Research Paper on

Does WTO Dispute Settlement provide effective remedies for Anti-Dumping Measure?

Submitted by:

Alam Mansoor
TABLE OF CONTENTS

Abstract
Motivation

Section I  Introduction
Prompt & Effective Settlement of Disputes
Special Provisions in WTO Agreements

Section II  What is Dumping?
   a) Dumping at International level and WTO
   b) The Anti-dumping Agreement (ADA)

Section III  Concept of Remedies under WTO Dispute Settlement System:
   a) Remedies under the Antidumping Agreement
   b) Types of Remedies in WTO
      i) Cessation
      ii) Compensation
      iii) Suspension of Concessions / Retaliation
          Level of Sanctions
   c) The role of Dispute Settlement Body (DSB) to enforce Remedies
   d) Order of Remedies in WTO System

Section IV  Do the existing Remedies effectively Work?

Section V  Reforms & Proposals
   i) Compensation
   ii) Cross Retaliation
   iii) Tradable Remedies
   iv) Procedural Reforms

Section VI  Conclusion
Does WTO Dispute Settlement provide effective remedies for Anti-Dumping Measure?

Abstract:
The Antidumping and DSU are the most cited provisions with the WTO regime and are among the most contentious issues within the WTO framework as well as in the dispute settlement of the WTO members. The Anti-Dumping Agreement was a make or break deal during the WTO negotiations and has been a major concern for developed and developing members of the WTO. This paper highlights the concept and types of remedies and analysis whether these remedies fulfill the objectives of the DSU by providing effective remedy for the infringement of WTO obligations by the concerned members. The paper also considers the special provisions relating to the Antidumping Agreement for resolving dumping cases. The paper finds that though WTO provides one of the most popular remedy of impositions of sanctions which are not available at any other government represented international forums. But these sanctions do not serve the purpose of trade liberalization and creates a further barrier by impositions of tariffs to induce compliance of the DSB Rulings. In case of Antidumping the remedies prove to be insufficient as the imposition of dumping itself results in trade diversion or have irrecoverable impact on the domestic industry of the exporting country. The paper concludes with suggestions for reforms which can be further explored and should be included in the present negotiations of the Doha Round of Trade Negotiations.

Motivation:
Why DSU remedies analysis with Antidumping? The basic reason stems from the contentious nature of Anti-dumping itself. It has been frequently raised against the developing countries and these countries always seek to have more coherent rules regarding dumping. On the other hand the developed countries are
particularly reluctant to negotiate on the existing Anti-dumping Agreement. Second reason arises from the number of disputes and investigation initiated for alleged dumping. In last year 107 Provisional Anti-Dumping Measures were taken by the WTO members in one year and making to total of 1279 measures between 1995 and 2006. Therefore evaluation of DSU remedies with respect to Anti-dumping laws is one of the major issues for ongoing negotiations.

The upbeat of the WTO success is beyond doubt and in the book WTO at TEN, it was considered as a major development and breakthrough for the multinational trading system. The DSU and Anti-dumping kept haunting the GATT era and the dispute settlement lacking effective remedies to enforce compliance of the GATT proved to be a major concern. Resultantly WTO regime was established during the Uruguay Round of Multilateral trade Negotiations. When one analyze the Dispute Settlement Understanding and Antidumping Agreement, it appears that members have effectively utilized both new agreements but unfortunately the remedial provisions of the WTO have lacked the required force to ensure strict compliance of the WTO Agreements in general and Antidumping in particular. This brings the question to dig into the concept of remedies available for the breach of WTO obligations with the present regime and consider whether these remedies effectively resolve the issue of misuse of Antidumping Agreement. This paper forms part of the thesis underway on the Antidumping and National Treatment obligation of the WTO.
Section I  INTRODUCTION

This article discusses the remedies available under the WTO (World Trade Organization) agreement and of the Anti-dumping Agreement (ADA) concluded to enforce Article VI of the General Agreement on Tariffs and Trade (GATT). The WTO came into existence on January 1, 1995, as a result of Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations and the purpose of which is to provide “common institutional framework” for the Covered Agreements of the ACT.1

Going back to 1945, the Bretton Woods System was introduced after the World War II under which the International Monetary Fund (IMF) and World Bank were established. The International Trade Organization was also to be created under the Havana Charter Agreements and all the disputes arising out of the Charter’s obligations were to be administered and settled by the ITO. But unfortunately due to political reasons, the ITO was never ratified by the US Congress and thereby the idea of its creation was totally dropped.

Since the idea of ITO failed, and the GATT, which was eventually to be amalgamated and administered by ITO, was the only agreement left to regulate multinational trade among its signatories. Over the five decades period and prior to the creation of the WTO, GATT 1947 was the only agreement for administration of matters in relation to multinational trade. Since GATT was not an organization, the loopholes for its administration were apparent from as early as 1960’s. WTO has now been created to

1 The covered agreements of the Final Act of the Uruguay Round include the Multilateral Trade Agreements. The Multilateral Trade Agreements are: the GATT 1994, which includes with certain exceptions the GATT 1947; its subsequent agreements and many of its decisions and waivers; the GATS Agreement; the TRIPs Agreement; the Dispute Settlement Understanding; and the Trade Policy Review Mechanism [hereinafter occasionally referred to collectively as the Multilateral Agreements]. The Plurilateral Trade Agreements are the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement [the Plurilateral Trade Agreements]. See also BRAZIL - MEASURES AFFECTING DESICCATED COCONUT AB-1996-4, the Appellate Body defined the term "covered agreements" in terms of the Art 1.1 of DSU. Available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm#fntext1, also ref to TRIPS in INDIA - PATENT PROTECTION FOR PHARMACEUTICAL AND AGRICULTURAL CHEMICAL PRODUCTS AB-1997-5, available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm#fnt2.
ensure the compliance of obligations under the “Covered and future Agreements” and to cater for the needs of the multinational trading nations which GATT lacked.

The WTO is responsible to facilitate the implementation, administration, operation and further objectives of the agreements, provide for future negotiations of the Agreements, resolve disputes, review trade policy and “to cooperate with the World Bank and IMF.”

a) **Prompt & Effective Settlement of Disputes:**

Historically, the United Nations Charter requires;

“All members of the UN to settle their international disputes by peaceful means in such a manner that international peace and security, and injustice, are not endangered.”

The international disputes can be settled in two ways either by negotiations of the diplomats among relevant states or by way of adjudication (arbitration or judicial mechanism) by an independent body. The Covered Agreement establishing the WTO, provide for dispute settlement mechanism as a result of the Agreement in the name of Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which serves as the procedural law for dispute settlement. In the case of the Guatemala - Cement I, the AB made the following general observations about the DSU and its application and scope under Article 1.1:

"Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU (the 'covered agreements'). The DSU is a coherent system of rules and procedures for dispute settlement which applies to 'disputes brought pursuant to the consultation and dispute settlement provisions of the covered agreements.'"

