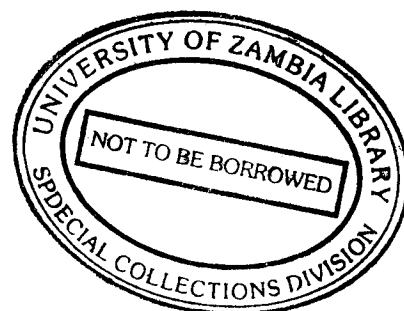


THE EFFICACY OF THE DISPUTE SETTLEMENT MECHANISM UNDER THE
WTO/GATT REGIME IN RELATION TO THIRD WORLD COUNTRIES



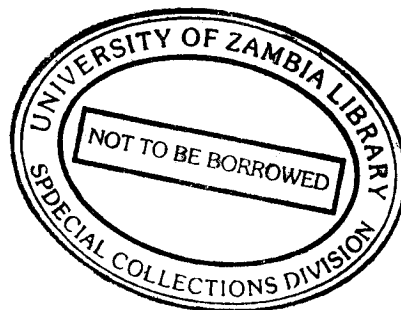
BY

ANGELA C. CHIKAMBA

UNZA

DECEMBER 2006

THE EFFICACY OF THE DISPUTE SETTLEMENT MECHANISM UNDER THE
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BY

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DECEMBER 2006

UNIVERSITY OF ZAMBIA
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DIRECTED RESEARCH ON

THE EFFICACY OF THE DISPUTE SETTLEMENT MECHANISM UNDER THE
WTO/GATT REGIME IN RELATION TO THIRD WORLD COUNTRIES

BY

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COMPUTER NUMBER 21086478

SUBMITTED TO THE UNIVERSITY OF ZAMBIA SCHOOL OF LAW IN
PARTIAL FULFILLMENT OF THE CONDITIONS FOR THE AWARD OF THE
BACHELOR OF LAWS (LLB) DEGREE.

SUPERVISOR: DR. KAMUWANGA

DECLARATION

I ANGELA C. CHIKAMBA-Computer number 21086478, do hereby declare that the contents of this research paper are entirely based on my own research and I have not used, without acknowledging, any person or institutions work. I therefore, bear absolute responsibility for all errors or omissions therein.

DATE..... 17th January 2007.....

SIGNATURE..... Chikamba.....

DEDICATION

To my father, Chapa Yotam Chikamba who saw in me the potential to be a lawyer and directed me towards that dream. We are almost there Daddy. My mother, Fanny Colleen Shawa Chikamba who has been and continues to be my strength and pillar all my life.

To my one and only brother, Munchimba Chabu Chikamba for always bringing out the best in me.

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Thank you God for blessing me richly. I owe it all to you.

I also wish to extend my gratitude to my supervisor, Dr. Kamuwanga for her patience and guidance.

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My gratitude also goes to my friend Yobe Mwalula. Thank you for helping me research for this paper and for always being there whenever I needed a helping hand.

Lastly but by no means least, my parents Mzee and Mama Ngina (whom I fondly call my IMF) none of this would be possible without you.

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LIST OF ABBREVIATIONS

AB.....	Appellate Body
ACP.....	African, Caribbean and Pacific
AG.....	African Group of Countries
AGOA.....	American Growth Opportunity for Africa
COMESA.....	Common Market for Eastern and Southern Africa
DCM's.....	Developing Country Members
DDA.....	Doha Development Agenda
DSB.....	Dispute Settlement Body
DSS.....	Dispute Settlement System
DSU.....	Dispute Settlement Understanding
EC.....	European Community
EU.....	European Union
GATT.....	General Agreement on Tariffs and Trade
ICC.....	International Chamber of Commerce
LDC.....	Least Developed Country
NGO.....	Non Governmental Organization
SADC.....	Southern Africa Development Community
TRIP's.....	Trade Related Aspects of Intellectual Property
WTO.....	World Trade Organization
USA.....	United States of America

CHAPTER ONE

The World Trade Organization

Introduction

It is a common trend for both developing and developed countries to engage in multilateral trade by joining the World Trade Organization (WTO). The main incentive for the developing countries engaging in multilateral trade is to enable them to improve their national economies through export of their products to WTO member countries. Trade between nations plays a major role in the promotion of development especially to the third world or developing nations. One such country is Zambia itself, which has been a member of WTO since inception in 1995¹. This is because trade stimulates economic growth. As at 11th December the World Trade Organization 1995 had a membership of 149 countries². The WTO makes trade rules and aids in the enhancement of trade liberalization.

The WTO began life on 1st January 1995, but its trading system is half a century older. Since 1948 the General Agreement on Tariffs and Trade (GATT) has provided rules for the multilateral trading system. Over the years GATT has evolved through several rounds of negotiations, the largest of which was the Uruguay Round which led to the WTO's creation. This Round of negotiations lasted from 1986 to 1994.

Essentially the WTO, headquartered in Geneva Switzerland, is an organization where member governments go to try to sort out the trade problems they face with each

¹ Sanoussi Bilal, Managing Challenges of WTO. Case study 27 The Experiences of Zambia and Mauritius

² www.wto.org Understanding the WTO: Basics Page 1 of 3

other. It has been recognized by the WTO member countries that trade relations often involve conflicting interests and the most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. So a dispute settlement system has been put in place. This means that the system helps to keep peace among member countries and can be divided under two heads; (a) helping trade to flow smoothly by facilitating the bilateral agreements that the member countries negotiate and (b) providing them with a constructive and fair outlet for dealing with disputes over trade issues. It is the latter element of the two that this paper will focus on in analyzing how effective the system is for developing country members.

Dispute Settlement Procedure in the WTO

History is full of examples of trade disputes turning into war. In the 1930's there was trade war³ when countries competed to raise trade barriers in order to protect domestic producers and retaliate against each others barriers. This eventually played a part in the outbreak of World War II. The development and adoption of the GATT helped to avoid a repeat of the pre-war trade tensions. The principle provisions through which disputes arising under the GATT are Articles XXII and XXIII which are the framework of dispute settlement procedure incorporated in the Dispute Settlement Understanding (DSU) and various WTO agreements.

The first stage in the settlement of any dispute between WTO member countries is bilateral consultation. Just as people with a quarrel between them must sit together and consult to find a way forward, so parties to a dispute under multilateral trading system are encouraged to do the same. Article XXII (2) of the GATT expressly states:

³ Ibid

“The CONTRACTING PARTIES may, at the request of a contracting party consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation...”

The above provision shows that before resorting to the Dispute Settlement Body (DSB) contracting parties should be able to consult each other on the way to proceed in the settlement of the dispute.

