout with the four other members of the AB who did not participate in the hearing of the appeal.

Also not on public record then, but known to this writer at that time (after talking to some panel and AB members after their rulings), was the way the secretariat functioned beyond its mandate to service panels. After the hearing of parties and third parties in a dispute, panels, in reaching conclusions, are "guided" by the legal (and substantive) divisions of the WTO secretariat "servicing" the panel. In most cases the secretariat also draws up a draft report.

Panel members told the writer after their reports were published, that in one or two instances, when they disagreed with the secretariat, they were told they would never again be named to a panel!

In the case of the AB, the three-member division bench interacts throughout, without the presence of the parties and third parties to the appeal, with other members of the AB, and their reports too are drafted with the AB secretariat's legal assistance.

In any domestic jurisdiction under any system of law, this is enough to make a ruling or decision (judicial, quasi-judicial or administrative) illegal and invalid.

The WTO is a different animal though; thus, part of the DSU review process to be undertaken, in priority over any other negotiations at the WTO, must address and remedy this and any other basic adjudicatory flaws. It is also essential to ensure that adopted rulings at the DSB do not "add to or diminish the rights and obligations provided in the covered agreements".[30]

6. In its ruling on a US vs EU dispute, the AB ruled against the US on countervailing duties under the SCM Agreement, but in the process raised more controversies.

In its notice of appeal, the US had not spelt out the legal grounds and panel decisions thereof, as required under the AB working procedures. When the EU asked for dismissal of the appeal on this ground, the US said there was no such requirement in the DSU.

Instead of upholding its own working procedures, the AB division "requested" the US to file its grounds of appeal and accepted it, though the time limit for the appeal had expired!

The AB also asserted its right to receive amicus curiae briefs, this time from an industry association, but then decided there was nothing in the brief! In the process, it gave NGOs superior rights over WTO members, as third-party members which had not notified their intention to intervene in the appeal or members other than third parties can't claim any right to be heard.

On substance, the AB turned down US arguments about when a "benefit" is conferred, but refused to provide any authoritative ruling that would end future disputes.[31]

7. In the EC-Canada patent case (DS114/R), the panel used the "negotiating history" of the TRIPS Agreement provided in a note by the secretariat (Annex 6 of its report). This purported to draw up a history of the negotiations "on the basis" of draft legal texts in the negotiating group in the spring of 1990, a secretariat composite text, and the subsequent chairman's informal text

[30] Article 3.2 of the DSU, Legal Texts, p. 405.
[31] *SUNS*, No. 4666, 12 May 2000; and *SUNS*, No. 4684, 9 June 2000.

and revisions, as well as (in an appendix to Annex 6) "parallel work" in the World Intellectual Property Organization (WIPO) Committee of Experts on preparations for a Patent Harmonization Treaty.

The secretariat admitted that these texts had not been circulated to the TRIPS negotiating group, but (drawing on its internal notes) still cited them on the ground that WIPO representatives had kept negotiators "informed" of developments![32]

At Marrakesh when all formal documents and reports were derestricted, no report of minutes of various meetings of the Negotiating Group on TRIPS was available even to Uruguay Round delegates; they only had draft minutes (subject to editing and corrections from delegations); the reports were finalized and made public only in 1995 or 1996, long after the WTO came into being, and thus not part of the cache of documents derestricted in April 1994.

8. While the AB has shown willingness to create law and do what it wants to play to the gallery over NGO briefs, on the sequencing issue – compliance panel first before request for authorization for right of retaliation – on which the Quad (Canada, the EU, Japan and the US) disagreed, the AB noted the lack of clarity and ambiguity, and ruled it was for the members to clarify through interpretation or change of rules![33]

---

32 *SUNS*, No. 4630, 21 March 2000; No. 4654, 26 April 2000; and No. 4655, 27 April 2000.

33 *SUNS*, No. 4812, 12 January 2001.

5 Dispute Panels, AB Must Abide by Principles of Natural Justice

IN undertaking a complete review and reform of the DSU, a cardinal principle to be borne in mind and implemented is that strict adherence to the principles of natural justice is fundamental and fully applicable to dispute panels and the AB.

This is dealt with in detail below, after a discussion of some US complaints against the functioning of the DSU.

In voicing complaints against the AB at meetings of the Dispute Settlement Body, the US has flagged some issues but without elaborating or engaging on them with other member states, despite repeated prodding. It has even shown some disdain at the attempts of other members to address the US complaints by proposing changes to the DSU rules.

