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Making WTO Dispute Settlement System Useful for LDCs

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Abstract

The World Trade Organization, a forum of multinational bargaining for trade under an international regulatory authority, has adhered compromising provisions for all member countries. The natural rule 'stronger pie more and weaker are hanged up in the better dream of future' is indirectly reflected in the WTO rules (the agreements, commitments and a few decisions of Ministerial Conferences) as well. While weaker countries (including independent economic territories) had shown strong reservation in opening up Agreement on Trade-Related Aspects of Intellectual Property Rights, General Agreement on Trade in Services and Agricultural market during negotiation, the richer had persuaded in inserting scattered, flexible and concessional provisions in different Agreements of WTO; and Ministerial Conferences had made decisions and commitments to support and compensate them. The ultimate indication of trade performance is measured on their transactions and on the free movement of their goods and services. In case if the treatment is not fair or the regulatory compliance is not fulfilled, remedy ought to be accessible. Since its commencement, just a single case was initiated by Least Developed Countries for settlement through the Dispute Settlement Body due to the doubt on the procedure and effectiveness of DSB. The article tries to analyze that why weaker (especially LDCs) countries are reluctant in joining DSB and framing way-out to resolve the problem by making convenient provisions for the weaker, LDCs as well.

World Trade Organization: An Introduction

The World Trade Organization (WTO) is a rule-based international institution for the implementation of its rules and principles, especially non-discriminatory treatment, and slashing down barriers of free trade among the members that ultimately relies on the settlement of disputes. Every member, including poor and weak, hope that WTO's rules of market access and the standard rule will help and encourage for their economic development. The forty-seven years-long negotiation did result in a shift in policy reform such as liberalization of the market, harmonization of law and policy, and additional flexibilities to weak trade partners. In fact, the negotiation was a "grand bargain" to adhere "new issues" namely General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Agreement on Agriculture (AoA), and investment, intellectual property and

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'single undertaking' of the developed members for WTO membership.¹ Obviously many poor and small countries have had cast doubt about their role and benefit in the open market since they were technically poor, institutionally unfavorable, economically not viable, legally incompatible and far behind to the utilization of open competitive market. The rich and bigger had assured economic development of the poor countries providing numbers of flexibilities and simple dispute settlement procedures as a response to their concern. In fact, the poor and developing countries have agreed to introduce GATS, TRIPS, AoA and to open up the market to the goods and service from multinational companies on the unbalanced reciprocal understanding, on response to the provisions.²

Free and Fair Trade among Unequal Partners

Based on the fact of "bargain" and "risk" to market and product of the poor, generic concern of majority people is free and fair trade between or among unequal partner/s, especially with poor, developing and the LDCs. However there is no such parametric menology that the LDCs and poor or developing member countries did get strong belief on free trade and rapid economic achievement after accession to WTO despite there are some positive legal premises, which are already defined and fixed as "guaranteed in exchange", and those are namely:

1. Legal concessions and flexibilities including Special and Differential Treatment (SDT)³, and longer time frame for implementation,
2. Special decisions and commitments for weaker members, and
3. Effective, acceptable and independent dispute settlement rules and mechanisms.

In addition to mesmerizing "economic miracle" of the west during a short amount of time, decades of World War II had also the motive of building secured transaction and rapid development, and a paradigm shift from traditional provisions as mainstream culture.

These grounds were really convincing to the poor for accession in the beginning or during negotiation but the countries do feel in other ways, now. As a "bargain deal", the Marrakesh Protocol to the General Agreement on Tariffs and Trade (GATT) and the Agreements, namely AoA, Trade Policy Review Mechanism (TPRM), Technical Barriers to Trade (TBT), TRIPS, Agreement on Subsidies Countervailing Measures

¹ See Sylvia Ostry, 'The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations', in Daniel L.M. Kennedy & James D. Southwick (ed), *The Political Economy of International Trade Law*, Cambridge University Press, Cambridge, 2002. Numbers of NGOs i.e. Third World Network (TWN), focus on the Global South, Indian Research Foundation for Science, Technology and Ecology, International South Group Network, Consumer Unity and Trust Society, World Economy, Ecology and Development, 92 Group, Oxford Committee for Famine Relief, The International Centre for Trade and Sustainable Development and United Nations Conference on Trade and Development had also facilitated the voices of the poor.

² Anyone can verify Tokyo and Uruguay Round discussion record.

³ Different 160 SDT provisions are provided in different agreements basically 66.1/2/TRIPS, 20/AOA, 9 & 10/SPS, 11.8/TBT, IV/GATS and 24/DSU. Trade Facilitation Agreement (WT/MIN (13)/36) contains unique SDT measures that link the requirement to implement with the capacity of developing and LDC. It also emphasizes donor members to enhance assistance and support for capacity building of poor LDCs.

(SCM), Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), GATS and Dispute Settlement Understanding (DSU) have provided flexible provisions for the use of rule, discipline, time and treatment considering transitional arrangements and conditions or special situations of the members. The provision of implementation periods and transitional stage are to be considered for cutting tariff in industrial or agricultural products. Article 6.2/AOA allows LDCs an exemption from domestic support reduction commitments, input subsidies (low-income-poor farmers) and *de minimis*. Besides, 10 percent domestic support commitments as to Article 6.4(b) on agricultural export subsidies reduction and tariff reduction on agricultural goods as per Article 15.2 are very catchy provisions. Provisions under Article XXIV have granted concessional market access to weaker trading partner on the name of 'Enabling clause', 'GSP scheme', 'Everything but Arms', and waiver to LDCs from obligations with respect to pharmaceutical products under Article 70.9 of TRIPS.