The principle provisions through which disputes arising under the GATT are handled are embodied in Article XXIII of the GATT under the heading; ‘Nullification and Impairment’. In essence, in order to avail a complaint under the terms of the said article, a party must show either that the benefits accruing to it under the GATT are being nullified or impaired or that the attainment of an objective of the General Agreement is being impeded. Such nullification or impairment complained of must be as a result of;

- i) a breach of obligation by the respondent member
- ii) the application of any measure by the respondent member whether or not it conflicts with the provisions of the agreement
- iii) any other situation

It is against this main background that the provisions of the Dispute Settlement Understanding (DSU) are premised. The DSU covers the rules and procedures governing the settlement of disputes. Having outlined the requirements in order for a WTO member country to bring a complaint to the DSB, the procedure will now be discussed in brief. The provision for consultation under Article XXII of the GATT is reinforced in the DSU⁴. It specifies that within 10 days after receiving a request for consultations, the member to whom the request is made shall reply. Consultations in good faith must be

⁴ Article 4. Dispute Settlement Understanding

held within 30 days from the date of receipt of the request failure to which the complaining party may proceed directly to request the establishment of a panel.⁵ It is paramount however, that members should attempt to obtain satisfactory adjustment of the matter before proceeding to further action under the Understanding. It is worth noting that under Article 4(10) members are urged to give special attention to the particular problems and interests of developing country members. This is pursuant to the 1966 Procedures⁶ which recognize the vulnerable position of developing country members. There is also an option to resort to the good offices, conciliation and mediation procedures offered by the Director General of the WTO if the parties to the dispute agree. This option may be exercised before the dispute settlement procedures begin. It is a voluntary procedure and if one party to the dispute does not agree then the Dispute Settlement Body is the alternative option. Paragraph H1 of the 1989 improvements further provides that;

‘While the secretariat assists contracting parties 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 developing contracting parties’.

One of the important principles which these procedures lay down is that a dispute should be brought to the DSB by the government of a member country for settlement only after efforts to settle it on a bilateral basis have failed. Once this fails the complaining party may request the DSB formally to commence the Dispute Settlement Mechanism by establishing a panel under Article 6 of the DSU to examine the conflict. A panel is the adjudicator which hears and determines the case while the DSB is the

⁵ Ibid 4(3)

⁶ 1966 Decision on Procedures to be followed in consultations between a less-developed and a developed contracting party

enforcement agency of the WTO. The request for establishment of a panel must be made in writing and should provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. A panel normally consists of 3 persons who are well qualified governmental and/or non-governmental individuals who have taught or published on international trade law or policy or served as senior trade policy official of a Member country⁷.

The disputing parties submit their briefs or submissions prepared by lawyers to the DSB, no legal representation is allowed. It is really litigation at an international level in that the disputants present their case to this panel which then makes an objective assessment of the matter before it. This includes an objective assessment of the facts of the case and applicability of and conformity with the relevant covered agreements. The function of the panel is to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. The panels are required to submit reports of their findings to the DSB within a period of 6 – 9 months. The panel report is then submitted to Members and the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to Members⁸. Within 60 days the report may be adopted by the DSB unless a party gives notice of its intention to appeal or the DSB decides by consensus not to adopt the report. This is an important aspect of the dispute settlement mechanism under GATT/WTO. Even the truant Member countries have an opportunity to be heard when not satisfied due to the right of appeal. This promotes fairness.

⁷ Article 8(1) DSU

⁸ Ibid 16(1)

The appellate body consists of 7 persons who, like those on the panel, must have expertise in all international trade and subjects covered by the various World Trade Organization agreements. Of these 7 persons only 3 are called to serve in any one case. The appeal can be made by any of the parties to the dispute. The report of the appellate body will be confined to issues of law in the panel report and the legal interpretation developed by it⁹. This report must be submitted to the DSB within a 60 to 90 day timeframe. Article 20 of the DSU states the timeframe for DSB decisions which is 9 months for panel reports and 12 months when the panel report is appealed. Once the panel and appellate body procedures have been finalized there remains the issue of implementation of reports. The DSB can recommend implementation in three ways; compliance, payment of compensation or the authorization of retaliatory action. These will be discussed further with reference to how they affect developing member countries in the chapters that follow.

Format

My research was based on personal interviews with officials from the WTO office in the Zambian Ministry of Commerce Trade and Industry. A case study of disputes that have been settled under the Dispute Settlement Mechanism concerning developing member countries was also undertaken. Text books and journals and legal instruments on International Trade were also consulted. Websites involving trade such as www.wto.org and www.tralac.com were also visited in order to consolidate the research.

⁹ Article 17

CHAPTER TWO

The Problem with the Dispute Settlement Mechanism

Under international law today the WTO Dispute Settlement System is said to be one of the most effective mechanisms of interstate dispute settlement.¹⁰ This fact, coupled with the recognition of the vulnerable status of the developing and least developed country members has increasingly built up the international confidence and co-operation that the system creates and reinforces. However, not all is well in the WTO DSS as not all member countries are equal. The development of a member country plays a major role in the status that country will enjoy in the system. In broad terms development is related to a country's position in the centre or periphery of the world economy. What this means is that the more developed and industrialized a country is, the higher its chances of being at the core of the world economy and the situation is reversed with the less industrialized countries. This can be seen with the G8 countries. Developed Country Members (DCM's) are found in the centre of and are in fact at the helm of the world's economy. On the other hand, developing (DCM's) and least developed (LDC) nations are so called because they operate in the periphery of the world economy. They are more controlled than in control.

There are no WTO definitions of developed or developing countries, but the WTO recognizes as least-developed those countries which have been designated as such by the United Nations. Zambia is an example of a least-developed country. In essence, although these DCM's and LDC's are accorded special treatment under GATT and the

¹⁰ Dan Sarooshi, From Doha to Cancun. Delivering a Development Round. p 105

DSU¹¹, the situation is in reality rather contrary. These member countries face a myriad of problems in the use of the Dispute Settlement Mechanism. This chapter will focus on a detailed discussion of these problems.

Firstly, developing countries have problems in trying to invoke the Dispute Settlement System. Under the DSU good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree¹². The fact that the procedure is voluntary poses a problem for those DCM's that wish to invoke the mediation procedure when in conflict with a powerful developed country member. This is because there is no way to compel the developed country to conciliate and mediate. It is evident that the pursuit of disputes through the DSS can be prohibitive for DCM's as it is taxing on their economies. This is why these countries would rather take advantage of the provision for mediation provided by the good offices of the Director General instead of going through with the lengthy DSB process. However, if the other party to the dispute does not agree to the procedure then the DCM is left with no other option other than to invoke the DSB.

Financial constraints are the major problem that DCM's face in their pursuit of settlement of disputes. Many developing nations do not have the resources to mount or defend a case before the WTO. Because of the prohibitive costs of defense, poorer countries are more susceptible to even threats of challenges to their laws by wealthier countries. The entire dispute settlement process is a lengthy one and so tends to put a drain on the DCM's already meager financial resources. The time period from the

¹¹ Part iv of GATT and Articles 4(10) and 24 of the DSU

¹² Article 5(1)

initiation, through consultation, panel and appellate proceedings and any subsequent arbitration means that proceedings can last for years. This is one of the most problematic issues for DCM's and they have argued that the DSS is complicated and overly expensive. These countries need supplementary resources in order to actively participate in the process. This lack of resources is the main disincentive in DCM's participation in the use of the DSB. These countries opt not to initiate proceedings under the DSU and so suffer silently. This is a problem that has not been addressed by the Dispute Settlement Understanding. In fact, Dan Sarooshi¹³ notes that least developed country members have not, to date, used the DSS to resolve a trade dispute. According to them, this is due to the difficulties the system poses for them¹⁴. These severe resource constraints that the developing and least developed nations undergo require them to be treated differently because they are not able to afford to participate in WTO cases. Although Article 4(10) of the DSU provides that members should give special attention to the problems and interests of DCM's, this is not sufficient. There is need for financial assistance to be accorded to these countries.

Another problem which has been identified is that the WTO dispute resolution process is secretive, biased and exclusive, concentrating power in the hands of international trade insiders such as the G8 and other powerful developed nations. The process and records of WTO dispute settlement bodies are closed and no unofficial observers are allowed to witness the deliberations. Further, no legal representatives are allowed to take part in the process except through briefs. This is highly disadvantageous to the DCM's in that there is no transparency to the process since there is no public

¹³ Herbert Smith Associate Professor in International Economic Law, Faculty of Law, University of Oxford.

