Addis Ababa University

School of Graduate Studies

DISPUTE SETTLEMENT MECHANISM IN WTO – *LEAST DEVELOPED COUNTRIES' PERSPECTIVE*

By Asamnew Barega

Addis Ababa, Ethiopia

October, 2008

Addis Ababa University

School of Graduate Studies

DISPUTE SETTLEMENT MECHANISM IN WTO – *LEAST DEVELOPED COUNTRIES' PERSPECTIVE*

By Asamnew Barega

Advisor: FikreMarkos Merso (Dr)

Faculty – Law

Department – Business Law

A thesis submitted to School of Graduate Studies, Addis Ababa University, Faculty of Law in partial fulfillment for the requirement of the Master of Laws Degree (LLM).

Addis Ababa, Ethiopia

October, 2008

Addis Ababa University

School of Graduate Studies

DISPUTE SETTLEMENT MECHANISM IN WTO – *LEAST DEVELOPED COUNTRIES' PERSPECTIVE*

By Asamnew Barega

Approved by the Examining Board:-

Name of Examiner	Signature
1. Fikremarkos Merso (Dr.)	
2. Mehari Redda	
3. Martha Belete	

DECLARATION

I, the undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university, and all sources of materials for the thesis have been duly acknowledged.

Declared by:-

Name:- Asamnew Bareja

Signature:- _____

Date:- 11th. Oct. 08

Place and Date of Submission: - Addis Ababa University, Faculty of Law, 11th October, 2008.

Table of Contents

ABSTRACT

This paper aspires to examine the dispute settlement system of the World Trade Organization from the perspective of Least developed Member Countries.

The WTO dispute settlement Mechanism (DSM) hailed by many as one of the innovations of WTO and a truly successful aspect of the Organization, is considered to be one of the major, if not the only advantage WTO offers to its Members.

However, LDC Members of the WTO have never been to enjoy this advantage.

In this paper, we will attempt to address this issue starting from its historical background, going through the possible causes of the non-utilization, to suggestion regarding how to change the situation.

Because of absence of track record regarding LDCs' experience in WTO dispute settlement mechanism the paper is forced to rely on few available sources and forced to make a somehow higher dose of forecast, bordering on purely theoretical discussion.

Finally, the paper will attempt to make some remarks and suggestions to reform the system so as to make it effectively accommodate the interests of the LDCs.

CHAPTER ONE

Introduction

Section I

Background of the Study

About 153 states and independent customs territories now belong to the world Trade Organization (WTO). With this membership of close to universal organization WTO covers almost 95% of international trade and regulate the trade of goods and services as well as the protection of intellectual property rights[1]. All these are through the several Agreements concluded under the WTO umbrella.

However, even the best international agreement is not worth the paper it is written on if its obligations cannot be enforced when one of the signatories fails to comply with such obligations. In fact, weakness in and lack of enforcement mechanism is the innate and pervasive problem of both international treaties and international relation.

It is in recognition of this phenomenon that Members of the WTO put in place the dispute settlement system as part of WTO Agreement during the Uruguay Round. This system is contained in the Understanding on Rules and Procedures Governing the Settlement of

1 Palmeneter, D & P.C. Mavroidis Dispute Settlement in the World Trade Organization – Practice and Procedure – 2001, Second Edition, Simon & Schuster, New York, p.21.

Disputes, commonly referred to as the Dispute Settlement Understanding[2].

Resolution of disagreements among member states is put as the central aim of The WTO dispute settlement mechanism. Though, like other constituent Agreements of the WTO, the Dispute Settlement Understanding (the DSU) too takes into consideration the special situation and needs of least developed Country Members, for multitude of reasons no LDC has ever been party to a dispute or made use of the dispute settlement mechanism[3].

Evaluation of the WTO dispute settlement system done by several scholars conclude that, on the whole, the system has been a success. The large number of cases in which parties invoked the dispute settlement system in the first eight and a half years of the WTO (which is already significantly larger than the number of disputes brought under GATT 1947 during a period of nearly 50 years) suggests that members have faith in the system[4].

The big problem, however, is that this is not exactly true when viewed from the perspective of least developed countries (LDCs).

---

2 The Understanding on Rules and Procedures Governing the Settlement of Disputes, ('The Dispute Settlement Understanding' and abbreviated 'DSU'), which constitutes Annex 2 of the WTO Agreement.

3 WTO, "Understanding the WTO",_2003, p.75, available at http://www.wto.org, (Accessed on September, 5,2007.

4 Bown, C. P. and Hoekman, B, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'. Center for World Affairs and the Global Economy (WAGE), University of Wisconsin, 2005, p68, Available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html. (Accessed on 11th October,2007).

Yes, it is true that the very existence of a compulsory multilateral dispute settlement system by itself is of particular advantage for developing countries and LDCs. Such a system, to which all members have equal access and in which decisions are made on basis of rules rather than on the basis of economic power, empowers developing countries and smaller economies by placing the weak on a more equal footing with the strong.

In this sense, any judicial law enforcement system benefits the weak more than the strong because the strong would always have other means to defend and impose their interests in the absence of a law enforcement system.

This view, however, tends to be rather formal and theoretical for it is clear that LDC members desiring to avail themselves of the benefit of dispute settlement system face huge burdens. For example, least developing countries often do not have a sufficient number of specialized human resources who are experts in the intricacies of the substance of WTO law or the dispute settlement procedures. The growing body of jurisprudence developed by Panels and Appellate Body makes it increasingly difficult for trade officials to WTO to master both the substance and the procedural aspects of WTO law, including the latest developments[5].

---

5 Butler, Monika , and Hauser,Heinz , The WTO Dispute Settlement System:A First Assessment from an Economic Perspective, February, 2000, p.31,available at http://www.hec.unil.ch/deep/publications-english/e-cahiers.htm, accessed on 15th October, 2007

Though the DSU prescribes legal assistance to LDCs, it is often difficult for WTO to assign one of its few officials - who already face the challenge of keeping up with the whole breadth of WTO matters - to a dispute. A single dispute could well keep an official busy for large periods of time, up to two years[6].

It may also be difficult for an LDC member to endure the economic harm arising form another member's trade barrier for the entire period of the dispute settlement proceedings[7].

If such a trade barrier undermines the export opportunities of the LDC concerned and is found to be inconsistent with the WTO, its withdrawal may not occur until two or three yeas after the filing of a WTO dispute settlement complaint[8].

The fund required to finance the commonly lengthy and complex disputes that usually arise in the WTO framework is simply unavailable in the coffers of least developed countries.

Worst of all, a least developed country member may not have the political will to raise its voice and objection against a developed country wrong--doer who most certainly might be a major donor to its economy.

The existence and adverse effect of these problems can be easily and amply demonstrated by the fact that not a single least developed

---

6 Butler, Monika , and Hauser,Heinz , foot note 5, p. 32.

7 Brown, Chad P, & Bernard M. H., WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector: 8 JIEL 861, 2005, p. 24.

8 Ibid, p. 25.

country member has so far been either complainant or respondent in any WTO dispute.

Now that our country is in the process of acceding to the WTO, this problem might quite soon become ours too.

Therefore, it is imperative that an in depth investigation of the WTO dispute settlement system is made so that the local capacity could be built to exploit the system.

The purpose of this research is to review the WTO dispute settlement system, identify its strength and weaknesses from the perspective of least developed countries. The paper will also attempt to point out possible solutions.

Section II

Research Question

With the above background, the research primarily will seek answers to the questions presented below: -

1. Is the WTO dispute settlement system inaccessible to the least developed county members?
2. Are there structural problem in the DSU that hinder LDCs from making use of it?
3. Are there special and differential treatment designed for LDCS' in the DSU? How effective is it? What should LDCs do to fully exploit this preferential treatment?

4. What inherent problems hinder LDCs from making use of the WTO dispute settlement mechanism?
5. How can LDCs over come these problems? What can the WTO do to alleviate this problem?

Section III

Research Objective

3.1 General Objective

The research has the general objective of critically examining the WTO dispute settlement mechanism, the law and the practice, particularly from the perspective of least-developed country members.

3.2 Specific Objectives

The following are its principal objectives;-

- Examining the legal framework of the WTO dispute settlement system in general;
- Analyzing the WTO dispute settlement Understanding and determine its ability to respond to the dispute resolution need of member countries;
- Analyzing the WTO dispute settlement Understanding and determine its ability to respond to the dispute resolution need of least-developed-countries member countries;
- Assess the strength and weakness of the WTO dispute settlement system in accommodating the need of least-

developed-countries member countries, identify and recommend possible solution to address the problem;

- Assess the causes for failure or weakness of the least developed countries to make use of the dispute settlement system of the WTO;
- Recommend ways and means to address these failures and weaknesses.

Section IV

Significance of the Research

The global trading system as constituted by the World Trade Organization is increasingly gaining ascendance. Now the lions share of world trade is conducted under its umbrella and 153 nations are members thereof.

Our Country is also in the process of acceding to the WTO and as such the fortunes and misfortunes of the trading system might be right at our doorsteps.

This requires development of local understanding of the entire WTO system in general and the dispute settlement system in particular.

More importantly, though the dispute settlement system of the WTO is praised as one of its successes least-developed-countries seem to be excluded partaking from this benefit.

This paper, therefore, however mildly, will contribute in addressing the problem and identifying the solution in relation to the issue at hand.

Section V

Research Methodology

- A detailed, critical and in-depth analysis of the Marrakesh Agreement establishing the WTO, the Understanding on Rules and Procedures Governing the Settlement of Disputes and other WTO related agreements shall be made particularly from the perspective of least developed countries;
- To this end data of the developing countries track record in the dispute settlement will be collected and reviewed with a view of identifying problems and come up with possible solutions;
- Work of different scholars on the issue shall be extensively consulted;
- Extensive discussion shall be held with specialists in WTO law.

Section VI

Organization of the Paper

The paper is divided into Seven Chapters. The first is the one being discussed here and now, which tries to depict the background of the study, make statement of the problem, draw the research objective and point out significance and contribution of the paper. It also explains the research methodology used and chapterization of the paper.

Chapter Two tries to establish a common understanding as to who belong to the group of 'Least Developed Countries' and the meaning thereof, the origin of the term as well as the characteristics common to all LDCs. We shall also see under this Chapter the economic prospect of LDCs, the criteria used for identification of an LDC country, and the full current list of members to the group.

The paper in its Third Chapter tries to trace the origin of the WTO Dispute Settlement Understanding. As an Organization, the WTO is relatively new. The Marakesh Agreement establishing the World Trade Organization only entered in to force in January, 1995. However, the DSM and the entire system of the WTO have been existent since 1947 in the form of GATT. Therefore, Chapter Three attempts to see the continuity of the dispute settlement mechanism to the WTO through GATT 1947. We also will look briefly at the core objectives of the WTO dispute settlement mechanism.

The Fourth Chapter of this paper is devoted to the discussion of differential treatment granted to LDCs under the WTO dispute settlement mechanism. Here, we will scrutinize the benefits allocated to LDCs specifically as well as those benefits universal in their application to all WTO Members, but with special importance to LDCs.

Chapter Five is concerned with the historical examination of LDCs participation and performance in WTO dispute settlement mechanism. Here, we have attempted to analyze the possible set-backs that least developed Countries would face in their effort to make use of the system. There is also an attempt to demonstrate the problems that exists before a

case might actually be brought to the WTO dispute settlement system by an LDC member state.

The Six Chapter reviews the set-backs and problems observed in the WTO dispute settlement system from the perspective of LDCs. Here, difficulties faced by LDCs before they decide to embark in a dispute (pre-case problems), are separately discussed from those problems they during the course of the dispute in WTO forum (post-case problems). Cases that involved LDCs marginally and also where developing countries appeared as parties to the dispute are included hereby way of demonstrating the actual working of the problems.

The last Chapter, i.e. Chapter Seven, is devoted to echo and take part in the chorus of proposals forwarded for making WTO dispute settlement mechanism work effectively in favour of LDCs. In this Chapter, it is attempted to underline the growing importance of WTO and its DSM to LDCs and the need for exerting maximum support for its prominence.

Finally, there is the conclusion part which brings the paper to an end by making some general remarks.

CHAPTER TWO

The Concept of Least Developed Countries

Section I

Origin of the Term

The purpose of this paper, as has already been mentioned in the previous Chapter, is to examine the dispute settlement system of the World Trade Organization from the perspective of Least Developed Country Members.

Therefore, it is quite imperative and, helpful as well, to first establish a common understanding as to the meaning of the term, at least for the purpose of this paper.

During the early decades of the 20th Century, the economically underdeveloped countries of Asia, Africa, Oceania, and Latin America, were considered as an entity with common characteristics, such as poverty, high birthrates, and economic dependence on the advanced countries[9]. The French demographer Alfred Sauvy coined the expression ("tiers monde" in French) in 1952 by analogy with the "third estate," the commoners of France before and during the French Revolution - as opposed to priests and nobles, comprising the first and second estates

---

9 Quinion, Michael, First, Second and Third World, 2005, p 19, available at http//www.worldwidewords.org. (accessed on 3rd June, 2008).

respectively.[10] Like the third estate, wrote Sauvy, the third world is nothing, and it "wants to be something." [11]

The term 'third World', therefore, implies that the third world is exploited, much as the third estate was exploited, and that, like the third estate its destiny is a revolutionary one. It conveyed as well a second idea, also discussed by Sauvy, that of non-alignment, for the third world 'belonged neither to the industrialized capitalist world nor to the industrialized Communist bloc' [12].

The expression third world was used at the 1955 conference of Afro-Asian countries held in Bandung, Indonesia[13]. In 1956 a group of social scientists associated with Sauvy's National Institute of Demographic Studies, in Paris, published a book called 'Le Tiers-Monde'[14].