The ground on which most of the poor, developing and LDCs relied to increase their trade volume of exporting goods and services never came true as dreamt before. Rather it has proved to be negative through conferring rapid destruction of their environment, sustainable livelihood, health and hygiene resulting in thousands of poor, and importantly the waste of effort and time for nothing to them.⁴ "Profit is guaranteed" under the tag of trade or banner of the patent, trademark, and copyrights. Thousands of thousands are being out of health care and food as they cannot bear because the goods and services are protected under the "tag". It rewarded only to the mega-multinationals, which are shockingly sucking local resources, violating the established standard of United Nations and International Labour Organization.⁵ Most of the poor countries after liberalization and opening up their markets have widened trade deficit and are falling in the gorge of the debt trap. It is not just an allegation such as the food bills of LDCs increased six-fold between 1992 and 2008, and many developing countries (including Kenya and Indonesia) and LDCs (Benin, Burkina Faso, Mali) incurred losses heavily after liberalization of their market or being a member of WTO. It is so because of non-compliance of subsidies by developed members. Data sourced from UNCTAD, WTO and International Monetary Fund literature indicate that dangerous negative trade impacts are incurred to most of the LDCs or poor nations after the accession to WTO.⁶ Exceptionally, a few LDCs have balanced their trade.

Most goods exported from LDCs, viz. agro-based products with minimal requirement to the market of developed countries are rejected or blocked imposing SPS and TBT measures whereas developed countries are capturing market through refined products of the same goods.

⁴ Exceptionally very few poor countries have improved their economic condition.

⁵ See Global Exchange, 'Top Ten Reasons to Oppose World Trade Organization', 1999, *Third World Traveller Official Website* available at http://www.thirdworldtraveler.com/WTO_MAI/TopTenReasons_Oppose.html, accessed on 15 September 2018.

⁶ See Aurelie Walker, 'The WTO has failed developing nations', 14 November 2011, *The Guardian Official Website* available at <https://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries>, accessed on 15 September 2018; Ruth Bergan, 'WTO fails the poorest- again', 29 July 2011, *The Guardian Official Website* available at <https://www.theguardian.com/global-development/poverty-matters/2011/jul/29/wto-doha-fails-poorest-countries>, accessed on 15 September 2018.

Features of Dispute Settlement System in WTO

The WTO is a rule-based system. The dispute settlement institution is politico-quasi-judicial body, where every member party, rich or poor, big or small, is subjected to the same rules and remedies; and so goes for the Dispute Settlement Body (DSB) (like political bodies),⁷ WTO panels, the Appellate Body (like quasi-judicial bodies)⁸ and arbitrators (ADR bodies)⁹. WTO panels and the appellate body issue advisory reports with recommendations addressed to WTO members and their findings become legally binding only upon adoption by the DSB.¹⁰ Hence, panels and the appellate body exercise only “quasi-judicial” functions, different from those of truly independent courts, however, both WTO panels and the appellate body have asserted inherent powers to examine their jurisdiction *Proprio Motu* to adopt interim rulings, to admit *amicus curiae* briefs, and to “complete the legal analysis” at the appellate level.¹¹ Thus, the independence of WTO dispute settlement bodies remains legally and institutionally limited and could be reinforced by international cooperation among judges. The reality is that parties without the political and economic muscle will be trampled upon by powerful ones and will not secure a share in the growth in international trade.¹²

The simple observation and comment of experts based on the following legal skeletons are the special features of Dispute Settlement system in the WTO, and they are quite different from the others.

1. It is a central element in providing security and predictability to multilateral trading system recognizing to preserve rights and obligations of members under the covered agreements, and the recommendations and rulings of DSB cannot add to or diminish the rights and obligations provided in the covered agreements.¹³
2. It provides single, integrated and comprehensive system except for limited flexibilities to the developing and LDCs.

⁷ Appellate Body stated that ‘it is not the task of either Panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX: 2 of the WTO Agreement. Only WTO members have the authority to amend the covered agreements or to adopt such interpretations. Determining what the rights and obligations under the covered agreements ought to be is not the responsibility of panels and the Appellate Body; it is clearly the responsibility solely of the Members of the WTO’. *United States-Import Measures on Certain Products from the European Communities*, Report of the Appellate Body, WT/DS165/AB/R, Dec. 11 2000.

⁸ *Understanding on Rules and Procedures Governing the Settlement of Disputes Annex 2 of the WTO Agreement*, 1869 U.N.T.S. 401, 15 April 1994 (Dispute Settlement Understanding).

⁹ Ibid arts 21, 22 & 25.

¹⁰ Ibid arts 17, 18, 19 & 20.

¹¹ See Friedl Weiss, ‘Inherent Powers of National and International Courts’, in Federico Ortino & Ernst Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, 2004.

¹² See Gosego Rockfall Lekgowe, ‘The WTO Dispute Settlement System: Why it doesn’t Work for Developing Countries?’, 24 April 2012, SSRN Official Website, p. 4 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045470, accessed on 15 September 2018.

¹³ See Dispute Settlement Understanding (n 8) art 3.2.

3. A case cannot be initiated by any company, person or NGO or industry as law, however, they are the *de facto* key force, who support and even induce, to lobby their government to take the case in WTO.
4. DSB prefers members to resolve issues through mutually acceptable and satisfactory solution rather adjudication by means of consultation or negotiation.¹⁴
5. Application of different methods for settlement of the dispute is exercisable since DSU provides four different methods, namely: a) consultations or negotiations¹⁵; b) adjudication by panels and the Appellate Body¹⁶; c) arbitration¹⁷; and d) good offices, conciliation and mediation¹⁸. Of these, arbitration under Article 25 and good offices, conciliation and mediation under Article 5 have only played a marginal role. In most of the WTO disputes, members had recourse to consultations, and if those were unsuccessful, went to adjudication.
6. Article 31 and 32 of the Vienna Convention on the Law of Treaties are applicable for the interpretation of WTO rules; and, as to the provision of Article 3.2 and 19.2 of DSU, members' rights and obligations provided in the covered agreements are highly protected under customary rules of interpretation of the public international law.
7. Under multilateral procedures, the member must settle the dispute with other members' compliance through the multilateral procedures rather unilateral action.¹⁹
8. DSB provides three types of remedies namely, first final remedy (withdrawal or modification of WTO inconsistency measures), second temporary remedy (can apply withdrawal or modification temporarily) known as compensation, third suspension of concession and other obligations known as retaliation.²⁰
9. Two independent bodies for dispute settlement and exceptional provision are in existence under dispute settlement procedure. They are namely, *ad hoc* for Panel and standing as Appellate Body to settle the dispute, to uphold or reverse report that becomes binding except sustaining with 'negative consensus', which is an exceptional provision (not practiced yet).