¹⁴ Proposal by the LDC group TN/DS/W/17 p.1

record of the deliberations but only a final ruling. In the old GATT dispute settlement process, panel reports could be adopted only by consensus of all GATT parties, including the country ruled against. This allowed countries to block rulings against their domestic regulations and so there was provision of basic safeguards of national sovereignty. WTO now requires a consensus of all member countries to overturn any dispute ruling¹⁵. This eliminates the national sovereignty protection. In its place WTO Dispute Settlement Bodies assume binding power to strike down democratically adopted laws protecting the public or the environment when it finds that they conflict with trade regulations. The DSS has been said to lack legitimacy when compared to the International Court of Justice (ICJ) due to its built in bias and closed proceedings.

Thirdly, DCM's are severely hampered in their access to the DSS due to human resource constraints. These countries lack adequate numbers of trained officers and also lack access to legal advisors with experience in WTO law and the dispute settlement process in particular. It is important to acknowledge that the WTO does provide additional legal advice to member countries who are parties to a dispute. This is done through the WTO Advisory Law Centre. 'However, this centre is also currently understaffed, with an estimated five lawyers to work on a number of cases'¹⁶. The problem that this staff shortage causes to DCM's is one of raised costs. This is because the WTO Advisory Centre lawyers, when overloaded with work, tend to sub-contract the work to qualified law firms with litigation expertise and these private law firms are renowned for charging astronomical legal fees. Similarly, the cost of membership of the said WTO Advisory Centre is prohibitive to some developing country members to access

¹⁵ Article 16(4) DSU

¹⁶ www.wto.org

its facilities. This is a problem that is not addressed in the DSU or other WTO agreements.

The fourth difficulty that DCM's are faced with is with regards to the adequacy of the remedies granted under the Dispute Settlement Understanding. As stated in chapter 1 of this paper, the remedies that may be granted by the DSB once a dispute has run its course are either that of compensation or authority to suspend concessions in the same sector as that is an issue in the panel case (retaliation)¹⁷. DSU mechanisms for compliance are often illusory for developing country members. For instance under Article 22(1), compensation is voluntary and this becomes a problem when the DCM is involved in the dispute because they are powerless to negotiate compensation. The member in violation must enter into negotiations with the complainant party with a view to developing a mutually acceptable compensation. What happens if there is no agreement? This is where the problem lies. If a DCM is the complainant and they cannot negotiate compensation then they have very limited measures left open to them. The only option that they have left is to retaliate. Now this in itself could be disastrous, more so to the DCM than to the DdCM in violation. This has proved to be very harmful to their economies and DCM's are reluctant to take this course of action although it is sanctioned by Article 22 of the DSU and is perfectly legal.

For instance in 1983, Nicaragua initiated a complaint against the USA decision to reduce the amount of Nicaraguan sugar allowed to be imported into the USA under its quota system. They alleged that the USA quota system violated GATT rules on administration of quotas. Although the panel clearly took a stand against the USA action, the USA indicated that it did not intend to change its practice. Given the circumstances,

¹⁷ Article 22 of the DSU

Nicaragua had and could have taken the option of retaliation by imposing restrictions on imports from the USA. However, this action would have had no noticeable impact on the US economy and would instead have been contrary to Nicaraguan interests.

So a DCM cannot in practice impose trade counter-measures against powerful DdCM's since these would probably damage the DCM's own economic interests and deny them much needed market access. It seems that DCM's need access to DdCM's markets more than the DdCM's need theirs. This is due to the fact that DCM's usually export raw materials because they have not acquired the technology required to export finished products but the DdCM's do have this technology. So, although not economically sound, it is convenient for these DCM's e.g. Zambia to export its copper raw materials to Britain and then import the finished product from the same member country. It would not help Zambia to close its markets to Britain in the event of a dispute between the two member countries. So equally in this aspect the DSS is lacking when it comes to the issue of DCM's and LDC's. This issue of compliance is one that has had negative impact on these countries and needs reform.

There is also a lack of remedies for injuries suffered by DCM's 'as a result of measures withdrawn by a member before commencement or after finalization of the proceedings under the DSU'¹⁸. When there has been a dispute between a developed and a developing country member, and the developed country member withdraws the offending measures before finalization of the dispute settlement proceedings, this helps to restore the equilibrium in the trade between the two parties. However, it does not compensate for the injury suffered by the DCM prior to the withdrawal of the measures. In cases where

¹⁸ Dan Sarooshi Reform of the WTO Dispute Settlement Understanding: A Critical Juncture for Developing Countries p 109

proceedings have been finalized, the provisions and practice on compensation have not satisfactorily reflected the interests and injury suffered by the industries of DCM's. The key for DCM's is that compensation should be in monetary form as opposed simply to market access. This should be continually paid until the withdrawal of the measures that are in breach. There is need for monetary compensation to make up for the loss and this is not addressed in the DSU or any other WTO agreements. It is the unfortunate reality that measures which restrict the exports of developing and least developed members, even for a seemingly short duration, can cause them irreparable damage. This is because such measures when taken on the small size economies of these countries upset their Balance of Payments and external financial position. This means that whilst they are restricted from exporting, they will still be importing goods and the import/export scale will be imbalanced.

Under the GATT¹⁹ quantitative restrictions are prohibited. The GATT favors tariffs in the forms of duty's, taxes and other charges as opposed to quotas, import or export licenses or other such measures. It is premised on the liberalization of international trade and free market access amongst member countries. There are however, certain circumstances when quantitative restrictions are allowed. These export restricting measures are allowed when there is need to relieve critical shortage of foodstuffs, for the application of standards or regulations for classification and also for the enforcement of governmental measures.²⁰ Furthermore, a country may under Article XII of the GATT, restrict the quantity of imports in order to safeguard its external financial position and balance of payments. The exceptions to the elimination of quantitative restrictions have

¹⁹ Article XI (I)

²⁰ Ibid

given leeway to the developed countries to restrict the exports of DCM's which they consider to have become competitive, having moved to a higher stage of development. This causes the DCM's serious economic injury. The WTO agreements contain provisions for the extension of special and differential treatment to developing countries. The General Agreement on Tariffs and Trade²¹ actually contains provisions that stipulate that due to the need for development of the less developed countries, there is need to facilitate the trade of these countries. As a result, developed countries have introduced one-way free trade arrangements under which imports from either all or a limited number of developing countries enter their markets duty free. These arrangements are known as non-reciprocal as the developing countries benefiting from preferential access do not extend any preferential treatment to imports from developing countries.²² The developed countries however, deny preferential access to developing countries which have moved on to a higher stage of development or have failed to respect human rights.

DCM's are also faced with problems when it comes to panels. These countries are not adequately represented when it comes to the composition of panels. 'Statistics show that under the current system, only 35%²³ of panelists who have served since 1995 came from a DCM'. This shows the lack of development in DCM's knowledge of and expertise in the Dispute Settlement System. Article 8(10) of the DSU states:

'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'

²¹ Part IV (Trade and Development)

²² E.g. the Lome convention under which EU allows imports from developing and least developed countries in Africa, Caribbean and Pacific (ACP) countries on a duty free basis

²³ www.wto.org Understanding the WTO

This provision clearly gives the DCM's some slight advantage in the DSS but it would be made more effective if the provision was made mandatory even without the DCM requesting it. Having majority panelists from developed countries raises the problems of conflict of interests for these panelists. One such situation is that of the conflict of interest for a panelist in dispute over US policy towards Cuba. Arthur Dunkel²⁴, former director of GATT was appointed in 1996 by the WTO as one of the panelists to judge a challenge by the EU to the US Helms-Burton Act. This law imposes sanctions on foreign companies with investments in former US assets expropriated by Cuba after its 1959 revolution. At that time Dunkel also served on the board of directors of Nestle, S.A and chaired of the Commission on International Trade and Investment Policy of the International Chamber of Commerce (ICC). Nestle has done business in Cuba since 1930 and the ICC Commission strongly and publicly opposed Helms-Burton. The US Trade Representative claimed two years after the WTO appointment that it had been unaware of Dunkels' role in the ICC.

