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**Globalization and the WTO Dispute Settlement Mechanism:  
Making a Rules-based Trading Regime Work**

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**Abstract:**

We discuss the role of the dispute settlement mechanism (DSM) of the World Trade Organization (WTO) in the context of a complex characterization of globalization. The dispute settlement mechanism (DSM) of the World Trade Organization (WTO) is at present a controversial exercise at the international level. Reasonable people disagree as to whether it has enhanced and maintained equality between developing and developed countries. Through examining its concrete provisions, procedures and several important factors such as resource availability and political influence outside the WTO, it can be found that there are conditions under which the new rule-based DSM can indeed contribute to promoting developing countries' status in the system. Consequently, it can provide them with more power to defend their own interests. However, the DSM still does not eliminate the power-based relationships among countries. Developing countries are still affected by biases, which stem from several sources such as high financial and legal resource costs, political pressure generated outside the WTO, declarative WTO legal provisions, etc.. A reformed WTO with less asymmetry of power will result in a higher level of global social welfare.

## I. Introduction

As one of the major outcomes of the Uruguay Round, the WTO Dispute Settlement Understanding (DSU) is regarded as one of the central pillars of today's multilateral trading regime. It is expected that this new rule-oriented dispute settlement mechanism (DSM) can replace the GATT's power-based dispute resolution system, thus can bring more equality and protection to developing countries. Some researches support this claim. According to Holmes, Rollo and Young, in the DSM of the WTO, there is no strong evidence of a bias against developing countries either as complainants or respondents.<sup>1</sup> In other words, the new DSM enhances equality between developing member countries and developed ones.

However, there are also suspicious voices questioning whether the DSM can be really impartial. The fact that developing countries usually find themselves in a weaker position in the WTO compared with industrialized members may indicate that the DSM needs to contribute more efforts to improving the equality status of developing countries. Besson and Mehdi, through their empirical research, conclude that the DSU procedure is biased against developing countries.<sup>2</sup> Shaffer points out three primary challenges to equality that developing countries have to face in the new DSM, including lack of legal expertise, constrained financial resources and political and

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<sup>1</sup> See Peter Holmes, Jim Rollo and Alasdair R. Young, "Emerging Trends in WTO Dispute Settlement: Back to the GATT?," World Bank Policy Research Working Paper 3133, September 2003.

<sup>2</sup> See Fabien Besson and Racem Mehdi, "Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis" (paper presented at the International Conference on Policy Modeling, Paris, France, June 30 – July 2, 2004).

economic pressures.<sup>3</sup> Hoekman and Mavroidis also argue that the WTO inherits all of the asymmetries that arise when there are substantial differences in bargaining power, since it rests on decentralized enforcement of international obligations.<sup>4</sup>

The purpose of this paper is to examine whether the new rule-based DSM of the WTO brings about more equitable outcomes among participants, especially, whether the developing members under the new mechanism enjoy more equality and have more power to protect their self-interests. Our argument is that while it is true that relative to the GATT mechanism, the DSM better equalizes power disparities between developing and developed countries, the new system is still more favorable to industrialized members than to developing ones, and there are many other obstacles in developing countries' way of pursuing equality.

This paper has six sections. After this introduction, next section provides the framework of globalization in which the WTO is embedded. Section III provides a brief overview of the DSM framework. Section IV analyzes how the new DSM brings more equitable outcomes for developing countries. Section V elaborates the reasons why developing members still do not possess sufficient equality under the new mechanism. Section VI concludes.

## **II. Globalization and WTO**

With frequent use the word globalization has by now acquired the status of an academic cliché. For many, the twin tendencies of the globalization of production and the emergence of a new international division of labor represent deep structural

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<sup>3</sup> See Gregory Shaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation," *World Trade Review* 5, no.2 (2006): 177-198.

<sup>4</sup> See Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance," in *Developing Countries and the WTO: A Pro-active Agenda*, ed. Bernard Hoekman and Will Martin (Malden, MA: Blackwell Publishers Ltd., 2001), 131-146.

transformation of the world economy. In some sense, this is clearly true. But as some observers have pointed out (Harris, 1998, Khan, 1998) the word globalization, as commonly used, is largely a descriptive and not an analytical category. Furthermore, as a descriptive term its proper use requires a historical perspective that is often missing in the vast and growing literature. When viewed historically, it appears that globalization is a contradictory process of international economic integration that was severely interrupted by the first world war, the great depression, and the second world war. The emergence of the Bretton Woods framework can be seen as a way to integrate the world with respect to trade while controlling the flow of private capital. The demise of Bretton Woods has set in motion forces of capital account liberalization that are often the most visible aspects of 'globalization'. However, even this process is fraught with new instabilities as evidenced by the Mexican and — more recently and even more dramatically — by the Asian financial crisis. At the same time integration of trade even within the standard neoclassical Heckscher-Ohlin-Samuelson model would imply a fall in the wages of unskilled workers of the north thus increasing inequality there (Krugman, 1996; Wood, 1994). The south is supposed to experience a more equalizing effect through trade; but empirically, there is very little evidence of this happening. Therefore, it is necessary to treat the rhetoric of globalization with caution. At best, we are experiencing a 'fractured' globalization (Harris, 1998).

Nevertheless, during the past few decades, the structural changes that took place in the world economy have brought about increased cross-border economic relations and, relatively speaking, a global economy. The internationalization of trade and foreign investment, aided by the worldwide deregulation of financial markets, has promoted economic integration and regional unions (Cook and Kirkpatrick, 1997). A new division of labor and a qualitatively different type of resource utilization, production and capital accumulation have emerged. The most significant effect of the recent structural change in world economy has been the creation of global interdependence and an economic global village.

Although integration of the world economy is not exactly new, these structural changes have added up to a qualitative alteration in the organization of global markets, namely, one involving a shift away from international trade towards international production and the domination of international finance and the man-made brainpower industries (Thurow, 1996). As Cook and Kirkpatrick (1997) put it,

The internationalization of economic activity is not a new phenomenon...The recent growth in international integration is qualitatively different, however, from the earlier expansion of international trade, in that it has been characterized by the intensification of economic linkages

that transcend national boundaries, often at the functional level (p. 55).

In the previous years of economic integration, international trade and the reduction of trade barriers played the leading role in integrating the world economy while in today's global economy the main key players are multinational corporations and the growing finance and capital markets as well as information and computer technologies.

Since the early 1980s, multinational corporations have increased not only in number but have also seen their share of foreign investment grow tremendously. In the early 1990s, there were about 37,000 multinational corporations that controlled some 170,000 affiliates and the global stock of FDI constituted about \$2 trillion (Cook and Kirkpatrick, 1997). Today, some multinational corporations' turnover is greater than the GNP of some developing countries.