Among the complaints voiced by the US are that: the WTO is becoming a forum for litigation and not negotiation; the timelines for the conclusion of appellate proceedings and reports are exceeding the stipulated 90-day period; the AB is practising “judicial activism”; and AB rulings cannot be binding precedents in subsequent disputes.[34]

---

[34] *SUNS*, No. 8536, 21 September 2017, http://twn.my/title2/wto.info/2017/ti170914.htm; No. 8831, 24 January 2019, http://twn.my/title2/wto.info/2019/ti190106.htm; and No. 8841, 7 February 2019.

In the US itself, the US Trade Representative (USTR) and other administration officials have been speaking in greater detail about the US grievances. A prominent US complaint voiced there is over the AB rulings in disputes raised by other members against US use of the “zeroing” methodology in anti-dumping investigations. These and some others are briefly set out and analyzed below.

According to US media reports, in remarks on 18 September 2018 in Washington DC, the USTR Robert Lighthizer expressed the administration’s unhappiness with the WTO’s dispute settlement process, pointing to numerous cases where he claimed dispute panels had overstepped their jurisdictions. He claimed that there were a number of issues on which there was “pretty broad agreement” that the DSU was “deficient”, such as transparency issues and issues with the staff.

The USTR (who had been counsel to the US steel industry in his previous avatar) said there were many cases involving anti-dumping and countervailing duties where the (panel and AB) decisions had been “really indefensible.” He also cited as an example the AB decision in February 2000 holding the US Foreign Sales Corporations (FSC) law as WTO-illegal. Lighthizer claimed the rulings had diminished what the US had bargained for or had imposed obligations that the US did not believe it had agreed to.

The US complaints on the anti-dumping and FSC cases are analyzed below. Before doing so, it needs to be pointed out that in respect of all the US complaints set out above, it was the US itself (in the early days of the WTO) that had “pioneered” and forced the WTO onto this path and cheer-led the rulings that made these possible.

(When the WTO came into being, the legal division of the secretariat, which “serviced” dispute panels, was headed by a US national, and the AB secretariat by a national of Canada, a close US ally against the rest of the membership on trade issues in those days.)

This has been brought out in Chapter 4, which cited a run of panel/AB rulings against key developing countries. The US was a party or third party in these disputes, but either the three-member division benches hearing them included US nationals, or US nationals who were AB members participated in the deliberations of all seven AB members on the appeals under the AB's procedural rules on "collegiality".

All these rulings were adopted by the DSB and frequently cited in pleadings in subsequent disputes by the US itself as a party or third party, and even more by the AB in its own opinions, applying the *stare decisis* (principle of precedent) doctrine for its rulings.

Now for some specific complaints voiced by the USTR or his officials and reflected in some pro-USTR media.

The complaints relate to the consistent AB rulings till now that the US use of the "zeroing" methodology to determine dumping is illegal under the WTO's Anti-Dumping Agreement (ADA).

(The term "zeroing", not found in the ADA itself, has been used in respect of cases where the US takes account of export prices which are below the "normal value" but ignores those above the normal value.)

However, the latest ruling on an anti-dumping dispute has seen a dispute panel depart from the long line of AB rulings against "zeroing", claiming "cogent" reasons for deeming the US use of "zeroing" valid. This ruling, issued in a dispute raised by Canada against the US on imports of softwood lumber, has been acclaimed in the US. Canada has however given notice of appeal against it to the AB.

In its report on this ruling, the *Inside US Trade* newsletter of 18 April cited an unnamed US trade lawyer for the view that the US arguments against the previous AB rulings on "zeroing" centre on the wording in Article 2.4 of the ADA on comparing export price and normal value, and in Article 2.4.2 on how and in what circumstances a normal value "established on a weighted average basis" may be compared against prices of individual export transactions. The US contention has been that the ADA has not forbidden "zeroing".

In weighing the merits of the US complaints, it may be useful to first consider briefly the relevant parts of the scheme of the ADA (in its Article 2, titled "Determination of dumping"[35]) in Annex 1A of the Marrakesh Agreement, and how the anti-dumping issue had previously been treated under GATT 1947.

Before the establishment of the WTO (and the ADA), GATT 1947 had an anti-dumping code after the Tokyo Round negotiations. Prior to that, in the Kennedy Round talks, an attempt had been made via a code approach to elaborate on some of the provisions of GATT 1947, but this did not get anywhere since the US Congress had given the US President authority only to negotiate tariff concessions. The Tokyo Round marked the first time that Congress gave the President (Nixon) "fast track" authority to negotiate non-tariff issues, binding itself to only vote either "yes" or "no" to any negotiating outcome and not attempt to modify it – a necessary precondition before other nations would agree to negotiate with the US on non-tariff issues.