---

2 Supra FN 1
3 Final Act of Uruguay Round Agreements Part II.
4 Article 2.3: United Nations Charter
The objective of the WTO dispute settlement is to provide prompt settlement of disputes among its members regarding WTO law and obligations. The prompt settlement of disputes is considered to be:

“essential for the effective functioning of the WTO and the maintenance for the proper balance between the rights and obligations of Members.”

Therefore in WTO, DSU is a fundamental instrument in the effective functioning of the multilateral trading system.

The DSU provides a multilateral settlement of disputes through quasi-judicial panel / arbitration procedures rather than unilateral actions by the member states for violations. This had been the GATT practice, as in the case of US - Trade Act sec 301, whereby the US could unilaterally impose sanctions on the countries for alleged violations of the GATT obligations. Article 23.1 of the DSU states,

“When member seeks redress of violation of obligations or other nullifications or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have a recourse to, and abide by, the rules and procedures of this Understanding.”

The DSU further elaborates that members are not to take unilateral actions without recourse to the WTO, DSU mechanism for the alleged violations of obligations. To avoid such occurrences in WTO, DSU with elaborated rules and permanent or ad-hoc adjudicating bodies has been formulated within the multilateral trading system.

### b) Special Provisions in WTO Agreements:

The WTO Agreements contain a number of agreements such as Agreement on Technical Barriers to Trade, Agreement on Implementation of Article VI of GATT 1994 (Antidumping Agreement), Agreement on Subsidies and Countervailing Measures (SCM Agreement). Appendix 2 of the DSU enlists all the Covered Agreements of the WTO.

---

8 Art 3.3: DSU.
These agreements contain special provisions relating to the nature of the agreements whose provisions are in question. These provisions prevail over any contradicting DSU provisions. However if there is no difference between the special provisions and those of the DSU, according the AB Report in *Guatemala – Cement I*, provisions of both agreements shall apply. The provisions of the Covered Agreements only apply where there is contradiction in DSU, or where they prescribe special rules.

*Article 17* of the Antidumping Agreement covers special provisions in relation to the consultations and dispute settlements. To be more precise Article 17.6 refers to the determination by the panel and also states that the provisions of this Agreement has to be interpreted in accordance with the customary rules of rules interpretation of public international law. Similarly in SCM Agreement no provision has been made for interim reports from the panel and *Article 4.6* specifically provides for circulation of final reports to the disputing parties and the members within 90 days of panels’ composition and establishment. Practically no panel has so far been able to submit its report within 90 days. Since the creation of the WTO the shortest possible time for panel report in these agreements has been 180 days since the composition of the panel to issuance of its report. In the case of *US – Foreign Sales Corporation* and *Canada – Automobiles*, the panels issued their report after more than 300 days.

These are just examples where the special rules have been agreed by the WTO Members which refer to the panel proceedings. Art 21 and 22 enforcement provisions are applicable to the Special Agreements. The Appellate Body also viewed that special agreements and DSU provisions complement each other. In the *US – Hot-Rolled Steel*, the AB expressed that in case of conflict between Art 13 of the DSU and Art 17.6 of the

---

12 Art. 1.2: DSU.
17 For example Art 4.11 of the SCM agreement refers to arbitration under Art 22.6 of the DSU.
Antidumping Agreement; Art 17.6 should prevail as it is a special provision.\(^{18}\) The table below indicates GATT Provisions have predominantly dominated the adjudication proceedings and among them DSU, Antidumping and SCM agreements are mostly cited.

### Number of Disputes in each Agreement.

<table>
<thead>
<tr>
<th>Agreement</th>
<th>No. of Disputes</th>
<th>Net usage %</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT &amp; Annexes</td>
<td>575</td>
<td>93.6</td>
</tr>
<tr>
<td>GATS &amp; Annexes</td>
<td>14</td>
<td>2.3</td>
</tr>
<tr>
<td>TRIPS</td>
<td>25</td>
<td>4.1</td>
</tr>
<tr>
<td>Total</td>
<td>614</td>
<td>100.0</td>
</tr>
</tbody>
</table>


The concept of remedies depends upon the type of mischief committed. In WTO law, there can be either violation of the Agreements itself, or there can be a complaint by a member for act which is non-violative in substance but results in violations due to its applicability. In Anti Dumping both violation and non-violation complaints have been under panel’s and Appellate Body adjudication. Before making analysis of the remedies, it is pertinent to elaborate this concept within the context of GATT Article VI and ADA as included in the WTO Agreement.

Section II What is Dumping?

“Dumping” may be defined as sale of export goods at unduly low prices to drive out competition in the importing country. A different meaning of the term arises from social perspectives. “Social Dumping” is a phenomenon where exports from one country, due to its lower export price or due to lower standard of working conditions than developed countries, are dumped into the market of importing country and are sold at lower than home market prices. Another view is that dumping is merely a legitimate price competition between domestic and foreign products and the anti-dumping measures are introduced where the prices are lowered due to unfair trade practices.

a) Dumping at International level and WTO:

Dumping in international arena is considered as price discrimination whereby “an enterprise sells the same or similar product at different prices in the domestic market of the importing country than the home market of the exporting country”. Products exported at a price lower than the normal value of the home market of the product would be subject to anti-dumping investigations as provided for in the WTO provisions. Article VI of GATT

“allows the importing member state to lawfully impose anti-dumping duties against exporting member where a product is introduced into the market of the importing member at less than the normal value of the product which causes or threatens to cause material injury to an established industry in the territory of a contracting party or materially retards the establishment of the domestic industry in the importing country.”

The Article VI of the GATT regulates the impositions of such duties in terms of levy on the dumped products which should be no greater in amount than the margin of dumping in respect of such products.

The antidumping policy has been controversial since its inception. Some commentators argued that antidumping measures are necessary to counteract unfair trade on part of the exporter whereas others argue that it serves as undue protection to the
domestic competitors and such rules are seriously flawed. During the Uruguay Round Negotiations, the developing courtiers were particularly sensitive over antidumping whereas the developed countries ensured the inclusion of such policy resulting in a new Anti-dumping Agreement which was included as last minute break through deal.

b) The Anti-dumping Agreement (ADA):

GATT Art VI sets forth the basic principles to be followed by the WTO members and allows them to incorporate domestic legislation to enforce the ADA and GATT Art VI principles. The legislative history of the ADA suggests that during the Kennedy and Tokyo Rounds of Trade Negotiations, it was considered necessary to include an agreement to implement the Art VI policy and principles on dumping. Article 17 of the ADA provides special rules for the dispute settlement pertaining to Anti-Dumping matters and overrides the DSU provisions where there is any contradiction. But generally the DSU provisions are applicable to antidumping cases. Moreover the ADA also provides procedural and evidential rules for the members to follow to conduct investigations and counter dumping through provisional duties, price undertakings and final determinations of dumping.

The antidumping measures do not aim to block imports but are taken to ensure fair pricing tendencies. According to GATT Art VI: 2 the objective of AD measures is to “offset or prevent dumping” by means of the imposition of an antidumping duty (or acceptance of a price undertaking) on imported products found to have been dumped and causing or threatening material injury to a domestic industry.