Globalization has also been enhanced by the rising importance of the financial market and financial institutions that are dominating global economic relations. Deregulation of the financial market and liberalization of foreign exchange policies have increased the flow of finance between countries and brought about the integration of the world economy.

As the effects of globalization and regionalisation are felt in every part of the world, social scientists have begun examining and debating these two concepts, their relationships, and the implication they are likely to have on the growth and welfare of developing countries. Among scholars there are clearly areas of dispute. Some scholars such as Hirst (1995) question whether there is such a thing as a globalized economy while others (Thurow, 1996; Ohmae, 1996) suggest that a qualitatively new form of economic integration has set the stage for the emergence of globalization and regionalization. Also, social scientists debate whether globalization and regionalization are enhancing the welfare of developing countries or marginalizing them, and thereby perpetuating regional and socioeconomic inequality.

In this paper we will examine the essence of globalization and regionalization, their relationship within the context of WTO, and the implications they may have for developing countries. We will also point out the contradictions between the DSM in its current state and the local needs and sensibilities in developing countries. At the end, we will see that this contradiction points to a need for understanding both the structural and normative aspects of globalization especially as it relates to development.

### **Fractured Globalization Within a Normative Framework of Analysis**

As mentioned at the beginning, globalization has been the buzz-word of the 1990s. As a process of change, globalization extends beyond the realm of politics and economics to embrace science, culture and lifestyles (Griffin and Khan, 1992). As such,

globalization is a "multi-dimensional phenomenon applicable to a variety of forms of social action--economic, political, legal, cultural, military and technological--and sites of social action, such as the environment" (Perraton et al, 1997: 258).

There is no consensus among scholars as to the definition of globalization, or its effect on our lives and behavior. Some scholars have attempted to explain globalization as a political concept (Gills, 1997) while others elucidate the concept within the framework of recent economic, political and environmental developments (McGrew, 1992). Some focus on the positive impact of globalization; still others emphasize its adverse effects on income and social inequality, women and the poor (Sen, 1997, Gills, 1997). Others underscore the impact of globalization on the nation states and argue that "nation states have already lost their role as meaningful units of participation in the global economy of today's borderless world" (Ohmae, 1996:11). Yet others focus on the contradictory forces of integration and fragmentation in a postmodern world (Khan, 1998; chapters 6 and 7).

Since globalization has significant implications for numerous nations, individuals and communities, it is imperative to clearly define and examine its implications. A sine qua non for this is to conceptualize the term clearly. This is what we intend to do. In simple terms globalization refers to the integration of the world economy in such a way that what is unfolding in one part of the world has clear, sustained and observable repercussions on the socioeconomic environment and lifestyles of individuals and communities elsewhere. As McGrew puts it, globalization is "the forging of a multiplicity of linkages and interconnections between the states and societies which make up the modern world system, as well as the process by which events, decisions and activities in one part of the world can come to have significant consequences for individuals and communities in quite distant parts of the globe" (1992, p.262). However, in order for the term to have genuine analytical significance it must be a part of a theory of globalization. Furthermore, in order for significant policy implications to emerge the theory must have a normative focus as well. Khan (1998) has proposed such a theory in the context of a postmodern world. In brief outline the structural forces in the global economy push towards integrating markets and regions. However, many markets are embedded in national economies; there are also non-market aspects of social and cultural lives of people that are threatened. As a result we find the contradictory phenomena of McWorld and Jihad (Barber, 1995). The creation of a genuine global society, which many see as the ultimate outcome of globalization then necessitates meeting the requirements of global justice. Khan (1998) mentions at least 5 areas, where the norms of global justice must evolve (among others):

1. *International trade and monetary regimes:* The current asymmetric system of payments which penalizes the deficit countries by forcing only them to bear the costs of adjustment needs to be made a global burden sharing institution. The World Trade Organization, similarly, needs to acknowledge the historical imbalances in the world trading

system. For example, specialization according to static comparative advantage may lock the developing countries in a relatively backward situation in the emerging global division of labor.

2. *International capital flows:* From the perspective of many people in the developed economies capital flight to LDC's (with or without free trade agreements) may constitute a barrier to well-being, at least in the short-run. At the same time foreign direct investment in LDCs may create only low-wage, marginal jobs (Wood, 1994). A just approach to FDI must consider the effects on both the north and south in terms of self-determination. A controlled capital flow accompanied by improvements of wages and working conditions in the south may be the most desirable solution.
3. *International ecological considerations:* Global interdependence has been increasingly recognized in this area. However, it is not clear what justice demands in terms of the relationship between the north and south. Other things being equal, the enforcement of strict environmental standards would seem to be just. However, such standards may destroy the livelihood of some people in the south, it is sometimes argued. A global tax and transfer scheme would seem to be the precondition for applying a global set of environmental standards. The transfer of ecologically sound technology systems from rich to the poor countries is a precondition for justice in this sphere.
4. *Asset redistribution and human development:* Much of the foregoing discussion pinpoints the need for giving people the economic wherewithal in order for them to develop their social capabilities. Most studies (e.g., Adelman and Robinson, 1978; Khan, 1985; James and Khan, 1993) have discovered that non-redistribution of assets to the poor hampers poverty alleviation strategies. Redistributing assets and developing their human capital so that the poor can have access to markets becomes a major necessity in our normative framework. In most parts of the world this will require structural reforms rather than marginal policy interventions.
5. *Gender justice:* The impact of globalization on women will have to be assessed carefully. The well-documented facts regarding gender inequalities that so far have affected women's capabilities negatively demand unequivocally that policymakers pay careful attention to enhancing (or at least not decreasing) women's capabilities. Will the globalization help women to overcome social limitations ranging from lack of nutrition to limits on participation in social, economic and political life? Unfortunately, the answer is unclear. In so far as many

developing country women do not possess skills for the global market place, globalization is already hurting them.

These five examples are meant to be illustrative only. By no means do they exhaust all the pertinent issues in moving towards a just economy globally. (For example, we could add or highlight the growing rural/urban disparities with globalization and its implications for justice). But they do illustrate both the problems and prospects for justice in the age of globalization. One of the major political problems we have not discussed so far is the weakening of national sovereignty that the call for global economic justice entails. Agreeing to a global mode of production and distribution constrained by the principles of justice does mean surrendering considerable authority to international agreements, conventions, and ultimately, perhaps to new international organizations. It should be observed, however, that even without the constraining role of justice the globalization process weakens national sovereignty, even for advanced industrialized countries (e.g., NAFTA). Thus, the call for a just economy must confront this (as well as other issues such as weakening of traditional cultural modes of living) head on in the light of reasonable principles. The fundamental message is that among these principles that of freedom as rational autonomy of the individual must be the principal one. This is one rational (perhaps the only one) approach if we are to avoid both the Scylla of Jihad and the Charybdis of McWorld.