Three years later, the French economist Francois Perroux launched a new journal, on problems of underdevelopment, with the same title. By the end of the 1950's the term was frequently employed in the French

---

10 Quinion, Michael., footnote 9, p. 19.

11 Ibid.

12 Ibid, p. 20.

13 Ibid.

14 Ibid, p. 21.

media to refer to the underdeveloped countries of Asia, Africa, Oceania, and Latin America[15].

Numerically, the Third World dominates the United Nations, but the group is diverse socially and increasingly economically, and its unity is only hypothetical. The oil-rich nations, such as Saudi Arabia, Kuwait, and Libya, and the emerging industrial states, such as China, India, Vietnam, Brazil, etc have little in common with desperately poor nations, such as Haiti, Chad, and Afghanistan[16].

Some of the very poorest countries, especially in Africa, that have no industrialization, are almost entirely agrarian (subsistence farming), and have little or no hope of industrializing and competing in the world marketplace[17]. Because of this, there gradually arose the distinction between the developing and least developed countries, there by dividing the group commonly referred to as 'Third World' in to two[18].

As a result, the term "Third World" is no more universally accepted and has increasingly fallen out of use, being replaced by other terms such as - developing countries, underdeveloped countries, emerging nations, and nowadays, least developed countries[19].

---

15 Quinion, Michael., footnote 9, p. 21.

16 Reitsma ,H. A. and J. M. Kleinpenning, The Third World in Perspective, Basingstoke and New York: Palgrave. 1995, p. 95.

17 Reitsma ,H. A. and J. M. Kleinpenning, footnote 13, p. 96.

18 Ibid.

19 Ibid, p. 97.

Section II

Common Characteristics of LDCs

The Least Developed Countries are marked by a number of common traits such as distorted and highly dependent economies devoted to producing primary products for the developed world and to provide markets for their finished goods; traditional, rural social structures; high population growth; and widespread poverty[20].

This combination of conditions in Asia, Africa, Oceania and Latin America is historically linked to the absorption of the Least Developed Countries into the international capitalist economy, by way of conquest or indirect domination[21]. The main economic consequence of Western domination was the creation, for the first time in history, of a world market. By setting up throughout the third world sub-economies linked to the West, and by introducing other modern institutions, industrial capitalism disrupted traditional economies and, indeed, societies. This disruption led to underdevelopment[22].

Because the economies of underdeveloped countries have been geared to the needs of industrialized countries, they often comprise only a few modern economic activities, such as mining or the cultivation of

---

20 Hermassi , E., The Third World Reassessed, Simon & Schuster, New York, 1990, p. 31.

21 Ibid.

22 Hermassi , E., footnote 17, p. 32.

plantation crops. Control over these activities has often remained in the hands of large foreign firms[23]. The prices of products of Least Developed Countries are usually determined by large buyers in the economically dominant countries of the West, and trade with the West used to provide almost all the Least Developed Countries' income[24].

Contemporary common features of LDCs generally exhibit conditions of extreme poverty, ongoing and widespread conflict (including civil war or ethnic clashes), extensive political corruption, and lack of political and social stability. The form of government in such countries is often authoritarian in nature, and may comprise a dictatorship, warlordism, or a kleptocracy. AIDS is a major issue in a lot of these countries. The majority of LDCs are in Sub-Saharan Africa[25].

Section III

Economic Prospects

Foreign aid, and indeed all the efforts of existing institutions and structures, have failed to solve the problem of underdevelopment. The United Nations Conference on Trade and Development (UNCTAD) held in New Delhi in 1971 suggested that one percent of the national income of

---

23 Hermassi , E., footnote 17, p. 33.

24 Ibid.

25 Triennial Review of the list of Least Developed Countries, the Economic and Social Council of the United Nations, 2003,

industrialized countries should be devoted to aiding the Least Developed Countries. That figure has never been reached, or even approximated. In 1972 the Santiago (Chile) UNCTAD set a goal of a 6 percent economic growth rate in the 1970's for the underdeveloped countries. But this, too, was not achieved. The living conditions endured by the overwhelming majority of the 3 billion people who inhabit the poor countries have either not noticeably changed since 1972 or have actually deteriorated[26].

Nonetheless, the relationship between the underdeveloped and the industrialized countries has improved somewhat. In 1975 the nine-nation European Economic Community (EEC) concluded an agreement, called the Lome Pact, with 46 African, Caribbean, and Pacific (ACP) nations that exempted most ACP exports from tariffs. The Lome II Pact, signed in 1979 by the EEC and 57 ACP countries, consolidated and broadened the Lome I agreement-for example by guaranteeing income from agricultural exports[27].

Section IV

The Criteria for the Identification of the LDCs

Least Developed Countries (LDCs) are countries which according to the United Nations exhibit the lowest indicators of socio-economic

---

26 UNCTAD, The Least Developed Countries Report, 1981New York and Geneva : United Nations.

27 UNCTAD, The Least Developed Countries Report, 1984. New York and Geneva : United Nations.

development, with the lowest Human Development Index ratings of all countries in the world[28].

In its latest triennial review of the list of Least Developed Countries in 2003, the Economic and Social Council of the United Nations used the following three criteria for the identification of the LDCs, as proposed by the Committee for Development Policy (CDP):-

- a low-income criterion, based on a three-year average estimate of the gross national income (GNI) per capita (under $750 for inclusion, above $900 for graduation);
- a human resource weakness criterion, involving a composite Human Assets Index (HAI) based on indicators of: (a) nutrition; (b) health; (c) education; and (d) adult literacy; and
- an economic vulnerability criterion, involving a composite Economic Vulnerability Index (EVI) based on indicators of: (a) the instability of agricultural production; (b) the instability of exports of goods and services; (c) the economic importance of non-traditional activities (share of manufacturing and modern services

---

28 The Economic and Social Council of the United Nations, Triennial Review of the List of Least Developed Countries in 2003. Africa (33 countries) Angola, Benin, Burkina, Faso, Burundi, Central African Republic Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Zambia; Caribbean (1 country):- Haiti; Asia (10 countries):- Afghanistan, Bangladesh, Bhutan, Cambodia, East Timor, Lao People's Democratic Republic, Maldives, Myanmar, Nepal, Yemen; Pacific (5 countries):- Kiribati, Samoa, Solomon Islands, Tuvalu, Vanuatu; Graduated LDCs:- Botswana (in 1994) Cape Verde (in 2007).

in GDP); (d) merchandise export concentration; and (e) the handicap of economic smallness (as measured through the population in logarithm); and the percentage of population displaced by natural disasters[29].

To be added to the list, a country must satisfy all three criteria. To qualify for graduation, a country must meet the thresholds for two of the three criteria in two consecutive triennial reviews by the CDP. In addition, since the fundamental meaning of the LDC category, i.e. the recognition of structural handicaps, excludes large economies, the population must not exceed 75 million[30].

In the 2000 review, Senegal was included in the list of LDCs. East Timor was added to the list in 2003, bringing the total number of LDCs to 50[31].

In 2007, the United Nations graduated Cape Verde from the category of Least Developed Countries. This is only the second time it has happened to a country. The first country to graduate from LDC status was Botswana in 1994. Samoa may become the third country to graduate in this manner, with a decision on this issue scheduled for 2008[32].

---

29 The Economic and Social Council of the United Nations, Triennial Review of the List of Least Developed Countries in 2003, foot note 28.

30 The Economic and Social Council of the United Nations, Triennial Review of the List of Least Developed Countries in 2003.

31 Ibid, 2000 Report.

32 Ibid, 2007 Report.

CHAPTER THREE

Origin of the Dispute Settlement Understanding

Section I

The Background

World History is full of wars caused by trade related disputes among people and between states. For instance in 1840 Britain invaded China to overturn the Chinese bar on opium imports. In 1852 the United States sent her Navy to force the Japanese nation open its shores to international trade[33].

In fact, it is alleged that the WTO/GATT system emerged following World War II due to the desire of the victorious nations to create institutions that would eliminate the causes of war. The desire of the creators of these institutions was to prevent conflict causes of war through the United Nations and to eliminate economic causes of War by establishing three international economic institutions[34].

These three institutions were:-

- The International Monetary Fund (IMF);
- The World Bank; and,
- The International Trade Organizational (ITO).

Initially, these were known as the Breton Woods Systems[35].

---

33 Moens, G. and Gillies, P. International Trade and Business: Law, Policy and Ethics. UK: Carvendish Publishing, 1998, p. 61.

34 Bagwell, Kyle, and Robert,W. Staiger. Multilateral Trade Negotiations, Bilateral Opportunism, and the Rules of GATT/WTO. Journal of International Economics, 2003, p. 16.

35 Ibid.

In the beginning the International Trade Organization (ITO) which was negotiated in Havana, Cuba was planned to be the formal trade management global organization in the post World War II era. Political disagreements ultimately spelled the end of the ITO as a formal organization, yet participants considered trade issues important enough to resurrect portions of the ITO Charter and transform them into a less formal, free standing agreement known as the General Agreement on Tariffs and Trade (GATT)[36].

Hence, GATT is rather an international treaty and not an institution as such. GATT became the Agreement as well as the Organization for establishing and enforcing, through dispute settlement, the international trade rules.

The (WTO) dispute settlement system is often praised as one of the most important innovations of the Uruguay Round. This should not, how ever, be misunderstood to mean that the WTO dispute settlement system was a total innovation and that GATT 1947 did not have a dispute settlement system[37]. On the contrary, there was a dispute settlement system under GATT 1947 that evolved quite remarkably over nearly 50 years on the basis of Articles XXII and XXIII of GATT 1947[38].

---

36 Bagwell and Staiger, foot note 34, p. 17.

37 Brown, Chad P, & Bernard M. H., WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector: Journal of International Economic Law, 2005, p.27, available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html (accessed in March 2008.

38 Brinza, Daniel, International Trade Dispute Settlement System, Journal of International Economic Law, 719, 2003, p.139, available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html (accessed in March 2008.

Several of the principles and practices that evolved in the GATT dispute settlement system were over the years codified in decisions and understandings of the contracting parties to GATT 1947[39].

Section II

Dispute Settlement System Under GATT 1947

As mentioned above the dispute settlement system of the GATT is enshrined under Articles XXII and XXIII there of. Article XXII (1) provides that:-

> Each contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement[40].

However, if the contracting parties fail to reach on a satisfactory solution by themselves within reasonable time, the GATT 1947 gave the jurisdiction to deal with the dispute to the entire contracting parties of GATT:-

---

39 Brinza , foot note 38, p. 139.

40 The General Agreement on Tariffs and Trade (GATT 1947): Article XXII (1).

> If no satisfactory adjustment is effected between the contracting parties concerned within reasonable time,..., the matter may be referred to the contracting parties[41].

In practice, however, particularly during the early years of GATT 1947, disputes were decided by rulings of the Chairman of the GATT Council. Later, they were referred to working parties composed of representatives from all interested parties, including the parties to the dispute. These working parties adopted their reports by consensus decisions. They were soon replaced by panels made up of three or five independent experts who were unrelated to the parties of the dispute[42].

These panels wrote independent reports with recommendations and rulings for resolving the dispute, and referred them to the GATT Council. Only upon approval by the GATT Council did these reports become legally binding on the parties to the dispute[43].

It is through this process that the GATT panels built up a body of jurisprudence that later on formed the mainstay of WTO dispute settlement system.

The contracting parties to GATT 1947 progressively codified and sometimes also modified the emerging procedural dispute settlement

---

41 The General Agreement on Tariffs and Trade (GATT 1947): Art. XXIII (21).

42 Collier, John G, The Settlement of Disputes in International Law: Institutions and Procedures: Oxford, Oxford University Press, 1999, 71-72.

43 Ibid.

practices. The most important Pre-Uruguay round decisions and understandings were:-

- The decision of April 1966 on Procedures Under Article XXIII;
- The understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979;
- The Decision on Dispute Settlement, Contained in the Ministerial Declaration of 29 November 1982;
- The Decision on Dispute Settlement of 30 November 1984[44].

One drawback in the dispute settlement system during GATT time was the principle of positive consensus. For example, there needed to be a positive consensus in the GATT Council in order to refer a dispute to a panel. Positive consensus meant that there had to be no objection from any contracting party to the decision. The strange thing was, the parties to the dispute were not excluded from participation in the decision making process. In other words, the respondent could block the establishment of a panel. Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of counter measures against a non-implementing respondent. Such actions could also be blocked by the respondent[45].

---

44 Kuruvila, P.E. International Trade, Developing Countries and the GATT/WTO Dispute Settlement Machanism. Journal of World Trade. ISSN 101-6702. 1997, 31(6), 171-208, p.178.

45 Palmeneter, D & P. C. Mavroidis Dispute Settlement in the World Trade Organization – Practice and Procedure: 2ndedition, West Publishing Co., 1999, p12.

It is during the Uruguay Round that the DSU eliminated the right of individual parties, typically the one whose measure is being challenged, to block the establishment of panels or the adoption of a report. That means, the 'Positive Consensus' rule has been replaced by the 'Negative Consensus' rule. Now, the DSB automatically establishes panels and adopts Panel and Appellate Body Reports unless there is a consensus not to do so[46]. This 'negative' consensus rule contrasts sharply with the practice under the GATT 1947 and also applies, in addition to the establishment of panels and the adoption of panel and Appellate Body reports, to the authorization of counter measures against a party which fails to implement a ruling[47].

Also, as part of the results of the Uruguay Round, the DSU introduced a more detailed procedure for the various stages of a dispute, including specific time-frames. It is as a result of this that the DSU now contains many deadlines, so as to ensure prompt settlement of disputes[48].

Other important new features of the WTO dispute settlement system introduced during this round are the appellate review of panel reports and a formal surveillance of implementation following the adoption of Panel (and Appellate Body) reports[49].

---

46 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 16(4).