In-fact the imposition of such measures results in raising the product prices within the importing country and therefore aims to protect the domestic industry. Practically

---

21 Michael P. Leidy; Bernard M. Hoekman argued that, “...the objective of anti-dumping legislation can be only to protect nascent or established domestic industries, to the extent that the AD threat induces exporters to recoil from the foreign market...” in their article titled “Production Effects of Price- and Cost-Based Anti-Dumping Laws under Flexible Exchange Rates” The Canadian Journal of Economics / Revue canadienne d'Economique, Vol. 23, No. 4. (Nov.,1990), pp. 873-895, available at: http://links.jstor.org/sici?sici=0008-4085%28199011%2923%3A4%3C873%3APEOPAC%3E2.0.CO%3B2-%23
the AD measures restrict trade and increase domestic prices of the product resulting in higher prices to be paid by the consumer. Moreover the anti-dumping investigations may also be initiated to protect the domestic industry from foreign competitors.22

The ADA and GATT Article VI are the most cited provisions in WTO Dispute Settlement Proceedings. The recent trend suggest that India has been most active to pursue AD actions and proceedings whereas earlier the Developed countries including the US, EC, Canada and Japan were the most frequent users of the AD actions and regularly appeared in antidumping proceedings. Mexico, Brazil, India and China are among the developing countries list of AD actions. However since China’s accession to WTO in 2001, most antidumping investigations have been launched against Chinese products.23

The ADA though provides coherent rules (a discussion on those is beyond the scope of this topic) but there still exist substantial room for improvement including procedural and remedial measures to facilitate the violations of WTO Agreements. As its predecessor GATT 1947, many flaws still continue to haunt the Dispute settlement process despite the adoption of the new Anti-dumping Agreement (ADA) to implement the Article VI of the GATT 1994.24 The discussion here shall focus on the concept of remedies available to the WTO members once the antidumping measures have been declared to be in violation of the WTO agreements.

22 Ibid.
23 See WTO Anti-dumping Gateway for details available at www.wto.org/english/tratop_e/adp_e/adp_e.htm.
24 Anti Dumping legal Frame now includes GATT Article VI along the Anti-dumping Agreement.
Section III

Concept of Remedies under WTO Dispute Settlement System

The concept of remedies in GATT 1947 was more closely linked with the delicate balance of tariff reductions and the obligations imposed, for example under Art II (tariff binding) and Art III (national treatment). Violations of these obligations were considered serious because the delicate balance of tariff reductions would be destroyed if such actions were not taken strongly. Art XXIII of the GATT provided for requirements of “nullification or impairment of benefits” for a violation complaint similar to the concept of injury in contract law.25 The concept of nullification and impairment of benefits as violation and their removal as remedy have been included in WTO system as WTO law also includes the previous GATT law and the jurisprudence developed in its time.26

However it should be noted that on issues like anti-dumping and subsidies, the domestic countervailing duties were retained by the contracting parties of the General Agreement, to remedy the unfair foreign trade practices. GATT Art VI also legalized such trade remedy laws subject to certain requirements.27 Further procedural requirements were also introduced in the Tokyo Round Codes28 and the WTO side agreements in 1994.29 The Antidumping Agreement allows for certain provisional measures to counteract dumping as shall be discussed in next section.

The main objective is conformity with the WTO obligations and all other means are never preferred to compromise compliance of obligations.30

25 Italian Discrimination Against Imported Agricultural Machinery, Oct. 23, 1958, at 60, para 1 (1959), GATT B.I.S.D. [WTO Doc. Symbol BISD/75/60], UK claimed that the Italian law, whereby the credit facilities were provided to farmers for the purchase of domestically produced tractors, violated the GATT and impaired the benefits to U.K under the GATT Agreement, by decreasing the imports of U.K tractors. The panel found the Italian law, to be violative of GATT and then went on to discover how the law actually impaired benefits to U.K.

26 Supra FN 1.

27 GATT Art. VI (Anti-Dumping and Countervailing Duties).


29 WTO Subsidy Code, art. 16 (defining of Domestic Industry); WTO Anti-Dumping Code, art. 4 (defining Domestic Industry).

30 For example the DSU Article 21.5 provides for a legal ground for a compliance panel. The compliance panel is convened to resolve disputes in relation to the measures taken by members, to comply with the
The GATT 1947 also provided for “non-violation of the Agreement Provisions”. The GATT Panel concluded that where the measure amounts to nullification of benefits which a party could have reasonably assumed amounts to violation of GATT.\(^{31}\) Similarly in Sardines case, the panel concluded that the subsequent German modification “substantially reduced the value of the concessions obtained by Norway” and that Norway therefore, “suffered an impairment of benefit accruing to it under the General Agreement.”\(^{32}\)

In case of non-violation complaints, the measure or act in question is lawful under the international law. In such cases the withdrawal of the lawful act would be disproportionate precisely because of its compatibility with the WTO obligations. The DSU in such instances merely favors a solution where the effects of the act would be mitigated without questioning the legality of such an act.\(^{33}\) In Kodak Fuji case, the panel rejected the claim advanced by the US and no appeal was filed against the panel ruling.\(^{34}\)

The panel stated that,

“the ordinary meanings of this provision limits the non-violation remedy to measures that are currently being applied.”

a) Remedies under the Antidumping Agreement:

The ADA allows members to impose antidumping duties where the investigations reveal that dumping is actually causing harm or threatening to cause injury to the domestic industry. However during investigations it is likely that the import of the product under investigations may be increased in anticipation of the antidumping duties decisions and to evaluate the existence or consistency of those measures with the Agreements. Art 22, of the DSU, expressly provides for the removal of violations and states that other remedies such as compensations and withdrawal of concessions are temporary in nature.

\(^{31}\) The Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, GATT B.I.S.D. (vol. 2) at 188 (1952), [WTO Doc. Symbol BISD/II/188], Australia had failed to comply with the GATT by suddenly removing sodium nitrate from the pool of nitrogenous fertilizers that it had subsidized.

\(^{32}\) Treatment by Germany of Imports of Sardines, Oct. 31, 1952, GATT B.I.S.D. (1st Supp.) at 16 (1953), [WTO Doc Symbol BISD/15/53], the Norwegian Government argument, that the particular type of cluepiod in which they were interested, would not be treated less favorably than other preparation of the same family, was favored by the panelists for the same reason.

\(^{33}\) Art 26.1 b, of the DSU provides, “where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violations thereof, there is no obligation to withdraw the measures. However, in such cases, the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment.”

causing further harm to the domestic product and industry. In such situations Art 7 of the ADA allows members to impose provisional antidumping duties for up to 4 months generally after making a provisional affirmative determination of dumping by the national antidumping authorities.

According to WTO Annual Report of 2006, 107 provisional measures were taken by the WTO members in between July 2005 and June 2006 as reported to the WTO Committee on Antidumping as elaborated in the table below.