¹⁴ Ibid art 3.4.

¹⁵ Ibid art 4.

¹⁶ Ibid arts 6-20.

¹⁷ Ibid arts 21.3 (c), 22.6 & 25.

¹⁸ Ibid arts 5 & 24.2.

¹⁹ Ibid art 23.

²⁰ As an experience of Ecuador in the *EC-Bananas (1997)* and Antigua and Barbuda in the *US – Gambling (2005)*, the retaliation is not so effective even after given authorization to cross-retaliate and suspend obligation under TRIPS agreement against EU and US respectively. With regard to LDCs, under article 24.1 of DSU, developing countries should exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures if found nullification or impairment.



Completion of Uruguay Round signed in April 1994, at Marrakesh, Morocco²¹

Premises for Justice

The *Understanding on Rules and Procedures for the Settlement of Disputes* commonly referred to as DSU or *Dispute Settlement Understanding* is more comprehensive and effective rules compared to the Article XXII and XXIII of GATT 1947. Thus, as the provisions, the DSB has wider jurisdiction over the concern of WTO Members either developed, developing or the LDCs based not only to the covered 'packet of agreements or WTO Agreements' but also on other national legislation, customs, practices, decisions and measures of local authorities which are against the preview of 'commitment' made during accession.

As a general trend, the complainant has to file argument as that respondent has nullified or impaired acquiring benefit under the covered agreement or has violated WTO law, commonly known as 'violation complaint'. However 'non-violation complaint' or just an indication of impairment without referring the violation of WTO rules can be filed. In both the cases, the latter one is weaker and has higher chances to lose the case in DSB.

DSU Practices by LDCs

The number of cases settled through dispute settlement system reflects that developed countries are able and in a more advantageous position in the WTO. Considering the flow of cases, it is suggested that the WTO dispute settlement system is institutionally biased, pricing developing and least developed countries out of their ability to participate within the system.²²

²¹ See Amrita Narlikar, *The World Trade Organization: A Very Short Introduction*, Oxford University Press, 2005, p. 26.

²² Henrik Horn, Petros C Mavroidis & Hakan Nordström, 'Is the Use of the WTO Dispute Settlement System Biased?', discussion paper no. 2340, Centre for Economic Policy Research, 2009.

Since the establishment of WTO in 1995, the European Union and the United States have dominated dispute settlement proceedings as respondents or complainants in WTO cases whereas developing countries have accounted for only 46 percent of all cases²³ and the LDCs are out of the ring. Among the 36 LDCs members of WTO, Bangladesh is the only LDC that ever brought a dispute to the WTO in 2004. Bangladesh brought a complaint to the panel against India on the latter's imposition of anti-dumping duties on lead-acid batteries (Indian tariff on Lead Acid Battery Import was 40 percent that was waived 60 percent by the SAARC Preferential Trading Arrangement remaining just 16 percent but Indian custom charged 131 percent),²⁴ and few African countries have initiated Panel proceedings.²⁵ Many LDCs had suffered from the trade barriers and discrimination on number of provisions even before WTO such as Bangladesh's cotton product (cotton shop towel) was imposed by the USA in February 1992 following a petition by Roger Milliken and Co., a giant manufacturer, and seller of terry towel and shop towel in the USA. A similar situation emerged when Brazil decided to impose anti-dumping duties on jute bags imported from Bangladesh (and also India) in September 1992.²⁶

Except for India, Nicaragua, and Pakistan, the situation of developing members is not encouraging. It is embarrassing that Sub-Saharan has never used DSB like other LDCs. And also, no case has been filed against LDCs in the DSB as well. LDCs members such as Benin, Chad, Madagascar, Malawi, Mauritania, Senegal, and Tanzania have involved as a third party in the proceeding, in both or any, of Panel and Appellate Body but none of them is by any measure a regular third party in WTO dispute settlement proceedings.²⁷

Causes of Distraction of DSB

There are multiple, complex and interrelated causes for the distraction of the poor, developing and LDCs in DSB. The first stage known as consultation is heavier for them because of diplomatic roles and the influence of cost or capacity.²⁸ The poor

²³ Kara Leitner & Simon Lester, 'WTO Dispute Settlement 1995-2014; A Statistical Analysis', vol. 18, no. 1, *Journal of International Economic Law* p. 203, 2015, p.205.

²⁴ *India—Anti-Dumping Measures on Batteries, India, WT/DS 306, 2004*. This dispute was settled through bilateral negotiations under Article 4 of the DSU; See Peter Van den Bossche & James Gathii, 'Use of the WTO Dispute Settlement System by LDCs and LICs', 2013, *Trade Policy Training Centre in Africa Official Website*, p. 6 available at <http://new.trapca.org/wp-content/uploads/2016/04/TWPI304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf>, accessed on 15 September 2018.

²⁵ Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement', vol. 9, no. 2, *Journal of International Economic Law* p.427, 2006, p.432.

