

DEVELOPING COUNTRIES AND THE WTO DISPUTE RESOLUTION SYSTEM: A LEGAL ASSESSMENT AND REVIEW

LINIMOSE NZERIUNO ANYIWE *
EGHOSA OSA EKHATOR*

ABSTRACT

The aim of this paper is to review and analyse the WTO procedures and rules designed to resolve developing countries disputes. The Dispute Settlement Understanding (DSU) of the World Trade Organization is generally considered as providing innovative set of rules through which countries could address and resolve trade disputes amongst themselves. The DSU also establishes an Advisory Centre, which seeks to assist developing countries to resolve trade disputes. Despite these innovations, opinions are divided on the practical effectiveness of the DSU and the Advisory Centre, particularly with respect to resolving disputes involving developing countries.

In this paper, we shall examine the practical effectiveness of DSU and the roles of the Advisory Centre in the dispute resolution processes involving developing countries.

Drawing examples from previous disputes, some practical challenges and constraints with the current procedures faced by developing countries are identified and discussed; they are: lack of expertise, inability to enforce WTO rulings, reluctance to institute trade disputes and economic pressure applied by developed countries on developing countries in trade disputes amongst others. Addressing these challenges are critical to the overall success of the DSU. This paper calls for a review of the DSU to incorporate the reforms enunciated by various stakeholders to the WTO.

INTRODUCTION

The World Trade Organization (WTO) is an international body set up in 1995 with the principal aim of liberalizing trade by reducing imminent trade obstacles and ensuring that a level playing field is obtained. It provides a legal and institutional framework for the implementation and monitoring of agreements, as well as for settling disputes arising from their interpretation and application.¹ The WTO Dispute Settlement Understanding (DSU), a purposeful system of dealing with international trade disputes, came into being as a result of the General Agreement on Tariffs and Trade (GATT), Uruguay round of negotiations. These negotiations took place between the years of 1986 to 1994. It has been argued that the WTO DSU is one of the most outstanding outcomes of the Uruguay round.² WTO principles are largely based on the GATT provisions and it is the principal rule-book on matters

* Linimose Nzeriuno Anyiwe LL.B (Benin), LL.M (University of Central Lancashire)

* Eghosa Osa Ekhator LL.B (Benin), LL.M (Hull), PhD Candidate at the Law School, University of Hull, eghosaekhator@gmail.com. Corresponding author.

¹ World Trade Organization – About the WTO, a statement by the Director-General <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm>, accessed 20 November 2012

² Bernard Hoekman & Petros Mavroidis ‘WTO Dispute Settlement, Transparency and Surveillance’ [2000] TWE 527

concerning: trade in goods, trade in services, relevant aspects of intellectual property, dispute settlement and trade policy reviews.³

This paper analyses the position of developing countries in the Dispute Settlement System (DSS) in the WTO. The DSS is a highly legalized and judicialized process of resolving or settling trade disputes among member-countries of the WTO. Many developing countries are members of the WTO and the DSS is said to promote justice and equality among the developing and developed countries when settling trade disputes. By 2008, nearly 400 disputes had been brought before the dispute settlement system and almost 300 rulings (including panel and Appellate Body reports and arbitration awards) had been issued.⁴ In 2012, the number had increased from 400 to 452 dispute cases.⁵ This paper will aver that notwithstanding the participation of developing countries in trade dispute settlement, the DSS has not actualised hopes and aspirations of its founding fathers towards developing countries.

The first part of the paper will be the introduction. The second part of the paper will focus on the history of the WTO and its metamorphosis from the GATT. Also, dispute settlement under GATT will be in focus. The third part of the paper will dwell on the dispute settlement under the WTO. The fourth part of the paper will focus on developing countries and the WTO system. Here, the paper will attempt to answer the conundrum inherent in the WTO and its impacts on the dispute settlement involving developing countries. The final part of the paper will advocate reforms to improve dispute settlement in WTO.