<table>
<thead>
<tr>
<th>Summary of anti-dumping actions, 1 July 2005 – 30 June 2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD Investigations</td>
</tr>
<tr>
<td>Provisional Measures</td>
</tr>
<tr>
<td>Definitive Measures</td>
</tr>
<tr>
<td>Price Undertakings</td>
</tr>
<tr>
<td>Measures in Place Prior to 30/06/2005</td>
</tr>
</tbody>
</table>

The ADA also regulates for imposition of *definitive antidumping measures* equivalent to the difference between the domestic price and the export price of the product under investigation as provided in Art 9 of the ADA. The above figures speak for themselves that once the antidumping authority initiates investigations, the authority is more than likely to impose the antidumping duties and in some cases may resort to the price undertakings by the foreign exporter. The antidumping duties once imposed can continue so long as and to the extent *necessary* to counteract dumping causing injury.\(^{35}\) Necessary is determined by considering whether the imposition of duty is needed to offset dumping and upon a finding of whether it is *likely to recur* if removed.\(^{36}\) However the ADA Art 11.2 stipulates that the antidumping duty imposing member is under an obligation to review the need for continued antidumping duties after a reasonable time. In any case the maximum duration for such duties is 5 years during which they have to be reviewed under the sunset review clause of Art 11.3. These are the remedies usually available to a member where unfair trade practices by the exporting member causes harm to its domestic product or manufacturer.

\(^{35}\) ADA: Art 11.1
Similarly when antidumping measure are imposed on a product from one member, the WTO provides remedies through exhaustion of dispute settlement proceedings where member challenges the imposition of antidumping duties amounting to nullification of benefits guaranteed under the WTO Agreements. In such cases the provision of special agreements as well the DSU apply to the proceedings.\(^{37}\)

\section*{b) Types of Remedies}

\subsection*{i) Cessation:}

Cessation and non-repetition is considered to be the most desirable remedy in international law. The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;


In WTO Law this form of remedy exists in terms of the withdrawal of the questioned measures under Art 19 and Art 3 of the DSU. The Panel or the Appellate Body determines the question of the consistency of the measure in accordance with the WTO Law. If in-consistency exists, the Appellate Body or panel requires the violating member to bring such action in line with the WTO rules and provisions. Therefore cessation provides for dual remedy in WTO. At first, it operates to halt the questioned measure when raised by the complainant and then it requires the violation measure to be brought in line with the WTO Agreements. The question which follows is of the remedy being effective or not. This issue is addressed by the DSU Art. 21.5, whereby the Compliance Panel Procedure is adopted, which the original panel determines whether the remedy i.e. withdrawal of the questioned measure has been fulfilled by the losing party.\(^{38}\) The complaining party can either question the statute itself or its mere application depending

\(^{37}\) Supra FN 18 on \textit{US – Hot-Rolled Steel}

\(^{38}\) DSU, Art. 21.5. Even under GATT 1947, which lacked an express provision as to a compliance panel, an original panel could be re-convened to examine whether the defendant party had complied with recommendations by the Contracting Parties (panel).
upon the facts of the case. E.g. *Non-Rubber Footwear Panel* held the US Trade Act 1974 provisions of Section 301, is contradictory in substance and not by mere application by the Executives.\(^{39}\) While declaring the application of the measure to be in violation, the Appellate Body did not recommend the repeal or amendment of the Sec 609, but only its application. The Appellate Body report in *US Shrimp Turtle case* emphasized that the US had not seriously attempted to negotiate with the other complainants while multilateral procedures such as Inter-American Convention for the Protection and Conservation of the Sea Turtles were available.\(^{40}\)

Therefore, it can be stated that new WTO system seeks to resolve the matter in a constructive manner by way of leaving a margin of discretion to the offending member. By this way the system regards the margin of discretion of the offending member, by leaving the statute intact and only suspends its application to the extent of the violation.

**ii) Compensation:**

DSU Art 22.1 provides for compensation as a temporary remedy in WTO dispute settlement mechanism which also includes for unlawful dumping measures. Compensation in general is not trade distortive in comparison to withdrawal of benefits or suspension of concessions, which are trade distortive in nature. Until early 2006, compensation has been mutually agreed in three cases in WTO. In two cases it was in the form of concessions in tariffs.\(^{41}\) In the third case the parties agreed on monetary compensation but it was specifically provided in the agreement that it is a temporary remedy.\(^{42}\) The main issue for compensation is the agreement between the parties to reach a mutually agreed amount, and this has been the major hurdle in assessing the loss due to impairment or violation. The parties for this reason prefer to opt for suspension of concessions rather than compensations.

---


\(^{42}\) *United States - Section 110(5) of US Copyright Act (US - Section 110(5))*, Notification of a Mutually Satisfactory Temporary Agreement, WT/DS160/23, 26 June 2003.
In international law arena the tribunals and the courts have recognized the remedy of compensation to the injured state due to internationally wrongful act committed by the state. The International Court of Justice ICJ, formerly known as Permanent Court Of international Justice (PCIJ) in Chorzow Factories case, stated that,

“it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore, is the indispensable complement of failure to apply a convention.”

The ICJ ruling Chorzow Factories case encourages the use of compensation to repair the damage caused by the breach of international law. In ILC Draft Articles on state responsibility, payment of compensation has also been stated as a valid remedy for breach by State for internationally wrongful act. In International Court for Settlement of Investment Disputes (ICSID), compensations in the form of damages are recovered in resolving the investment disputes between private investors and the States.

However it should be noted that DSU Art 22 only allows for the mutually acceptable compensation as a temporary remedy to the complainant. It should also be kept in mind that DSU Art 22.1 also provides that compensation “shall be consistent with the covered agreements,” which include GATT 1994 Art 1 on Most Favorite Nation Obligation (MFN). Under Art 22, the party offering compensation to the complainant is to provide the same option under the Agreements, to all other third parties. Therefore any such agreement for compensation has to be in line with the WTO Law and the members states are not free to agree on which ever terms they like, for a mutually agreed compensation, as the main objective in WTO dispute settlement mechanism is to ensure compliance. However it should be noted that the option of compensation would be very attractive to developing or least developed members of the WTO rather than withdrawal of concessions or retaliation to enforce compliance. One rational for this preference seems to be their smaller and weaker economies and compensations in the form of remedy can help to support their financial hardships as shall be discussed later in the next section.

iii) Suspension of Concessions / Retaliation:

43 1929 PCIJ Series A, No 4 & 8, at pg 21.
The sanctions are basically in the form of “suspension of concessions.” The mechanism is self-enforced on authorization of the Dispute Settlement Body under Art 1.1 of the DSU. WTO Dispute Settlement Body has authorized suspension of tariffs in a number of cases to enforce compliance of the WTO obligations which also includes antidumping cases. The purpose of recommending concessions is not only to ensure conformity to the existing obligations but also to discourage future breaches. However it cannot be said that the concept is new, as it also existed under the GATT 1947 and was provided for in Art XXIII: 2 of the GATT and which is applicable to WTO as well.