Another problem with the panels is that they are ad hoc²⁵. The WTO cases have increasingly become complex and these ad hoc panelists tend not to have the experience necessary to deal with procedural matters. Neither do they have the time required to be fully acquainted with WTO case law. There is increasing need for a different system to ensure permanence of the panels in order to attain more consistent rulings both procedurally and substantively. Carlos Correa, a jurist and expert on intellectual property rights, criticized the WTO dispute settlement panels and the Appellate Body for the power they have assumed. Correa, who serves as trade advisor to several developing

²⁴ 'Arthur Dunkel Serves As Chairman of Body Critical of the Law He Was to Consider as WTO Panelist' Public Citizen Global Trade Watch, May 19, 1998.

²⁵ For a specific purpose and so not permanent

nations called for the rigorous examination of the resolutions handed down by the WTO panels, which had not only declared their own jurisdiction over assessing and interpreting the provisions of trade treaties, but also proclaimed their right to interpret the laws of individual nations.

Amicus curiae²⁶briefs are another thorny issue for DCM's. A number of developing country members, led by India vigorously opposed the concept of amicus curiae briefs as part of the WTO dispute settlement system. In the Shrimp/Turtle case²⁷which involved the US embargo on shrimp harvested without the use of 'turtle excluding' devices, the Appellate Body made a breakthrough when it held that WTO rules do not prohibit a panel from accepting unsolicited amicus briefs or submissions. This decision was seen by Bhagirath Lal Das, ²⁸as giving emphasis to DdCM's environmental policies over DCM's interests.

It should be noted that in the past, amicus curiae briefs were rejected under the DSS. This was due to the supposed misinterpretation of Articles 12 and 13 of the DSU which govern panel procedures and the right to seek information. Although the breakthrough of the Shrimp/Turtle case has been widely acclaimed by the developed country members, the DCM's are not comfortable with it. By accepting amicus briefs, the DSS would greatly benefit the business interests of the developed nations. It would also give them greater influence over the WTO litigation process by having their legal representatives submit their own factual and legal arguments to WTO panels. The European Communities (EC) and USA separately made the proposal that it may be useful

²⁶ a friend of the court; one who calls the attention of the court to some point of law or fact which would appear to have been overlooked

²⁷ WTO/DOC WT/DS 58/AB/A WTO – Appellate Body October 12, 1998

²⁸ Former Indian Ambassador and Permanent Representative to GATT

to provide a framework for the submission of amicus curiae briefs to panels and the Appellate Body. India, in response to the EC proposal, formally asked the question;

‘Would the EC agree that if amicus curiae briefs are permitted then the present disadvantages suffered by developing country members in international trade would get further accentuated as very few entities in the developing countries would be in a position to make amicus curiae submissions, while on the other hand developing country Members would have to assume the added burden of defending themselves against any arguments which such submissions might contain?’²⁹

It is true that the entities with the capacity to make amicus curiae submissions at present exist more in the developed nations than the developing ones as they are more environmentally aware. These entities may sometimes take positions in favor of the interests of developed countries. DCM’s fear that NGO’s who wish to submit amicus curiae briefs in cases will generally support the position of the developed countries where they often have their headquarters³⁰. Of greater concern to DCM’s are the private corporations and industry bodies being able to use amicus curiae briefs to support a Members case where it has implications for a large corporation or an industry. So, according to DCM’s, consideration of amicus curiae briefs amounts to changing the intergovernmental character of the WTO. Ultimate compliance is to be done by governments and not by all domestic stakeholders in a country, so allowing amicus briefs may have implications for compliance by the governments themselves.

In essence, the developing country members of the WTO are unable to participate freely in the Dispute Settlement System. There is need for reform in order to improve the efficacy of the system in relation to these countries.

²⁹ ‘India’s Questions to the EC and its Member States on their Proposal relating to improvements of the DSU’, TN/DS/W/5, 7 May 2002, p.5

³⁰ Dan Sarooshi . Reform of the WTO Dispute Settlement Understanding p. 117

CHAPTER THREE

Proposals to Reform the Dispute Settlement Understanding

The problems that have been outlined in the preceding chapter are well known to most if not all WTO member countries. One would be of the view that the contracting parties under the GATT/WTO foresaw that there would be some difficulties in the settlement of disputes. This can be seen in the Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes³¹ which reads in part;

‘Ministers...invite the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the WTO within four years after entry into force of the Agreement Establishing the WTO, and to take a decision on occasion of its first meeting after the completion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures’

So, in essence, WTO members are mandated to complete a review of the operation of the current DSU. A number of informal consultations have been held at the WTO DSB for this purpose. A case in point is that of the Ministerial Conference in Doha which provided the legal mandate to initiate the reform of the DSU³². Negotiations started in early March 2002 and were supposed to be concluded by end of May 2003 but this was not the case due to the stalemate in the Doha Round of negotiations. During the

³¹ Adopted by the Trade Negotiations Committee on 15 December 1993

³² Dan Sarooshi From Doha to Cancun; Delivering a Development Round p 111

SADC summit³³ in Lesotho, UNECA executive secretary Abdoulie Janneh stressed that instead of crying foul over the Doha Rounds failure, countries need to explore their options. “In the Doha Round, African countries in particular expected the playing field to be leveled...but we were disappointed. Perhaps this stalemate in progress has stressed the need to increase intra-African trade”, he said³⁴. WTO director-general Pascal Lamy suspended five years of Doha Round negotiations in July 2006 because of a failure by six major trading powers (chiefly USA and the EU) to compromise on tariffs and subsidies³⁵. The troubled effort to bring down agricultural and industrial barriers was dubbed the Doha Development Agenda (DDA) when it was launched in the Qatari capital, Doha in 2001.

There have been numerous calls for reform of the DSU not only from the Developing Country Members (DCM's) but even from the Developed countries themselves. It is hoped that reform will ameliorate most of the problems of the DSS especially with regard to the DCM's. This chapter focuses on proposals for the improvement of the Dispute Settlement Mechanism. WTO members have tabled more than 44 formal proposals for DSU reform since March 2002³⁶. Of concern to this paper are those that directly respond to the problems faced by DCM's as stipulated in chapter two. This will be done in an orderly fashion following the sequence of problems outlined in the preceding chapter.