The McWorld aspect of globalization is a result of a fractured but real economic, financial and technological integration. Following the collapse of the Bretton Woods Agreement in the early 1970s, the financial market (including interest rates and exchange rates) was deregulated, thereby enhancing the flow of capital between nations. Until then the world financial system was governed by the Bretton Woods agreement of 1945 which provided for fixed exchange rate where currency values were expressed in terms of dollars and gold. When the system was abolished in 1971 by the Nixon administration and replaced by a floating exchange rate, the grounds for a global market were laid.

This was reinforced by the resurgence of a neoliberal free-market ideology of liberalisation, privatisation and deregulation that became the "only game in town" following the ascendance of political conservatives -- Reagan in the U.S., and Thatcher in Great Britain. It was further reinforced by the collapse of the former socialist countries and the emergence of the neoliberal thinking as a dominant and unchallenged school of thought (Falk, 1997). All these factors created a conducive environment for the free movement of goods including capital goods, and services as well as finance, thereby seemingly creating an integrated global economy. In the following section we discuss the main causes of this contradictory but nonetheless integrating moment in the world economy.

## Causes of a Fractured Globalization

There are several factors that lie behind the emergence of globalization. One of these factors is the growth of the *global financial market*. Recently, international finance has increased more rapidly than world trade and has become an important element and the driving force behind global integration. As Drucker notes, "capital movements rather than trade in goods and services have become the engines and driving force of the world economy" (quoted in Yeung and Lo, 1996: 19). Facilitated by deregulation and the liberalization policy of western countries, international capital has increased both its mobility as well as its turnover. According to *The Economist*, in 1995

...\$1.2 trillion of foreign exchange swapped hands on a typical day. That is roughly 50 times the value of world trade in goods and services. In the early 1970s, prior the liberalization of the world's capital markets, the value of currency trading was only six times greater than the value of "real" trade (1997:93).

With an emerging Eurocurrency now in place as the 'euro' and the accelerated growth of private capital, the traditional understanding of capital as being related to a particular country has

lost its meaning. In other words, capital has become so internationalized that it has lost its national color, making it very difficult to control and regulate the flow of finance between nations.

The second factor, which enhanced the integration of the world economy, is *the demise of the Soviet System and end of the Cold War*. The collapse of the former Soviet Union and the end of the Cold War, has led to a widening of the global market and deepening of economic linkages. Today, except for North Korea, almost all countries of the world are integrated into and have become part of the global market. Even Cuba, which is ruled by a hard-line communist party, has allowed to a certain extent foreign investment to play a substantial role in the economy of the country.

Consequently, the world is no longer divided into a bipolar political order as it had been during the Cold War era when the United States and the Soviet Union were competing for ideological influence. Today, the competition between nations is no more for ideological supremacy but for market and scarce resources. In today's global economy geo-politics is out and geo-economics is in.

The third factor, which lies behind globalization, is the *growth of corporate activities*. Global integration has been the result of the growing activities of multinational corporations. Today, the number of multinational corporations as well as their sphere of influence has expanded. To reduce the cost of production and maximize profit as well as to have competitive edge over others in conquering market, multinational corporations are transcending their national boundaries and are investing in other nations. Consequently, foreign investment has increased dramatically in recent years (see Table 1). This is partly facilitated by the revolution made in communication and transportation technology.

**Table 1: Growth of World-wide Direct Foreign Investment (1981-90)**

	Annual Growth (Per Cent)	
	1981-85	1986-90
All Countries		
Direct Foreign Investment Outflows	4	24
Gross Domestic Investment	0.5	10
Developed Countries		
Direct Foreign Investment Outflows	3	24
Gross Domestic Investment	2	11
Developing Countries		

Direct Foreign Investment	-4	17
Gross Domestic Investment	-3	9

**Source:** United Nations, *World Investment Report*, (New York: United Nations, 1993, p. 15)

As Boisier notes, "the revolution made in technology has made it possible the 'breaking down' of production process into different stages at different localities without losing efficiency and profitability" (1997). The high level of specialization has changed the structure of manufacturing in such a way that the production process allows different parts to be produced in different countries. The final goods are produced or assembled in a completely different country, thereby creating what is called a "global factory".

Global integration has been facilitated by the growth of world trade associated with foreign direct investment (Cook and Kirkpatrick, 1997). As indicated in Table 2, the growth of world trade has outstripped that of world output by 4.2 times between 1990-95.

**Table 2: Average Annual Growth of World Trade and GDP, 1950-95  
(Percentage)**

	1950-60	1960-70	1970-80	1980-90	1990-95
World Trade*	6.5	8.3	5.2	5.0	6.2
World Output	4.2	5.3	3.6	3.1	2.0
Difference	2.3	3.0	1.6	1.9	4.2

**Source:** World Bank, *World Development Indicators* (Washington, D.C.: The World Bank, 1997, p. 129).

\*Exports of goods and services on a national accounts basis.

The fourth, and maybe the most important driving force behind globalization, is the revolution made *in information, communication and transportation technology* which has reduced telecommunication as well as transportation costs, and thereby diminished the importance of distance in economic activity (Boisier, 1997).

Between 1930 and 1996, the cost of a three minute telephone call between New York and London fell from \$300 (in 1996 dollars) to \$1 (*The Economist*, 1997a). The dramatic reduction in telecommunication and transportation costs “have, in turn, permitted closer integration between markets, consumers, producers and suppliers” (Cook and Kirkpatrick, 1997:58).

Business activities, including selling and buying of goods and services, as well as other financial transactions can be conducted at a distance using telecom networks. This is further facilitated by the Internet and the other modern technologies that have not only reduced telecommunication costs but also made it easier to reach almost all parts of the world. Consequently, shopping through telephone and Internet, tele-conferencing, distance education through video and television, and even tele-working have become cost-effective and widespread practices.

**Table 3: Long-term Trends in Transport and Communications Costs (1990 US\$)**

<b>Year</b>	<b>Average Air Transport Revenue Per Passenger Mile</b>	<b>Average 3-Minutes Telephone Call New York-London</b>
1930	0.38	244.65
1940	0.46	188.51
1950	0.30	53.20
1960	0.24	45.86
1970	0.16	31.58
1980	0.10	4.80
1990	0.10	3.32

**Source:** World Bank, *Global Economic Prospects and Developing Countries* (Washington, D.C.: The World Bank, 1992, p. 34).

The decrease in transportation and communication costs means considerably narrowed "space" and shortened "time" that has made goods and factor markets very close and more interlinked (Straubhaar and Wolter, 1997). It also means greater mobility of people within and between regions. In developing countries, the relative decline in transportation costs combined with

The push of miserable conditions at home and the pull of higher standards of living abroad are leading tens of millions of people to move from poor countries to rich countries just when unskilled labor is not needed in the wealthy industrial world (Thurow, 1996:9).