47 Ibid: 22(6).

48 The DSU: footnote 14, Appendix 3, Working Procedures, parg. 12.

49 Ibid, 21(6) & 22(8).

Section III

Objectives of the Dispute Settlement System

The main objectives of the dispute settlement system are framed under Article 3 of the DSU some of which are discussed below: -

Provision of Security and Predictability

Article 3(2) of the DSU sets out the central objective of the WTO dispute settlement system to be 'provision of security and predictability to the multilateral trading system'.

It is known that though the parties to the WTO are mainly states the trade of goods and services, however, are actually conducted among private economic operators. The commercial activities of these players require stability and predictability in the government laws, rules and regulations.

Hence, the DSU plays the role of ensuring existence of a rule oriented system to resolve disputes about the application of the provisions of the WTO Agreement there by re-enforcing the rule of law and making the trading system more secure and predictable.

Preservation of Rights and Obligations of WTO Members

The second objective of the dispute settlement system is claimed to be provision of a mechanism through which WTO members can ensure that their rights under the WTO Agreement can be enforced. Again Art. 3(2) of the DSU Points out that 'members recognize that it (i.e. the

dispute settlement system) serves to preserve the rights and obligations of members under the covered agreements.

This is envisaged to be achieved by application of the procedures and provisions of the dispute settlement system to challenge a trade policy measure adopted by one WTO Member against another member in contravention to the obligation set out in the WTO Agreement.

So, the DSU provides forum where a complainant presents its case and the respondent whose measure is challenged also can defend itself there by preserving members rights and obligations under the WTO Agreement.

Clarification of Rights and Obligations through Interpretations

It is a well-known fact that legal provisions are often drafted in general terms. What is more, the precise scope of the rights and obligations contained in the WTO agreement certainly cannot always be evident form the mere reading of the legal texts. The WTO Agreements, which are results of a long negotiation process among several parties are bound to suffer form lack of clarity due to the compromise needed for their formulations.

Therefore, the DSU sets as one of it's main objectives:

> *to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*[50].

50 The DSU: footnote 14, Art:3.2.

But, what are these 'customary rules of interpretation'?

We do not have a precise indication of them in the DSU. However, Art. 3.2. of the DSU certainly had in mind the Vienna Convention on the Law of Treaties, particularly Articles 31 through 33.

So, the WTO is to be interpreted in good faith in accordance with the ordinary meaning of the terms in the relevant provisions. In doing so, the context in which the terms appear and the object and purpose of the treaty will also be taken into consideration[51].

Article 3(2) of the Vienna Convention prescribe supplementary means of interpreting treaties such as the preparatory work of the treaty and the circumstances of its conclusion in the event the application of the principal means of interpretation leave the meaning still ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable[52].

Arbitration over Adjudication

The other main objective of the WTO dispute settlement system is ensuring that solutions mutually agreed by the parties be found for disputes. Article 3(7) of the DSU states that 'a solution mutually

---

51 The DSU: footnote 14, Art: 3. (2); see also The Vienna Convention on the Law of Treaties, Art.31 (1).

52 Ibid: Art. 3.2; Vienna Convention: Art. 31(2).

acceptable to the parties to a dispute and consistent with the Covered Agreements' is to be preferred. [53]

Speedy Settlement of Disputes

Art. 3. (3) of the DSU emphasizes this objective by stating that: -

> *the prompt settlement of situations in which a member considers that any benefits accorded to it directly or indirectly under the covered Agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.*[54]

Compulsory and Exclusive Jurisdiction

One of the inherent problems in international relation is absence of compulsory and exclusive jurisdiction over disputes among parties to a treaty. The DSU, however, aspires to overcome this shortcoming. Under Article 23 of the DSU, WTO members have undertaken to use the multilateral system for settling their trade disputes rather than resorting to unilateral action[55].

---

53 The DSU: footnote 14, Art. 3.7.

54 Ibid, Art. 3.3.

55 Ibid, Art. 23.

This Article particularly states that:

> *When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered Agreements or an impediment to the attainment of any objective of the covered Agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding*[56].

Therefore, unlike other systems of international dispute resolution, there is no need for the parties to a dispute to accept the jurisdiction of the WTO dispute settlement system in a separate declaration or agreement. This consent to accept the jurisdiction of the WTO dispute settlement system is already contained in a Member's accession to the WTO. As a result, every Member enjoys assured access to the dispute settlement system and no responding Member may escape that jurisdiction[57].

---

56 The DSU: footnote 14, Art. 23.1.

57 Butler, Monika, and Hauser, Heinz, The WTO Dispute Settlement System: A First Assessment from an Economic Perspective, February, 2000, p.31, available at http://www.hec.unil.ch/deep/publications-english/e-cahiers.htm, (accessed on 10th March, 2008).

CHAPTER FOUR

Preferential Treatment Granted to Least Developed Countries

Section I

Introduction

About two thirds of the WTO's around 153 members are developing or least developed countries. They play an increasingly important and active role in the WTO because of their numbers, because they are becoming more important in the global economy, and because they increasingly look to trade as a vital tool in their development endeavor[58].

Developing and least developed countries are a highly diverse group often with very different views and concerns. However, the WTO deals with the special needs of developing and least developed countries in three ways:-

1. The WTO Agreements contain special provisions on developing and least developed countries;
2. a Committee on Trade and Development is established as a body focusing on work in this area in the WTO, with some other dealing with specific topics such as trade and debt, and technology transfer;

58 Steger, Debra P and Susan M. Hainsworth, 'World Trade Organization Dispute Settlement: the First Three Years', Journal of International Economic Law, 199, 1998, p.59, available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html (accessed in March 2008).

3. The WTO Secretariat provides technical assistance for developing and least developed countries.[59]

This special treatment is also reflected in the dispute settlement of the WTO which has its origin in the preceding system of GATT.[60]

Section II

Treatment of Least Developed Countries under the GATT Dispute Settlement System

At the initial stage of GATT 1947, the dispute settlement system was absolutely unsuitable to and inconsiderate of least developed Country Members. This is because the dispute settlement system under GATT 1947 was primarily based on negotiation, conciliation and consensus.[61] Due to extremely weak economic and political leverage, a least developed country Member of the WTO could not hope to negotiate on equal footing with a developed Country counterpart and resolve its dispute. Hence, inter governmental conciliation prevailed during the early periods, the function of GATT being merely to facilitate the settlement of disputes by government contracting parties.

---

59 Jackson, J.H. Dispute Settlement and the WTO, Background Note for Conference on Developing Countries and the New Round Multilateral of Trade Negotiotiaions. Center for International Development, John F. Kennedy School of Government, 1999, p. 19, available at http://www.ksg.harvard.edu/Trade_Workshop/jackson.pdf (accessed on March, 2008).

60 Ibid.

61 Gupta,K.R, GATT and Underdeveloped Countries. Atma, Ram and Sons, 1976, p. 22.

As is tried to mention in the initial pages of this paper, the GATT was not an institution, but rather an international treaty, and as such there was no specific body designed to settle dispute between members. Dispute settlement under GATT rested on conciliation[62].

Thus the economic might of the parties to the dispute had a decisive bearing upon the whole dispute settlement process and out come.

However in spite of (and may be because of this) there gradually developed a differential treatment in favor of developing and least developed countries under the GATT dispute settlement system.

The dispute settlement system rested on Articles XXII and XXIII of GATT 1947. In fact, these are the only two original GATT provisions dealing with the issue of dispute settlement.

Article XXII, which emphasizes on consultation stipules that:-

> Each contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter

62 Kuffor, Koffi Oteng, International Trade from the GATT to the WTO: the Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes. Journal of World Trade. ISSN 1011-6702. 1997, 31(5), 117-145, p. 122.

affecting the operation of this (GATT 1947) Agreement.[63]

So, Art, XXII (1) of GATT provides the first stage of the dispute settlement procedure, that is the obligation to consult each other (the bilateral stage).

In the event, however, these two parties fail to reach on a solution within a reasonable time, the matter may then be referred to the contracting parties to the GATT (the multilateral stage).[64]

As can be easily observed from the reading of the relevant provisions, the GATT 1947 dispute settlement procedure did not serve the interest of least developed countries. This is principally because economically strong members of the GATT were in a tempting position to use their political and economic strength to take advantage of weaker countries in the course of negotiation.[65]

What is more, genuine and fair conciliation can only take place between parties of comparable leverage. Therefore, it is argued that this situation has resulted in lack of trust of developing and least developed members in the GATT dispute settlement mechanism, and that is why they filed only ten out of fifty-eight complaints from 1948 to 1966[66].

---

63 GATT 1947:footnote 8, Art. XXII(1).

64 Ibid: Art XXII (2).

65 Jackson, J.H.,footnote 27, p. 61.

66 Kuruvila, P.E., footnote 12, p. 173.

Hence, the need for judicialization of the dispute settlement process was felt right from the initial stage of GATT principally because of the support of developing and Least Developed Country GATT members for a legalistic system that places emphasis on rules and procedure in order to ensure equal and faire treatment.[67]

Subsequently, the seventh session of GATT held in 1953 decided that the settlement of disputes should be entrusted to panels of experts (instead of the entire contracting parties of the Treaty).[68]

The panels of experts were to be composed of three to five GATT delegates, according to their individual competence and merits.[69] The two parties to the dispute were then heard by the panel. In the event the dispute was not settled during the deliberations, the panel deliberated in camera and ruled in the form of a draft report.[70]

The parties had the opportunity to submit comments on this draft report. Having considered these comments, the panel could modify its draft report or simply take note of them.[71]

From the perspective of developing and least developed countries, the panel system was a major improvement. For instance, the composition of panels appeared to reflect smaller countries interests.

---

67 Kuruvila, P.E. footnote 34, p. 173.

68 Jackson, J.H.footnote 33, p. 64.

69 Ibid.

70 Ibid.

71 Ibid, p. 65.

Moreover, this system allowed for a quicker settlement of disputes. It also more element of independence and less passion in the treatment of disputes compared to working parties which were basically representatives of their government.

This does not mean, however, the situation was markedly improved. It did not. Still, panel reports did not bind the parties to the dispute. Still, the enforcement mechanism being recourse to retaliation, was not an affordable option for least developed countries, above all when the economy of the LDC in question mainly depends on the trade of a single product with a developed country.

As a result of this Brazil and Uruguay submitted a proposal in 1965 to reform Article XXII of the GATT, which aimed to introduce the following four points to establish a preferential treatment in favor of developing and least developed countries:-

i. Developing and least developed countries should be given the option of employing additional measures (including greater technical assistance) and that third party be permitted to prosecute GATT related complaints on their behalf;
ii. Financial compensation to be paid in case of violations of the GATT by developed countries where it is established that the measure at issue has an adverse effect on the trade of the developing or least developed country;
iii. Developing countries be released from their obligations under the GATT towards a developed country whose restrictive measures have impaired their import capacity;

iv. A collective action be taken in order to obtain compliance in the event a developed country has not complied with a panel recommendation with in a certain time limit.[72]

Though this proposal failed to receive acceptance it helped to bring attention to the unequal economic relationship between the developed and Least Developed Members of the WTO and also search for new remedies in favor of developing and least developed countries in order to compensate their inability to retaliate against developed countries.[73]

This proposal also helped bring about the 1966 Procedures and their adoption by the GATT contracting parties. The Procedure consists four provisions which only apply to complaints by developing and least developed countries against developed countries.[74] The 1966 Procedures were aimed to breakup the idea of a uniform dispute settlement system, rendering a political and legal recognition of the unequal economic relationship between developed and underdeveloped countries[75].

As a result of these 1966 procedures it was resolved that the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of and their impact on the trade and economic development of affected contracting parties.[76]

---

72 Kuffor, K. O., footnote 30, p. 123.

73 Ibid.

74 Ibid.

75 Hudec, R. E. Developing Countries in the GATT Legal System. Trade Policy Research Center, 1987, p. 48.

76 Gupta, K.R., footnote 29, p. 39.

This provision was designed to call upon panels to take account of the economic dimension of the case besides its purely legal implications. The fact that the economic and not simply legal implications of the measure at issue were to be taken into account as a major element in the panel ruling was a real improvement.[77]

It is also as a result of the 1966 Procedures that developing and least developed countries involved in a dispute with a developed country were given the privilege to have a right of recourse to good offices of the Director-General of the GATT. The Director-General was given the authority to bring the matter to the attention of the contracting parties at the request of any of the countries involved in the event no satisfactory solution is reached after two months.[78]

Two further provisions contained in the 1966 procedures dealt with the question of delays in the dispute settlement process:-

a. a panel of experts is to be appointed forthwith upon receipt of the report of the Director-General. This panel is to reach its decision and submit its recommendation to the GATT Council for review and appropriate action within sixty days;
b. the question of the implementation of panels rulings was also tackled by the 1966 decisions. Precise time frames were established for this purpose, regarding both the information on

---

77 Gupta, K.R., footnote 29, p. 39.
78 Ibid, p. 41.

the action taken by the respondent and the practical implementation of the recommendation it self.[79]

These 1966 procedures were followed by further efforts to improve the developing and least developed countries position.

The Members of GATT agreed in 1967 to create 'a self-starting' panel procedure the aim of which was to "examine problems relating to the quantitative restriction maintained by developed contracting parties on industrial products of particular interest to developing countries with a view to an early removal of these restrictions".[80]

However, developing and least developed countries considered that bilateral negotiations were preferable and resisted the creations of these panels simply because this procedure was not automatic and no legal obligations bound the contracting parties in this regard.[81]

The decade of the 1970's saw an overhaul and rebuilding of the GATT legal system. The Tokyo Round negotiations led to a codified and better structured dispute settlement system in the form of the '1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance'.[82] In addition, a legal office was finally created at this

---

79 T.R.A.D.E. Working Paper: Issues Regarding the Review of the WTO Dispute Settlement Mechanism. 1999, p.10, available at http://www.southcentre.org/publications/trade/dispute.pdf,1999, (accessed on March, 2008).