2. HISTORY OF THE GATT/WTO

The WTO came into existence in 1995. It is the successor to General Agreements on Trade and Tariffs (GATT) and is the legal and institutional foundation of the international trading system; it was created by the *Marrakesh Agreement Establishing the World Trade Organisation* (WTO Agreement). Unlike GATT, WTO is an international organisation. However, the GATT is subsumed under the WTO Agreement. Thus, GATT ended up being a document without any institution for its administration.

The GATT had its origins in the still-born International Trade Organisation.⁶ Due to the devastating effects of the Second World War, world leaders began to nurse the idea of a world trade body.⁷ During negotiations of the International Trade Organisation provisions, the GATT was signed at Geneva in 1947.⁸ The intention was that GATT would be absorbed into the ITO⁹, GATT was supposed to be a temporary agreement pending when the

³ 'The WTO in Brief'

<http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm> accessed 20 November 2012

⁴ Yuka Fukunaga 'Civil Society and the Legitimacy of the WTO Dispute Settlement System' (2008) 34 *BJIL* 1, 85

⁵ World Trade Organization – Dispute Settlement : The Disputes
<http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 30 November 2012

⁶ Robert Hudec *Essays on the Nature of International Trade Law* (1st edn, Cameron and May 1999)

⁷ David Palmeter and Petros Mavroidis *Dispute Settlement in the World Trade Organisation* (2nd edn, Cambridge University Press 2004)

⁸ Paul Demaret, 'The Metamorphosis of the GATT: From Havana to the World Trade Organisation' (1995) 34 *CJLL* 126

⁹ *Ibid*

ITO would come into legal existence. Some countries could not wait for the completion of the different legislative approvals needed for the ITO to become effective, they agreed to apply GATT provisionally as of January 1, 1948.¹⁰ Thus, GATT was a child of necessity and an impromptu agreement.

Dispute Settlement in GATT

The basic goal of GATT was to promote free international trade by establishing rules that limited national trade impediments.¹¹ According to Hudec¹², the sole dispute machinery in GATT was the “nullification and impairment” provision dating from the Geneva draft of the ITO.

Early dispute settlement was highly diplomatic and the process was referred to as “conciliation”.¹³ Dispute settlement in GATT involved members protesting measures taken by another member to provide certain of its industries with special protection or advantages that interfere with international trade.¹⁴ The General Agreement contained a lot of provisions designed to resolve trade disputes between its contracting parties.¹⁵ The primary provision regulating dispute settlement in GATT was Article XXIII. This provision was normally resorted to when a member claims that it has suffered loss as a result of another member who had its benefit nullified or impaired.¹⁶ Article XXIII:2 of GATT 1947 provided that the contracting parties themselves, acting jointly, had to deal with any dispute between individual contracting parties.¹⁷

Earlier in GATT, parties to a dispute were also members of the panel to decide the case. Subsequently, parties directly involved in the disputes were dropped and neutral parties were appointed into a three or five member panels. However, these panels were populated by diplomats instead of lawyers versed in international trade law. Thus, “legal rulings were drafted with an elusive diplomatic vagueness”.¹⁸ A panel’s decision would be referred to the contracting parties (GATT council) and if approved by it, becomes binding on the parties. Flowing from the above, dispute settlement under Articles XXII and XXIII arguably provided for a system of rudimentary dispute settlement procedures and the process was not ‘judicialized’ or ‘legalized’ (unlike the WTO). Dispute settlement in GATT had no enforcement mechanisms and the legality of the rulings “is up to the disputant states themselves”.¹⁹

A major flaw in GATT was that it was a multi-party contract and any decision to amend, modify or interpret it needed the consent of all the parties.²⁰ This was referred to as ‘Positive Consensus’ in GATT, when a panel report is brought to the contracting parties for approval, the losing party can ‘block’ it. This is done by refusing to assent to the report, and if a party blocks