The fifth factor that has led to globalization is *internationalization of environmental problems* such as global warming and acid rain. These global

environmental problems require global solutions, making international co-operation and policy co-ordination not only important but necessary. Here, however, the rhetoric has so far outstripped the actual institution building process on a global basis.

One area where the institution building process has proceeded is international trade. We now look at WTO and the DSM in particular.

### **III. The WTO Dispute Settlement Mechanism (DSM) – A Brief Overview**

Settling disputes is the responsibility of the Dispute Settlement Body (DSB), which consists of all WTO members.<sup>5</sup> It has the authority to set up panels, adopt or reject panel and Appeal Body (AB) reports, maintain surveillance of the implementation of decided rulings, and authorize limited trade transactions.

The DSM encourages countries to first settle their dispute through bilateral consultation by themselves.<sup>6</sup> If the discussion fails, the parties can bring the dispute to the DSB. Then the DSB establishes a “panel” composed of three experts to investigate the case, after which the panel issues a report with rulings or recommendations. Either side disagreeing with the report can appeal the report at the AB. After reviewing the case based on points of law rather than reexamining the evidence, the AB can uphold, modify or reverse the panel’s conclusions by issuing a new report. And the DSB needs to accept or reject the AB’s report, but rejection is only possible by consensus.<sup>7</sup>

When the case has been decided by the DSB, the losing defendant must bring its

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<sup>5</sup> See World Trade Organization, “Understanding the WTO – A Unique Contribution,” [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

actions into line with the decided rulings or recommendations. If it does not comply with the rulings in a certain period of time, and it also fails to reach a mutually-acceptable compensation in negotiation with the complaining side, the latter may ask the DSB for authorization to impose trade sanctions against the other side.

Compared with the GATT mechanism, the DSM of the WTO, “a jewel in the crown of the Uruguay Round,”<sup>8</sup> presents profound changes on several aspects:

First, the DSM establishes a “single unified dispute settlement system,”<sup>9</sup> in contrast to the multiple dispute settlement procedures under GATT.

The second change is about the “automaticity”. One of the most decisive changes from GATT to the WTO mechanism is the introduction of “negative consensus.” Unless there is a consensus within the DSB to reject the establishment of a panel, the panel must be set up. Similarly, decisions of the panel and the AB are also automatically adopted unless there is a DSB consensus to reject them.

Third, the establishment of the new appellate procedure and institution – the AB – is another important change. Though the AB only deals with legal issues and does not have the right to reexamine the evidence, it still enhances the possibility that different voices can get heard. In practice, many cases step into the appellate procedure. Of the 78 panel rulings issued from 1995 to 2003, 53 cases (68%) have been appealed.<sup>10</sup>

Fourth, the new DSM procedure has fixed timetable for each step (Table 1). This reform not only makes countries able to foresee the time and costs for dispute

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<sup>8</sup> Karen J. Alter, “Resolving or Exacerbating Disputes? The WTO’s New Dispute Resolution System,” *International Affairs*, 79, no.4 (2003): 784.

<sup>9</sup> Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (New York: Oxford University Press Inc., 2005), 86.

<sup>10</sup> See Keisuke Lida, “Is WTO Dispute Settlement Effective?,” *Global Governance* 10 (2004): 210.

settlement, it also helps speed up the process thus enhances the WTO efficiency.

Table 1. Stages in the WTO Dispute Settlement Process

<b>How long to settle a dispute?</b>	
60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
<b>Total = 1 year</b>	<b>(without appeal)</b>
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
<b>Total = 1y 3m</b>	<b>(with appeal)</b>

Source: World Trade Organization, "Understanding the WTO – A Unique Contribution," [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)

Fifth, the DSM of the WTO has improved its participation and surveillance mechanism for decision implementation. The AB allows the participation of nongovernmental organizations (NGOs), which shows the increasing accessibility of the DSM.<sup>11</sup> And the DSB decisions can be better implemented with its surveillance mechanism that was virtually non-existent in GATT.<sup>12</sup>

Relative to the power-based GATT system, the DSM of the WTO moves toward a more rule-oriented mechanism. Many scholars expect that this reformed rule-based system can better protect developing countries from the unilateral exercises launched by strong powers, thus enhance the equality in international trade. Whether this is the case in reality needs further examination of the DSM.

<sup>11</sup> Ibid.

<sup>12</sup> See Amrita Narlikar, *The World Trade Organization: A Very Short Introduction*, 87.

#### **IV. The Rule-Based System: Improved Equality for Developing Countries**

The Uruguay Round reforms have brought great influence on developing countries' participation and performance in the WTO dispute settlement system. The establishment of a single organizational forum for managing disputes with formalized procedures and greater legal transparency certainly has brought about many positive results that improve the equality status of developing countries.

##### **How the new DSM Enhances Equality**

On the one hand, the new DSM in the WTO is a multilateral mechanism for dispute resolution, which provides developing countries with a more favorable environment than that under the bilateral mechanism. Under the rule-based DSM, all the members, no matter they are weak or strong, have the right to resort to the DSM to seek fair and reasonable resolutions for their trade disputes, which is a law-protected equality. The mechanism reduces the instability arising from countries' unilateral actions. And it also increases the transparency of the dispute settlement procedure thus help enhance the fairness.

First, the new DSM improves the bargaining power of developing countries. The system is based on formal legalized rules, thus members are "equal" in front of the law. Even the superpowers need to abide by the regulations. Thus developing countries gain more equality, and hence more power for equal bargaining. Just as Cameron and Campbell argue, resolving disputes through a judicial route is "particularly beneficial for smaller countries, as without the rules and procedures of the DSU and the extensive

obligations in the WTO agreements, they would not have the necessary bargaining power vis-à-vis the larger powers.”<sup>13</sup> For instance, Brazil had not pursued a complaint against the EU under the GATT system since it knew the complaint would be blocked. However, under the new WTO mechanism, Brazil notified the EU that it would bring the dispute to the DSB for formal consultation, which is the first step of the WTO dispute settlement procedure. A few days later, the EU made concessions that it had previously held as impossible, and the dispute was resolved.<sup>14</sup> Furthermore, while the GATT system might cripple weaker countries’ bargaining power by its “positive consensus” rule, the new WTO DSM improves the situation through the “negative consensus” framework, which greatly reduces the possibility of blockage.

Second, from the angle of independence, under the power-based GATT system, the independence of developing countries was eroded because of their economic and political “dependence” on developed countries. Sometimes they could hardly express their real attitudes. Under the new WTO DSM, as a contrast, a certain level of independence is guaranteed by the fixed legal regulation system. Thus the rule-based arrangements for dispute resolution tend to produce more equal outcomes, mitigating power/wealth disparities.<sup>15</sup>

Third, the general spirit of compliance with the result of the DSM is another optimistic indicator of improved equality. In this rule-based system, the major powers in international trade have indicated that “they will comply with the mandates of the

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<sup>13</sup> James Cameron and Karen Campbell, *Dispute Resolution in the WTO* (London: Cameron May, 1998), 57.