In International Law, sanctions are readily used due to its deterrent effect on the state against whom such withdrawal of concessions is agreed. In United Nations, there are numerous examples to ensure compliance of the International Law, where sanctions have been approved by the UN Security Council.

The concept of sanctions in WTO law however is different from that of International Law. In WTO, withdrawal of concessions is imposed by the complainant member on approval from the Dispute Settlement Body. The effect of sanctions depends heavily upon the economy of the member against whom they are imposed. For least developed or developing countries, they do enforce compliance of the obligations but when such withdrawal is by a poor economic member against a stronger economy, they do not have the same deterrent effect. The enforcement problem of the GATT system has now been rectified in the new system and which has become a major feature of the WTO Law and its success. In the present system, the threat or operation of sanctions can now only be avoided by a consensus vote of the DSB wherein, it would not be possible to

---


46 Ref. above FN 1, where by all the decision and the Agreements of the GATT 1947 are now being included in the WTO.

47 Recent example includes the withdrawal of sanctions against Iran for its pursuance of nuclear programme.
convince the winning party to a dispute, to vote against itself and for which it would have
gone through the whole dispute settlement mechanism.48

**Level of Sanctions:**
In recommending withdrawal of concessions or tariff concessions, the greatest
hurdle arises to assess the level of such impositions against the violator member. One
view is that the sanctions must be in proportion to the actual trade loss i.e. to the extent of
nullification and impairment which the complainants have suffered due to the questioned
measure. However the punitive view is that the WTO sanctions are compliance-inducing
mechanism and any level of sanctions are considered to be justified by this approach. In
the recent *US – FSC (Article 22.6 – US)*49, at the final stage of the FSC saga, the U.S
challenged the E.U’s request for authorization of a $ 4 billion sanction against U.S under
DSU Art 22.6. The *Arbitrators rejected the US arguments of counter measures
equivalent to the actual trade loss and stated that not only the WTO sanctions but the
general countermeasures in international law should compel the violator to comply with
the rules*, meaning thereby, to withdraw their violative measures. It should also be noted
that this report did not mention the *Art 22.4 of the DSU*, which requires a quantitative
benchmark i.e. “*the level of sanctions be equivalent to the level of nullification or impairmen*t.” It can be stated, that the primary objective is to induce compliance with the
rules by the violators, however a certain cap to the scale of sanction has to exist in the
light of equity and fairness.50

The same approach was adopted by the arbitrators in *EC- Banana III* Case where
it was held that the purpose of suspension is to induce compliance and conformity with
the obligations breached.51 However it is practiced that there should be some limitation to
calculate the complainant’s actual trade loss due to nullification or impairment of benefits

---

49 Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse
to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement
50 Draft Articles on Responsibility of States, Art. 51 (Proportionality), prepared by the ILC suggests the
proportionate requirement while taking into account the gravity of Wrongful Acts.
51 Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution
of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU [EC –
by a member’s illegal measure as suggested by the Arbitrators Report in *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US).*

Another important aspect is in-terms of requiring the members to withdraw their illegal measure and to make reparations to undo the damage caused due to its actions. The panels have recommended such degree of actions in their reports. The Panel in *Australia Automotive Leather II (Article 21.5 – US),*\(^5^3\) held that:

“Based on the ordinary meaning of the term "withdraw the subsidy," read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement is not limited to prospective action only but may not encompass repayment of the prohibited subsidy.”

Contrarily, WTO members have been reluctant to have such retrospective remedies. Under the WTO law, the priority has been given to withdrawal of measures than favoring the retrospective remedies. A recent compliance panel under DSU Art 21.5, suggested the repayment of the prohibited subsidy under the WTO Subsidy Code, but the parties agreed on the principle of prospective implementation of the findings.\(^5^4\)

From the above it can be argued that test of nullification and impairment of benefits does not reflect actual loss incurred by the complainant. Therefore to suggest that the level of actual loss has to be determined can be misleading, e.g. is it possible to find out the actual trade loss where Antidumping duties had been imposed resulting in trade diversion taken by a member. And the questions arise as to what impact such illegal measures can have on least developed economies.

---


54 Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act[US Section 129(c) URAA],* WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581, ¶ 3.41 both disputing parties, the United States and Canada, agreed on the "principle of prospective implementation" under the DSU.
There is also a concept in cross retaliation in WTO whereby if the sanctions appear not to be substantive enough to induce compliance, the complainant has the right, subject to Dispute Settlement Body (DSB)\textsuperscript{55} approval, to withdraw concessions in all sectors or sectors where it would be material to the offending member. Andrew T. Guzman (2002, p 186) summarizes the concept of remedies with the WTO in the following terms;

\begin{quote}
\textit{The WTO provides a dispute settlement mechanism under which, if all else fails, a complaining party may impose sanctions on a party found to have violated its WTO obligations.}
\end{quote}

To exercise these remedies the unilateral actions by the concerned members are expressly prohibited within the WTO system unless those remedies have been approved and adopted by the Dispute Settlement body of the WTO. The DSB is considered to be the most powerful body of the international trade system. Any action for resolving dispute and decision of the adjudicating bodies have to be adopted by the DSB.

\textbf{c) The role of Dispute Settlement Body (DSB) to enforce Remedies:}

The whole dispute settlement mechanism is governed and administered by DSB under art 2.1 of the DSU. Under the WTO agreement, the General Council is empowered to convene and act as DSB.\textsuperscript{56} “The Art 2.1 of the DSU elaborates on the responsibilities of the DSB and provides that,

\begin{quote}
\textit{DSB has the authority to establish panels, adopt panels and appellate body reports, maintain surveillance of implementation of rulings and recommendations, and other obligations under the covered agreements.}
\end{quote}

The DSB is also empowered to appoint members of the Appellate Body and to adopt Rules of Conduct for WTO dispute settlement. The decisions by DSB are usually taken by consensus.\textsuperscript{57} However the type of consensus depends upon the nature of the decision it has to take. There is a reverse or negative consensus rule when the DSB decides on establishments of panels, adoption of panels and Appellate Body reports and

\textsuperscript{55} DSU: Art 2.1.
\textsuperscript{56} Art IV:3 of the WTO Agreement.
\textsuperscript{57} Art 2.4 of the DSU.
when the DSB has to authorize suspension of concessions and other obligations.\textsuperscript{58} The reverse consensus requirement means that the decision by the DSB would be taken unless the WTO members decide by consensus to not to take the decision or adopt a report. The chances for such a reverse consensus are slim as there shall never be a member to vote for its own detriment. However there are chances that a member would not forward a report for adoption and the report of the panel or Appellate Body remains un-adopted as it happened in the case of Banana III.\textsuperscript{59}

To enforce any remedy for any violation or non-violation complaint, DSB authorization is required under the DSU procedures in WTO law. Firstly, the existence of non-compliance with the original decision of the panel or the Appellate Body has to be recommending that the violation exists and secondly, the level of sanction i.e. the extent of concessions to be suspended has to be determined. For antidumping cases once the violation of ADA has been determined and the report of Panel has been adopted the members have to adhere to the DSU Art 21 and 22 provisions.\textsuperscript{60} The Art 21 provides for the compliance process convened to assess the implementation of the original panel or Appellate Body rulings. The details of the compliance process deviates from the topic.\textsuperscript{61}

The controversy usually arises in terms of determining the extent of concessions to be suspended. Art 22.6 provides that, “..., if the Member concerned objects to the level of suspension proposed ... the matter shall be referred to arbitration.”