¹⁰ Palmeter and Mavroidis (n 7) 3

¹¹ William Davey, ‘Dispute Settlement in GATT’ (1987) 11 *FILJ* 51, 53

¹² Hudec (n 6) 38

¹³ Demaret (n 8) 6

¹⁴ *ibid*

¹⁵ Davey (n 11) 54

¹⁶ *ibid* 55

¹⁷ WTO Website available at

http://www.wto.org/english/tratop_e/dispu_settlement_cbt_e/c2s1p1-e.htm

¹⁸ Robert Hudec *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993) cited in Palmeter and Mavroidis (n 7) 7

¹⁹ Eric Reinhardt, ‘Adjudication without Enforcement in GATT Disputes’ (2001) 45 (2) *Journal of Conflict Resolution* 175

²⁰ Hudec (n 18) 9

a report, based on the consensus rule, the report would not be adopted. Losing parties took advantage of it, by using the consensus rule to stop the establishment of a panel and to guard against unfavourable panel reports. Other flaws²¹ in the GATT included secrecy in its dispute settlement process, rulings were easy to block and no fixed timetables for resolving disputes amongst others.

As a result of this and other defects in the GATT, the WTO was formed.

Review of Dispute Settlement in the WTO

A trade dispute arises in the WTO when one country adopts a trade policy measure or takes some action that another country considers to be against the WTO agreements.²² In essence:

...disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements.²³

Here, the dispute settlement process in the WTO was meant to promote fairness and equality and sustainable development towards the developing countries. The dispute settlement process changed from diplomatic to a legalized process and from power-based to rule-based procedure.²⁴

Dispute settlement is the central pillar of the multi-lateral trading system, and WTO's unique contribution to the stability of the world economy. A major difference between the GATT and WTO is that WTO has a new body called Dispute Settlement Body (DSB). The DSB is an assembly consisting of all the members of the WTO of all the members of the WTO. It was created during the Uruguay Round of negotiations to deal with any dispute arising from WTO agreements and this done in line with the provisions of the 'Understanding on Rules and Procedures Governing the Settlement of Disputes', the Dispute Settlement Understanding (DSU).²⁵ The DSB has authority to create dispute settlement panels, to adopt panel and appellate body reports, to maintain surveillance of the implementation of the rulings, it can also authorise retaliations if the rulings are not adhered to by virtue of Article 2.1 of the DSU.

The WTO Dispute Settlement Understanding (DSU) is composed of 27 Articles and 4 Appendices. It covers agreements which include: the WTO Agreement, its multilateral trade agreements for goods, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and four plurilateral trade agreements which cover Civil Aircraft, Government Procurement, Dairy and Bovine Meat.²⁶ There are also special or additional applications of the DSU rules.²⁷

²¹ Generally see John Jackson, 'The World Trade Organization: Constitution and Jurisprudence' (Chatam 1998).

²² WTO Website available at <http://www.wto.org/>

²³ *ibid*

²⁴ Kim Van der Borgh, 'The Review of WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate' 14 (1999) 14 *AMUILLR* 1224

²⁵ (n 7) 15

²⁶ Article 1.1, Appendix 1 Dispute Settlement Understanding (DSU)

The Dispute Settlement System (DSS) of the WTO comprises of the Dispute Settlement Body (DSB), the Dispute Settlement Panels (DSP) and the Appellate Body (AB). The DSB could be regarded as a political institution within the WTO; while the DSP and AB are the judicial-type of institutions.²⁸

Trade disputes are settled among WTO member countries through the following methods:

- i. *Consultation/Negotiation between Parties:* If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days. If the dispute is not resolved within 60 days, the complaining Member may request a panel.²⁹
- ii. *Good offices, Conciliation and Mediation:* This is a voluntary procedure that is undertaken where the parties to the dispute agree to it. Proceedings and the position taken by the parties are confidential and without prejudice to the rights of either party in any further proceeding.³⁰
- iii. *Arbitration:* This is a suitable method of settling disputes where the relevant issues for determination are clearly defined by both parties.³¹ Arbitrators are selected by the parties to the arbitration or, if they cannot agree on an arbitrator, the Director-General may appoint one on their behalf.
- iv. *Adjudication by Panels and the Appellate Body:* The request for a panel must be made in writing; identifying the specific measure at issue and giving a brief but clear summary of the complaint sufficient to present the problem.³² Once the panel is constituted, it hears written and oral arguments from the disputing parties. After a careful consideration of these presentations, a descriptive part of its report (facts and argument) is issued to the disputing parties. Following a review period, a final report is issued to the disputing parties and later passed around to all WTO Members.³³
- v. *Implementation and enforcement of the recommendations and rulings adopted by the DSB:* Where a WTO decision finds a defending member in violation of an obligation under a WTO agreement, the member must inform the DSB of its

²⁷ Article 1.2, Appendix 2 DSU

²⁸ Peter Van Den Bossche *The Law and Policy of the World Trade Organization* (2nd edn, Cambridge University Press 2008) 235

²⁹ Article 4, Dispute Settlement Understanding (DSU)

³⁰ Article 5 DSU

³¹ Article 21.3(c), 22.6, 25 DSU

³² Articles 6 to 20 of the DSU

³³ Articles 12, 15, Appendix 3 DSU

implementation plans within 30 days after the panel report and any AB report are adopted. If it is 'impracticable' to comply immediately, the Member will have a 'reasonable period of time' to do so.

Classification of Countries in the WTO

There are three classifications of countries in the WTO. They are the 'developed' 'developing' and 'least developed' countries (the developing and least developed countries are sometimes placed in one category). There is currently no strict definition of either class of countries at the moment. Thus, there are no yardsticks for these classifications of countries into the various groups. The term 'developing country' has been argued to be "an ambiguous one and does not clearly differentiate between those who are more likely to use the WTO system".³⁴

The selection or categorisation is made when members announce for themselves whether they are 'developed' or 'developing' countries; the status is based on self-declaration. One benefit of the above classification is that countries with similar interests can band together to promote their interests in the WTO and the classification can be a unifying factor for such countries. However, the mere fact that a WTO member announces itself to be a developing country does not automatically mean that it will benefit from the preference schemes available. In practice it is the preference giving country (usually a developed nation), which decides the list of developing countries that will benefit from the preferential treatment.

Furthermore, in comparison with the GATT, it has been posited that developing countries fare better under the WTO DSS thus:

...because the WTO is a rule-based system and not a power-based system. It is generally accepted that a rule-based system with a quasi-judicial dispute settlement system serves the interests of developing countries, least-developed countries (LDCs) and small economies better.³⁵

Under the GATT, very few developing countries were GATT contracting parties, thus many were free to "engage in protectionist, trade-restricting and import-substituting policies"³⁶ amongst other economic policies. Some scholars aver that many developing countries and LDCs have been short-changed by the WTO dispute settlement mechanism.³⁷ Thus, this view is

³⁴ Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' in James Hartigan (ed.) *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Frontiers of Globalization, Volume 6 Emerald Publishing 2009) 170. Shaffer also posits thus: "Certain developing countries, such as Brazil and India, and China, may have low capita income, but they nonetheless can defend their interests in WTO litigation (at least more effectively than others) because of the scale and scope of their economics...Smaller developing countries, in contrast. Have generally not used the system."

³⁵ Kim Van Der Borgh, 'Justice for all in the Dispute Settlement System of the World Trade Organization' (2010-2011) 39 *Ga. J. Int'l & Comp.L.* 787, 788-789.