<sup>14</sup> See Karen J. Alter, “Resolving or Exacerbating Disputes? The WTO’s New Dispute Resolution System,” 785-786.

<sup>15</sup> See Don Moon, “Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data,” *International Interactions* 32, no. 3 (2006): 206.

Dispute Settlement reports when they are finalized and formally adopted.”<sup>16</sup> And even the most powerful players cannot defy the final rulings without risking harm to the institution.<sup>17</sup> When developing countries file complaints against developed ones to the DSB, even if the result is negative to the developed side, the recommendations or rulings can still be implemented. This situation tends to “reduce asymmetries in post-agreement bargaining power”<sup>18</sup> and enhance developing countries’ equality status in the phase of rulings implementation. Besides, countries now get easier access to countermeasures provided through cross-retaliation, which makes developing countries able to impose pressure on developed ones. Thus, as developing members have more assurance as to the implementation situation of the DSM results, their equality status in the system is improved.

On the other hand, considering the concrete DSU provisions, because of the increasing concern on developing countries’ particular needs and interests, the DSU provides plenty of provisions offering special favorable conditions to developing countries through the whole dispute settlement procedure. Thus developing countries can enjoy more equality with developed countries.

Article 4.10 of the DSU calls for members to pay special attention to the particular problems and interests of developing countries in consultations. Article 12.10 allows for the extension of the consultation time-period. Article 8.10 states that a developing country involved in a dispute can request that the panel includes at least one panelist

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<sup>16</sup> See John H. Jackson, “Dispute Settlement and the WTO: Emerging Problems,” *Journal of International Economic Law* 1, no.3 (1998): 340.

<sup>17</sup> See James Smith, “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement,” *Review of International Political Economy* 11, no.3 (2004): 546.

<sup>18</sup> *Ibid.*

from a developing member country if the other side is a developed state. And Article 12.11 provides that the panel report must indicate the form in which the special and differential treatment rules of the DSU have been taken into account, if a developing country member involved in a dispute raises such rules.

At the stage of implementation, according to Article 21.2 of the DSU, particular attention should be paid to matters affecting developing countries interests. As to surveillance, Article 21.8 states that if a case is brought by a developing country, the DSB needs to take into consideration not only the trade coverage of the challenged measures, but also their impact on the economy of the developing country concerned.

Furthermore, Article 27.2 requires the WTO Secretariat to make available legal expertise assistance from the WTO technical cooperation services to any developing member upon its request. And Article 24.1 calls for due restraint in bringing disputes against a least-developed country (LDC) and in asking for compensation or seeking authorization to suspend obligations against a LDC that has lost a dispute.

### **Improved Equality Situation: the Data**

Compared with the GATT system, the DSM of the WTO has created a more equitable legal environment for developing countries to resolve trade disputes, with its rule-based mechanism and the concrete provisions paying special attention to developing members' particular requests and interests. These improvements have enhanced the self-interest protection capabilities of developing countries.

Within the new DSM, developing countries have gained more equality and more power to bring disputes to the DSB for resolution. Even if the other side is a developed

country or developed countries, the DSM of the WTO can encourage the developing members to solve the problem through this formal route.

As indicated in table 2, until September 2000, 207 complaints had been brought to the WTO. Of these, 26% were brought by developing countries. Compared with the situation in GATT period, during which developing countries brought 16% of the total cases, developing countries under the WTO are more encouraged to use the new DSM for dispute resolution.

Table 2. Number of Dispute Settlement Cases, 1995 through September 2000

	Complaint by	
	Industrial countries	Developing countries
Number of cases	154	53
Share of Total cases (%)	74	26
Share of cases under GATT (%)	84	16

*Source:* Valentina Delich, “Developing Countries and the WTO Dispute Settlement System,” in *Development, Trade, and the WTO*, ed. Bernard Hoekman, Aaditya Mattoo and Philip English (Washington, DC: The World Bank, 2002), 76.

Between 1995 and 2001, roughly one-third of WTO disputes have involved developing countries as plaintiffs, which is higher than their share of disputes initiated under the GATT (1947-1994) period.<sup>19</sup> And during the four and one-half years from 2000 to June 2004, developing countries initiated 62% of the consultation requests, which developed ones only initiated 38%.<sup>20</sup> Especially, 51% of disputes in 2000 and

<sup>19</sup> See Chad P. Bown, “Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes,” *The World Economy* 27, no.1 (2004): 64.

<sup>20</sup> See William J. Davey, “The WTO Dispute Settlement System: The First Ten Years,” *Journal of International Economic Law* 8, no.1 (2005): 24.

71% percent of disputes filed in 2001 came from developing countries.<sup>21</sup>

From these data we can see that compared with the GATT system, the DSM under the WTO indeed has enhanced the possibility that developing countries use this formal mechanism for dispute resolution. This is the natural outcome of the improved equality situation and strengthened rights protection power of developing countries.

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<sup>21</sup> See Keisuke Lida, "Is WTO Dispute Settlement Effective?," 217.

## V. Inequality in the WTO Dispute Settlement Mechanism:

### Situation and Explanation

Indeed, the new DSM of the WTO better enables developing countries to use the system for trade dispute resolution. However, many developing members of the WTO are long being among the critics of the new system's inequality since its establishment.<sup>22</sup> And if we take a closer look at some other numbers, the picture is not that optimistic. Moon's research shows that under the new DSM of the WTO, developing countries now are much more frequently taken to court by developed countries, as the percentage of "developed countries as complaints and developing countries as defendants" increased considerably from 9.5% under the GATT system to 28.1% under the WTO mechanism.<sup>23</sup> Reinhardt and Busch find out that "developing countries are one third less likely to file complaints against developed states under the WTO than they were under the post-1989 GATT regime."<sup>24</sup> Smith further notes that between 1995 and 2002, only a handful of developing countries were involved as third participants. Excluding the EU-banana case, the grand total came to 28 appearances by 14 developing governments. In contrast, during this period, only 9 developed countries made a combined 65 appearances as third parties.<sup>25</sup> Additionally, till today, the least developed countries (LDCs) are even totally absent in the DSM of the WTO.<sup>26</sup>

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<sup>22</sup> See James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement," 547.

<sup>23</sup> See Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data," 213.

<sup>24</sup> See Amrita Narlikar, *The World Trade Organization: A Very Short Introduction*, 95.

<sup>25</sup> See James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement," 554-561.