²⁶ M. A. Taslim, 'Dispute Settlement in the WTO and the Least Developed Countries: the Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh', 26 January 2006, *International Centre for Trade and Sustainable Development Official Website*, p. 11 Asia Dialogue on WTO Dispute Settlement and Sustainable Development Jakarta, 25-26 January 2006 available at <https://www.ictsd.org/themes/trade-law/research/dispute-settlement-in-the-wto-and-the-least-developed-countries-the-case-0>, accessed on 15 September 2018.

²⁷ See Bossche & Gathii (n 24), p. 7.

²⁸ See Navneet Sandhu, 'Member Participation in the WTO Dispute Settlement System: Can Developing Countries Afford not to Participate?', vol. 5, no. 1, *UCL Journal of Law and Jurisprudence* p. 153, 2015, pp.153-173.

countries cannot go against the bigger member countries because of the economic dominance of the rich country. Even if they dare to go against or retaliate despite their political dominance and diplomatic relation, it makes no significant impact to the country or product of that country. Further, it passes in causing substantive loss, or creating enough pressure to comply because of the small domestic market of the poor LDCs, and causing the suspension of the concession of non-complying bigger became more serious to the poor. These causes can be further inscribed in:

- 1) *Size of the economy*: Small share in world trade and the limited diversification of their trade (the volume of exports is sometimes so modest that the expected gains from a successful challenge could be less than the actual costs of litigation, thus making the challenge is economically unprofitable) is often in the scene. Since LDCs have a very small share of global trade, their ability to threaten or to pose retaliation against larger trading partners, who violate their rights, is very limited. Moreover, retaliation is likely to 'hurt' the economic interests of the complaining LDCs (by depriving themselves of cheaper imports) more than it 'encourages' the offending larger economies to comply. The poor do nothing when bigger countries are found violating fair trade and competition rules injuring or damaging small and poor countries' market and their 'like product' because of heavy cost to challenge them,²⁹ however, WTO DSU has stipulated to facilitate the issues of such countries with special initiation, such as good office and negotiation considering the economic and development stage of these countries.³⁰ Data shows that even the facilitation service has not been easily practiced by the SG or Chairman of DSB in favor of LDCs. Exceptionally, in case if the LDCs do proceed the case and luckily do get ruling in favor, they cannot execute the decision in fact unless the country concerned self-complies the ruling within the stipulated period of time,³¹ because in non-compliance, there is no way rather go retaliation against the country. It has been proved in case of *US–Gambling* (2005), *Antigua and Barbuda*, which won the case against the US. But it has less than 90,000 population and 0.02% of all exports of the US, therefore it was noted that: 'Ceasing all trade whatsoever with the US would have virtually no impact on the economy of the US, which could easily shift such a relatively small volume of trade elsewhere'³² (since the US did shift easily the market in another country). Same experience had happened for *Ecuador* against European Commission (EC). EC has 0.1 percent

²⁹ But in the case of developing member countries, the system is almost useful. Around half of the complaints brought before the WTO have been initiated by developing members; See, World Trade Organization, 'Resolving Trade Disputes Between WTO Members', 2015, *World Trade Organization Official Website* available at https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf, accessed on 15 September 2018.

³⁰ DSU states that the Director-General can assist members in settling their disputes through his "good offices", mediation or conciliation.

³¹ Generally "reasonable period of time" is given to implement the dispute settlement rulings, ranging from eight to fifteen months. Mostly, if the member's parliament or congress needs to change or abolish the measure in question to bring it into conformity with the relevant WTO agreement, take a longer time.

³² *Cross-Border Supply of Gambling and Betting Services, Antigua and Barbuda v. the United States*, WT/DS285/ARB, 2007, para 3.

market in Ecuador.³³

Considering the reality, World Trade Report 2007 of WTO has acknowledged the inability of LDCs to pressure large economies to comply with DSB ruling as retaliation measures.³⁴ If the WTO DSB would have an effective enforcement mechanism that could be beneficial and of course undoubtedly be courageous to LDCs to make more use of DSB.

- 2) *Complexity* of WTO disputes settlement process and lack of in-house expertise: In fact, to be able to argue effectively in WTO cases, which involve sophisticated legal arguments and complex factual 'details', countries must have capable human resources to understand and apply the facts rather than having simple knowledge of general legal principles and readily available laws. WTO litigation is extremely costly alongside difficult in measuring with a certainty of the exact cost, thus can compel the developing countries choosing not to initiate proceedings even in situations when they have a legitimate case.³⁵ Complicated and lengthy disputes can cause wider damage to the economy of the countries involved, especially the poor. If a WTO member does not have an in-house specialized legal, economic and scientific expertise, it will be too tough to go there. Most of them have no, or too few, in-house lawyers to analyze WTO law, to monitor WTO case law, and to advise their governments on how best to safeguard their rights and force their entitlements under this law.³⁶
- 3) *High cost* of outside expert: The nature of the case demands expert lawyer that they do not have always thus it forces to hire outside experts; but hiring them is not easily possible because of their cost to be paid i.e. the very normal charge of such lawyers is US\$ 200-600/hour otherwise the practice is of paying US\$ 200,000³⁷ to US\$ 10 million (i.e. in Japan-Film 1997). That is not possible for the poor, developing and LDCs. Thus, the WTO dispute settlement process is often referred to as 'complicated and overly expensive'³⁸ to the small companies' production and turn over.

However, for the effective participation of LDCs and developing member countries, Advisory Centre on WTO Law (ACWL) can support in dispute settlement process, i.e. consultations, panel, and Appellate Body proceedings and implementation and enforcement preparing written submissions, and representing them in panel meetings and Appellate Body hearings, in

³³ See Ibid; *European Communities-Regime for the Importation, Sale, and Distribution of Bananas*, Ecuador; Guatemala; Honduras; Mexico & United States v European Communities, WT/DS27/ARB, 2000, para 95.