Compared with the ADA, the Tokyo Round anti-dumping code could perhaps best be described as sketching out for the first time some ideas and concepts without much detail and which were thus perhaps amenable to various interpretations.

Subsequently, under the ADA, Article 1 makes the application of ADA provisions conditional on the existence of the "circumstances" set out in Article VI of GATT 1994. The use of the term "shall be" in Article 1 makes this mandatory.

[35] Legal Texts, pp. 168-71.

Article 2.1 sets out how a product is to be considered "dumped" when exported and introduced into the commerce of another country. The subsequent provisions in Articles 2.2, 2.3, 2.4 and 2.5 set out conditions under which the provisions of Article 2.1 need not be used, and the alternative ways that can be used to determine "normal value", "dumping" and "dumping margins." As such, these are exceptions to the provisions in Article 2.1.

In outlining various methodologies that can be used, Article 2.4 makes clear that under any methodology there has to be "fair comparison." Article 2.4.2 details, in a kind of descending hierarchy, several methodologies that may be used for comparison and determination during an anti-dumping investigation in the importing country. These are: W-to-W (weighted-average-normal-value with weighted-average-of-prices-of-all-comparable-export-transactions) or T-to-T (comparison of normal value and export prices on a transaction-to-transaction basis). Article 2.4.2 allows also for comparison of a weighted average normal value with prices of individual export transactions "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of [W-to-W or T-to-T] comparison".

The burden of proof in invoking Articles 2.2, 2.3, 2.4 and 2.5 rests on the party invoking them. As such, it is difficult to accept the US argument that "zeroing" can be used since it is not prohibited.

Moreover, at each stage, the ADA makes clear that the investigating authorities' decision has to be based on facts and the evidence, and not surmises.

Thus, Article 17.6(i) of the ADA stipulates that a dispute panel, in a dispute involving the ADA, "shall determine" whether the establishment of facts was proper and the evaluation of those facts was unbiased and objective. Under Article 17.6(ii) (commonly known as the "standard of review" provision), where provisions of the agreement admit of more than one permissible interpretation, the panel shall find the investigating authorities' measure to be valid if it rests upon one of those permissible interpretations.[36]

[While a Marrakesh Ministerial decision[37] called for this standard of review to be reviewed after three years and a decision taken whether it was capable of wider application, the WTO membership decided against it (when the EU tried to get it made applicable to disputes under the SCM Agreement).]

The US, which has been blocking the filling up of vacancies in the AB since 2017, is alone in its argument that its use of "zeroing", despite consistent AB rulings against it, is valid since it is not forbidden. According to the *Inside US Trade* report, the US may lift its blockage of AB appointments in return for an accord in revising the DSU to enable continued use by the US of "zeroing".

In response to the panel ruling on the softwood lumber dispute, Canada has given notice of appeal to the AB. If the AB (with its currently depleted membership) is able to function, hear and dispose of this appeal (giving priority to it over other pending appeals), and reverses itself on the use of "zeroing", it will be seen as a case of yielding to US "blackmail". The AB would lose whatever credibility and legitimacy it has.

On a careful reading of the panel ruling, beyond use of the adjective "cogent", it is difficult to see the logic in the panel's reasons for it to differ from the reasoning in the long line of AB rulings against "zeroing". Perhaps the "cogent" reasons cited could have a connection to the possible "invisible hand" of the WTO secretariat in its role of "servicing" the panel, to meet the US demand to make "zeroing" valid.

[36] Legal Texts, pp. 192-93.
[37] Legal Texts, p. 453.

The rest of the WTO membership, particularly the developing countries, the main targets of the US in its anti-dumping investigations, might as well wind up the WTO rather than yield to the US on this.

Behind this US demand is an issue pending accord in the ongoing US-China trade talks which the “luminaries” in the Trump administration (USTR Lighthizer, National Security Advisor John Bolton et al.) have made clear they will thereafter try to import into the DSU, namely, that everyone in the WTO must abide by the WTO rules and DSB recommendations, except the US, which, like the sovereigns of Europe in the medieval era, is above the law and need not abide by it.