Following the main problem areas capitulated in Chapter two, the first problem needing to be addressed is that Article 5 of the DSU which makes the Good offices,

³³ August 2006

³⁴ The Post, Wednesday August 28, 2006 p.15

³⁵ Ibid

³⁶ Dan Sarooshi From Doha to Cancun. Delivering a Development Round p.105

conciliation and mediation procedures voluntary. With regard to this issue, the government of Jordan proposed the following main change to be made to Article 5; after the first sentence in Article 5.1 the following sentence should be added:

‘In disputes involving developing country or least developed country Members, such procedures shall be mandatory’,³⁷

Moreover, Jordan proposes in relation to Article 4.4 that after the first sentence the following second sentence be inserted; ‘If one of the parties is a developing or least developed country Member, procedures for good offices, conciliation or mediation shall continue while the panel process proceeds unless both parties agree otherwise’,³⁸

A critical analysis of this proposal shows that it may be helpful to DCM’s because disputes may end at the conciliation stage. So it is a cheaper option for these poor countries. Granted, there is room for inhibition on the part of the DCM’s in that making conciliation procedures mandatory will increase the length of a dispute that goes through to a panel. However, this is a risk worth taking for those DCM’s whose disputes do not go through to the panel but are solved through mediation and conciliating. This is because if it is a developed country Member that is the other party to the dispute, that country will be compelled to pursue the Good offices, mediation and conciliation procedures under the DSU once made mandatory. Even in ordinary everyday disputes, people opt for mediation instead of litigation due to the many advantages that it offers. It is cheaper, private and helps to maintain or mend relationships between the disputing parties.³⁹ It is a better alternative dispute resolution method. It is better that this provision for conciliation be made mandatory by consensus as without it the more powerful

³⁷ Communication from Jordan, TN/DS/W/43,p.2

³⁸ Ibid

³⁹ Dr Patrick Matibini Mediation as an Alternative form of dispute Resolution 2005, UNZA Press

countries will remain free to impose their will unilaterally on their smaller trading partners. This proposal has been supported by the government of Paraguay who tabled a similar proposal concerning the reform of Article 5 of the DSU.

With regard to the critical problem of financial resource constraints that the DCM's face in their use of the WTO DSS there have been many proposals put forward to ameliorate the problem. The most noteworthy being that submitted by the African Group⁴⁰. The African Group emphasized that the DSU is complicated and overly expensive and that they need supplementary resources to enable them use the DSS. They proposed that the activities of the Advisory Law Centre be supplemented by the establishment of a 'permanent fund' financed by the WTO membership. This will help developing countries overcome the institutional and human constraints they face in using the complex DSU procedures.⁴¹ The establishment of a fund would greatly assist not only the African Group of developing and least developed countries but other south countries as well.

Aside from the fund proposed by the AG, the DCM's should not only look for funding at the WTO level but take particular advantage of the regional arrangements that they are party to⁴². The regional dimension can help countries to co-ordinate their positions at the WTO. Regional secretariats can provide solid technical support and analysis to help member countries take positions on certain overlapping issues in the WTO. Regional organizations might co-ordinate the burden-sharing among countries in

⁴⁰ African Group consists of all members of the AU, which contains all African countries except Morocco

⁴¹ Paper entitled 'Negotiations on the Dispute Settlement Understanding : Proposal of the African Group in the WTO', distributed in September 2002

⁴² These arrangements are sanctioned under Part III of the GATT, Article XXIV

following and actively engaging in a heavy WTO agenda which few, if any, DCM's can adequately tackle on their own.

One such regional arrangement is Common Market for Eastern and Southern Africa (COMESA)⁴³ which was established in 1994. COMESA currently has a membership of 20 states including Zambia where it is headquartered. Its main focus is on strengthening regional integration through promotion of cross border trade and investment. In as much as COMESA may not be able to offer financial assistance to its member countries when it comes to WTO disputes, they do offer technical assistance and help with information gathering. For WTO questions, COMESA established a Working Group on WTO issues, which operates as a sub-committee of the COMESA Trade and Customs Committee. The core functions of the Working Group are to provide technical backup and analysis of WTO issues and to suggest appropriate recommendations⁴⁴. So, in essence the DCM's that belong to COMESA may be assisted in gathering the much needed information when involved in a dispute. Other DCM's around the world can similarly take advantage of the various regional arrangements that they are party to. Furthermore, Anwaru K. Chowdhury⁴⁵ encouraged developing countries to take advantage of and benefit from UN programs. He stated;

‘...The landlocked developing countries should redouble their efforts within the context of the Doha trade negotiations to be pursued in Geneva following the setback in Cancun. Landlocked developing countries should work proactively to

⁴³ Sanoussi Bilal and Stefan Szepesi, How Regional Economic Communities can Facilitate Participation in the WTO: The Experience of Mauritius and Zambia. Case study 27

⁴⁴ Ibid

⁴⁵ UN Under-Secretary-General and High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States

benefit from technical co-operation and capacity building programs offered by the relevant UN organizations and the WTO.’⁴⁶

Similarly, organizations such as the South Centre with funding support from the World Bank, has established a pilot project to monitor and analyze the work of the WTO from the perspective of developing countries.⁴⁷ Due to the limited human and financial resources available to the project, it focuses on selected issues in the WTO identified by DCM’s as deserving priority attention.

Apart from the financial problems, DCM’s also face human resource difficulties. They lack adequate numbers of officers with the expertise in world trade issues. In terms of domestic institutional setting, the lack of clear and pre-established mechanisms to handle disputes is detrimental to all actors in any DCM’s economy. While the private sector risks arbitrary neglect or dismissal of its case, public agencies bear uncertainty about their competencies and decisions. The considerable cost and expertise required is a problem for developing countries.

One feasible, cost effective solution would be for these DCM’s to reallocate public officials to create a permanent and multi-disciplinary corps of experts to handle trade disputes. In this way, experience and learning could be accumulated by the same agency. So legal outsourcing from expensive law firms in Geneva would be limited to fine tuning and/or data collection when needed. Furthermore, DCM’s should be encouraged to involve the business community when involved in disputes instead of leaving it to governments alone. Business participation is a key element of successful

⁴⁶ Fourth Annual Ministerial Meeting of the Landlocked Developing Countries held at the UN Headquarters, New York. 30th September 2003

⁴⁷ South Centre. ‘Issues Regarding the Review of the WTO Dispute Settlement Mechanism’ Trade Related Agenda Development and Equity (T.R.A.D.E) Working Papers 1. Geneva : South Centre, Feb. 1999

involvement because there will be a sense of shared responsibility with the public sector for the final outcome of the dispute⁴⁸. It is impossible for the government of a DCM which is involved in a dispute to do groundwork for the case without the provision, by the business sector, of factual information, statistical data and financial collaboration. There is need to involve all the key players in the countries economy. This will improve capacity building and shared learning experience among all actors in the economy.

Also, in order to ensure equal access to the DSM, there should be provision of legal assistance to both the complainant and defendant developing countries by strengthening and expanding the coverage of present Article 27.2 of the DSU⁴⁹. This can be done by increasing the number of consultants. Another thing that would be ideal is the setting up of an independent legal unit within the secretariat to assist the existing Advisory Law Centre. Furthermore, there is need for appointment of a permanent Defense Counsel. As expensive as these ventures seem, the effects in the long run would greatly benefit the DCM's. A third solution to these human resource constraints is for the DCM's to take advantage of the various UN training programs that deal with trade issues. A prime example of this is that of the United Nations Conference on Trade and Development (UNCTAD) training project⁵⁰ which was held in September 2000, dubbed 'Building Capacity through Training in Dispute Settlement in International Trade, Investment and Intellectual Property. DCM's participating in this project greatly benefited from it and would further benefit from similar projects if the WTO funded and held them more often.