80 T.R.A.D.E., footnote 47, p. 11.

81 Ibid.

82 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210. Annex p.3.

occasion addressing to some extent the developing and least developed countries' calls for an institutional reform and for legal assistance to enhance their capacity to participate in the dispute settlement process.[83]

Moreover, paragraph 6(iii) of the above mentioned Understanding gave a legal recognition to the practice of appointing a panelist from developing or least developed countries in the case the dispute was between an industrialized and a developing/least developed country Member.[84]

The contracting parties also agreed to "conduct a regular and systematic review of the developments in the trading system with regard to matters affecting the interests of developing and least developed countries".[85]

Finally, the Technical Assistance Services of the GATT Secretariat was mandated, at the request of a less developed contracting party, to assist it in connection with matters dealt with in the Understanding.[86]

---

83 Jackson, J.H., footnote 33, p. 71.

84 GATT BISD, 26th Supplement, footnote 50, p. 4.

85 Ibid.

86 Ibid.

Section III

Treatment of LDCs under the WTO System

From the perspective of least developed countries, the major developments of WTO dispute settlement system from that of GATT are the relative judicializaion of the procedure and the definite WTO position against unilateralism and in favor of multilateralism.

In addition, the WTO Dispute Settlement Understanding reiterated and reinforced the need to provide special and differential treatment in favour of least developed countries.

The WTO legal position against unilateralism is particularly essential for developing and least developed country members, whose fear unilateral or bilateral determination of violations or suspension of concessions was, somewhat, alleviated.[87]

3.1 The Least Developed Countries under the WTO DSU

The least-developed Countries' campaign for special treatment during the Uruguay Round led to a materialization of the further distinction among developing countries, in the WTO DSU, i.e. between developing countries and LDC's.[88]

---

87 Kuffor, K. O., footnote 40, p. 132.

88 Rom, M., Some Early Reflections on the Uruguay Round Agreement as Seen From the View Point of a Developing Country. Journal of World Trade.,1994, p.22, available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html (accessed in February, 2008).

The crucial question remains of the definition of the term 'least-developed' it self. No serious effort was made during the Uruguay Round to determine criteria in this regard, despite the fact that least-developed countries raised this question during the negotiations.[89]

Therefore, now the United Nations list of least developed countries are referred to in order to give effect to the special treatment granted by the WTO DSU. This UN list contains today fifty countries, thirty of which belong to the WTO.[90] This identification is based on general (GDP, per capita, the share of industries in the GDP and the illiteracy rate) and other numerous more specific criteria.[91]

The core provisions of the DSU which deal with the special treatment of least developed member countries are Articles 24(1) and 24(2).[92] As a general principle, least developed countries are to be given special consideration "at all stages of the determination of the causes of a dispute and of dispute settlement procedure".[93]

In addition, "members shall exercise due restraint in raising matters under these procedures involving a least developed country member" or "in asking for compensation or seeking authorization to

89 Rom, M., footnote 88, p. 23.

90 Ibid, p. 28.

91 Ibid.

92 The DSU: footnote 14, Articles 24(1) and 24(2).

93 Ibid, 24(1).

suspend the application of concessions or other obligations pursuant to these procedures".[94]

Finally, paragraph 2 of Article 24 of the DSU provides for the possibility for least developed countries to benefit from the Director General or the Chairman of the DSB "good offices, conciliation and mediation with a view to assisting the parties to settle the dispute".[95]

It must be noted, however, that no least developed country has so far been involved in a WTO dispute neither as a respondent nor as a complainant. The possible reasons shall be discussed under Chapter Four of this paper.

3.2 Benefits to All but with Special Implication to LDCs' under DSU

3.2.1. The Judicialization

It is generally agreed that the very existence of a compulsory multilateral dispute settlement system itself is of a particular benefit for developing and least developed country members. Such a system, to which all members have equal access and in which decisions are made on the basis of rules rather than on the basis of economic power, empowers developing countries and LDCs by placing the weak on a more equal footing with 'the strong'.[96]

---

94 Ibid.

95 The DSU: footnote 14, Art. 24(2).

96 Kuruvila, P.E.,footnote 34, p. 177.

In this sense, any judicial law enforcement system benefits the weak more than the strong because the strong would always have other means to defend or impose their interests in the absence of a law enforcement system.

3.2.2. The Negative Consensus Rule

Under GATT, the need to reach a consensus at every stage of the procedure was a major impediment in the use of the DSM, above all for developing and least developed countries.

This 'possibility to frustrate the procedure was a major concern for developing and least developed countries and the cause for their lack of trust in the system'.[97]

However, under the WTO DSU, a 'negative consensus' rule is applied and a consensus is needed in order to halt the proceeding from advancing at any stage of the formal dispute settlement procedure.[98]

This is a major improvement since the need to reach a consensus at every stage of the procedure could have been major impediment in the use of the DSM, above all for least developed countries.

For instance,

---

97 Footer, M.E. Developing Country Practice in the Matter of WTO Dispute Settlement. Journal of World Trade. 2001, p. 73. available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html (accessed in February, 2008).

98 The DSU: footnote 14, Articles 6, 16(4), 22(6).

> If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[99]

Similarly a consensus is needed to rule against the adoption of a panel report, or the authorization to suspend concessions.[100] Thus no blockage can hinder the dispute settlement procedure because the possibility to reach consensus is de facto impossible.

Although this development benefits any contracting party, it has a great impact on the situation of complainant developing or least developed country because the automaticity of the procedure and the adoption of panels give them more weight in the negotiation process, even against developed countries.[101]

3.2.3. Strict Time Frames

The WTO DSU provides for tight and precise time limits at every stage of the procedure. The consultation phase is set to be concluded between 10 and 30 days.[102]

---

99 The DSU: footnote 14, Art. 6(1).

100 Ibid, Arts. 16(4) and 22(6).

101 Safadi R. and Laird S. The Uruguay Round Agreement: Impact on Developing Countries, 1996, p123, World Development. available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html (accessed in February, 2008).

102 The DSU: footnote 14, Articles 4(3).

As to the panel procedure:-

> Panels shall have the following terms for reference unless the parties to the dispute agree other wise within 20 days from the establishment of the panel.[103]

Article 12 thereof farther lays down the strict time frame for conducting panel procedures.[104]

What is more, Article 3.12 of the DSU gives developing and least developed countries special privilege by giving them the right to invoke the 1966 procedures when involved in a dispute as a complainant against a developed country. This provision entails the right to benefit form the tight time limit of sixty dates for the panel to issue the report.[105]

3.2.4. Legal Assistance

Article 27(2) of the DSU provides that:-

> While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to

---

103 The DSU: footnote 14, Art. 7(1).

104 Ibid, Art. 12.

105 The GATT DSM, 1966 Procedures: Paragraph 7.

> developing country members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country member which so requests. This expert shall assist the developing country member in a manner ensuring the continued impartiality of the Secretariat.[106]

This is a provision which clearly recognizes the limitation of Least Developed Countries and aspires to address it.

3.2.5. Consultation Phase

The consultation phase of the dispute settlement process is regulated by Article 4 or the DSU. It is stipulated here that "during consultations members should give special attention to the particular problems and interests of developing country members."[107]

Another provision that deals with developing and least developed countries special right in the consultation phase is Article 12.10 which concerns time frames for consultation. This Article allows the parties to the dispute to agree to extend the time frames for consultations as set out in Article 4.7 and 4.8 of the DSU.

However, this is limited to the case where a least developed country is a defendant. It is also provided for the possibility for the chairman of the DSB to step in and decide on any further time extension

106 The DSU: footnote 14, Articles 27(2).

107 Ibid, Art. 4.

in the case the relevant time has elapsed and the parties to the dispute can not agree on whether the consultations have concluded or not. [108]

3.2.6. Panels Phase

At this stage of the dispute settlement process, too, developing and least developed countries are availed with preferential treatment.

The preferential treatment starts right form the composition of the panel itself:-

> When a dispute is between a developing country member and a developed country member the panel shall, if the developing country member so requests, include at least one panelist from a developing country member.[109]

What is more, under Article 12.10 of the DSU:-

> In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. . . In addition, in examining a complaint against a developing country Member, that panel shall accord sufficient time for the developing country

108 The DSU: footnote 14, Articles 4(7) & 4(8).

109 Ibid, Art. 8(10).

Member to prepare and present its argumentation.[110]

The content of the panel report is also made the subject of this preferential treatment. Article 12.11 of the DSU provides that:-

> Where one or more of the parties is a developing country member, the panel's report shall explicitly indicate the form in which account has been taken of a relevant provisions on differential and more favorable treatment for developing country members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.[111]

Accordingly, whenever a least developed country member invoked a special treatment provision, then the panel's response there to must be indicated in the report thereof.

---

110 The DSU: footnote 14, Articles 12(10).

111 Ibid, Art. 12 (11).

CHAPTER FIVE

Historical Examination and Prospect of the WTO Dispute Settlement from the Perspective of Least Developed Countries

Section I

The Growing Importance of WTO Dispute Settlement to LDCs

Least Developed Countries need access to foreign markets if they are to reap the benefits of globalization, and break out of the chronic poverty under which their people suffer. And, it is hoped that multilateral negotiations under the World Trade Organization play a pivotal role in facilitating market access to LDCs. Yet, throughout the global economy, pressure for protectionism abound, open and disguised, threatening to roll back these gains.[112]

The Argument that the WTO is not that important for LDCs as a means to secure access to market because there are other more important unilateral trade preferential arrangements can be a myopic one.

---

112 Ewelukwa, U. U., African States, Aggressive Multilateralism and the WTO Dispute Settlement System : Politics, Process, Outcomes and Prospects. Fayetteville, AK : University of Arkansas School of Law, 2005, p9, available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html, (accessed on March, 2008.

The developed countries as well as others like China and India are now generous in granting preferential treatment to LDCs simply because the LDCs are no threat to them due to meager size of economy, complementarities of trade, and primary nature of the commodities they export.

However, when, buoyed by favorable export market situations and other factors, LDCs manage to increase the size of their export and diversify their export commodities in to manufactured goods to a sizeable degree, the now generous recipient Countries are bound to grow increasingly protective and decrease or withdraw the unilateral preferential trade treatments they now so generously grant. Even now, there is discordance between developed and least developed countries on the question of subsidies on agricultural products.

Therefore, if the LDCs are to hope on a sustainable economic growth, they need to base their medium-term strategy on treaty and law bound market access through arrangements like the WTO.

If, ultimately, LDCs are to rely on the WTO as a dependable mechanism to secure access to international market, then the WTO's dispute settlement mechanism is the most critical and successful feature of the trade regime that helps them to accomplish this hope. It is only using this mechanism that LDCs can aspire to protect their market access, and launch international legal scrutiny on the protectionist practices of their trading partners.

Section II

The DSM to LDCs in the New Structure of World Trade

There is also another new and important factor that makes the WTO DSM more important to LDCs than it was hitherto.

Previously, the international arena was largely a two side's affair. There was mainly the rich-poor, north-south, developed-undeveloped, characterization.

The developed and developing countries (including the LDCs) were not competitors as such because the developed countries have an economy based on industry, information technology, sophisticated services, and tertiary products while the developing and least developed countries primarily took to the international market agricultural products, raw materials, minerals and other unprocessed goods.[113]

Moreover, there was a huge gap between these two group of states in terms of any applicable social or economic measurement – be it literacy rate, per capita income, GNP, level of technology, infrastructure, volume of international trade, etc. Hence, the trade relationship between the two sides was mainly focused on whether the price given for the poor countries products was fair or not.

---

113 Gelb, Stephen. 2005. South-South Investment: The Case of Africa. In Africa in the World Economy—The National, Regional and International Challenges. The Hague: Fondad, 2005, p.119, available at. http://www.fondad.org, (accessed on February, 2008).

But now, the similar level of economic development of the hitherto developing and least developed group has now become extremely distinct.

There is now China with the second largest economy in the world after the United States with a GDP of $10.21 Trillion (in 2006) when measured on a purchasing power basis.[114] It is the fourth largest in the world after the United States Japan and Germany, with a GDP of US $2.68 Trillion (2006) when measured in exchange rate terms.[115]

There is also India, a developing country until very recently but now with the twelfth largest economy in the world, with a GDP of US $1.25 trillion (in 2008). It is the third largest in terms of purchasing power parity.[116]

What is more, India is the second fastest growing major economy in the world, with a GDP growth rate of 9.4% for the fiscal year 2006 – 2007. It is also a country fourteenth in the world in factory output. 34 Indian Companies have been listed in the Forbes Global 2000 ranking for 2007. It is also fifteenth in the world in services output.[117]

Brazil, another big economy masquerading as a developing state, is the tenth largest economy in the world, with 2000 GDP of $588 billion.[118]

---

114 Forecasts for economic growth, 2008, p. 31, available at www.focus-economics.com (accessed in February, 2008).

115 Ibid.

116 Ibid, p. 35.

117 Ibid.

118 Ibid, p. 19.

It is a highly diversified economy with wide variations. The Country has one of the most advanced industrial sectors in Latin America. Accounting for one-third of GDP, Brazil's diverse industries range from automobiles, steel, and petrochemicals, to computers, aircraft, and consumer durables.[119]

Another example, Vietnam, has Asia's second fastest growing economy; with 8.4 percent growth in 2006, trailing only China's and the pace of exports to the United States is rising faster than even China's.[120] On November 7, 2006, Vietnam became WTO's 150th member, after 11 years of preparation including 8 years of negotiation. China too, has now become a full fledged member of the WTO.

The strange phenomenon here is the fact that all the above four Countries, almost with a developed economy in-terms of size, diversification and sophistication are poor income countries with tremendous least developed state features.