On the issue of the FSC law, the USTR’s comment on the relevant DSU ruling ignores trade disputes on both the FSC law and its predecessor, the Domestic International Sales Corporations (DISC) law. Even under GATT 1947, a panel had ruled against the DISC law for providing tax credits and benefits to US corporations using at least 50% of US inputs in their foreign sales.

Besides the dispute over the DISC law, the US had at that time challenged the laws and practices of four member states of the European Economic Community (EEC). The panels, consisting of the same persons in both disputes, held the DISC law illegal, and some tax provisions of the EEC members equally illegal. Both sides blocked adoption of the panel rulings. (Under GATT 1947, unlike in the WTO, adoption of rulings could be, and was often, blocked by the two leading trading entities, the US and Europe.) In 1979, a subsidies code under the Tokyo Round was concluded. And in 1981, the two sides allowed the two panel rulings to be adopted. As part of the adoption of the rulings, there was also an understanding reached at the GATT Council.

In pursuance of all this, the US changed its DISC law and enacted the FSC law. FSCs are offshore shell corporations (mostly incorporated in the Virgin

Islands, Guam and Barbados) with little or no economic activity at location but at best a room and a fax machine to receive and send out messages.

Under the FSC law, these offshore corporations, wholly owned by US corporations, get more favourable tax treatment for products exported (in their name) and containing no more than 50% in value of (non-US) imports. And unlike the “arm’s length” relationship required for such parent-subsidiary transactions under the US tax code, the FSC law enables administrative pricing.

The favourable tax treatment gives benefits of between 15-30% of the foreign trade income to the parent. The FSC law divides the foreign source income of an FSC into “foreign trade income” and all other foreign source income, including investment income and income from patents, licensing etc. The foreign trade income of an FSC is divided into exempt and non-exempt foreign trade income.

In the US, the foreign source income of a foreign corporation is taxable to the extent of it being effectively connected to trade or business conducted in the US, to be ascertained by a factual inquiry by the US tax authorities. In the case of an FSC, the exempt portion is set by the law, and thus not subject to any factual inquiry.

In normal cases where the income earned by a foreign corporation controlled by a US corporation is taxed on repatriation, the parent corporation or shareholder is required to include in gross income a pro-rata share of the undistributed foreign income. In contrast, the parent of an FSC is not required to declare its pro-rata share.

The dividends received by the parent US corporation from foreign corporations and from an FSC are also treated differently. Under the FSC law, the US parent corporation is generally not taxed on dividends received that are derived from the foreign trade income of the FSC. All these benefits are dependent on exports and the exported products containing imported content to no greater degree than 50% of fair market value.

The US, in its arguments before the WTO dispute panel and the AB, had tried to inject into the WTO rules, including the SCM Agreement (which for the first time defined a subsidy), the 1981 understanding in the GATT Council reached at the time of the adoption of the panel rulings on the DISC law and the EEC laws.

Both the panel and the AB turned down this attempt, and ruled that the FSC tax exemptions involved subsidies contingent upon export performance and thus constituted a “prohibited subsidy” under Article 3.1(a) of the SCM Agreement.

The panel held that the tax credits or exemptions under the US tax regime (but for the FSC law) also provided a marketing subsidy for marketing agricultural products. As such, they were subject to a reduction commitment in terms of Article 9.1(d) of the WTO Agreement on Agriculture (AoA), and thus violative of Article 3.3 of the AoA (which provides for a ceiling on export subsidies and subjects them to a reduction).

The AB agreed that the FSC measures involved a subsidy contingent upon exports, in terms of the SCM Agreement. It also agreed that it was a subsidy contingent upon export performance under the AoA.

It held that the FSC measure created a legal entitlement for the recipients to receive export subsidies, not listed in Article 9.1 of the AoA, on agricultural products – both those scheduled and those not scheduled in the US schedule of commitments. The legal entitlement accrued to the recipient when it complied with the statutory requirements of the FSC law, and at that point the US government must grant the FSC a tax exemption, with no discretionary element vested with the government.

The AB also held that the FSC law involved application of export subsidies, not listed in Article 9.1 of the AoA, in a manner that at the least “threatens to lead to circumvention”. In this light, the AB reversed the relevant panel finding and held that the US had acted inconsistently with its obligations under Article 10.1 of the AoA by applying export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that at the very least threatened to circumvent its export subsidy commitments under Article 3.3 of the AoA. And by providing export subsidies inconsistent with Article 10.1 of the AoA, the US had acted inconsistently with its obligations under Article 8 of the AoA.