³⁶ *Ibid* at 788

³⁷ This will be amplified in a later part of this paper.

that very few developing countries have benefited from the WTO DSS. Hence, the African Group³⁸ in the WTO posits that:

Experience has shown that the [dispute settlement system] has not satisfactorily and clearly aimed in its operation to contribute towards the tangible attainment of the development objectives of the WTO Agreement.³⁹ A number of countries have declared themselves to be developing countries. Prominent amongst them are; Pakistan, Hong Kong, Malaysia and South Africa.⁴⁰ In terms of written submissions, some active developing countries within the WTO include: China, India, Egypt, Brazil, Kenya and Argentina⁴¹ Developing countries account for more than two thirds of the total number of countries in the WTO.⁴²

Over the years, the developing country status has led to controversy. In the US–Steel Safeguard dispute China did not expressly declare her developing country status in her Accession protocol.⁴³ This led to ambiguity on the appropriate WTO procedure to utilize.⁴⁴ Similarly upon adoption of the Panel and AB reports in the Korea – Beef Case, the European Union stated that it did not consider it appropriate for Korea to be considered a developing country for the purpose of the Agreement on Agriculture.⁴⁵ The developing country status was also considered at the conclusion of the Uruguay round. During the negotiations, the United States tightened measures on the use of subsidies by foreign governments. It declared that it would no longer consider certain Members to be developing countries for purposes of subsidies or countervailing duty investigations.⁴⁶ The controversies resulted in a

³⁸ A number of countries have formed alliances in the WTO. The groups often speak with one voice during WTO negotiations. The African Group which is made up of all African WTO members. Majority of the African states are LDCs.

³⁹ Negotiations on the Dispute Settlement Understanding, Proposal by the African Group, para.2, TN/DS/W/15 (Sept. 15, 2002) [hereinafter African Group Proposal] in Van Der Borght (n 35) 790

⁴⁰ George Bermann & Petros Mavroidis *Columbia Studies in WTO Law and Policy: WTO Law and Developing Countries* (1st edn, Cambridge University Press 2007) 161 -162

⁴¹ Hakan Nordstrom, 'Participation of developing countries in the WTO – new evidence based on the 2003 official records'

<http://www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf> accessed 30 November 2012. Also as of March 2013, the WTO currently has 159 countries as members. See WTO Members and Accession Candidates, August 2012 at

<www.wto.org/english/thewto_e/acc_e/members_brief_e.doc> accessed 30 July 2013

⁴² Jan Bohanes and Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement' 4 (1) (2012) *TLD* 51

⁴³ World Trade Organization - Dispute Settlement, Dispute DS252: 'United States – Definitive Safeguard Measures on Imports of Certain Steel Products' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm> accessed 30 November 2012

⁴⁴ WTO, Accession of the People's Republic of China (2001) <<http://www.worldtradelaw.net/misc/chinaaccessionprotocol.pdf>> accessed 30 November 2012

⁴⁵ World Trade Organization - Dispute Settlement, Dispute DS161: 'Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm> accessed 30 November 2012

⁴⁶ Agreement on Subsidies and Countervailing measures <<http://ia.ita.doc.gov/regs/uraa/saa-cv.html>> accessed 30 November 2012

compilation by Horn of the WTO Membership into 5 groups.⁴⁷ These five groups are the European Union and United States; Brazil, India, and China; Other Industrialized Countries: including Korea, Mexico, Singapore, and Turkey; Developing Countries and Least Developed Countries.

Privileges Enjoyed by Developing Countries in the WTO

There are key provisions in the WTO, which arguably promote the favourable treatment of developing countries. These provisions grant them privileged rights called: ‘Special and Differential treatment’ (S&D). It is important to examine these provisions in order to appropriately understand the position of developing countries in the WTO. Developing countries enjoy exclusive concessions in three ways:

- *WTO Agreements:* They contain special provisions for developing countries: The Committee on Trade and Development: Focuses on Trade and Development, and also deals debt and technology transfer.
- *The WTO Secretariat:* The Secretariat provides Technical Assistance (mainly training of various kinds) to developing countries.