³⁴ See World Trade Organization, 'World Trade Report- 2007', July 2007, *World Trade Organization Official Website*, pp. 283-284 available at https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf, accessed on 15 September 2018.

³⁵ See Sandhu (n 28), p.154.

³⁶ See Bossche & Gathii (n 24) p. 23.

³⁷ See Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', Resource Paper No. 5, International Centre for Trade and Sustainable Development, 2003, p. 9.

³⁸ *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group*, TN/DS/W/15, 25 September 2002, para, 3, cited at Bossche & Gathii (n 24).

a subsidized fee. The subsidized fee to LDCs to entire dispute including consultations, panel, and Appellate Body proceedings is CHF 35,000 (Swiss Franc) that is at least CHF 140,000 to developing countries.³⁹ Advisory Centre on WTO Law (ACWL) also provides Consultative Board (CB) support in the form of training on WTO law. The LDCs can request for *pro bono* legal service with a leading global law firm as it was experienced helping Brazil (civil society), Benin and Chad in the case of US-Cotton.⁴⁰

- 4) *Inability to enforce* compliance with recommendations and rulings makes the government representative of poor and LDCs fail to stand with valid 'dialogue' of Dispute Settlement System (DSS) in case of decision or ruling in their favor. One of the reasons for the representatives in LDCs is that s/he is often not in close relation to domestic industries, companies and the government. As a result, the government obviously does not pay much attention to the needs and challenges of the private sector domestic industries, and in particular of smaller industries, that are very vulnerable to trade restrictive measures in export markets or competitive pressures in the domestic market that may be inconsistent with WTO rules. Unlike, developed, they lack provisions to 'lobby' their government to initiate a complaint in WTO on behalf of such industries and companies.⁴¹
- 5) *Inability to identify violations of WTO law*: Any Member has a right to challenge against the violation and the WTO DSS would sustain the claim in fact. By principle, the complaining country will be benefitted from the withdrawal of trade measures after the compliance of WTO DSS recommendation and ruling but the poor and LDCs can hardly establish the claim of violation in proper form. A *prima facie* problem to lodge a claim virtually is not only an issue of fear psychology it is also an issue of unfriendly legal provisions for the poor countries. The supporting system available in DSB is not easily accessible in terms of money, technical know-how and procedural structure.
- 6) *Fear of reprisals*: Poor country always have fear of reprisal of the offense however DSU Article 3.10 has provided that 'requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts'; and it means a legal and friendly act of settlement of issues is to be executed. But it is only an assumption. Blockade or suspension or threat of preferential treatment or access i.e. DFQF of developed or the rich developing country would create serious result to the economy of such country. Addition to trade facilities or preferences, the suspension of developed or the rich countries' non-trade support i.e. technical or other development support or aid, which may be bigger than the loss of trade, is serious fear to the LDCs or the poor. That ultimate pressure to precede DSS.

³⁹ See Jan Bohanes & Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement', vol. 4, no. 1, *Trade, Law and Development* p.45, 2012.

⁴⁰ See Bossche and Gathii (n 24), p. 50.

⁴¹ See Ibid, p. 21.

Number of reasons have proved that such sanctions against bigger or richer always turn “harmful” to the weaker or small nations. Sanction against is just like “shooting oneself in the foot”.⁴² Many freelancers have voiced strongly that retaliation rules under DSU are useless for these countries since the virtual result of dispute settlement is waste of time and money for the countries, which have no capacity to invoke the WTO's dispute settlement procedures against the bigger and rich countries.⁴³ The WTO has also felt it a big obstacle to the poor and LDCs.⁴⁴ The inability of such countries to effectively retaliate has been argued to mean that their access to WTO dispute settlement ‘is not equal to that of developed countries and in fact largely illusory’.⁴⁵ The fear of losing preferential access to developed country markets in LDCs and LICs after using the WTO’s dispute settlement system is another cause of not taking cases in the process.⁴⁶

Application of WTO Laws

The WTO law is still a “soft” law by nature and application and basically founded on ‘agreements, MC decisions, and commitment of member countries. That obviously reflects the subjective nature of the provisions.’⁴⁷ Interestingly, most of the important decisions are made informally with the consultation of core members in ‘Green Room’; and that is neither maintained in the rule nor is it transparent as to the principle of “transparency.”⁴⁸

Use of its law in the dispute settlement system begins automatically after a formal complaint by any member. The first stage, is known as “request for consultations” which needs to be initiated by the member trying to resolve the dispute concerned with another member. If it fails, a panel will be established to examine the case, in the second stage. But in fact, the ‘voice of LDCs and LICs is not heard’ or WTO law and its procedures are often beyond the access of these countries in dispute settlement

⁴² See M. Bronkers and N. Van den Brock, ‘Financial Compensation in the WTO: Improving Remedies of WTO Dispute Settlement’, vol. 8, no. 1, *Journal of International Economic Law* p. 101, 2006, pp.101-126, at 103; P. Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’, vol. 11, no. 4, *European Journal of International Law* p. 763, 2000, pp. 763-813; B. Hoekman & P. Mavroidis, ‘WTO Dispute Settlement, Transparency and Surveillance’, vol. 23, no. 4, *World Economy* p. 527, 2000, pp. 527-542.

⁴³ See Robert E. Hudec, ‘The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective’ in Bernard Hoekman, Aaditya Mattoo & Philip English(eds), *Development, Trade and the WTO*, The World Bank, Washington D.C., 2002, p. 81.

⁴⁴ See World Trade Report 2007(n 34), p.284.

⁴⁵ See Bronkers & Brock (n 42), p. 106.