The FSC scheme’s main beneficiaries at that time included such political heavyweights as Microsoft, leading aircraft maker Boeing and automotive giant General Motors. The tax breaks for these companies over the next five years were then estimated to be worth some $15 billion, according to the Congressional research office.

In these instances of the past detailed by USTR Lighthizer, the analyses above show the hollowness of the US grievances.

Nevertheless, in the DSU review, the complaints of the US must be considered along with those of developing countries and any others. If they are found to be justified, the relevant DSU rules should be revised by consensus.

A few changes to the DSU rules are important to restore the negotiation-litigation balance at the WTO:

1. As mentioned earlier above, observance of the principles of natural justice by panels and the AB is fundamental. The most important of these principles, commonly voiced in judicial, quasi-judicial or administrative proceedings, are best summed up in the two Latin phrases “*Audi alteram partem*” and “*Nemo judex in causa sua*”.

"*Audi alteram partem*" ("let the other side be heard as well") is considered to be a principle of fundamental justice or equity in most legal systems. It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. In modern times, this includes the rights of a party or his/her lawyers to confront the witnesses against him/her, to have a fair opportunity to challenge the evidence presented by the other party, to summon his/her own witnesses and to present evidence, and to have counsel, if necessary at public expense, in order to make his/her case properly.

This, as well as the other principle, "*Nemo judex in causa sua*" ("no one should be a judge in his own case"), has been commonly accepted and found in ancient Greek and Eastern systems (Dharma in India and Confucian in China), in Anglo-Saxon and Continental jurisprudence, and in the Islamic Hadith. It is part of public international law and, as per the UN General Assembly mandate to draw upon all systems of law, was codified by the International Law Commission and adopted by the UN General Assembly as the Vienna Convention on the Law of Treaties.

2. In accord with the above, the WTO secretariat should not be allowed to brief (and guide) panels and the AB behind the backs of the parties to a dispute under the guise of "servicing" the panels and AB. At a minimum, any briefs/notes provided to panels should be made available simultaneously to the parties (complainant, respondent and third parties) to enable them to respond. It would be better if no briefs/notes are provided by the secretariat.

3. Panellists named to a dispute panel and the AB division bench members hearing an appeal must reach conclusions on their own and draft their own reports. At best, a small secretariat of legal officers (not administratively under the WTO Director-General) may be envisaged to help in the drafting. It may even be worthwhile to set up a small unit outside of the WTO secretariat (perhaps as part of the UN Commission on International Trade Law secretariat or even of the International Court of Justice) to "service" panels and the AB.

This servicing could be outsourced to such a unit by the WTO, with the costs borne on the WTO budget.

4. Both dispute panels and the AB are creatures of the DSU in terms of the relevant rules on these; as such, they have no independent or inherent authority or residuary powers, only those vested in them by the DSU rules. Nor can panels or the AB empower themselves beyond what is spelt out under the DSU. It follows that the AB practice where members of a division bench hearing an appeal consult the other AB members who are not part of the division bench, has to end.

5. In carrying out their mandates and responsibilities (under Article 11 of the DSU[38]), panels are obliged to make an objective assessment of matters before them, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant WTO agreements. It is not clear whether panels can exercise "judicial economy" in not providing clear findings and rulings on all the matters before them (on which they are obligated to make an objective assessment). However, it is clear that Article 17.12 of the DSU, read with Article 17.6, gives no scope for the AB to exercise "judicial economy" and refrain from ruling on all points of law raised in appeal.

6. Under GATT 1947, it was the GATT Contracting Parties, acting jointly in terms of Article XXIII.2, that considered and adopted panel rulings, thus making them part of the GATT acquis. In contrast, WTO rulings adopted by "negative consensus" have no such basis for application of the *stare decisis* doctrine. That doctrine does not apply in any event under international law, but only in national jurisdictions, in particular among those countries following Anglo-Saxon jurisprudence, where the country's superior court is a court of record and decisions of that court are the law, until that court reverses itself or until the law and/or the Constitution is changed according to prescribed provisions and procedures.

38 Legal Texts, pp. 413-14.

7. Nevertheless, adoption of rulings by negative consensus is essential to settle particular disputes. However, for a WTO ruling adopted by negative consensus to constitute any basis or precedent to be followed to avoid future disputes and bring some certainty, it must be considered (separated from the facts of the particular case) and adopted by positive consensus at the DSB, perhaps excluding the parties to the particular dispute in this instance of decision-making. Better still would be its consideration and formulation as an "authoritative interpretation" of the relevant rule(s) in the relevant agreement by the WTO General Council, where voting, if no consensus decision is feasible, is envisaged.