⁴⁸ Kyle Bagwell, The Case for Tradable Remedies in WTO Dispute Settlement January 21, 2004

⁴⁹ This article deals with the responsibilities of the WTO secretariat in their assistance of panels

⁵⁰ www.unctad.org/dispett/index.htm

The remedies offered by the DSB are the fourth problem that DCM's need to have tackled. This is because they are inadequate and in desperate need of reform. As stated earlier in chapter two, it is difficult for complainant DCM's to ensure compliance of the remedies granted in disputes where the defendant is a developed country. Non-implementation depends on the identity of the complainant and defendant. Implementation is more likely in a developed v developing country scenario than vice versa. So DCM's are addressing a real issue here. Due to this lack of compliance on the part of the DdCM's, the DCM's are left with the option of counter-measures. It is well known that DCM's are not eager to utilize this option due to the setbacks discussed in chapter two. The data below shows some prime examples:-

a) Situations where countermeasures were authorized but no action was taken:-⁵¹

DS 222: The Arbitrator (Art. 22.6 DSU) established the level of counter-measures that Brazil could impose against Canada for failure to implement the Aircraft Subsidies Report (DS 222/ARB, 17 Feb. 2003). Brazil subsequently obtained authorization to impose counter-measures but never exercised the option.

DS 27: On 18th May 2000, Ecuador was authorized to impose counter-measures against the EC for the failure of the latter to implement the panel and AB report on bananas. Ecuador has never exercised this option.

b) Situations where there was no request for countermeasures when faced with non-implementation⁵²

⁵¹ WTO Doc. WT/DS/OV/14 of 30th June 2003

⁵² Ibid

DS 27: Mexico did not request authorization to impose counter-measures against the EC for the failure of the latter to implement the panel and AB report on bananas.

Not only is this data accurate as it comes from a WTO document, it further suggests that there is not one single occasion where a developing country imposed counter-measures to induce compliance when faced with non-implementation. This is due to the fact that when faced with a recalcitrant opponent which happens to be a 'larger market', members refrain from requesting the authorization to impose counter-measures. There are three solutions to this problem:

Firstly, the option for counter-measures under Article 22.6 of the DSU would be made more effective if all WTO Members were authorized to suspend collectively concessions to a non-compliant Member⁵³. The government of Haiti supported this proposal and calls for amendment of Article 22.6 by adding the following paragraph (b):

(b) where the case is one brought by a least developed country member against a developed country member and the situation described in paragraph 2 occurs...the DSB, upon request shall grant authorization to all members to suspend concessions or other obligations within 30 days unless the DSB decides by consensus to reject the request...⁵⁴

Thus DCM's will benefit because as a matter of practice the utilization of the economic power of WTO members will enhance compliance with DSB rulings in cases involving DCM's. Secondly, since counter-measures have proven to be an ineffective instrument in the hands of smaller players, a proposal with high level of support was submitted by Mexico to allow WTO members to trade their right of retaliation. If the

⁵³ J. Pauwelyn, 'Enforcement and Counter-measures in the WTO; Rules are Rules – Toward a More Collective Approach' *AJIL*, 94 (2000), p 335

⁵⁴ 'Communication from Haiti', *TN/DS/W/37*, pp 4-5

offending measure is not rescinded and the demanding country does not want to shoot itself in the foot to retaliate, it ends up empty handed. Non-compliance and the low pay-off of retaliation restrict the impact of the action. So Mexico proposes that DCM's trade off this right to those member countries to whom it would be of greater benefit. The Mexican proposal reads in part:

'The suspension of concessions phase poses a practical problem for the Member seeking to apply such suspension. That Member may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests... There may be other Members, however, with the capacity to effectively suspend concessions to the infringing Member'⁵⁵

This proposal is meritorious and has two potential benefits if implemented; firstly, there would be better readjustment of concessions since the affected member would be able to obtain a tangible benefit in exchange for its right to suspend. Secondly, the incentives for compliance would expand. This is because developed countries would be faced with a more realistic possibility of being the subject of suspended concessions. This is because the DCM would have traded its right to a more powerful DdCM e.g. if Zambia had a dispute with the Canada, Zambia would be able to trade its option to France for some benefit. There is more likely to be compliance in the France v Canada scenario as compared to Zambia v Canada. The infringing member will be more inclined to bring its measure into conformity. So, by auctioning counter-measures in the WTO, the existing right of retaliation may be more efficiently allocated to the WTO Member who values this right most highly. The third option to improve the remedies offered by the DSS is that of compensation. This is because there is lack of remedies for injuries suffered by

⁵⁵ 'Communication from Mexico' TN/DS/W/40 p.6 also see WTO 2002 p.5

DCM's as a result of measures withdrawn by a member before commencement or after finalization of the proceedings under the DSU. Brazil during the early phase of the Uruguay Round dispute settlement negotiations had put forward formal proposals to give more favorable treatment to developing countries, arguing that their limited power of retaliation as well as Part IV of the GATT and earlier decisions in their favor required that they be provided with 'higher leniency'⁵⁶. The rationale behind this proposal was the same as that of 1965 when Brazil and Uruguay tabled a proposal to amend Article XXIII of the GATT. So in essence, what is needed is to allow adequate commercial remedy or compensation in the form of an indemnity of a financial character where measures complained of have adversely affected the trade and economic prospects of DCM's. Kenya went further to propose that this compensation should be computed from the date of the adoption of the measure found to be inconsistent with covered agreements until the date of its withdrawal⁵⁷. So Article 22 of the DSU can be expanded to accommodate these demands. This would greatly assist DCM's to mitigate their costs and losses suffered during the length and duration of a dispute.

Pertaining to the panel issues that have been identified as problematic to the DCM's, there are various ways and means of dealing with these problems. The European Communities (EC) have proposed a move to more permanent panelists as compared to the ad hoc panelists currently existing under the DSU⁵⁸. This is a feasible suggestion as there will be a flow of more consistent rulings handed down by the DSB as the panels will have more time to become fully acquainted with WTO case law. However, more needs to be done in addition to putting in place a system of permanent panels. This is

⁵⁶ John Croome, *Reshaping the World Trading System*, Geneva 1995 p. 150

⁵⁷ 'Communication from Kenya on behalf of the African Group' TN/DS/W/42 p.3

⁵⁸ 'Communication from EC' TN/DS/W/1, pp 2-3

because disputes at the WTO DSB are heard by small panels of ‘trade experts’ selected from a small number of trade officials and lawyers. These panels often have little or no expertise in the non-legal issues in question. This is especially true when it comes to environmental, scientific or social concerns. Most of these panelists are ideologically pre-disposed to oppose public-interest regulations and to support unrestricted commerce. So what needs to be done when selecting panelists is not to restrict the candidates to lawyers and trade experts alone but to include environmentalists and other experts. It is imperative that these experts be brought on board. Furthermore, in order to reduce the trend of biased panelists, there is need to screen them so as to select pro-active people who will give fair judgments without fear or favor. An example of a trade dispute that has raised concern over the ability of the DCM’s to benefit from the DSM was the dispute that emerged as a result of a US resolution to ban imports of certain kinds of shrimps from India, Malaysia, Pakistan, and Thailand based on the pretext that the fishing nets used caused death to other sea creatures. In as much as the WTO panel opposed the US measures, the Appeal Committee condoned them, while pointing out the contradicted WTO agreements. Clearly, there is a big problem with the Appeal Committee. This decision raised controversy as it legitimized unilateral action while the WTO is based, theoretically, on collective multilateral arrangements.

There have however, been some situations where the panelists were pro-active such as the dispute between the US and Costa Rica.⁵⁹ This dispute resulted from the US restricting its imports of cotton Underwear from Costa Rica. Interestingly enough, the DSB issued a decree against the US procedure, which it perceived as contradictory to WTO agreements and the Appeal Committee supported the verdict. The US implemented

⁵⁹ WTO Doc. WT/DS/OV/14 of 30th June 2003

the resolution and cancelled all restrictions imposed on its imports from Costa Rica. These are the type of panelists needed in the WTO if the DSS is to function effectively.