In the case of Banana III,\textsuperscript{62} the U.S requested the DSB to “authorize suspension of concessions to the EC and its members of the tariff concessions and related obligations under GATT 1994 covering trade in an amount of U.S $ 520 million” after unilaterally determining that E.C failed to implement the Appellate Body’s ruling in the original case. The arbitration panel disregarded this E.C approach and ruled that “in determining, whether the level of suspension is proportionate to the nullification or impairment under Art 22.7, the panel should in advance determine, whether the E.C.’s revised regime,

\textsuperscript{58} Art 16.1, 16.4, 17.14 and 22.6 of the DSU.
\textsuperscript{59} Panel Report on EC – Banana III (Art 21.5 - EC) circulated in April 1999.
\textsuperscript{60} DSU: Art 21.5 provides that “Where there is a disagreement as to the existence or consistency with the covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.”
\textsuperscript{61} For details see DSU Article 21.
\textsuperscript{62} Above FN 51.
which it had established as an implementation of the original Banana case decision, violated the WTO rules or not.” The DSB has also adopted the same approach for the antidumping cases.⁶³

Despite this case law, it appears from the later cases that the complainants firstly, refer the matter to the compliance panel under Art 21.5 in order to determine disputes on compliance with the panels or Appellate body recommendations, and then seek authorization of the DSB for suspension of concessions even in antidumping cases.⁶⁴ This approach has gained much favor among the members so that the unilateral determination of implementation, of the panel or Appellate Body decision, should not be adopted to seek authorization of suspension of concessions.

It is pertinent here to draw some light on the sequence of their application.

d) Order of Remedies in WTO System:

e) The crucial point which draws attention is whether the parties have a choice of remedy which they can seek from the WTO law?

Professor Jackson emphasized that DSU “clearly establishes a preference for an obligation to perform the recommendation” based upon the law laid down in DSU. Under Art 19 of the DSU, the panels and Appellate Body basic duty of recommendations is to require the violative measure to be brought in conformity with WTO rules and obligations. The compensation only serves as the temporary remedy under Art 22.1 of the DSU and is coupled with the duty of surveillance by DSB until the performance of rectification of the violative measure has not taken place.⁶⁵

In the ILC Draft Articles on State Responsibility, it is emphasized that a State in breach of international law continues to bear a duty to perform the obligation that it breached and that any “countermeasures”, i.e. sanctions should be aimed to induce

---

⁶⁵ Art 22.8 of DSU.
compliance of the international law. Following the recent approach of the WTO, the ultimate goals is to achieve adherence to the WTO law and reaching an amicable settlement of disputes, therefore compensations seems to be just a temporary remedy and is for the purposes of seeking time from the winning party to ensure compliance. The Banana Saga suggest a remedy of waiver to the losing party, which for the purposes of international arena, seems a reasonable solution rather that suggestion of flat breach of WTO law.

---

66 Draft Articles on Responsibility of States, Art. 29 (Continued Duty of Performance) & Art. 50 (Object and Limits of Countermeasures).
67 WTO Ministerial Conference, The ACP-EC Partnership Agreement, WT/MIN (01)/15 (Nov. 14, 2001) (authorizing a waiver to GATT Article I (MFN) for both EC and ACP countries and thus ending a long-standing banana dispute).
Section IV  Do the existing Remedies effectively Work?

The upbeat of the WTO dispute resolution mechanism has been due to the remedial provisions it contains for the enforcement of its institutional rulings and recommendations. This concept of remedies is related to the imposition of sanctions for non-fulfillment of the treaty obligations which are legally imposed upon a member for breaching its treaty commitment after determination by the WTO institutions and adoption by the DSB.

The question arises that whether these remedies are exercised in all cases and whether they fulfill the objectives of the WTO and the Antidumping Law. It can be argued that sanctions would amount to violation of the WTO law itself. The aim and objective of the WTO is to liberalize trade and introduce transparency and harmony within the world trade system. The antidumping laws similarly targets international price discrimination by reducing elements that could harm the domestic industry of WTO members. The impositions of sanctions and seek redress through cross retaliations do not pursue these objectives rather further builds upon the trade barriers which they try to eliminate.

Similarly the antidumping laws do not go to the root cause of the dumping phenomenon. State sponsorship of local industries and accumulation of wealth by the rich remain despite the cases where lawful antidumping measures are introduced on foreign product. The nominal wages paid to the poor workers remain despite the imposition of such measures. In fact such measures should serve the distribution of wealth among the low paid working classes. This situation itself needs further consideration and provide a fruitful food of thought but is beyond the scope of this topic.

Sanctions, is considered to be the most effective remedy under the new system as highlighted above. However, in international law, as we have envisaged power imbalances between rich and the poor, the uniform application of these remedies is not practicable. In any way the use of sanctions against losing member may induce compliance of the WTO law, it simultaneously hurt the inflictor’s own people and economy. Furthermore following the principle of rule of law, the option of retaliation or
cross retaliation makes it a law of the jungle, wherein two parties fight for their rights, approaching the forum such as WTO is of no use to the winning party, if the end is to do the same as done by the wrong doer. For instance, World Health Organization does not authorize one country to spread viruses to another and similarly World Intellectual Property Organization does not fight piracy with piracy. Even if the sanctions are imposed by a country, it only benefits small group of related industry but the general welfare of the people is at stake in such scenario, as imposing restriction means more tariffs and high pricing for the consumers in the winner state itself. However in case of a poor or developing country such mechanism is perfect to induce compliance but when such issues raise against stronger economic nations/members, the outcome is yet to be seen.

The remedies are only available, where the complainant has obtained recommendations through adjudication or arbitration, which are presented for adoption to the DSB. However there are chances that a member would not forward a report for adoption and the report of the panel or Appellate Body remains un-adopted as it happened in the case of Banana III.68

Another possible solution to counter the antidumping or other action by a member state for alleged violation of the WTO law is to apply the questioned discriminatory tax measure on domestic products to eliminate the discrimination of the domestic and foreign goods. The WTO law requires lower the tax rates for foreign producer rather than to raise the domestic prices which would mean a negative obligation. But the possibility and examples from the GATT system are there, such as GATT Superfund (1987) panel, in which a U.S domestic tax was declared discriminatory but the panel admitted the possibility that the U.S may raise its internal tax to cover the gap between foreign and domestic producers. In Shochu I case, Japan raised its internal tax on Shochu, when it was found to be in violation of the national treatment standard to reduce the foreign and internal tax gaps.69 This kind of negative implications on domestic economy would result in injustice and definitely undermine the objectives of the WTO law.