⁴⁶ However, Costa Rica had gained and increased trade and kept best foreign relation with the US after failing case in *US-Underwear-1997* that Costa Rica was too hesitant to file complaints against the US because of Costa Rica-US foreign relation and trade benefit. See John Breckenridge, ‘Costa Rica’s Challenge to US Restrictions on the Import of Underwear’, in Peter Gallagher, Patrick Low & Andrew Stoler (eds), *Managing the Challenges of WTO Participation: 45 Case Studies*, Cambridge University Press, Cambridge, 2005.

⁴⁷ But in practice, for poor and LDCs it is ‘semi-hard’. So they are still far from its real use.

⁴⁸ See Narlikar (n 21), pp. 45-46.

system (because of the absence of such law and active participation).⁴⁹

One of the strong reasons of LDCs and LICs not joining DSS either for Panel/Appellate Body or Arbitration is that they have realized that the nature of applicable laws is 'semi-hard', just opposite of its juridical character because there is greater chance to be influenced in use of the rules during the preceding and final decision on strong financial or political strength of opposition party. Where a satisfactory solution has not been found in the course of consultations in dispute settlement cases involving a LDCs, the Director-General (DG) or the Chairman of the DSB shall, upon request by a LDCs Member, offer their good offices for conciliation, and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made as per Article 24(2) of the DSU. In providing the above assistance, the DG or the Chairman of the DSB may consult any source which either deems appropriate. This is one of the strongest favored provisions for the LDCs in intending to promote cheap and amicable settlement of disputes to the countries. Is it really so before reaching the conclusion, for this we have to look at the situation. It is not clear yet what happens if the LDC makes a request and the DSB or the DG offer their good offices but the developed country declines to attend or participate. It means that the developed or developing countries, like in other processes, are free not to participate in these mediation proceedings. The absence of such countries will potentially weaken the utility of the provision and its intentions. Again, least use of Article 24.1., 24.2, and 22.6/DSU and most importantly inability to retaliate against the bigger country are the results of LDCs' psychology that have blocked them going to DSS.

No case has been brought to DSB after Bangladesh did in 2004.⁵⁰ Now it is an established fact by a research of American Law Institute's Project on WTO case law that the complaints filed for WTO adjudication represent only a small fraction of the total number of measures or policies of WTO members that may be in violation of various WTO rules. Thus, a large potential exists for LDCs and LICs to use the WTO's DSS to name and shame countries in violation of their obligations.⁵¹

Addition to an application of the rule in issues, the DSB is also found impressionistic (subjective) to its members i.e. in the cases of *Indonesia-Autos* where the arbitration was allowed but in *Chile-Alcoholic Beverages* with the similar ground the arbitration was not allowed. Completely unequal treatments are found for different members on the same ground of request for example, in the case of *Pakistan - Patent Protection for Pharmaceutical and Agricultural Chemical Products (WT/DS36/3)*, time extension was not permitted whereas in the case of *India-Quantitative Restrictions (WT/DSO90/R)* time extension was permitted.⁵²

⁴⁹ See Bossche & Gathii (n 24), p. 29.

⁵⁰ See *India-Anti Dumping Measure on Batteries from Bangladesh* (n 24).

⁵¹ See Andrew Guzman and Beth Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes', vol. 34, no. 2, *Journal of Legal Studies* p. 557, 2005, pp. 557-598.

⁵² See *India - Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products, United States v India, WT/DS90/R*, 6 April 1999, pp. 132-133. Request by India for sufficient time to prepare and present its

Also, the behavior of some members is so regressive that can be hardly imagined i.e. blockade imposition is even practiced during the war. Blockade in peaceful time is a crime against humanity. The GATT Article V, VIII and X about the *Transit rights, Fees and Formalities* and the legal provisions of Laws of Sea (UNCLOS 1958-I, UNCLOS 1960-II and UNCLOS 1982-III) and *UN Convention on Transit Trade of Land-locked States, 1965* have clearly provided transit right for the concerning countries. Imposition of blockade obviously is not only a matter of embarrassment but also an illegal activity and shame to the WTO as well. It became more serious when it was imposed for nothing⁵³ but the DSU has a provision 'where there is an infringement of the obligations under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment'⁵⁴ It means, as a legal provision if the breach has an adverse impact, any concerned member can bring to rebut the charge. How could a member impose the blockade to other just for not accepting pressure to change some provisions in the Constitution? But it happened to Nepal in 2015-2016, and the WTO and other international institutions just watched the violation of the legal provisions and the spirit of WTO laws. Had the WTO initiated the mediation during the serious violation of laws against a member (Nepal), by another member (India), Nepal would have felt guardianship and justice from the WTO. The violation has again proved that the WTO legal provisions including, GATT Article VI, XIX, XXVIII; Art. 20 of AoA, Art; IV, XV, XIX, XXI/GATS; 66.2 of TRIPS and decisions i.e. paragraph 42 of DDA and paragraph 33 at HK MC are useless for the weak and poor nations.

Expected Changes in Law

The remedial provisions available in DSU i.e. cessation, compensation and retaliation are not convenient in the same condition to the poor, developing and LDCs. Following amendments adhering provisions on DSU Rule would be encouraging real protection to them for their active participation in DSS.

argumentation, pursuant to Article 12.10 of the DSU. However, the jurisprudence for the application of the decision made by Dispute Settlement Body is alike to regular court. The Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. That is the reason why the legal interpretation embodied in adopted Panel and AB reports became a part and parcel of the dispute settlement system. See the *United States- Final Anti-Dumping Measures on Stainless Steel from Mexico, Mexico v the United States*, DS344, 30 April 2008, paras 158 & 160.