8. As former GATT law official Frieder Roessler had advocated (cited earlier), the delicate balance in the WTO between the deliberative/legislative remit of the WTO bodies and the adjudicatory role of the DSU to prevent abuse needs to be respected and restored.

9. Developing countries would also do well, in the DSU review, to take up the several suggestions and recommendations for revision of the DSU that are still valid and relevant from the monograph "The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South" (C. Raghavan, 2000[39]).

[39] https://www.twn.my/title/tilting.htm

ANNEX

The Panel and Appeal Process at the WTO

by Bhagirath Lal Das

This article was published in the South-North Development Monitor *(*SUNS*) (No. 4689, 19 June 2000).*

A NUMBER of serious problems have been noticed for some time in the functioning of the dispute settlement system in the World Trade Organization (WTO).

The recent paper by Chakravarthi Raghavan, "The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South" (Third World Network, Trade and Development Series No. 9), has amply brought out that panel/appeal findings and recommendations have been tilting the balance of rights and obligations in the WTO through substantive interpretations.

Frieder Roessler, former Director of the GATT Legal Division, in his presentation in a seminar at Harvard University (1-2 June 2000), has drawn attention to the trend that the panels/Appellate Body (AB) are transgressing into areas which should rightly be in the jurisdiction of various other organs of the WTO. He has recommended caution in this regard and maintenance of a balance between the political and judicial organs of the WTO.

Even when two provisions are manifestly conflicting, the panels/AB have not hesitated in pronouncing which one will be operational in preference to the other. Instead of referring such cases to the WTO General Council, which has the role and authority (in between Ministerial Conferences) to interpret the agreements, the panels/AB have taken it on themselves to undertake the task of substantive interpretation.

One important example in point is the Indonesia car subsidy case, where the subsidy was permissible under the Agreement on Subsidies and Countervailing Measures but not permissible (according to the panel) under the Agreement on Trade-Related Investment Measures (TRIMs). The panel decided that the subsidy was not permissible.

In one case, i.e., the Korea-US government procurement case, the panel has even gone on to reflect on the errors in treaty negotiations. The panel has said that it sees no reason why the question of error in treaty negotiation cannot be addressed under the Dispute Settlement Understanding. The panel goes on to say that it is necessary that negotiations in the Government Procurement Agreement be conducted on a particularly open and forthcoming basis. This may be so, but one doubts whether it is for the panel/AB to reflect on the error in negotiation and transparency in the negotiating process.

Recently in two cases on safeguards, the AB has ignored or casually dealt with an important feature of the WTO agreements (the family of agreements covered by the WTO). The feature in question is the pre-eminence of the new agreements on goods over the old General Agreement on Tariffs and Trade (GATT) in cases of conflict between the two. The interpretations/ conclusions of the AB have expanded the obligation of the countries taking safeguard measures beyond what is envisaged in the WTO Agreement on Safeguards.

The two disputes in question are: Korea-EC dispute in the area of dairy products, and Argentina-EC dispute in the area of footwear.

In anticipation of conflicts between the provisions of the new agreements on goods and the old provisions of the GATT, a general interpretative note has been included in Annex 1A: Multilateral Agreements on Trade in Goods annexed to the Marrakesh Agreement Establishing the WTO. This general interpretative note lays down that the provisions of the new agreements shall prevail over the old provisions of the GATT to the extent of the conflict.

This has been a deliberate, practical and decisive step, necessitated by the fact that the new agreements on goods modify the GATT significantly in many areas. Instead of rewriting the GATT to incorporate the changes brought about by the new agreements, this pragmatic approach has been adopted.

One important difference between the old provisions of the GATT and the new agreements on goods lies in the area of conditions for taking safeguard measures. Prima facie, there is a significant difference between the conditions incorporated in these two places. Following the general interpretative note mentioned above, the conditions as contained in the new agreement (Agreement on Safeguards) should be operative and the old provision on this matter in the GATT should be considered obsolete, because of the conflict between the two.

The AB in both the cases referred to above came to the identical conclusion that there was a difference between the two provisions. And yet, it did not apply the principle of pre-eminence laid down in the general interpretative note mentioned above. It decided that both the sets of conditions must apply simultaneously. This has added to the burden of the countries proposing to apply safeguard measures. The line of logic applied by the panels and the AB will be analyzed in the subsequent paragraphs.