The antidumping laws provide no remedies where the unlawful measures impacts the foreign exporters. When it comes to states own regulatory authority, the WTO members’ domestic regulations are also influenced by the domestic political pressures. The political motivation is also evidenced from the US practices in the case of US – Offset Act (Byrd Amendment)\(^{70}\) where distribution of duties collected from foreign products in conjunction with the Continued Dumping and Subsidy Offset Act of 2000, to the domestic manufacturers was held contrary to WTO AD & SCM Agreements. Another classic and more specific case establishing the political and domestic influence to impose AD and SCM on foreign products is the Boeing – Airbus Saga. The matter has yet to be adjudicated in the WTO as reported in the dispute of US — Large Civil Aircraft—Complainant: European Communities\(^ {71}\) for which the request for consultation has been made by both parties in October 2006. This shall be biggest test of the WTO dispute settlement process. Both members allege government involvement in financing and protecting their airplane manufacture industries in terms of subsidization and counter veiling measures to close their respective domestic markets for their competitor. The antidumping investigations authorities adopt such practices which contradict the purposes of imposing antidumping duties.

The ADA allows members to incorporate domestic rules through domestic legislations, for the implementation of Art VI including the ADA but theoretically should not impose additional restrictions or burdens on other members. In doing so, the WTO members have imposed additional requirements or conditions along with the Art VI obligations to suit their own domestic social and cultural needs. The legislative history of the US produced a remarkable antidumping legislation in 1916 to counter the foreign unfair competition policies within the US. The Act introduced a criminal liability allowing US Department of Justice (DOJ) Antitrust division to prosecute the offenders and also imposed treble the amount of fines for breach of the Act. In the case of Zenith


\(^{71}\) *United States — Measures Affecting Trade in Large Civil Aircraft Complainant: European Communities DS317 & European Communities — Measures Affecting Trade in Large Civil Aircraft Complainant: US DS316*
Radio Corp. v. Matsushita Electric Indus. Co., the court applied the 1916 Act as an antitrust law rather than as an antidumping law. However the legislation was challenged again in Geneva Steel Co., where civil action suit was brought against the defendants to seek damages. The matter however reached the WTO panel and AB. The AB affirmed the panel observation that the 1916 Act was an international law dealing with antidumping situations due to the plain wording of the Statute, contrary to what the US courts and Supreme Court had earlier determined in previous ruling on the Act. However the significant of this case arises due to the fact that members adopt policies which go far than the criteria laid down in the WTO antidumping provisions as in this case the law had imposed criminal prosecution as well as civil action liability to the offender.

Similarly in the EU there is a “community interest” additional requirement along with the usual antidumping requirements. The 1996 Anti-Dumping Regulation 384/96, which was promulgated to implement the ADA within the EU specifically provides for this additional requirement. In a recent investigation against the Chinese Leather Shoes the EC alleged dumping by the Chinese shoe manufacturers on the grounds that the Chinese Government had subsidized the Chinese Shoe industry by allowing additional tax holidays, cheap financing and improper assets valuation. The investigation could not establish the actual dumping criteria but used the Subsidy (SCM) criteria to determine the dumping which resulted in imposition of antidumping duties against shoes from

---

75 “Community Interest” is defined by Article 21 of the Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Union. Available at http://ec.europa.eu/trade/issues/respectrules/anti_dumping/legis/adgreg01a.htm#21
China and Vietnam. However a mutual agreement was reached on the basis of lesser duty rule.

During the anti-dumping ban imposed on Pakistan cotton by the United States the domestic industry of Pakistan was hit hard by the imposed measures as cotton is one of the major exports of the country. According to the empirical research conducted by the author in July August 2007, to analyze the consequences of unlawful antidumping measures by the US as held by the Appellate Body particularly Multan region of the country which is famous for its cotton growth, cotton ginning and spinning mills, there was a 98% default ratio on part of the cotton ginners and growers. Overall during these restrictions the Cotton Export and the cotton market suffered huge losses within the region.

The concept of remedies adopted in DSU as well in ADA, these concerns and implications of unlawful dumping measures are not addressed to provide an effective relief to the injury sustained by the impositions of such measures. The reform of the ADA has been in discussions of the Doha Round of Trade Negotiations but so far no conclusion or change in ADA is envisaged.

---

Section V  Reforms & Proposals

The DSU provides for the compensation as a remedy in terms of interim measures pending the removal of violation by the Defendant. As discussed earlier compensation suit the developing and Least Developed countries more than the actually seek retaliation.

i) Compensation:

The ongoing negotiations on Doha Round contains proposals for making compensation a more viable alternative to retaliation as reported presented by Various WTO members on DSU reforms proposal as well as considered by Mr. Bruce Wilson.79

In US – Combed Cotton Yarn,80 the questioned Anti-Dumping measure was imposed for three years and it took two years and nine months for determination by the AB and the eventual withdrawal of the violation measures by the US. Moreover according to a survey imposition of the US sanction on cotton yarn lead to the bankruptcy of many local cotton factories and ginning mills due to their inability to repay the bank loans.

The poor state economies like Pakistan are on much weaker footings to pursue compliance against economic powers, due to their political and diplomatic interests. Smaller economies have smaller trade stakes as compared to stronger economies. The small economies are more dependent on these small stakes as compared to larger economies. If we take the agriculture sector for instance, an embargo on a weaker economy would hit more rather than a developed member having diverse trade interests and having imports from more than one country. The loss sustained by the weaker claimant’s economy continues as the WTO provides for the defendant to continue violation until the stage of adoption. The claimants with lower economy are hard hit by

80 Supra FN 78.
this approach and prefer to have a compensatory measures for the losses sustained due to delays and violations.  

Compensation can also be in the form of reductions in future tariffs to the aggrieved party. This shall be a positive step for the industries in the exporting countries to recover their financial losses due to the violation of the WTO Agreements. These shall be much easier for administrative authorities to implement as duration of time for such concessions can be easily determined by the implementing authorities. The future tariff concession must be equivalent to the duration of the alleged violation i.e. from the time when such higher duties were imposed on export products by the investigating authorities of the importing country. Moreover it shall also reduce the risk of fraudulent complaints by the domestic industries of the importing country as such a remedy shall imply the same consequence to the domestic industry as those faced by the foreign country’s exporting industry. There is also a possibility of mutually agreed arbitration under DSU Art 25, as recognized by the arbitrators in the *US – Section 110(5) Copyright Act arbitration*. Utilization of Art 25 arbitration has also been proposed in the Doha round of Negotiations by the African Group. The Group suggested the possibility of compensation through arbitration by mutual agreement as well as the more frequent use of Arbitration under Article 25 of the DSU to cut down on delays.