<sup>26</sup> See Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the

All these evidences show that developing countries are still somewhat marginalized under the DSM of the WTO. If this situation continues, in the long run, the WTO legal system may be more and more shaped by developed members' interests and wills, and developing countries may be left less space to stand in. Then what are the real situations and possible explanations of this inequality and marginalization of developing countries in the DSM?

### **High Costs and Limited Resource Availability**

#### ***Financial Cost***

First, the costs of access of the DSM are very high. And compared with developed states, developing countries actually have fewer resources to invest to defend their WTO rights.

It is usually a long process for the WTO to settle a trade dispute through the DSM. As table 1 indicates, approximately, a typical WTO dispute settlement procedure may cost 12 months (without appeal) to 15 month (with appeal), and it will be even longer if including the succeeding implementation phase. In the famous banana dispute, from the start at 4 October 1995 to 19 April 1999 when the DSB authorized the US suspension of concessions, the process lasted 43 months. And the DSB suspension authorization to Ecuador was on 18 May 2000, which made the course as long as 56 months.<sup>27</sup> Such a long procedure brings great cost burden. Bown and Hoekman in

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GATT/WTO Dispute Data," 214. See also WTO, "Developing Countries in WTO Dispute Settlement," [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c11s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm).

<sup>27</sup> See Mauricio Salas and John H. Jackson, "Procedural Overview of the WTO EC – Banana Dispute," *Journal of International Economic Law* 3 (2000): 145-166.

their research point out that even just calculating the actual litigation and excluding the pre- and post-litigation costs, the bill for hourly legal services could run from \$89,950 for a low complexity DSM case to \$247,100 for a high complexity case. And these do not include the costs of litigation support through necessary data collection, economic analysis, and hiring of expert witnesses for testimony, which may lead to another \$100,000 to \$200,000. Furthermore, other substantial overhead costs associated with many other aspects such as travel, accommodation, communication, paralegal and secretarial assistance all have to be paid. Thus a typical “litigation only bill” to an exporter for a market access case is roughly \$500,000 and it even does not cover the resource costs of potential claim investigation in the pre-litigation phase and other public and political relation costs, which might be extremely high.<sup>28</sup>

Except for the litigation costs, countries initiating disputes in the DSM face income losses from hindered trade during the dispute investigation period.<sup>29</sup> For developing countries, especially those highly relying on their limited exports for national incomes, these potential income and market losses may be more unbearable than the litigation bills.

High costs of WTO dispute settlement erode developing countries’ capability, especially those weaker ones’, to participate in the DSM. Compared with their developed peers, developing countries usually have fewer financial resources to spend on the WTO litigation. Generally, their economic sizes are smaller, their industries are

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<sup>28</sup> See Chad P. Bown and Bernard M. Hoekman, “WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector,” *Journal of International Economic Law* 8, no.4 (2005): 870.

<sup>29</sup> See Pilar Zejan and Frank L. Bartels, “Be Nice and Get Your Money – An Empirical Analysis of World Trade Organization Trade Disputes and Aid,” *Journal of World Trade* 40, no.6 (2006): 1026.

less profitable, their government budgets are limited, and their limited resources also have to be spent on many other social needs of their own. Thus the high costs actually lower developing countries' status and make them less willing and less able to pursue dispute settlement through the DSM, which can be seen from their less appearance in the system. According to Shaffer, unlike the US and the EU, most developing countries cannot even afford to fly in officials from the capital for specific WTO meetings.<sup>30</sup> Then how can they stand the huge costs of dispute settlement? Furthermore, many developing countries tend to step into a vicious circle. They participate less frequently in the DSM because of high costs, but their less participation makes them not able to benefit from the economies of scale, that is, developed countries can spread the fix costs of developing internal legal expertise over more cases than developing states.<sup>31</sup> As a result, developing countries have to assume higher costs for individual cases.

Financial inequality brings developing countries big obstacles of pursuing WTO dispute settlement. It is theoretically true that they can obtain fund or assistance with lower costs from sources such as private firms and nongovernmental organizations (NGOs). But the problem is: the private sectors in developing countries are relatively weak and less profitable, and they typically view the WTO dispute settlement as the government's job.<sup>32</sup> And other institutions such as NGOs can hardly satisfy the increasing needs given the fact that developing countries are more and more involved in trade disputes and most of them do not have enough resources to invest.

The high financial costs of the WTO dispute settlement trigger inequality in the

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<sup>30</sup> See Gregory Shaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation," 181.

<sup>31</sup> *Ibid.*, 186.

<sup>32</sup> *Ibid.*, 185.

DSM. With abundant financial resources, developed countries can better afford the WTO dispute settlement thus may use it more frequently than developing states do. Hence it comes out that developing countries do not make full use of the DSM.

### ***Limited Legal Resources***

Except for financial investments, legal resources, especially the legal expertise, are also essential for WTO dispute settlement. For instance, in the panel phase, the written request for the panel establishment has to precisely define and limit the scope of the dispute; and the parties involved need to exchange multiple sets of written submissions, present views orally in oral hearings, and answer the questions raised by the panel. All these activities require sufficient legal expertise support. Actually, the shortage of special expertise, personnel and information for legal activities is an important reason why developing countries are suffering inequality and unfavorable outcomes in the DSM.

Industrialized states such as the US and the EU, also the major players in the WTO, are well equipped with legal experts in the area of the WTO legal system, and they have a worldwide network of commercial and diplomatic representation that feeds their systems with relevant data.<sup>33</sup> In contrast, developing countries have limited legal expertise and it is harder for them to collect data and information because of the lack of networks. Many developing countries have only one or two lawyers to address WTO issues.<sup>34</sup> When small developing countries are involved in disputes with the US

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<sup>33</sup> See Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance," in Bernard Hoekman and Will Martin ed. *Developing Countries and the WTO: A Pro-active Agenda*, (Malden: Blackwell Publishers Inc., 2001), 136.

<sup>34</sup> See Gregory Shaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation," 182.

or the EU as the other side, the developing ones are obviously in a disadvantageous position concerning legal expertise supply. Though they can buy legal expertise, “scarcity of national administrative resources to identify and prepare cases is a major constraint.”<sup>35</sup> Concerning data collection, when the European Commission (EC) realized its lack of such a system after the establishment of WTO mechanism, it hired consultants to identify and report on other countries’ trade barriers, which spurred many successful WTO complaints.<sup>36</sup> In contrast, developing countries lack adequate financial as well as human resources to establish such a system in a short time.

Developing countries, to certain extent, can improve their access to WTO litigation services. For example, according to DSU Article 27.2, developing countries can get technical help from the WTO Secretariat. They can also resort to the Advisory Center on WTO Law (ACWL) for legal assistance for dispute cases. And they can go to NGOs and other issue-based organizations or private firms for help.