Article XIX.1 of GATT 1994 contains the conditions under which a safeguard measure can be taken. It says:

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, ... any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause ... serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, ... to suspend the obligation ... or to withdraw or modify the concession." (For simplicity, let us call this "the earlier provision".)

Article 2 of the Agreement on Safeguards lays down the conditions as follows:

"A Member may apply a safeguard measure to a product only if that Member has determined ... that such product is being imported into its territory in such increased quantities ... and under such conditions as to cause ... serious injury to the domestic industry that produces like or directly competitive products." (For simplicity, let us call this "the later provision".)

In accordance with the general interpretative note mentioned above, if there is a conflict between these two sets of provisions, the latter will be applicable to the extent of the conflict, and the former will cease to be operative to that extent.

The difference between these provisions is that "the earlier provision" includes the phrase "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement", which is not included in "the later provision". Since this phrase will occur again and again in our analysis, let us call it "the critical phrase", for the sake of simplicity.

The Korea case panel came to the conclusion that there was no conflict between "the earlier provision" and "the later provision", as, according to the panel, "the critical phrase" does not "add conditions for any measure to be applied pursuant to Article XIX but rather serves as an explanation of why an Article XIX measure may be needed". The panel thus thought that "the critical phrase" did not have any operational significance. This is very surprising as "the critical phrase" clearly qualifies the conditions of increased import.

A plain reading of "the earlier provision" indicates that the increased import, to be a condition for implementing a safeguard measure, should have been the result of unforeseen developments and of the effects of obligations incurred by the WTO member. It is difficult to agree with the panel that “the critical phrase” has been included merely to serve as an explanation of why a safeguard measure may be necessary. The use of “the critical phrase” as an “explanation” of why an Article XIX measure may be needed was totally unnecessary in Article XIX.

The Korea case AB has rightly disagreed with the panel. It has concluded that “the critical phrase” describes certain circumstances which must be demonstrated in order that a safeguard measure under Article XIX can be taken.

But the problem with the conclusion of the Korea case AB is that it has not thereafter gone on to analyze the conflict between “the earlier provision” and “the later provision”. It has merely said that it is refraining from examining whether Korea fulfilled the requirement of “the critical phrase”. In this manner it has implicitly held that “the critical phrase” continues to be operative. Perhaps it has done so on the basis of what it has said in paragraphs 74 and 75 of its report. In paragraph 74, it has agreed with the statement of the panel that “all WTO obligations are generally cumulative and Members must comply with all of them simultaneously”. Further, in paragraph 75, it has observed that GATT 1994 and the Agreement on Safeguards are both integral parts of the WTO treaty and are equally binding on all members. Perhaps for this reason it has believed that both “the earlier provision” and “the later provision” are equally binding.

The Argentina case panel has noted that there is an express omission of “the critical phrase” in “the later provision”. It sees a meaning in this omission. And then it goes on to conclude that safeguard measures which “meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT”.

The Argentina case AB has disagreed with this view. It has concluded that a safeguard measure “must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994”. But then it goes on to say: "In our view, if they had intended to expressly omit this clause, the Uruguay Round negotiators would and could have said so in the Agreement on Safeguards." Thus the AB is not convinced that it is a case of deliberate omission.

Thereafter it says that the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards would apply cumulatively, except to the extent of a conflict between specific provisions. And it does not see this matter as an issue involving a conflict between specific provisions of two multilateral agreements on trade in goods. Hence it concludes that both the provisions must continue to apply cumulatively.

The main issue is whether or not there is a conflict between "the earlier provision" and "the later provision" because of the existence of "the critical phrase" in the former and its absence in the latter.

The Korea case AB has just ignored this point, which is surprising. On the one hand, it has held that "the critical phrase" is not redundant and has an operative role. On the other hand, it has failed even to notice that there is a possibility of a conflict between "the earlier provision" and "the later provision" if "the critical phrase" is operative.

The Argentina case AB has simply observed that it does not see it as an issue involving a conflict. There is no attempt at any examination as to whether there is a conflict. Such an examination should have been thought essential as there is a prima facie difference in the conditions imposed by "the earlier provision" and "the later provision". The Argentina case AB appears to have handled this important issue rather casually.

One should try to define the situation in which a conflict should be said to exist between two provisions. The common dictionary meaning of the word "conflict" is a clash or an encounter. In its verb form, it means being incompatible. Hence one should seek the elements of clash or incompatibility in the provisions. One criterion for the existence of conflict could be whether it is impossible to act in accordance with the two provisions simultaneously. Another criterion could be whether the actions in accordance with the two provisions result in two entirely different and incompatible situations.