**ii) Cross Retaliation:**

Another possible solution is to seek cross retaliation as has been envisaged in the US – Gambling case. The recent compliance panel report in US – Gambling Services (Article 21.5) report depicts that time is not far that small economic members shall also exert their rights guaranteed under the WTO Agreements specially where they are not in a position to reciprocate measures within the same sector of the trade and shall seek compensation or cross retaliation to protect their interests. The complaint was launched

---


by Antigua and Barbuda a very small country of around 70,000 residents, where offshore betting services for the US horse racing Industry were the target of US Gambling Laws which were found to be in violation of GATS agreement. The economic strength Antigua and Barbuda is in not strong enough to impose retaliatory measures and has to resort to cross sanctions for injury being sustained due nullification of their benefits by the US Gambling Laws. It is considered that if they impose retaliatory measure on copyrights of the US products, the stakes shall be much higher for the US as both its Gambling industry and Copyrights protection of its products e.g. music industry or films shall be a huge loss to the US Economy. Such sort of retaliations can actually enforce the compliance of WTO rulings.

iii) ** Tradable remedies:**

The concept of tradable remedies was first put forward by Mexico in response to the calls for proposals for the reforms negotiations of the DSU. Mexico who is actively involved in Anti-dumping and CVD disputes at WTO forums proposed that “The suspension of concessions phase poses a practical problem for the Member seeking to apply such suspension. That Member may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests...There may be other Members, however, with the capacity to effectively suspend concessions to the infringing Member.”

85 Ibid, at p. 6.

The tradable remedies means that a member, who is authorized to suspend concessions by the DSB against the WTO member found in violation of the WTO agreement be allowed to trade its right to other member who is in a better position to enforce and induce compliance by the defaulting members. This has two advantages namely,

1) **“Incentives for Compliance: Facing a more realistic possibility of being the subject of suspended concessions, the infringing Member will be more inclined to bring its measure into conformity.”**

and

2) **“Better readjustment of concessions, since the affected Member would be able to obtain a tangible benefit in exchange for its right to suspend.”**

85 Ibid, at p. 6.
This proposal would imply more far reaching effects to enforce compliance of the DSB rulings and has been considered as an effective remedy. A member with efficiently allocated resources would create a balance as compared to developing of least developed country pursuing implementation and compliance of the DSB and would not face further hardships caused to its own economy by imposing retaliatory measures. Bagwell, Mavroidis and Staiger support this proposal and considers the auctioning of right to retaliate would fulfill the objective of DSU enforcement mechanism to induce compliance. By auctioning its right to amount of actual benefits being impaired the aggrieved member shall not only mitigate the harm inflicted on it industry by violatory measure imposed by the other WTO member but shall enforce compliance where retaliation shall lead to equal affect on the violators own domestic industry.

vi) **Procedural reforms:**

To counter all these implications, it is necessary to have a more vigorous surveillance panel to implement decisions of the panel or Appellate body so that the obligations and the objectives can be adhered to, by the violating member. Procedural reforms of the DSU and the Anti-dumping agreement are underway but no agreement has yet been concluded due to diversified interests of the developed and developing blocks within the WTO members. But these deadlocks do not bar the consideration of proposals that in authors view are worth to be explored further. Such proposals may include the following apart from the few substantive proposals raised above and excluding those already under negotiations:

One possible solution would be to empower the DSB with the same powers as those of European Commission to initiate proceedings against the member itself for faulty compliance. Such mechanism shall lead to automatic initiations of proceedings

---

86 Bagwell, Mavroidis and Staiger (2004) in *The case for tradable remedies in WTO dispute settlement*, states that “the theoretical results of (2003) lend support to Mexico’s suggestion that auctioning countermeasures in the WTO can lead to both better incentives for compliance and better readjustment of concessions, if we gauge the incentive for compliance on the basis of the cost inflicted on the infringing government (more is better), and if we gauge the readjustment of concessions on the basis of the expected revenue generated by the government running the auction (more is better).” Economics Department, Discussion Papers, Columbia University Year 2004,
particularly where the members economic imbalances and dependency restricts them pursue implementation actively.

Moreover the DSB if allowed to impose fines for continued violation as well as for the infringement of obligations shall deter the members of misusing the WTO forums. As in the case of Anti-dumping, members once they impose antidumping duties exert all possible efforts in retaining them until the compliance and reasonable duration to implement have not been exhausted. By creating a concept of penalties for the infringements if the measures found to be unlawful during WTO proceedings, shall demand the domestic authorities to be on guard.

Another procedural reform may include interim measures to suspend the imposition of duties until the determination by the panel where the case has been brought to the panel adjudication process. The unilateral determinations by the domestic authorize shall be subject to final review of the WTO and shall ensure the uniform application of the ADA. The interim review mechanism is universally recognized in other international adjudicating bodies such as ICSID.
Section VI

Conclusion

There is no doubt that the WTO Dispute Settlement mechanism is jewel in the crown of the multilateral trading world. The Antidumping regime has not changed much since GATT apart from some procedural changes. The ADA was introduced as a last minute break through deal by the developed members of the GATT. The WTO does not provide for the power imbalances of the world trade and economy. The poor economic participants and the weak nations of the world, suffer the same struggle as they had always been in other international forums and scenes. The present remedies within the WTO regime are recognized a major step forward with the possibility of sanctions but there are still many issues of the GATT procedural and substantial which needs to be addressed. The remedies provided in the current system are a major break through but the concept of sanctions does not offer much to these members. Violative measure can possibly prove to destabilize the whole economy of the country itself and then to retaliate in terms of sanctions would be a nail in coffin. The system should provide for other options such as compensation, to such members.

Sanctions do provide a major breakthrough but by application they do not address the root cause of the issue of dispute. They are just used as a mechanism with no punitive or determent element attached to them. Moreover the diplomatic relations and trade dependence also establish that such action is rarely taken to enforce compliance. The delaying tactics as well the unilateral determination by the domestic authorities still prove to be contentious issues. Among other issues, the gaps between the trading blocks are specifically targeted at the reforms of the Anti-dumping Agreement as well DSU where the developing countries seek to have more coherent set of rules and procedures whereas the developed countries do not wish to pursue this course.

Therefore for the time there are no effective remedies to resolve the haunting issues due to the existing trade blocks significantly reducing the scope of negotiations to introduce the much needed reforms to counter act misuse of the Special agreements like Antidumping and SCM.
However it must be remembered that the system is still young and has yet to mature. In comparison to United Nations, there is no effective remedy for breach of international law apart from resolutions of the General Assembly or decisions of the Security Council. Similarly the International Labour Organization fails to enforce compliance of the international labour standards and it is thought that WTO Dispute Settlement Mechanism should provide for these violations. Due to the provision of remedies the system has been very popular among the trading world as compared to GATT 1947. And by the passage of time and with some improvements in the mechanism, the system should be able to counter its critics.
Bibliography:

12) *Doha and Beyond, The future of Multilateral Trading System*, By Moore, Cambridge University press.
22) Turab Hussain, Lecturer, Department of Economics, Lahore University of Management Sciences. Article on “Managing the Challenges of the WTO Participation” (web site retrieved on 02/04/2007). http://www.wto.org/english/res_e/booksp_e/casestudies_e/case34_e.htm