Lastly, the issue of *amicus curiae* briefs which has proved to be problematic to the DCM's can be tackled in the following way; the Appellate Body should not be allowed to take upon itself the role reserved for Member countries only. According to Article IX of the Marrakesh Agreement Establishing the WTO, the Ministerial Conference and the General Council of WTO have the exclusive authority to interpret the Multilateral Trade Agreements. In the shrimp-turtle case, the Appellate Body (AB) adopted a novel interpretation of Article 13 of the DSU. While the said article allows the panels to seek information, it implicitly bars them from seeking unsought information. However, the AB, by allowing panels to consider unsolicited material submitted by NGOs has in effect interpreted Article 13, a matter clearly reserved for Members. In the absence of firm action by all WTO Members, this trend may continue and may eventually lead to a situation where the AB takes upon itself the role of interpretation of Multilateral Trade Agreements. By allowing the panels to consider unsolicited submissions by the NGOs, the AB has granted the NGOs a place in the dispute settlement process which has not been given even to the WTO Members. This is in direct conflict with the contractual nature of the organization where only the Member countries have the rights to exercise and discharge obligations. So the solution to this problem is to have the WTO Membership reach consensus so as not to let these meddlesome NGOs usurp their powers and privileges.

Having discussed the various old and new proposals, it is important to take into account the fact that not all imbalances between players will be wiped out through the

negotiation of an international contract like WTO. However, it is expected that players will realize that it is essential from an institutional perspective to strike a compromise that will not make the same sub-group of players consistently unhappy.

CHAPTER FOUR

A Zambian Perspective on the Dispute Settlement Mechanism

The Dispute Settlement Mechanism is no doubt an essential feature of the World Trade Organization. It is probably the busiest organ of the WTO. The question is, ‘can this particular feature of the World Trade Organization be an instrument of justice and development in the interests of Developing Country Members and Least Developed Countries?’ It has been said of the World Trade Organization that the mere fact that it is the international organization dealing with the global rules of trade between nations seems, *prima facie*, to contradict the idea of a Dispute Settlement Mechanism promoting justice and development beyond trade interests. This chapter gathers information from articles read and the few interviews carried out during the research on this paper, as well as comments on the opinions expressed during these interviews. It should be noted that the people interviewed are Zambian nationals and officials in the government and private sector. Zambia is among the worlds least developed countries and as has been noted earlier, has never taken part in any dispute settlement under the World Trade Organization. So there is a general lack not only of experience but also of knowledge of the Dispute Settlement System under the World Trade Organization.

It is said that three quarters of the World Trade Organization members are developing or least developed members (respectively DCM’s and LDC’s)⁶⁰. This

⁶⁰ About 100 of the WTO’s 149 members are developing countries. They are expected to play an increasingly important role in WTO because of their numbers.www.wto.org/english/thewto_e

important weight in the World Trade Organization membership must be compared with these Developing Country Members limited share in the global trade. The failure to translate these essential features of world trade and WTO membership in World Trade Organization agreements and in particular the Dispute Settlement Mechanism would be a mistake given that rich and poor countries do have some common interests in world trade. To some extent many World Trade Organization agreements including the Dispute Settlement Understanding have reflected the fundamental differences that exist between developed, developing and least developed countries and do provide for differential treatments. The main conclusion that can be made is that while the Dispute Settlement Understanding contains several provisions which seek to improve the possibilities for developing countries to take advantage of the system, its basic structure nevertheless seems to make this difficult. Due to lack of effective sanctions against violators of the World Trade Organization Agreements, sanctions that are provided by the membership as a whole, at the end of the day countries are left alone in their struggle against violators. Consequently countries that are economically and politically weak are disadvantaged in the World Trade Organization system.

On the issue of special and differential treatment, Frieder Roessler, the Executive Director, Advisory Centre on World Trade Organization Law says 'his personal experience is that developing countries wish to face in legal proceedings developed countries as equals and are therefore hesitant to invoke procedural privileges that their opponents do not enjoy. Moreover, these Developing Country Members also fear that the application of procedural provisions in their favor may detract from the legitimacy of the result of the procedures and hence reduce the normative force of the rulings that they are

seeking’⁶¹. An alternative way to achieve equality between these developed and developing countries in World Trade Organization dispute settlement is to accord the Developing Country Members the financial resource and legal assistance they need to defend their rights as effectively as developed countries. Pursuant to article 27.2 of the Dispute Settlement Understanding, World Trade Organization secretariat is to provide legal advice and assistance in respect of dispute settlement to any developing country Member that so request. However, the experts of the secretariat shall assist the Developing Country Members in a manner ensuring the continued impartiality of the secretariat. This makes it impossible for the experts of the secretariat to act as an advocate for one Member in a legal proceeding against another and they have in practice not done so. This is why the Developing Country Members have therefore rarely invoked such provisions in the Dispute Settlement Understanding and the judicial organs have been reluctant to apply them. The basic aim should therefore be to put developing countries in the position to effectively defend their rights in a system which essentially same procedures apply to all parties.

The World Trade Organization is less than a multilateral trading system and that is the problem. This is so because there are many big chunks of international trade that do not come the World Trade Organization mandate e.g. commodity prices. To a normal developing country that is often the number one trade issue, the consequence being that commodity prices have collapsed and the rich countries have grown rich at the expense of the poor. However, Martin Khor⁶² says, ‘in a way, the World Trade Organization is more than a multilateral trading system because it has accumulated issues that are non-trade

⁶¹ Special and Differential Treatment of Developing Countries Under the WTO Dispute Settlement System – Remarks by Frieder Roessler www.acwl.ch

⁶² Director; Third World Network, Malaysia

and not in its mandate such as TRIPs⁶³. This is not a liberalization device, it is a protectionist device.

Honorable Ngandu P. Magande⁶⁴ said that before there can be talk of improving the efficacy of the Dispute Settlement Mechanism of the World Trade Organization, there is need to identify the most urgent needs of the developing and least developed countries. He observed that the key to any improvement in the World Trade Organization is for Developing Country Members and Least Developed Countries to improve their position on the world markets. According to Mr. Magande, these countries can improve their access to international markets through regional arrangements. In as much as regional arrangements have short term results for these countries in respect to world trade, these agreements cannot be completely written off as they are a stepping stone to better and improved trade opportunities. He cited in particular the Cotonou Agreement which offers a lot of opportunities for the African Caribbean and Pacific (ACP)⁶⁵ member countries who are by and large Developing Country Members and Least Developed Countries (Zambia included). The Cotonou Agreement is a Preferential Trade Agreement between the European Union (EU) and the ACP countries. Currently the ACP countries enjoy non-reciprocal trade preferences to the European Union and these African Caribbean and Pacific-European Union free trade arrangements are compatible with the World Trade Organization to which both the European Union and the African Caribbean and Pacific countries belong. The framework of the Cotonou Agreement includes a gradual integration of the African Caribbean and Pacific countries into the world economy by

⁶³ Trade Related aspects of Intellectual Property

⁶⁴ Zambian Minister of Finance and National Planning

⁶⁵ Mr. Magande was Secretary-General of the African Caribbean and Pacific Group of 71 states based in Brussels from 1996 to 2000

enhancing their production, supply and trading capacities before there could be full conformity to World Trade Organization rules.