They (and other several states like them) manufacture aircraft and export coffee. Their labor cost is almost at par with any given LDC state.

The Chinese government has focused on foreign trade as a major vehicle for economic growth. There is large scale unemployment in both urban and rural areas. From 100 million to 150 million surplus rural

---

119 Forecasts for Economic Growth, footnote 81, p. 19.

120 Ibid.

workers are adrift between the villages and the cities, many subsisting through part time, low paying jobs. [121]

Already, China's relation with Africa (a continent where a disproportionate numbers of LDCs are found) is pock-marked with problems. Firstly, trade imbalances are increasingly in China's favor and large scale dumping of cheap manufactured products are undermining local industries.[122] For instance, the South African clothing and textile sector has lost more than 100,000 jobs since 1995 due largely to the influx of cheaper products from China. Trade with China has, if anything, worsened unemployment and poverty in South Africa, which are two of the most pressing problems facing the Country today.[123]

This phenomenon is being observed in other LDCs too.

Now, even in international arena, there are frequent instances where the interests of developed and developing nations coincide against that of LDCs, especially in trade, environment, emigration, and several other issues.[124]

Today, Asia receives, for instance, about 27 percent of Africa's exports, in contrast to only about 14 percent in 2000. This volume of trade is now almost on par with Africa's exports to the United States and

---

121 Wickramasekera, Piyasiri. Asian Labour Migration: Issues and Challenges in an Era of Globalization. International Migration Program, International Labour Office, 2007, p. 31, available at www.wisc.edu/wage/ILO/ILO.htm , (accessed on February, 2008).

122 Smith, Nicky, Financial Mail, 20th October, 2006, p. 70.

123 Ibid.

124 Mosoti, V. Does Africa Need the WTO Dispute Settlement System? in V. Mosoti (ed.), Towards A Development-Supportive Dispute Settlement System in the WTO. Geneva: International Centre for Trade and Sustainable Development, 2003, p. 83.

the European Union (EU)—Africa's traditional trading partners; in fact, the EU's share of African exports has halved over the period 2000–05.[125]

Asia's exports to Africa also are growing very rapidly—about 18 percent per year—which is higher than to any other region. At the same time, although the volume of foreign direct investment between Africa and Asia is more modest than that of trade— and Sub-Saharan Africa accounts for only 1.8 percent of global FDI inflows—African-Asian FDI is growing at a tremendous rate. This is especially true of Asian FDI in Africa.[126]

Asia is now the third most important export destination, with a share of 27 percent of Africa's total exports in 2005, lagging only the EU (32 percent) and the United States (29 percent). Africa's exports to Asia, as a share of its total exports, have increased from a mere 9 percent in 1990 to 27 percent, while exports to its traditional markets among the EU countries have decreased from around 48 percent to 32 percent.[127]

Asia has become a significant trade partner for Africa in imports as well as exports over the last 15 years. The average annual growth rate of Africa's imports from Asia was 13 percent between 1990 and 1995, and

---

125 Kaplinsky, R., D. McCormick, and M. Morris, The Impact of China on Sub-Saharan Africa., Institute of Development Studies, University of Sussex., 2006, p.41, available at http://www.ids.ac.uk/ids/global/AsianDriverpdfs/DFIDAgenda Paper06.pdf, (accessed in January, 2008).

126 Kaplinsky, R., D., footnote 92, p. 42.

127 UNCTAD has estimated that South-South trade accounts for about 11 percent of global trade and that 43 percent of the South's trade is with other developing countries. It also has estimated that South-South trade is growing about 10 percent per year. "A Silent Revolution in South-South Trade," 2004, p. 29, available at www.wto.org/english/tratop_e/dda_e/symp04_paper7_e.doc,, (accessed in January, 2008).

accelerated to 18 percent between 2000 and 2005. Africa imported 33 percent of its total imports from Asia in 2005, second only to the EU. In comparison, Africa receives only 9 percent of its total imports from the United States.[128]

From the above discussion, it is easy to observe that, in the current global trade structure, countries like China, India and Brazil are to be the major sources of trade imbalance as well as opportunities to LDCs.

Possessing large and well developed agricultural, mining, manufacturing and service sectors the economies of such Countries outweighs that of other developing and least developed countries and are expanding their presence in world markets. Their competition and impact is more severe on LDCs than is the developed economies.

Hence, WTO, being a forum and a place to settle trade disputes has grown in importance to LDCs', both to protect the opportunity presented by this new world trade phenomenon as well as fend-off the negative impacts therefrom on LDCs.

If an Indian Company exports a product to Tanzania at a price lower than the price it normally charges on its own home market, it can be rectified with in WTO framework because it is dumping. If the government of Brazil subsidizes its manufacturing sector, hurting the

---

128 UNCTAD : Footnote 27.

domestic industry of an LDC Member of WTO, it can be forced to withdraw the undue subsidy using the WTO DSU mechanism.

With hundreds of millions of unemployed population, countries like China, India and Brazil are bound to be tempted to engage in protectionist policies and practices. Faced with a task of providing jobs to billions of people, there is no economic activity too primitive or unimportant for Vietnam and Indonesia which will put them in direct confrontation with LDCs, both for imports and exports.

If the LDCs can hope to secure the highly growing market for their products from the vast opportunities offered by countries like China and India, it can be done mainly through WTO mechanism, and its rule based enforcement mechanisms of the DSU.

But, how have least developed Country Members been faring under this dispute settlement mechanism so far?

Section III

Participation of LDCs in WTO Dispute Settlement

Unfortunately, the participation of LDCs in WTO dispute settlement mechanism can be summarized succinctly - least developed country members have so far been neither complainant nor respondent in any WTO dispute. [129]

---

129 Understanding The WTO, Written and Published by the World Trade Organization, Information and Media relations Division, 2003, p. 75, available at http://www.wto.org, (accessed in January, 2008).

This is in spite of the argument that WTO has nothing to offer to LDCs at this point in time except its dispute settlement mechanism.[130]

Trade preferences are seen by many as an essential element in integrating least developed countries into the world trading system. Because of this there are several bilateral and multilateral international treaties and arrangement that accord LDCs' with a variety of trade preferences.[131]

Of significance in this regard is the unilateral liberalization by China in early 2006 of certain African imports: tariffs were eliminated on 190 commodities from 25 African countries. There are also preferential arrangements provided by developed countries in the North, such as the U.S. African Growth and Opportunity Act (AGOA) and the EU Everything But Arms (EBA) programs, which also facilitate market access for exports from Africa produced by Chinese and Indian firms operating in Africa.[132]

That is why a number of scholars argue that LDCs do not and should not need WTO (at least for the short term) for the purpose of getting access to international market. If the LDCs build their capacity for production, the argument goes, there is enough international market for them opened outside the WTO framework.[133]

---

130 Bown, C. P. and Hoekman, B, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'. Center for World Affairs and the Global Economy (WAGE), University of Wisconsin, 2005, p.68, available at http://www.law.georgetown.edu/iiel/current/dsureview/index.html,(accessed in January, 2008).

131Ibid, p.69.

132 UNCTAD, The Least Developed Countries Report, 2004. New York and Geneva : United Nations., p.9.

133 C.f. Brenton,Paul, Integrating the Least Developed Countries into the World Trading System, The Current Impact of EU Preferences under Everything but Arms, The World Bank Poverty Reduction and Economic Management Network, International Trade Department, April 2003, p. 6.clo7277

Then, one can successfully argue (as stated above) that at present the whole attraction of WTO to LDCs should be its judicialized dispute settlement system. The dispute settlement system of the WTO is deservedly hailed as one of its principal successes which have brought a new feature to international relation, i.e. enforcement.[134]

Sadly, as pointed out above, LDCs have so far been not able to make use of the WTO dispute settlement system.

To be fair, it is to be expected that developed countries should make a disproportionate use of the dispute settlement system since they account for most of world-wide trade. They often have trade relationships that are very broad (in all sectors of goods and services) and deep (in terms of the volume of trade in quantity or value).

However, it is still quite bewildering and alarming that the dispute settlement machinery has never been operated by or against an LDC Member Country, which pushes membership thereof to the point of insignificance in the eyes of LDCs.

---

134 Busch, M. and Reinhardt, E., 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes', Fordham International Law Journal 24 (1): 2001, p161.

CHAPTER SIX

SET BACKS IN WTO DISPUTE SETTLEMENT SYSTEM

LEAST DEVELOPED COUNTRIES PERSPECTIVE

In the previous Chapter we have seen that the importance of the WTO dispute settlement mechanism to LDCs has increased due to the growing threat of developing countries to LDCs interest (on top of the already existing problem posed by the developed ones).

However, we also have noted that so far no least developed country has participated in the WTO DSM, either as complainant or respondent.

So, here we can not discuss how it has been used but why it has not been used.

Section I
Pre-Case Problems

1.1 Entry Barriers

As mentioned in previous pages, a WTO dispute settlement process undergoes through three main stages i.e., consultation, formal litigation, and implementation. All special preferences and assistances in favor of LDCs in the course of the dispute settlement process are availed only

after a case has been officially instituted, and none before actual start of the case.[135]

But, the DSU and the WTO as a whole have become too complex and technically demanding for an LDC to use effectively in the absence of adequate assistance. Information has to be gathered and analyzed by affected local economic players and transferred to the government, which then decides whether to pursue a case or not.[136]

For instance, in the United States and the European Union there is an institutionalized linkage between private companies and the concerned officials of the government. While under existing WTO rules only member states may initiate a case, this generally occurs on the basis of persuasion from private companies. This is facilitated where the established infrastructure gives private companies a voice and the chance to lead their case informally through the initial stage.[137]

But no such infrastructure exists in LDCs. The increased volume and complexity of WTO Agreements amplify the problems associated with lack of infrastructure, since they increase the demand for expert legal service and in depth knowledge of how to use the system and how to proceed with a case.[138]

---

135 Bown, C. P. and Hoekman, B. Foot Note 4, p. 34.

136 Ibid, p.35.

137 Sacerdoti, Georgio ,The WTO Dispute Settlement System : 1995-2003 ,Journal of International economic Law, The Hague: Kluwer Law International, 2004, p.89.

138 Ibid, p. 90.

Given that cases are usually initiated after complainants have assessed their merits and prepared their initial arguments and their first submission, and given that least developed countries are not capable of performing these tasks, the lack of pre-case assistance is a major disadvantage. Meanwhile, existing DSU provisions are applicable only once a case is officially initiated.[139]

1.2 Fear of Negative Repercussions

Another reason why least developed countries have not been active in WTO dispute settlement mechanism is said to be fear of negative repercussions of doing so. As we have pointed it out in pervious pages of this paper, LDCs do get market access into developed Countries outside of the WTO framework.

Let alone USA and EU, even China and India now give LDCs quite significant trade preferences, special treatments and tariff exemptions. For instance, under the 'Everything but Arms' (EBA) initiative all products from LDCs are eligible for duty and quota free access to the EU market and that such access is maintained indefinitely.[140]

---

139 Sacerdoti , footnote 137, p. 90.

140 Brenton, Paul, Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything but Arms, The World Bank Poverty Reduction and Economic Management Network International Trade Department, April 2003, p.17

Therefore, LDCs conceivably might opt to overlook an actionable act of a trade partner that happens to provide them with a preferential treatment. This means, other things being equal, adversely affected exporters are less likely to participate in a dispute settlement process when they are involved in a preferential trade agreement with the respondent, when they lack the capacity to retaliate against the respondent by withdrawing trade concessions, when they are poor or small, and when they are particularly reliant on the respondent for bilateral assistance.[141]

Section II

Post-Case Problems

2.1 Expertise Problem

To take full advantage of WTO law, least developed countries need the facility to aggressively pursue their rights in the increasingly complex international legal trade regime. For such capacity a country must have several things. It needs experienced trade lawyers to litigate a case, seasoned politicians and bureaucrats to decide whether it is worth litigating a case, which is arguably the most critical stage of the process.

It needs a staff to monitor trade practices abroad but also the domestic institutions necessary to participate in international

141 Ewelukwa, U. U. footnote 79, p. 13.

negotiationson complex issues, like health and safety standards, which figure so prominently on the WTO's agenda.

In reality, however, most least developed countries lack even a single full-time WTO representative, let alone the necessary dedicated trade negotiation bureaucracy at home:-

> In many cases in (developing countries) there is literally no one who can be reassigned to a dispute settlement-related function because no one in the government has the necessary background. Dedication, intelligence and hard work abound . . . and can compensate for lack of expertise in many respects. However, in disputes with trained experts from developed countries the lack of experience frequently can not be over come. Thus the fight is not fair[142].

Therefore, least developed countries are not in a position to devote sufficient resources to dispute settlement, principally because they do not have a sufficient number of WTO experts. The WTO Secretariat and developed country members have the capacity to shift resources if needed to satisfy greater demands.

---

142 Parlin, C. C. WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to function Effectively. International Lawyer, 1998, p. 41 available at WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm. (accessed on March, 2008).

Least developed country members, however, have few, if any, resources to transfer. For these members to utilize the WTO dispute settlement system effectively they must significantly increase the number of people in their government and the private sector who have expertise in the WTO Agreements and WTO dispute settlement procedures.[143]

Thus it is concluded from a statistical analysis of the operation of the DSU during the first five years that developing and least developed countries encountered even greater difficulties in bringing complaints under the WTO than under the GATT. Their explanation for this phenomenon runs as follows:-

> By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute such as appeals, compliance reviews and compensation abstraction, by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiations; and by adding a potential of two years to the defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the

143 Ewelukwa, U. U., footnote 79, p. 23.

> hurdles facing (developing countries) contemplating litigation.[144]

2.2. Financial Problems

As all adjudication processes, the WTO dispute settlement process as well is a very expensive venture particularly to least developed Member Countries.