⁵³ Nepal government has accused India of imposing an undeclared blockade. India has denied the allegations, stating the supply shortages have been imposed by Madheshi protesters within Nepal, and that India has no role in it. Despite Indian denials, some border entries points have witnessed no agitation but in the name of agitation India had enforced border blockade, choking imports of essential goods i.e. petroleum, medicines, earthquake relief material and Nepalese goods and trucks at the Kolkata harbor. The blockade was an open sanction against Nepal for not accepting Indian pressure to insert suitable changes in the Constitution so their hegemony can be established very soon after the commencement of the New Constitution that was passed by the 90 % vote of existing CA Members on 20 Sep. 2015. India strongly instigates Madheshi leaders alleging the Constitution is discriminatory to Madhesi, however, there is no such provision.

⁵⁴ See Dispute Settlement Understanding (n 8), art 3.8.

1. **First**, visit of DSB at the site of the conflict on just information of LDCs about trade barriers or discrimination on trade or an issue of trade law violation is a must. Thus, the provision of Article 24.2/DSU "where a satisfactory solution has not been found in the course of consultations the DG or the Chairman of the DSB shall, upon request by a LDC Member" must be added with "manage immediate site visit in own cost before or after" offering their good offices, conciliation, and mediation.

Immediate site visit just after the blockade or restriction of goods in the normal way will help to know the situation of any poor countries which are still unable to voice against the country concerned.

2. **Second**, monetary compensation of injury to LDCs rather than the general provision to comply within the stipulated period of time is the real remedy to the poor countries over the form of trade concession such as enhanced market access. Though such concession is only voluntary, the panel and the Appellate Body cannot impose it upon the parties and is applied prospectively only. Thus, making effective compensation to the poor, developing and LDCs under the provision of Article 19.1 after 'Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement', must add 'monetary compensation shall be given in injury to LDCs, and also' 'it shall recommend that the Member concerned to bring the measure into conformity with that agreement' and also ought to be changed accordingly in sub Article 1 and 2 of Article 22.

The adherence of monetary compensation provision for loss of trade by the violating members after the decision of Panel and Appellate Body can instigate LDCs to drag case in DSS and also create pressure to comply legal provision and speedy settlement on breaches. Obviously, it will minimize the size of the distraction of LDCs. Most of developing and LDCs are reluctant to join this system just because of the absence of compensation.⁵⁵ In this regard, the reform proposed by China as shifting the burden of cost to developed countries in dispute settlement proceedings has special importance to favor the live participation of a developing and least developed country.⁵⁶

3. **Third**, negotiation skills, based on fact, of poor LDCs should be empowered for effective negotiation and should be encouraged to get free commitment without any pressure to reduce their tariff and non-tariff measures, and opening their markets during negotiation.

It is an open fact that developed members impose high pressure on the

⁵⁵ Dennis Browne, 'Dispute Settlement in the WTO: How Friendly is it for the LDCs', CPD working paper 45, Centre for Policy Dialogue, 20 July 2005, p.37.

⁵⁶ Magda Shahin, 'WTO Dispute Settlement for a Middle-Income Developing Country: The Situation of Egypt', in Gregory Shaffer & Ricardo Melendez-Ortiz (eds), *Dispute settlement at the WTO: The Developing Country Experience*, Cambridge University Press, Cambridge, 2011, preface and p. 280.

LDCs and poor for the liberalization of the market including trade in service and trade-related intellectual properties where businesses are more lucrative. Unless the consideration is given to these basic requirements, free and fair trade for the poor members is almost impossible. Greater the equity in international trade bigger will be the chances of contributing to sustainable economic development and security of the rights of marginalized producers and workers, especially in the South. Where there is a free and fair trade, consumers are likely to protect and support the producers. So far fair trade, a base of WTO, is based on dialogue between trading partners, mutual respect and transparency.⁵⁷

Thus, it would be effective if the WTO has its own effective enforcement mechanism.⁵⁸

Intervening Area

The LDCs and poor countries have honestly reduced tariff and opened their markets as their commitment. But the developed and rich countries are more responsible for non-fulfillment of their words for financial and technical support to the LDCs and poor, and it is the main cause of widening trade deficit each year. Interestingly, developed and economically sound developing countries are still practicing protection of their industries and products, providing subsidies, offsetting dumping, tariff, and (Non-tariff barriers) NTB, which are permitted in a specific situation and temporary basis only i.e. protection from serious injury.⁵⁹

Like many LDCs, Nepal is being a victim of the tussle of the principles of mega international organizations, namely Human Rights Organization, ILO and WTO. The principles are in a line to encounter each other in the issues like rights, wages, job guarantee and security of workers. But their strong policies and structures are

⁵⁷ Otherwise, the concept, trade generates investment and investment do fosters higher productivity of domestic industries as a result of competition, exploitation of economies resources and access to knowledge, looks fade, however, trade practice, harmonized, uniformed rules and principles has slashed down trade barriers, the biggest achievement of the 21st century, has no meaning.

⁵⁸ See Bossche and Gathii (n 24), p. 27.

⁵⁹ "A number of individual measures, which cannot be traced down to any general provision but signal nonetheless a consistent trend, have targeted, starting from beginning-2015, several imported products, notably cosmetics, foodstuff, feedstuff, detergents. A large number of consignments of these products have been routinely blocked at ports and subject to new checks (phytosanitary, fraud-related and other unspecified) which take several months without the importers being informed of the reasons and expected the duration of such checks. In certain cases, consignments are blocked at ports indefinitely and perishable goods are no longer marketable. Complaints lodged by the operators remain usually without any reply and no reasons are given to justify these measures. In certain instances (also reported by the press), importers have been informed of an unofficial list of 25 products (mainly falling within the above-mentioned categories) which would be subject to import bans or future import licenses". See European Commission, 'Overview of Potentially Trade Restrictive Measures Identified Between 2008 and 2015', May 2016, *European Commission Official Website* p. 2, available at http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154568.pdf, accessed on 15 September 2018; European Commission, 'Report From the Commission of the Council and the European Parliament on Trade and Investment Barriers and Protectionist Trends, 1 July 2014 - 31 December 2015', 20 June 2016, *European Commission Official Website* available at http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154665.pdf, accessed on 15 September 2018.