It is arrangements like these that are helping to eradicate the problem of market access that Developing Country Members face. Under this arrangement, African Caribbean and Pacific country members can export anything to the United Kingdom, except arms, while the American Growth Opportunity for Africa (AGOA) Act is another facility that African developing and least developed countries can take advantage of.

Honorable Magande said particularly for Zambia, which is a least developed country, that exploiting the opportunities offered in the Cotonou Agreement will make the country graduate from Least Developed Country status. This would enable it participate freely in world trade and more importantly allow not only Zambia but other Least Developed Countries to fully utilize the World Trade Organization Dispute Settlement System in times of trade disputes. Mr. Magande stated that during his term as Secretary-general to the African Caribbean and Pacific he negotiated and obtained observer status of the African Caribbean and Pacific secretariat to the World Trade Organization and the World Bank/International Monetary Fund meetings. He placed great emphasis on the observer status to the World Trade Organization saying it would be easier for those disadvantaged countries which are African Caribbean and Pacific members to have their disputes monitored at the World Trade Organization Dispute Settlement Body by the African Caribbean and Pacific secretariat to avoid any irregularities. It is however not clear how this proposition can be made feasible as observers are currently not admitted at the hearings of the World Trade Organization Dispute Settlement Body.

Professor Oyejide⁶⁶ points out that Africa at the moment does not have the capacity to participate in World Trade Organization arrangements given that it is not a major supplier to the global market and neither is it a market for the worlds' super-economies, Europe and United States of America. Hence, it is not clear whether African trade interests would be more protected through World Trade Organization. This is in line with Honorable Magande in that there can be no fair trade and resolution of disputes before the playing field between developed and developing country members of the World Trade Organization, is leveled.

Mrs. V. Chipere⁶⁷ was quick to point out that Zambia had never utilized the services offered by the Dispute Settlement Body of the World Trade Organization although it is a member of the organization. This is due to reasons already stated in preceding chapters as the problems that Zambia and other Least Developed Countries and Developing Country Members face in world trade fall under the mandate of the Ministry of Commerce and Trade. Her recommendation for the improvement of the Dispute Settlement System is that the special and differential treatment be reinforced and made a reality. According to Mrs. Chipere, a strong case can be made that this will have the greatest beneficial impact on development. One reason for this is that it involves an element of 're-balancing' of the World Trade Organization. There is need for differentiation between developing countries in determining the reach of resource-intensive World Trade Organization rules. What matters most at this point is that World Trade Organization members recognize that capacities and priorities differ hugely across

⁶⁶ Department of Economics, University of Ibadan (2002)

⁶⁷ Senior Economist in Trade, Ministry of Commerce, Trade and Industry (Zambia)

the membership. It is not enough that this is stipulated in the Dispute Settlement Understanding but there should be practical recognition of this fact.

Another officer in the Ministry of Commerce Trade and Industry reiterated that Developing Country Members need to be given financial/technical assistance if they are to utilize the Dispute Settlement System effectively.⁶⁸ He said without this aid, most Developing Country Members and all Least Developed Countries will continue to shun the World Trade Organization Dispute Settlement System as it seems only to serve the privileged industrialized countries. The downside to the suggestion to make technical assistance mandatory under the World Trade Organization is the desire by donor countries to see developing countries implement certain World Trade Organization agreements. This diverts assistance away from recipients own priorities. A better approach is to support efforts to embed trade-related technical assistance in the national priority-setting processes that are used by governments and the donor community e.g. the Poverty Reduction Strategy Paper devised by the Zambian government and its donors. This is critical in order to ensure that trade priorities are identified for funding.

In view of the concerns raised not only in this but preceding chapters, it is clear that Developing Country Members and Least Developed Countries are addressing a very real problem at the World Trade Organization Dispute Settlement System. So, to the question as to whether there is need to review the Dispute Settlement System, the answer is in the affirmative. It is hoped that these concerns will be analyzed and reviewed as a matter of urgency in order to correct the anomalies in world trade.

⁶⁸ This information was obtained from Mr. Hillary Kumwenda, an economist in the WTO office at the same ministry.

CHAPTER FIVE

Conclusion and General Recommendations

The Dispute Settlement Mechanism cannot realistically be expected to generate outcomes that will be balanced and equitable. In all disputes there is always a winner on one side and a loser on the other hand who is not satisfied with the outcome. Looking at it from the perspective of the developing and least developed country members, the DSU itself can hardly become 'development friendly' overnight. The question remains to be answered whether the adjudication process of the WTO could act as an instrument of justice and development in favor of DCM's. Presently, as the paper has endeavored to show, it appears the DSM of the WTO cannot play such a role. The legal and practical significance of the special treatment granted to DCM's and LDC's can be questioned on many grounds. Furthermore, the political willingness to set up a truly preferential system is virtually non-existent. All this, coupled with the retrograde approach followed by the WTO DSM and lack of implementation procedures have contributed in the relative failure of the Dispute Settlement Mechanism (DSM).

One can however, not be too critical of the WTO DSM. In as much as it has not been a bed of roses especially with reference to the Developing Country Members (DCM's), there are some positive influences that the DSM has had on world trade. Judging by the use made of the WTO DSM so far, it is clear that the Dispute Settlement Understanding (DSU) represents a significant development. 'In the 10 years since the WTO began to function, there were almost as many cases subject to dispute settlement as

there were in the 50 years of GATT's existence'⁶⁹. Similarly, it seems due to the special treatment of DCM's embodied in the DSU and other WTO agreements; these DCM's participation has increased by 30% as compared with their overall participation in the GATT history⁷⁰. This involvement of DCM's is likely to become more important in the next few years since many of them⁷¹ enjoy longer transitional periods to fully implement the WTO agreements⁷².

These countries have mainly benefited from general improvements, such as the relative judicialization of the dispute settlement procedure. The DSU represents a certain degree of success although the special treatment provisions have in reality failed to reach the ultimate goal of helping balance trade between the rich and poor countries. Experience has therefore shown us that the difficulties DCM's face cannot be overcome through the grant of procedural privileges alone. The application of procedural provisions discriminating in favor of one party to a legal proceeding detracts from the legitimacy of the results of that proceeding. This is why the DCM's have therefore, rarely invoked such provisions in the DSU and the judicial organs have been reluctant to apply them. The basic aim should therefore be to put developing countries in the position to effectively defend their rights in a system in which essentially the same procedures apply to all parties whether developed or developing Members. Special and differential treatment in the field of WTO dispute settlement should for these reasons take primarily the form of privileged access to legal expertise. The DCM's situation as regards the implementation of decisions is the most worrisome problem. This issue specifically reveals the

⁶⁹ www.wto.org

⁷⁰ Ibid

⁷¹ Notably sub-Saharan African

⁷² Part IV

underlying problem of the system. The adjudicative dimension is so fragile that it is usually set aside in favor of diplomacy whenever a member (especially a developed one) is not willing to abide by the decisions. This move seems to be a developed countries privilege. So the WTO can dangerously be turned into a diplomatic club where DCM's are in a fragile position. What DCM's need of the Dispute Settlement Mechanism is a truly judicial mechanism although due to Member States' sovereignty this can never fully be set up at the international economic level. More the pity there is no international police to enforce DSS decisions.

The only hope left to the DCM's and LDC's is the dynamic and effective application of the special treatment afforded to them. What is needed is 'positive action' or 'positive discrimination'. The legal recognition by WTO Agreements of underlying weaknesses and practical difficulties faced by DCM's in international trade relationships should lead to a genuine preferential treatment under the DSM.

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