But the assistance methods’ accesses and effects are limited. Taking WTO as an example, its legal assistance services are offered by only two expert attorneys on a limited part-time basis, and the two experts advise developing countries disputants at most one day per week.<sup>37</sup> And the DSU further requires that even the limited assistance can only be provided after a member has decided to bring a dispute into the DSM.<sup>38</sup> Thus developing countries cannot use this assistance to help figure out their

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<sup>35</sup> See Bernard M. Hoekman and Petros C. Mavroidis, “WTO Dispute Settlement, Transparency and Surveillance,” 136.

<sup>36</sup> See Gregory Shaffer, “The Challenges of WTO Law: Strategies for Developing Country Adaptation,” 184.

<sup>37</sup> See James Smith, “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement,” 565.

<sup>38</sup> See Bernard M. Hoekman and Petros C. Mavroidis, “WTO Dispute Settlement, Transparency and Surveillance,” 139.

“winning probability” thus help decide whether to bring the disputes to the WTO. Moreover, a large number of developing countries are designated as “inactive” for not having paid their assessed contributions to the WTO budget for more than 3 years, and such a designation implies that they are not able to receive technical assistance from the WTO, and a number of other privileges, such as the distribution of documents, are withheld from them. But these “inactive” countries are actually the poor ones that most need the WTO’s help.<sup>39</sup> Similarly, the ACWL assistance may also encounter the problem of availability of its resources. On the one hand, the operation fund of the ACWL basically comes from individual countries, and a rich country may be hesitant to provide adequate fund to an organization that often provides litigation assistance directly challenging its own interests.<sup>40</sup> On the other hand, even the limited resources have to be allocated on a fiercely competitive basis. Compared with developed countries, developing countries not only lack legal resources domestically, but also face difficulty in getting assistance from outside.

The financial and legal resource constraints bring about inequality between developing countries and developed states in the DSM, by reducing developing countries’ capability to participate in the system. As Besson and Mehdi’s finding suggests, developing countries are unlikely to obtain a favorable outcome unless the asymmetry of capacity is corrected.<sup>41</sup>

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<sup>39</sup> See Constantine Michalopoulos, “The Developing Countries in the WTO,” *The World Economy* 22, no.1 (1999): 121-123.

<sup>40</sup> See Chad P. Bown and Bernard M. Hoekman, “WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector,” 875.

<sup>41</sup> See Fabien Besson and Racem Mehdi, “Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis”

## **Inequality Stemming from Power-Based International Relations**

The other kind of sources of inequality is about international relations among countries. The WTO is an international organization, the establishment and operation of which are made possible only if member countries are willing to give up a part of their sovereignty to make the institutional contract. This means actions of the WTO may be inevitably influenced by the international political and economic interactions. The DSM is also unexceptional. As what Moon points out, at the law-making stage for establishing the DSM, weaker states have to make concessions to stronger countries for the latter's acceptance of a rule-based system, the result of which is the agreements advantageous to stronger actors.<sup>42</sup> Thus from the beginning, the DSM regulations are more favorable to industrialized countries, and this argument is confirmed by Moon's empirical analysis of whether developing countries are more frequently taken to court by developed states under the DSM because of application of its legal provisions.<sup>43</sup>

In the rule-based DSM, power consideration and influence still cannot be denied. As Moon argues, "For reaching a legalized DSM agreement, there should be trade-offs between the stronger-actor-favorable content of law and the fair application of the law."<sup>44</sup> A question here is whether the WTO panels and AB can be really impartial as supposed. Potentially, as the experts are from different countries whose self-interests may also be influenced by powerful states, they cannot totally get rid of the political impact, though this impact may be indirect. According to Garrett and Smith, even the

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<sup>42</sup> See Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data," 208.

<sup>43</sup> See Moon's empirical test of his hypothesis 1, *Ibid.*, 211-214.

<sup>44</sup> *Ibid.*, 208.

AB of the DSM, a basically rule-based institution which should be unbiased in front of the law, is also reluctant to make unequivocal adverse rulings against powerful countries on issues of considerable domestic salience.<sup>45</sup> An important case here is the *Indonesia – Certain Measures Affecting the Automobile Industry* dispute brought to the WTO by the US, the EC and Japan. Indonesia provided certain preferential conditions to its domestic automobile industry and products, which were permitted under the Agreement on Subsidies and Countervailing Measures, but the panel deemed such arrangements were inconsistent with the Agreement on Trade-Related Investment Measures (TRIMs). The panel's final decision was: though such arrangements were permitted by one agreement, it still could not be continued since it violated the other agreement. In contrast, the panel's attitude towards the US Special 301 Provision was different. Though the panel found that this provision was inconsistent with the WTO spirit, it still permitted the provision and did not bring forward any correction recommendations. From these cases, we can see the power politics have considerable influence and bring about inequality even in the rule-based WTO litigation system.

Also, the powerful players can use other international political instruments to impose impact on weaker countries, while the latter are actually faced with limited degree of freedom to act. Particularly, since many instruments are outside the WTO's jurisdiction, the WTO can hardly deter such actions. One important kind of political instruments is foreign assistance and economic preferential arrangement provided by

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<sup>45</sup> Geoffrey Garrett and James McCall Smith, "The Politics of WTO Dispute Settlement," (paper presented at the annual meeting of the American Political Science Association, Washington, D.C., USA, August 28-31, 1999), quoted in Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data," 207.

developed countries to developing ones. These preferential conditions and financial aid, to some extent, make the poor countries “dependent” on rich economies, thus the latter can ask for favorable political and economic outcomes through imposing pressures on the former. It is not rare that developed countries use foreign aids to press forward their international political and/or economic interests. In the DSM, the developed countries can threaten to reduce or even withdraw the economic benefits they provide to poor countries, and the latter, especially the small ones, can do little to counter such threats thus may retreat and choose not to file the dispute to the WTO. Such actions are basically outside the WTO’s authority, thus the institution can hardly do anything about this international political and economic inequality. Through Zejan and Bartels’ empirical study of the relationship between aid to developing countries and their activity in the DSM, it is found that donor countries tend to penalize developing countries that seek to protect their interests through the DSM, and the amount of aid received affects the probability of a developing country to initiate a dispute.<sup>46</sup>

Indeed, international politics is intertwined with international economic issues and “power” is greatly influencing the operation of international law. Even the military expenditures gap appears to negatively affect the probability of developing countries to win a dispute.<sup>47</sup> While developed countries can use different political instruments to influence developing countries’ actions in and outside the DSM of the WTO, it is hard to say there is a real equality in this system.

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<sup>46</sup> See Pilar Zejan and Frank L. Bartels, “Be Nice and Get Your Money – An Empirical Analysis of World Trade Organization Trade Disputes and Aid.”

<sup>47</sup> See the empirical analysis of Besson and Mehdi, in Fabien Besson and Racem Mehdi, “Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis.”