First of all, the consultations are held in Geneva which implies a hefty additional cost to LDCs. If an LDC chooses to employ the services of a private legal counsel to appear before the Panel, then the price tag rises exponentially. In fact there are few WTO DSU specialists present in LDCs (if there are at all) and the cost of hiring specialists abroad is prohibitive.[145]

Of course, it is stipulated under Article 27(2) of the DSU that the WTO Secretariat provide additional legal advice and assistance to least developing country Members. However,

> The technical assistance granted is both quantitatively and qualitatively inadequate. First, the staff dedicated to this task (two

144 Busch, M. and Reinhardt, E. Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes, Fordham International Law Journal,2001, p. 15-16, available at WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm. (accessed on January, 2008).

145 Ewelukwa, U., footnote 79, p. 24.

> experts in the field working part time and two junior staff members) is by far insufficient compared to the number of disputes.[146]

In order to alleviate this problem, there are certain law firms based in Geneva that offer free initial assistance to least developed countries. In January, 2000 a law firm launched a free advice service for LDCs under which individual countries can receive up to 40 hours a year of free advice on WTO issues.[147]

The practice in industrialized countries whereby the costs of the dispute are met either directly by the affected industry or through a complex form of subsides to the government concerned cannot be followed in least developed countries. This is self evident because of the lack of resources of the affected industries which are in most cases composed of small and medium undertakings.[148]

The seriousness of the cost problem can be easily imagined if the dispute is raised between a least developed country and an industrialized power. There would necessarily be disequilibrium in the legal expertise that can be afforded by the parties to the dispute.

---

146 Bown, C. P. and Hoekman, B., footnote 102, p. 37.

147 Michalopoulos, C. Developing Countries in the WTO. Basingstoke and New York: Palgrave, 2001, p. 10,available at WTO Website.http://www.wto.org/ (accessed in January, 2008).

148 Ibid.

2.3. Inadequate and Obsolete Preferential Treatment

The WTO frame work as a whole and the DSU in particular groups WTO members in to two major groups, i.e. developed and developing countries. Though there are few instances where LDCs are treated as a sub-group, the DSU principally lumps LDCs with developing countries.

This grouping of states, however, is now quite obsolete. There are states termed as developing countries at time of WTO establishment which now have become so developed economically as to be a threat to the likes of Japan and USA.

Countries like Vietnam, China, Brazil, India, Indonesia etc fall under this category of states, a situation which the WTO had not envisaged at time of the drawing of the DSU.

On the other hand, the gap between the LDCs and the hitherto developing countries has grown to such an extent that the later now are a greater threat to the economic well being of LDCs than the developed countries are.

All the rules of special and differential treatment contained in the DSU apply to least developed country members, which are included in the group of developing countries. It is in addition that the DSU sets out a few particular rules applicable only to least developed Country Members. Even these few differential treatments dished out to the LDCs do not offer them a more favorable position in practice.

To be fair, no least developed country has had recourse to the WTO DSM so far. It is, therefore, difficult to have a practical view on the inefficacy of the special treatment granted to LDCs under DSU.

But, even the theoretical examination of the issues demonstrates the inefficacy.

For instance, Article 24(1) of the DSU stipulates that '...Members shall exercise due restraint in raising matters under these procedures involving a least developed country Member.' The problem, however, is that there is no parameter to monitor whether the developed country has complied with its obligation under this Article 24(1) as no precision is provided for regarding the due restraining it shall exercise.

To add another example, there is Article 24(2) which states that:-

> In dispute settlement cases involving a least developed country Member, where a satisfactory solution has not been found in the course of consultation, the Director General or the Chairman of the DSB shall, up on request by a least developed country Member, offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute...'.[149]

149 The DSU: footnote 14, Article 24(2).

However, this provision appears meaningless as a special treatment granted to LDCs because it does not add any thing to the situation of least-developed countries that is not already granted to all Members of WTO as a general principle:-

> Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.[150]

Hence, Article 24(2) actually grants least developed countries a right that any party is afforded. The impact of such provision is thus extremely limited.

2.4. Ambiguous Legal Standing of Panels and Appellate Body Rulings

There is an argumcnt which goes as, '...the WTO dispute settlement procedure follows a judicial model rather in procedure than substance'.[151] In fact, some even argue that it is not a strictly judicial system but a quasi-judicial model. The DSU 'do not, nor t hey were intended to, establish a comprehensive legal system with an independent judicial system'.[152]

---

150 The DSU: footnote 14, Article 5(1).

151 Zimmermann, T. A. WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation, Aussenwitschaft 60 (1): 27-61, 2005, p. 38, available at WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm., (accessed in January, 2008).

152 Ibid.

Accordingly, though the DSU procedure itself officially constraints disputants, the significance of the procedure and especially the Panel rulings remains unclear.

The most important culprit for the creation of such ambiguity is Article 32 of the DSU which states that:-

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the Covered Agreements, and to clarify the existing provisions of those Agreements in accordance with customary rules of interpretation of public international law. ***Recommendations and rulings of the DSB can not add to or diminish the rights and obligations provided in the Covered Agreements*** (emphasis added).[153]

---

153 The DSU: footnote 14, Article 32.

So, the last statement of this sub-article restrains the judicial nature of the dispute settlement system and saws suspicion and ambiguity on the legal standing of Panel and Appellate Body rulings.

2.5. Absence of Enforcement Mechanism

With the Dispute Settlement Body's adoption of the Panel or Appellate Body reports, there is now a recommendation and ruling by the DSB addressed to the ruling party (in the case of a successful violation complaint) to bring itself into compliance with the violated WTO law:-

> In the absence of mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are founded to be inconsistent with the provisions of any of the Covered Agreements.[154]

But the question is, what if the losing party refuses or fails to bring its measure into conformity with its WTO obligations?

The bed-rock of DSUs enforcement mechanism is retaliation. Retaliation is the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system:-

---

154 The DSU: footnote 14, Article 3(7).

> The last resort which this understanding provides to the Member invoking the dispute settlement procedure is the possibility of suspending the application of concessions or other obligations under the Covered Agreements on a discriminatory basis vis-à-vis the other Member, subject to the authorization by the DSB of such measures.[155]

The next, and bigger question is, will this enforcement mechanism work for least developed countries, especially if the dispute is against a developed country? How could DCS hope to make use of the DSU with their lack of a credible threat to retaliate?

In other words, even with a legal victory in hand, a least developed country is definitely not able to compel the defendant to liberalize since its threat to retaliate lacks credibility.

Even if we assume an LDC would have a credible threat to retaliate, it might opt not to due to fear of farther reprisals such as the suspension of foreign aid or unilateral trade preferences:-

> Retaliation is an instrument of economic power to be used ultimately against a reluctant

155 The DSU: footnote 14, Article 3(7).

> respondent. The threat and effectiveness that counter-measures represent highly depend on the existence and repartition of concessions between the countries involved in the dispute as well as the quality of the concessions themselves. Here lies the deep unfairness of the system. Self-evidently, there is only a limited threat and economic impact in an LDC raising import barriers against a developed country.[156]

What is more, it is not only the fact that retaliation by an LDC against a developed country can hardly have an impact or represent a serious threat, but also that suspensions of concession have a commercial and welfare cost that can hardly be afforded by LDCs.

In fact, since violations of the WTO are disproportionately burdensome for LDCs given the fragility of their export sectors and the fact that their export base is generally much less diversified than in high income countries, a cost benefit analysis may deter LDCs form commencing a dispute.

---

156 Bown, C. P. and Hoekman, B., footnote 102, p. 48.

Section III

Demonstration Cases

As has been repeatedly mentioned in the previous Chapters of this paper, the experience of LDCs in the dispute settlement process of the WTO is almost none. However, for the purpose of demonstrating the problems mentioned in the previous two sections of this Chapter we shall briefly see few cases where LDCs have participated marginally and others where developing countries have involved in as parties to the dispute.

An important case where the question of developing countries capacity for retaliation was addressed is the EC - bananas III affair.

This controversial case involved two sets of developing countries, both exporting bananas to the European Communities. After a single market to unify policies on bananas had been established in the EC in the year 1993, the United States, along with several Central American bananas producing countries, brought a complaint against the EC.[157]

These countries argued that their market access was being denied by the preferential access granted by the EC to former European colonies (ACP countries). This regime imposed restriction on bananas' imports on a discriminatory basis. The issues raised were particularly sensitive

157 European Communities – Regime For the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 by the European Communities, 1999, p. 6, available at http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc, (accessed in January, 2008).

because any sudden removal of ACP countries' preferential access to the EC market would have seriously disrupted the economies and societies of these countries.[158]

Initial consultation failed and the report eventually reached, which "condemned" the EC, was not adopted because of the blockage of the respondent. A case brought by Caribbean countries was similarly blocked. [159]

Under the WTO (in 1997), the dispute was raised by Ecuador, Guatemala, Honduras, Mexico and the US against the EU's regime for the importation, sale and distribution of bananas, which was alleged to be inconsistent with various provisions of the WTO. [160]

The panel found in May 1997 that the EC regime was inconsistent with the provisions of the WTO and the EC was asked to reform its regime by 1st January 1999. An appeal was then filed by the EU. The Appellate Body largely upheld the panel decision. However, the EU refused to disclose any details on its implementation plan and decided to maintain some trade preferences in its Bananas regime.[161]

158 European Communities – Regime For the Importation, Sale and Distribution of Bananas, footnote 157.

159 Ibid.

160 European Communities – Regime For the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 by Ecuador – 1999, p 7, available at. http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc, (accessed in January, 2008).

161 European Communities – Regime For the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 by the European Communities, footnote 154.

The US, Honduras, Guatemala, Ecuador and Mexico requested an arbitration in November 1997 and the arbitrator held that the EC would have fifteen months and one week to implement the WTO decision and bring the regime into compliance. In 1998, the European Union adopted a proposal to modify its bananas regime which was found by the complainants just as discriminatory as the previous system.[162]

This new regime was brought before the WTO panel and the US declared that retaliation would be applied from March if no substantial changes were done. The EU responded that it would agree on a panel only if the US withdrew its threat of sanction. Dissatisfied with the EC's implementation, the complaining countries brought the matter again before the WTO in January 1999, which found that the reformed regime did not meet the WTO requirements. The US requested the WTO to suspend its concessions to imports from the EC worth $ 520 millions as a compensation for the EC denial of market access. The WTO approved the request but reduced the amount of the suspension of concessions.[163]

More interestingly, Ecuador, a Developing Country, eventually requested that the Dispute Settlement Body authorize the suspension of concessions to the EC equal to the level of nullification and impairment that is $ 201.6 million, pursuant to Article 22.7 of the DSU.[164]

---

162 Request of 17 November 1997 by Ecuador, Guatemala, Honduras, Mexico and the United States. WTO Document WT/DS27/13/G/L/209 (20 November 1997) Overview of the state-of-play of WTO disputes. , P.23Available at http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc (accessed in January, 2008),.

163 Request of 17 November 1997 by Ecuador, Guatemala, Honduras, Mexico and the United States., footnote 160.

164 Ibid.

On 18 May 2000, the Dispute Settlement Body issued such authorisation as requested. "Ecuador (i) [took] note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004; (ii) upon implementation of the new import regime, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$ 201.6 million per year vis-à-vis the EC will be terminated ..."[165] But, by this date there was no harm that the Ecuadorian retaliation could have had on the EU economy, simply because Ecuador did not have any concession to withdraw or import to block.[166]

Another case concerns Article 21.2 of the DSU which deals with the issue of giving particular attention to matters affecting the interests of developing countries in the surveillance of implementation of recommendations and rulings.[167]

According to Article 21.2 of the DSU, particular attention should be paid to matters affecting the interests of developing countries. The first striking feature of this provision is indeed its imprecision as mentioned in the previous parts of this Chapter. It could be addressed to any organ of the DSM whose role deals with the implementation or the

---

165 Request of 17 November 1997 by Ecuador, Guatemala, Honduras, Mexico and the United States., footnote 160.

166 Ibid

167 Hudec, R. E., Enforcing International Trade Law : The evolution of the modern GATT Legal System. Butterworth Legal Publishers, 1993, pp 21-23.

surveillance, that is the panel, the Dispute Settlement Body or the Appellate Body. The verb "should" indicates a desirable, but not mandatory task and the method to be used is not specified. Some scholars maintain the view that the Dispute Settlement Body or panels could simply discharge their obligations in this regard by adding a few paragraphs to their rulings or spending "a few more minutes" on the case.[168]

In addition, it is interesting to note that Article 21.2 is not applied by panels when dealing with recourses under Article 21.5 of the DSU, that is in the event that there is a disagreement between the parties as regards the adequacy of the implementation. This worrisome situation, which directly echoes the hortatory character of article 21.2, was illustrated in two cases.

For example, in the EC-Bananas III case, at the request of Ecuador, the panel was reconvened under Article 21.5, on the ground that the EC implementation was inconsistent with the panel ruling. Ecuador asked the panel to make specific recommendations and suggestions as to how the EC could bring its regime for importation of bananas into compliance.[169] The EC made a separate request for the original panel to be reconvened, on the ground of Article 21.5 of the DSU. In both cases, although Ecuador was a developing country and the EC

168 Hudec, R. E., footnote 167, p. 21-23.

169 European Communities – Regime For the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 by Ecuador -, footnote 157.

could have sought to defend the interests of bananas-producing DCs (ACP countries), neither panel showed any special and differential treatment.[170]

Another important concern is the fact that action pursuant to article 21.7 and 21.8 is to be taken by the Dispute Settlement Body and to do so, a consensus must be reached.

The question of the preferential treatment was addressed in three cases which notably deal with the period of time to be granted to DCs for the implementation of panels and AB rulings.