causing big tussle. Thus, ILO principle and human rights to labor are being straight-jacketed to safeguard workers in every activity causing big hurdle for the effective implementation of WTO principle, vice versa.⁶⁰

In practice, technical assistance and aid inflows from advanced countries to the poor are squeezing and has buried hopes of, many LDCs including Nepal, getting advance technologies and chances of rapid economic reform through the instant exploitation of its abundant natural resources.⁶¹ In this respect, bilateral and multilateral agreement, adherence of the principles of Paris Declaration, 2005 and Accra Agenda for Actions, 2008 are becoming worthless. Accrediting LDCs centric programs like DFQF, Everything but Arms (EBA), TRTA-CB, Aid for Trade,⁶² Enhanced Integrated Framework (EIF) (mostly launched after 2007), Trade Facilitation and SDT for Early Harvesting are not effective to instill positive result and are even non-supportive to enhance their trade and business.⁶³ Offering 97 percent package has no meaning until they put all LDCs' products within three percent, or ensure strict application of TBT and SPS measures on LDCs' product even after offering hundred percent duty-free packages because LDCs do rarely get benefitted from the offer only after strict application of these measures is ascertained. Countries like Nepal cannot offer internationally recognized quarantine and accreditation of goods. Internationally recognized SPS technologies and laboratories in major customs points for checking and accreditation are main problems that are committed by the developed countries. Interestingly, they are blocking goods from LDCs just because of non-compliance of such quarantine requirement rather fulfilling own commitments. Is not there any obligation to set up such laboratories before blocking goods from LDCs, or at least request consultation for the issues?

It is often used to say that LDCs' participation in the WTO is not courageous. Yes, it is so; but it is because of their limited strength on various aspects i.e. human resources, institutional capacity, understanding of complex dynamics of the multilateral trade regime, logistics in the Geneva-based Permanent Mission and so on. Also, not effective bi-lateral cum other trade dialogue with potential trade partner countries is another

⁶⁰ See David M. Trubek & Lance Compa, 'Trade Law, Labour, and Global Inequality', University of Wisconsin Legal Studies research paper no. 1001, University of Wisconsin, 2006, p. 217-243; International Federation for Human Rights, 'Understanding Global Trade and Human Rights', 27 July 2005, *International Federation for Human Rights Official Website* available at <https://www.fidh.org/en/issues/globalisation-human-rights/trade-and-investment-agreements/Understanding-Global-Trade-Human>, accessed on 15 September 2018.

⁶¹ Nepal is also a beneficiary of WTO technical assistance. WTO has supported Nepal to enhance its human and institutional capacities. Some other important technical and financial assistance have been provided through EIF and STDF.

⁶² It is defined i) technical assistance for trade policy and regulations, ii) economic infrastructure, iii) productive capacity building and trade development, iv) trade-related adjustment, and v) other trade-related needs.

⁶³ Trade facilitation, Public Stockholding for Food Security Purposes, Tariff Rate Quota Administration Provisions of Agricultural Products, as defined in Article 2 of the AoA, Export Competition, Preferential Rules of Origin for LDCs, Waiver Concerning Preferential Treatment to Services and Service Suppliers of LDCs, Duty Free and Quota-Free Market Access for LDCs and Monitoring Mechanism on SDT are highly focused but except for Trade Facilitation no other program of action discussed at Bali 2013 and its follow up in Nairobi MC are effectively implemented.

weakness of LDCs. But from the first dialogue, developed countries were well informed that the poor countries lack the quality of negotiation and their representation in international trade fair and bilateral trade negotiation is of substandard quality. That means economic diplomacy is weaker thus it must improve it as per need but it would be foul to opine that because of their poor negotiation skills they have been into the trap of their own commitment made at WTO negotiation. Thus, some of their opinions are irresponsive to own commitment in favor of LDCs especially reducing customs duties and other restrictions i.e. Non-Tariff Barriers to the potential or prioritized export products of LDCs, reframing new fiscal measures and policy that has directly hampered the production of primary goods, raw or processed, wholly or partially. As a result, despite decisions to eliminate Non-Tariff Measures (NTMs,) LDCs are suffering from the NTMs imposed by the transacting WTO members especially on the name of both threat measures i.e. security purpose (SPS), quality purpose (TBT), and hard measures i.e. price control, quality control, and finance scarcity control.

At the time of accession, it was hoped that trade would be driven by private sectors after liberalization whereas the entrepreneurs have looked at the government for infrastructure development and conducive investment environment and favored treatment from other members which need tactful and efficient negotiation skills.⁶⁴

Conclusion

Thus, following reforms in the WTO dispute settlement procedures will be the best model for making effective participation of poor, developing and LDCs in DSU:

- 1) Change in DSU Rules as recommended before,
- 2) Compulsory representation of LDCs in the Panel, Appellate Body,
- 3) Increasing use of Good offices, conciliation, and mediation as per Article 5 of DSU⁶⁵
- 4) Providing monetary compensation instead of existing retaliatory provisions,⁶⁶
- 5) Involving qualified legal experts from the LDCs, as per Article 27.2 of DSU, to enhance their active participation,
- 6) Lodging separate small claims from high volume or large trade claim (potentially more efficient HR and procedural complexity needs to large trade),
- 7) Promoting legal aid to the countries in need.

⁶⁴ However, poor countries lack such skilful human resources and visionary activities of government i.e. making new laws, rules, improving conditions, enhancing physical and non-physical infrastructures, promotion of products and services throughout the world, compliance of international standards making entrepreneurs and company more competitive in the open market.

⁶⁵ See Bossche & Gathii (n 24), p. 45.

⁶⁶ See Bronckers & Broek (n 42), p.110.