## **Compensation Inadequacy and Lack of Enforcement Capability – Another Source of Inequality**

Except for the inequalities coming from the imbalances of political power and economic burden, even if developing states launch a complaint and win, it is also difficult for them to get adequate compensation or fully enforce the rulings.

### ***Inadequate Compensation***

As mentioned earlier, the time period, from starting a complaint to the end when the complaining side gets the DSB's permission to impose limited trade sanctions ("suspend concessions or obligations"), is a very long procedure. But the WTO retaliation mechanism prescribes that complaints cannot unilaterally take retaliatory actions unless the DSB makes decisions and permits them to, which means that the defendant side is able to violate the WTO laws and hurt the other side's interests during the long time-period, until the WTO recognizes and decides to take action to correct the violations. With economic strength, developed countries can relatively easily affect developing economies even just in a short time. Thus it is possible that before the DSB authorize them to impose trade sanctions, the developing countries' domestic markets and internal economic capabilities have already been badly harmed. For those small developing states, this situation may be even worse.

Even if a developing country as complaint wins in a dispute, the compensation methods under the DSM are limited. Usually it comes out in the forms that the losing defendant withdraws the measures found inconsistent with WTO law, or the winning

complaint gets authorization from the DSB to impose limited trade sanctions. Under the current “retaliation-as-compensation” approach, there is no room for retroactive compensation or punishment measures that can help developing countries make up for its previous economic losses that have been already caused before the decision is made. Even if the defendant side corrects its action after the dispute, the complaint still has to assume the economic losses generated before the correction. For developing countries particularly, while their economies are generally weak and vulnerable to outside impact, such burden may be too heavy for them to bear.

### ***Lack of Enforcement Capability***

It is also arguable whether developing countries possess adequate enforcement capability to fully implement the WTO rulings or recommendations even if the results are favorable to them. Under the DSM, the final dispute settlement decisions are supposed to be implemented on a decentralized, bilateral basis. The DSM relies entirely on state power for enforcement of its rulings.<sup>48</sup> It may be hard for a developing country to raise tariff rates on certain products imported from a developed country, even if it is authorized to, since this action may hurt itself in turn at the end.

With a relatively weak economy, a developing country may depend on certain imports from developed countries for development; if the products included in the retaliation are actually essential for its own growth, it can hardly be expected that the developing country will really deter or limit the imports. But considering the other side, since most developing countries’ markets and economic power are relatively small and

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<sup>48</sup> See Pilar Zejan and Frank L. Bartels, “Be Nice and Get Your Money – An Empirical Analysis of World Trade Organization Trade Disputes and Aid,” 1027.

weak, whether or not they take retaliatory actions to developed countries' products does not bring much difference to the developed economies, unless they retaliate in alliance, which does not usually happen. Thus, while the retaliatory actions taken by developing countries to developed states cannot bring much danger or worries to the latter but may incur negative consequences to the users themselves, developing countries actually do not possess real equality with developed countries because of the asymmetry of enforcement capabilities.

### **The DSU Provisions – Inequality behind the Articles**

Taking a closer look at the DSU provisions, there is also an interesting story. On the one hand, the Uruguay Round agreement provisions generally demonstrate that strong countries are real beneficiaries.<sup>49</sup> The WTO expanded its coverage to areas such as investment (Agreements on Trade-Related Aspect of Investment Measures, TRIMs), intellectual property rights protection (Agreements on Trade-Related Aspect of Intellectual Property Rights, TRIPs), service trade (General Agreements on Trade in Services, GATS), etc. Because of these agreements, disputes in these areas now can be brought into the DSM. While most of the agreements reflect developed countries' interests, developing countries are actually in an unequal position.

On the other hand, analyzing the special DSU provisions which aim at improving developing countries' status, it is found that they are more declarative than operative.<sup>50</sup>

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<sup>49</sup> See Garrett and Smith, cited by Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data," 210.

<sup>50</sup> See Valentina Delich, "Developing Countries and the WTO Dispute Settlement System," in *Development, Trade, and the WTO: A Handbook*, ed. Bernard Hoekman, Aaditya Mattoo and Philip English (Washington: The World

For instance, the Article 4.10 requires that special attention should be paid to the particular problems and interests of developing countries during consultation phase. But this article does not point out concretely on what specific aspects and to what extent the “special attention” should be paid. Since there is no specific implementation measure, in practice it is hard to evaluate whether member countries have really and adequately complied with this provision. And Article 21.2 has the similar problem.<sup>51</sup>

Furthermore, several other provisions regarding special and differential treatment may be difficult to apply, though they seem to be favorable to developing countries. For example, Article 21.7 states that the DSB must consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country has raised the matter. But it has not been used by any developing country. According to Delich, the reason here is probably that the country has to devote large amounts of resources to analyze and follow the case development, and developing countries hardly possess sufficient resources to do this.<sup>52</sup> Similarly, as discussed earlier, the provisions regarding technical assistance to developing countries are not able to be adequately applied for the sake of the limited resources availability. And till now, the provisions related to LDCs seem to be “useless” since no LDC has been involved in any dispute. Thus, while the DSU provisions, even those favorable to developing countries, cannot be fully applied, further efforts are needed to improve the inequality between developing states and developed ones in the DSM.

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Bank, 2002), 73.

<sup>51</sup> Article 21.2 of the DSU states that particular attention should be paid to matters affecting developing countries' interests with respect to measures which have been subject to dispute settlement.

<sup>52</sup> See Valentina Delich, “Developing Countries and the WTO Dispute Settlement System,” 74.

## VI. Conclusions

In this paper, we have attempted an examination of the DSM in a globalizing environment. The DSM of the WTO is a multilateral rule-oriented mechanism. Although many problems still exist, with its recently acknowledged special concern about developing countries' particular needs and interests, it has brought about many positive and favorable changes to developing member countries' status. From the perspective of equality, weaker states now possess a relatively better environment and more power to defend their WTO interests through this new dispute settlement system.

However, developing countries still do not enjoy a really neutral playing field where they can really trade equitably and efficiently with developed states. Though the DSU provisions are not biased literally, developing countries are not able to fully take advantage of the DSM in practice, even if certain provisions are supposed to favor them in principle. Since they do not have adequate financial and legal expertise resources, they can hardly bear the high costs of settling disputes through the DSM. Because of the unevenness of political power between developed states and developing countries, the latter group is in a disadvantageous position in the DSM given the political pressures they may suffer outside the WTO. The developing countries' lower status is also due to their inadequate capability to enforce the dispute settlement results, even if the outcomes are favorable to them. Furthermore, the real practical effects of the DSU provisions regarding developing countries also need further examination.

Thus, in the practice of the DSM, developing countries are not enjoying a really

equal status as developed states do.

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