In the case under consideration, it is clearly not impossible to act in accordance with the two provisions simultaneously. These provisions contain the conditions which are to be fulfilled before a member takes a safeguard measure. According to “the later provision”, a member has to determine whether increased import has caused serious injury to the domestic industry. According to “the earlier provision”, a member has also to determine, in addition, whether such increased import has arisen due to the existence of “the critical phrase” situation, i.e., because of unforeseen developments or because of the effect of obligations undertaken by the member. It is clearly not impossible to determine all these points simultaneously.

However, the actions according to these two provisions do indeed result in two entirely different and incompatible situations. Acting in accordance with “the later provision”, a member has the right to apply a safeguard measure after determining whether there is serious injury to the domestic industry because of the increased import. However, acting in accordance with “the earlier provision”, the member does not have that right. Following this course, the right would occur only if the additional condition which is contained in “the critical phrase” is satisfied.

Hence, even though it is not impossible to act in accordance with these two provisions simultaneously, the situations emerging from these two sets of actions are substantially different and incompatible. One situation gives the right to a member to take a safeguard measure without investigating the causes of the increased import, whereas the other situation does not give it that right. Following this line of reasoning, the inevitable conclusion is that there is a conflict between “the later provision” and “the earlier provision”. And in that case, “the later provision” prevails in accordance with the general interpretative note mentioned above.

The AB in these two cases has not examined the existence of conflict seriously and has, thereby, added to the burden of a member taking a safeguard measure and reduced the right of that member in this regard.

There is another matter which is totally unrelated to the substance in these disputes, but extremely important from the systemic angle. One is struck by a strange feature of the reports of the AB in these cases. Some important and operational paragraphs of the two reports are exactly the same. These paragraphs examine the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards and are significant. Paragraphs 84, 85, 86, 87 (part), 88 and 89 of the Korea case AB report are exactly the same respectively as paragraphs 91, 92, 93, 94 (part), 95 (part) and 96 of the Argentina case AB report.

The members of the AB divisions in these two cases were two totally different sets of members of the Appellate Body. Each of these reports is signed by the respective sets of three members each. It is surprising how these two different sets of persons ended up writing exactly the same language in some parts of their respective reports.

The AB is like a judicial body in the WTO. One has to presume that the AB in a case writes its own reports and does not get it written by some other persons. This presumption seems to be hit by the exact convergence of the language in some parts of the two reports as mentioned above.

This is an important issue meriting serious consideration by the members of the WTO and, in particular, the Dispute Settlement Body.

Bhagirath Lal Das is a former Ambassador and Permanent Representative of India to the GATT forum and also former Director of International Trade Programmes at the United Nations Conference on Trade and Development (UNCTAD).

THE WTO AND ITS EXISTENTIAL CRISIS

The multilateral trading system centred in the World Trade Organization (WTO) faces no less than an existential threat stemming from the United States' blocking of new appointments to the WTO's Appellate Body (AB) – a standstill which could effectively paralyze the entire mechanism for resolving trade disputes between countries.

While the US stance has been seen as a means to force through a reshaping of the WTO in Washington's own interests, it has also cast a spotlight on longstanding flaws in the WTO dispute settlement system. As this paper points out, dispute panels and the AB have in several cases been perceived as unduly altering the balance of WTO member states' rights and obligations, often to the detriment of developing countries.

The priority now, asserts the paper, is to "call the US bluff" and address the AB impasse at the highest political decision-making level of the WTO. Separately, a review of the WTO dispute settlement regime, which is long overdue, should be undertaken in order to ensure that the system enshrines principles of natural justice.

CHAKRAVARTHI RAGHAVAN *is Editor Emeritus of the* South-North Development Monitor *(*SUNS*). He is the author of, among other books,* Recolonization: GATT, the Uruguay Round and the Third World*;* The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South*;* The Third World in the Third Millennium CE: The Journey from Colonialism Towards Sovereign Equality and Justice*; and* The Third World in the Third Millennium CE: The WTO – Towards Multilateral Trade or Global Corporatism?.

TWN TRADE & DEVELOPMENT SERIES

is a series of papers published by **Third World Network** on trade and development issues that are of public concern, particularly in the South. The series is aimed at generating discussion and contributing to the advancement of appropriate development policies oriented towards fulfilling human needs, social equity and environmental sustainability.

ISBN 978-967-0747-35-4

TWN Third World Network

9 789670 747354