In the EC - Bananas III case, four of the complainants (namely Ecuador, Guatemala, Honduras and Mexico) along with the United States, had recourse to arbitration under Article 21.3(c) in order to determine the "reasonable period of time" for the EU to comply with the panel's ruling. These developing countries argued that special attention should be paid to their interests, on the ground of Articles 21.2, 21.7 and 21.8 of the DSU.[171]

However, this request had no impact whatsoever on the arbitrator's decision, since he was not convinced that particular circumstances should be taken into account to justify a period shorter than the fifteen

---

170 European Communities – Regime For the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 by Ecuador -, footnote 157.

171 Ibid.

months contained in Article 21.3(c) and ruled that the EU had fifteen months and seven days for implementation.[172]

The question of Developing Countries' special treatment with regard to the implementation of decisions was also addressed in the case of Indonesia- Certain Measures Affecting the Automobile Industry (Indonesia-Automobiles).[173] In July 1998, Indonesia requested an additional nine months in order to implement the panel ruling, arguing that its car industry was in need of structural adjustments.[174] Although the arbitrator refused to take into account this argument, he considered that particular attention should be paid to Indonesian interests, pursuant to Article 21.2 of the DSU. Accordingly, he accorded Indonesia an additional period of 6 months to implement the panel ruling, with reference to the difficult economic situation of this country.[175]

A third case can be referred to which also deals with the implementation of a panel ruling by a developing country. In India-Quantitative Restrictions on Agricultural, Textile and Industrial Products, the Panel had anticipated the difficulties India may face in the implementation of the panel recommendations and decided to suggest

---

172 European Communities – Regime For the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 by Ecuador -, footnote 157.

173 Indonesia- Certain Measures Affecting the Automobile Industry (Indonesia-Automobiles).WTO Documents WT/DS54/R (Complaint by the European Communities), WT/DS55/R and WT/DS64/R (Complaint by Japan), WT/DS59/R (Complaint by the United States), (report of the panel), (2 July 1998), adopted on 23 July 1998, Overview of the state-of-play of WTO disputes. Available at http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc, (accessed in February, 2008)

174 Ibid.

175 Ibid.

ways in which this country should implement the decision, according to the faculty offered to panels and Appellate Body by Article 19.1 of the DSU.[176] The panel considered that the period of 15 months was merely an indication, not a rule, and thus that an extension of this timeframe would be possible. It further decided that any Article 21.3 arbitration should respect the principle of special and differential treatment and the necessity to pay particular attention to developing countries' interests.[177]

In relation to problems related to finance, it is worth noting that the fact that consultations are held in Geneva, which implies additional costs in the procedure, was the subject of a complaint by Pakistan.[178]

---

176 India-Quantitative Restrictions on Agricultural, Textile and Industrial Products, Complaint by the United States, WTO Document WT/DS90/R (6 April 1999) (panel) and AB-1999-3, WTO Document WT/DS90/AB/R(23 August 1999) (Appellate Body), adopted on 22 September 1999; Overview of the state-of-play of WTO disputes. Available at http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc (accessed in February, 2008).

177 Ibid.

178 Pakistan - Patent Protection for Pharmaceutical and Agricultural Products, WTO Document WT/DS36; Overview of the state-of-play of WTO disputes. Available at http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc, (accessed in January, 2008).

CHAPTER SEVEN

Proposals for Making WTO Dispute Settlement Work Effectively in Favor of LDCs

Section I

Introduction

While the importance of aid and debt relief for LDCs can not be undermined, favorable terms of trade are increasingly regarded as the key to sustainable development and self-sufficiency.

Various studies have demonstrated that the aid LDCs receive annually is only a fraction of what they lose as a result of unfair trade practices in developed country markets.[179]

The poorest LDCs, many of which are found in sub-Saharan Africa, need the rule based WTO to protect them, especially at a time when bilateral and regional free trade arrangements are mushrooming more than ever before.

Moreover, as the economic might and competitiveness of developing countries like India and China increases, developed countries

---

179 Petersmann, Ernst-Ulrich How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System, 1998, p. 49, Journal of International Economic Law, available at WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm., (accessed in March, 2008).

may be forced to disparage the rules of WTO and resort to protectionism in order to shield their domestic economic interest.

From the previous pages of this paper we have gathered that LDCs are not able to use WTO dispute settlement system since its establishment. Now that the world-wide trade relationship is showing sign of strain between developed and developing economies, the need of LDCs to use the WTO dispute settlement mechanism will likely greatly increase with the obstacles to do so piling up likewise.

Therefore, under this Chapter we shall try to see what LDCs should do in order to optimally use the DSU to their best advantage.

Section II

Preserving the WTO

The writer of this paper believes that access to market plays vital role in pulling out LDCs from the state of abject poverty.

The attitude that the structure of international trade will never allow poor countries to achieve economic development is myopic at best.

China, India, Vietnam, Brazil etc were able to record miraculous economic development by attracting foreign direct investment and building export oriented production system. No one can doubt that these countries could not have reached such level of economic development if the developed countries were to engage in rampant protectionism.

As a result of world economic development, now the price of primary products like oil and agricultural outputs in international market is increasing from time to time thereby helping to boost the economy of many least developed countries.

In another aspect, the writer of this paper fears for the very existence of the WTO as an entity. And, the sources of this fear are the very champions of the WTO, i.e. developed countries like USA and the European Union.

China is proudly claiming to be the factory of the world. The trade surplus between China and USA is fast becoming a threat of national security level for the later.[180] The economic and political dominance of USA and the Western World is proportionately descending with the ascendance of China, India, Russia and Brazil.[181]

The level of annual economic development in the European Union and USA have stagnated or has been expressed in decimal numbers while those of the likes of China have been consistently registering double digit growth for more than two decades.[182]

---

180 'China', The Washington Post Company, 2008, p.2, available at http://www.washingtonpost.com/wp-srv/world/countries/china.html, (accessed in May, 2008). See also Sinclair, Young, China and the World., p.3., available at http://bbs.chinadaily.com.cn/forumdisplay.php?gid=2&fid=8&page=1(accessed in May, 2008).

181 Ibid.

182 Janszen, Eric, China versus U.S.A.- Economic equivalent of M.A.D. may end with a bang, 2006, p. 14, available at http://www.globalresearch.ca/, (accessed in May, 2008).

The competition for vital resources is driving the price of iron, oil, food etc to absurd level there by cramping the economies of the western world and negatively affecting the economic welfare of their populace.

The disquieting fact is that China, India, Brazil, Vietnam, etc are roaring for yet farther economic development whereas the United States and member countries of EU appear to be at a loss how to readjust themselves with this new phenomenon.[183]

But, if the present trend is to continue unabated, one scenario can be painted to happen in the not far future. The developed countries finding the free-for-all state of the world trade to be quite detrimental to their economic well being bolting out of the WTO and establishing whatever bilateral or regional economic block to suit them.[184]

If the present rule based, WTO framed system of international trade appears to be challenging to LDCs, then the world with out WTO can turn out to be very difficult to operate within.

---

183 Overview of the U.S. Economy: Perspective from the BEA Accounts, U.S. Department of Commerce, Bureau of Economic Analysis, 2006, p.2-4, available at http://www.bea.gov/newsreleases/glance.htm, (accessed in March, 2008).
See also Bengtsson ,Hans, EU-China Trade– and EU Deficit– Double in Four Years, The Epoch Times. , 2004, p.7, available at http://en.epochtimes.com/news/4-12-20/25081.html, (accessed in March, 2008).

184 Engdahl,, F. William, China and USA in New Cold War over Africa's Oil Riches. Darfur? It's the Oil, Stupid... ., 2007, p.9, available at http://www.globalresearch.ca/ (accessed in January, 2008).

The rule based system might be replaced by 'might is right', and where the strong dictates the terms of the bargain, refusing access to its own market and forcing the weak to open its.

Therefore, the LDCs, recognizing the ultimate benefit of having the WTO, have to support and prop up the World Trade Organization.

Section III

Institutionalizing the LDC Status

In the previous Chapters of this paper we have discussed in detail the fact that the whole bunch of WTO Agreements, including the DSU lumps the LDCs together with developing countries like India, Brazil, Vietnam, and Indonesia.

Obviously, a system that perceives Lesotho and Indonesia as belonging to the same economic level and metes out the same preferential treatment in the WTO Agreements works to the tremendous disadvantage of LDCs.

This situation has now reached ridiculous level simply because countries that clearly belonged to the block of developing countries some two decades ago have now become so developed to threaten countries like Italy, France and USA.

The same is true when we review the WTO DSU where the categorization of member states into two main blocks, i.e. developed and developing countries is followed.

Therefore, in order to make the best use of the DSU, the LDCs must negotiate for a special recognition of their status and re-engineering the inbuilt preferential treatments to the special needs of them.

Section IV

Concerted Capacity Building

In this paper, it has been repeatedly recited that no LDC member of WTO has ever participated in a dispute settlement proceeding.

Lack of financial resources, scarcity of experts versed in WTO laws, lack of infrastructure to give private companies voice their grievance in international trade, fear of negative repercussions of bringing a case against a powerful WTO Member state, etc are cited as some of the possible problems precluding the LDCs from participating in WTO dispute settlement process.

However, the ill-effects of these problems can be significantly reduced if the LDCs were to come and work together for their solutions.

Increasingly, countries are getting together to form groups and alliances in the WTO. In numerous cases they even speak with one voice using a single spokesman or negotiating team. This can be used as a

means for LDCs to increase their capacity to utilize WTO dispute settlement system against their larger trading partners.

For Europe there is the European Union which helps member states to coordinate their position in Brussels and Geneva, and the European Commission alone speaks for the EU at almost all WTO meetings. The EU is a WTO member in its own right as one of its Member states.[185]

For Asia, there is the Association of South East Asian Nations (ASEAN). Brunei, Indonesia, Malaysia, Myanmar, Philippines, Thailand, Singapore, Vietnam and Cambodia are members thereof, being able to coordinate their positions in the WTO and to speak with a single voice. The role of spokesman in WTO rotates among ASEAN members and can be shared out according to topic.[186]

Latin American Countries too have a similar set up in MERCOSUR, the Southern Common Market, constituting Argentina, Brazil, Paraguay and Uruguay as its members with Bolivia and Chile as associate members.[187]

---

185 Understanding the WTO, footnote 96, p. 105.

186 Ibid, p. 106.

187 Ibid.

Canada, US and Mexico also have NAFTA, the North American Free Trade Agreement, though their level of regional economic interaction have not yet reached the point where the members have a single spokes man on WTO issues.[188]

The groupings cited above help their members muster more strength. It also provides them the opportunity to build institutional, financial and manpower capacity so that they can effectively promote their interest in all WTO related proceeding both as a group and individual member.

Similarly, it would prove quite advantageous if LDCs were to follow the same pattern and form grouping of their own for purpose of presenting a unified position in the WTO and speak with a single voice.

They could form a new alliance for this purpose or use existing regional blocks like African Union.

If such was the case, problems like fear of negative repercussion, for instance, can be reduced if the case is to be initiated and handled within a frame work of a regional organization representing a group of LDCs.

---

188 Understanding the WTO, footnote 96, p. 106.

Moreover, their weak financial and manpower resources can be pooled together and create a stronger capacity to initiate a case against a developed WTO member under DSU on behalf of an LDC member.

Section V

Capacity Enhancement

One major issue we noted in Chapter IV as one of the problems featured in WTO dispute settlement mechanism as far as LDCs are concerned is the prevalence of unequal possession of legal knowledge and experience among WTO Members. This issue is a chronic and serious impediment and one which will continue to be so for a long time to come, particularly in the identification and preparation of potential cases.[189]

Of course, Article 27.2 of the DSU provides that "the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing Country Member which so requests".[190]

Accordingly, qualified legal experts from the WTO technical cooperation have been made available, either from internal WTO services or from former staffers of the Legal Division.

---

189 Roessler, F. Special and Differential Treatment of Developing Countries Under the WTO Dispute Settlement System. Geneva: Advisory Centre on WTO Law, 2005, p. 23.

190 The DSU: footnote 14, Article 27(2).

However, numerous observers maintain that this technical assistance has failed to reach its objective. This is not because of the incompetence or unwillingness of the staff but because of inadequacy:-

> The WTO Counselor merely provided technical assistance on a narrow range of issues, frequently doing no more than critiquing possible arguments or defenses and providing basic advice about the course of WTO dispute proceedings.[191]

It is also not possible to expect more because the WTO was not intended to play the role of public defender assigned to advocate on behalf of developing or least developed countries.

There is an attempt to ameliorate this problem of inadequacy of legal assistance with the creation of The Advisory Centre on WTO Law. "The objectives of this organization is to:-

- Provide training on WTO law through regular seminars;
- Give legal advise;
- Support legal proceedings in WTO matters; and,
- Provide internships for officials dealing with WTO legal issues to its developing and least developed Country members".[192]

---

191 Parlin, C. C.:footnote 109, p.53.

192 Footer, M.E., footnote 64, p.75.

Infact, the proposals to improve access of LDCs to WTO dispute settlement mechanism must aim towards the achievement the above mentioned objectives.

Section VI

Approval of Collective Retaliation

In the previous Chapters, we have reiterated that one of the major factors that render the WTO dispute settlement mechanism pointless as far as LDCs are concerned is the fact that they do not have the economic leverage to retaliate against a loosing party to a dispute settlement process.

The gist of this issue is that, retaliation being the corner stone of WTO DSM enforcement system, LDCs do not have sufficient economic muscle to enforce a WTO dispute settlement award. As a result LDCs can rarely afford to retaliate, either for pure commercial reason or for fear of counter-retaliation which might prove more damaging to the LDC party.[193]

Therefore, some scholars argue that the WTO dispute settlement mechanism should allow LDCs to jointly pursue their case of similar issue so that they could muster more political and economic might in a dispute.[194]

---

193 Shaffer, G. Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View, Geneva: Advisory Centre on WTO Law, 2005, p. 9-10.

194 Ibid.

This could be achieved by expanding and elaborating paragraph 6 of Appendix 3 of the DSU and Article 10 of same.[195]

Article 10(2) of the DSU provides that:-

> Any member having substantial interest in a matter before a Panel and having notified its interest to the DSB (referred to in this understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the Panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the Panel report.[196]

And, third parties are also entitled to receive the submissions of the parties to the dispute to the first meeting of the Panel.[197]

Paragraph 6 of Appendix 3, which deals with DSU Working Procedures also reiterate the above provisions of the DSU by restating that "all third parties which have notified their interest in the dispute of the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose."[198]

---

195 The DSU: footnote 14, Article 10 & Parg. 6, Appendix 3.

196 Ibid, Art. 10(2).

197 Ibid, Art. 10(3).

198 Ibid, Appendix3, Parg. 6.

The problem, however, is that the status of the third party involved in the dispute, the out come thereof, etc are net provided for clearly both substantially and procedurally.[199]

Therefore, it is necessary to expand the rights of third parties in the dispute as well as elaborate on the provisions so that LDCs could muster their strength and pool their resources in order to help them effectively utilize the dispute settlement mechanism.[200]

Section VII
Status of Private Parties

In the WTO dispute settlement system, only member states can be parties to a dispute.[201]

However, if private parties were to be allowed to be parties to a dispute and bring their own action, the interest of LDCs can derive certain advantages.[202]

For instance, LDCs can easily detect harm to their interest caused by an action of a violating WTO Member. What is more, the fear of

---

199 Shaffer, G, footnote 138, p. 12-17.

200 Ibid.

201 The DSU:footnote 14, Art. 1(1).

202 Roessler, F., footnote 134, p. 23.

politicizing a case and provoking counter-retaliation of a powerful Member state can be minimized?[203]

"The legitimate concerns of LDCs as regards the safeguard of their interests could easily be alleviated by establishing a procedure whereby private parties would have to obtain the authorization of their government to stand before the WTO".[204] This authorization approach would give governments the ability to reinforce and develop their defensive policy in a coherent way with regard to their economy.[205]

This limit to the right of individuals would be justified by the necessity for the government to protect national welfare.

Section VIII

Shorter Time Frames

Paragraph 12 of Appendix 3 of the DSU (Working Procedures) contains proposed time-table for handling a dispute submitted to a Panel. The over-all period extends to thirty months.[206]

---

203 Roessler, F., footnote 134, p. 23.

204 Kuffor, K. O. footnote 40, p. 135.

205 Ibid.

206 The DSU: footnote 14, Parag. 2, Appendix 3.

It is easy to note that LDCs do not have the financial, human and other resources and capacity to bear the burden for such a long time.

Moreover, the action violating the Covered Agreements and hampering the LDC' Member's interest is supposedly to remain in place until such time the dispute is settled.[207]

Therefore, in order to improve this situation, the time-frame issue should be made a subject of preferential treatment, and shortened as much as possible. This is easy to be achieved since a case involving an LDC Member of WTO is likely to be less complicated and of a relatively small amount if expressed in monetary terms.[208]

Section IX

Compensation

The DSU, as time and again mentioned by us, just allows a winning disputant to take retaliatory measure against the loosing party. On the other hand, the settlement process could take as long as 30 months, during which time an injured LDC party may be exposed to strenuous economic, financial and other repercussions.

---

207 Nordstrom, H. 'The Cost of WTO Litigation, Legal Aid and Small Claim Procedures'. Paper presented at conference on WTO Dispute Settlement and Developing Countries: Implications, Strategies, Reforms. Center for World Affairs and the Global Economy (WAGE), University of Wisconsin, 21 May. 2005, p. 49.

208 Nordstrom, H..,footnote 151, p. 51.

The DSU, however, does not have any provision that aims to redress this negative consequence or compensate the winning party for whatever economic and financial loss it might have suffered during the dispute settlement process.

On top of discouraging LDCs from taking their case to WTO DSM, this situation might prove quite harmful to the weak economy of the concerned LDC member.[209]

Therefore, the DSU should be amended in such a way that a winning party is entitled to obtain financial compensation for losses incurred during the dispute settlement process.

SECTION X

Enforcement

Here is the WTO dispute settlement process at its weakest, especially from the perspective of LDC Member states.[210]

In the previous Chapters we have attempted to demonstrate that the cornerstone of WTO DSM enforcement is retaliation.

---

209 Nordstrom, H..,footnote 151, p. 51.

210 See for example Hoekman, B. M., and Mavroids P. C, WTO Dispute Settlement Transparency and Surveillance, 1999, p. 81, available at http://www.worldbank.org/wbiep/trade/papers_2000/dispute_settlement. (accessed in January, 2008).

We have also mentioned that the very concept of retaliation as a means to enforce an award of a WTO Panel can not amount to much for LDCs for the simple reason that they do not have the economic muscle to make their retaliatory measure meaningfully painful.[211]

Therefore, the DSU must be revisited in order to recognize this basic flaw. To this end, the subject of retaliation has to be part of preferential treatment to be accorded only to LDCc considering their special circumstance or inability to wield retaliation as an enforcement weapon.

Accordingly, in the event an LDC party to a dispute emerges a winner the measure of retaliation in the form of withdrawal of access to market should be taken by all members of WTO, and not only by the victim LDC member.

This definitely would have the effect of rendering retaliation a meaningful means of enforcing a WTO Panel decision benefiting an LDC disputant.

It will also have the more desired deterrent effect on powerful WTO Members from trespassing on the rights of an LDC Member.

---

211 Nordstrom, H.,footnote 151, p. 51.

Conclusion

This paper has briefly explored the weak nature of LDCs participation in the dispute settlement mechanism of the international trading system over the decades.

The writer of this paper strongly maintains that the core benefit of the WTO system availed to its Members is its dispute settlement mechanism. It can be successfully argued that, the WTO, unlike other international treaties and organizations, is able to overcome the innate and chronic weakness of international relation, i.e. absence of dispute settlement mechanism with commanding jurisdiction and lack of enforcement mechanism.

Even the United Nations, which aimed by means of collective security to avert war as enforcement mechanism in relation among states, has failed time and again to prevent violence among Member states.

The WTO, however, has largely been successful in adjudicating trade disputes among its Member states and enforce decisions thereof.

Unfortunately, however, this success story has passed over the head of LDCs for various reasons.

However, the non-LDC Members of the WTO are getting stronger thereby enhancing their capacity to look after their economic interest in their individual standing.

Therefore, the LDCs need the WTO dispute settlement mechanism, now more than ever, in order to ensure legally protected and rule based market access to the international trade.

The fact that the LDCs have never made use of the WTO dispute settlement mechanism does not in any way diminish the latter's importance to the former.

The major purpose and advantage of any given law and order system is to make the populace disciplined and keep abide by the rules. The act of punishing those very few that traverses the order is quite a secondary purpose.

What is more, it does not need much argument to convince that a rule based adjudication system benefits the weak much more than the strong.

If, however, the LDCs neglect the WTO DSM claiming that they have no need for it as their track record amply demonstrates, they soon will lose the advantage of even the benefit derived from the deterrent effect of such a system.

Bibliography

Books

Brenton,Paul, Integrating the Least Developed Countries into the World Trading System, The Current Impact of EU Preferences under Everything but Arms, The World Bank Poverty Reduction and Economic Management Network, International Trade Department, April 2003.

Collier, John G, The Settlement of Disputes in International Law: Institutions and Procedures: Oxford, Oxford University Press, 1999.

Gupta,K.R, GATT and Underdeveloped Countries. Atma, Ram and Sons, 1976.

Hudec, R. E. Developing Countries in the GATT Legal System. Trade Policy Research Center, 1987.

Moens, G. and Gillies, P. International Trade and Business: Law, Policy and Ethics. UK: Carvendish Publishing, 1998.

Palmeneter, D & P. C. Mavroidis Dispute Settlement in the World Trade Organization – Practice and Procedure: 2nd edition, West Publishing Co., 1999.

Articles

Bagwell, Kyle, and Robert,W. Staiger. Multilateral Trade Negotiations, Bilateral Opportunism, and the Rules of GATT/WTO. Journal of International Economics, 2003.

Bown, C. P. and Hoekman, B. WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector. Paper presented at conference on WTO Dispute Settlement and Developing Countries: Implications, Strategies, Reforms. Center for World Affairs and the Global Economy (WAGE), University of Wisconsin, 20-21 May. 2005. http://www.law.georgetown.edu/iiel/current/dsureview/index.html.

Brinza, Daniel, International Trade Dispute Settlement System, 6 JIEL 719, 2003.

Brown, Chad P, & Bernard M. H., WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector: 8 JIEL 861, 2005.

Busch, M. and Reinhardt, E. Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes, Fordham International Law Journal 24 (1): 158-72. WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm., 2001.

Butler, Monika , and Hauser,Heinz , The WTO Dispute Settlement System:A First Assessment from an Economic Perspective, February, 2000, http://www.hec.unil.ch/deep/publications-english/e-cahiers.htm,

Engdahl,, F. William, China and USA in New Cold War over Africa's Oil Riches. Darfur? It's the Oil, Stupid... . http://www.globalresearch.ca/ , May 20, 2007.

Ewelukwa, U. U., African States, Aggressive Multilateralism and the WTO Dispute Settlement System : Politics, Process, Outcomes and Prospects.

Fayetteville, AK : University of Arkansas School of Law, 2005, http://www.law.georgetown.edu/iiel/current/dsureview/index.html.

Footer, M.E. Developing Country Practice in the Matter of WTO Dispute Settlement. Journal of World Trade. ISSN 1011-6702. 2001, 35(1), 55-98.

Gelb, Stephen. 2005. South-South Investment: The Case of Africa. In *Africa in the World Economy—The National, Regional and International Challenges*. The Hague: Fondad. http://www.fondad.org.

Hoekman, B. M., and Mavroids P. C, WTO Dispute Settlement Transparency and Surveillance. http://www.worldbank.org/wbiep/trade/papers_2000/dispute_settlement.pdf, 1999.

Jackson, J.H. Dispute Settlement and the WTO, Background Note for Conference on Developing Countries and the New Round Multilateral of Trade Negotiotiaions. Center for International Development, John F. Kennedy School of Government, http://www.ksg.harvard.edu/Trade_Workshop/jackson.pdf, 1999.

Janszen ,Eric China versus U.S.A.- Economic equivalent of M.A.D. may end with a bang, http://www.globalresearch.ca/, April 19, 2006.

Kaplinsky, R., D. McCormick, and M. Morris.The Impact of China on Sub-Saharan Africa., Institute of Development Studies, University of Sussex. Online, available at http://www.ids.ac.uk/ids/global/AsianDriverpdfs/DFIDAgenda Paper06.pdf, 2006.

Kuffor, Koffi Oteng, International Trade from the GATT to the WTO: the Developing Countries and the Reform of the Procedures for the Settlement of

International Trade Disputes. Journal of World Trade. ISSN 1011-6702. 1997, 31(5), 117-145.

Michalopoulos, C. Developing Countries in the WTO. Basingstoke and New York: Palgrave, WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm., 2001.

Mosoti, V. Does Africa Need the WTO Dispute Settlement System? in V. Mosoti (ed.), Towards A Development-Supportive Dispute Settlement System in the WTO. Geneva: International Centre for Trade and Sustainable Development,(2003.

Nordstrom, H. 'The Cost of WTO Litigation, Legal Aid and Small Claim Procedures'. Paper presented at conference on WTO Dispute Settlement and Developing Countries: Implications, Strategies, Reforms. Center for World Affairs and the Global Economy (WAGE), University of Wisconsin, 21 May. 2005.

Parlin, C. C. WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to function Effectively. International Lawyer. ISSN 0020-7810. WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm. 1998.

Petersmann, Ernst-Ulrich How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System, 1 JIEL 25, WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm., 1998.

Roessler, F. Special and Differential Treatment of Developing Countries Under the WTO Dispute Settlement System. Geneva: Advisory Centre on WTO Law, 2005.

Rom, M., Some Early Reflections on the Uruguay Round Agreement as Seen From the View Point of a Developing Country. Journal of World Trade. ISSN 1011-6702. 1994, 28(6), 5-30.

Sacerdoti, Georgio ,The WTO Dispute Settlement System : 1995-2003 ,Journal of International economic Law, The Hague: Kluwer Law International, 2004.

Safadi R. and Laird S. The Uruguay Round Agreement: Impact on Developing Countries. World Development. ISSN 0305-750X. 1996, 24(7), 1223-1242.

Shaffer, G. Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View, Geneva: Advisory Centre on WTO Law, 2005.

Steger, Debra P and Susan M. Hainsworth, 'World Trade Organization Dispute Settlement: the First Three Years', 1 JIEL 199,1998.

T.R.A.D.E. Working Paper: Issues Regarding the Review of the WTO Dispute Settlement Mechanism. http://www.southcentre.org/publications/trade/dispute.pdf, 1999.

Wickramasekera, Piyasiri. Asian Labour Migration: Issues and Challenges in an Era of Globalization. International Migration Program, International Labour Office, Geneva. available at www.wisc.edu/wage/ILO/ILO.htm , 2007.

Zimmermann, T. A. WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation, Aussenwitschaft 60 (1): 27-61,
WTO Website.http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm., 2005.

Official Documents

The General Agreement on Tariffs and Trade (GATT 1947): Article XXII (1).

The Vienna Convention on the Law of Treaties.

UNCTAD, The Least Developed Countries Report, 2004. New York and Geneva : United Nations.

Understanding on Rules and Procedures Governing the Settlement of Disputes.

Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement (1980) 210. Annex

Understanding The WTO, Written and Published by the World Trade Organization, Information and Media relations Division, http://www.wto.org, 2003.