Other incentives put in place by the WTO to encourage developing country participation are;

- *Extra time to fulfill commitments:* After a successful dispute resolution, developing countries are given extra time to fulfil their commitments and obligations.
- *Provisions designed to increase trading opportunities:* Through greater market access, trading opportunities are increased by breaking barriers to trade in areas like textiles, services, and technical barriers to trade.
- *Provisions requiring WTO members to safeguard the interests of developing countries:* WTO members are enjoined to adopt meaningful domestic and international measures in areas such as anti-dumping that will safeguard the interest of developing countries.
- *Provisions for various means of helping developing countries:* These commitments focus on specific areas including; animal and plant health standards, technical standards, and other provisions aimed at strengthening their domestic telecommunications sectors.
- *Legal assistance:* The WTO Secretariat has special legal advisers for assisting developing countries in any WTO dispute and for giving them legal counsel. The service is offered by the WTO’s Training and Technical Cooperation Institute.
- *The Advisory Centre on WTO Law:* In 2001, 32 WTO governments set up an Advisory Centre on WTO law. Its members consist of countries contributing to the funding, and those receiving legal advice. All least-developed countries are automatically eligible for advice. Other

⁴⁷ Henrik Horn, Louise Johannesson and Petros Mavroidis ‘The WTO Dispute Settlement System 1995 – 2010: Some Descriptive Statistics’ [2011] IFN 3. Available online at <http://www.ifn.se/wfiles/wp/wp891.pdf>

developing countries and transition economies have to be fee-paying members in order to receive advice.

3. DEVELOPING COUNTRIES AND DISPUTE SETTLEMENT IN THE WTO

It has been argued that the successful use of the WTO dispute settlement rests on the meaningful organization and collaboration among various governmental agencies as well as between the public and private sectors.⁴⁸ In other words, the decision to pursue a case at the WTO lies predominantly with the governments of member states. The government is charged with the onerous task of selecting a case, evaluating whether it will be worth going forward with and thereafter managing the litigation process. Therefore, information is a key requirement and embodies a considerable part of the litigation costs for initiating a WTO dispute.⁴⁹ Davis supports this view and opines that a large amount of the case specific information is provided by the affected domestic industry and legal advisors. There are fixed costs that are a function of experience; these include a building knowledge of WTO rules and procedures in both government and industry circles and establishing institutional processes to facilitate participation in dispute settlement.⁵⁰ The member countries that face the most difficulties in meeting coordination challenges are the developing countries.⁵¹ Primarily these challenges occur due to their lack of experience and also their failure to prioritise litigation coordination.⁵²

In determining whether the WTO DSS has been effective in resolving the trade disputes of developing countries, it is pertinent to examine two significant arguments that have been put forward. The first argument posits that the WTO procedure has been adequate and effective in settling disputes. The second argument postulates that there are challenges in the DSS which deter developing countries from participating in the process. We will now address the two arguments.

Strengths of the WTO Dispute Settlement Process involving Developing Countries

It is contended that the DSS has been highly effective in settling disputes and has improved trade relations between developing countries and other member states to a large extent. This argument is primarily pivoted on the fact that countries 'learn by doing'. When developing countries are 'repeat players', they acquire relevant knowledge on how the process works and thereby improve institutional arrangements for coordination of public and private action to address trade problems.⁵³

The WTO experience of Pakistan exemplifies this. The first case filed by Pakistan as a sole complainant was against the United States regarding a transitional safeguard measure on combed cotton yarn from Pakistan (US -

⁴⁸ Gregory Shaffer and Ricardo Melendez-Ortiz 'Dispute Settlement at the WTO: The Developing Country Experience' (ICTSD 2012)

⁴⁹ Bernard Hoekman and Petros Mavroidis 'WTO Dispute Settlement, Transparency and Surveillance' [2000] *TWE* 1

⁵⁰ Christina Davis and Sarah Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' 71 (2009) *JOP* 1036

⁵¹ Shaffer and Melendez-Ortiz (n 48)

⁵² *ibid*

⁵³ Davis and Bermeo (n 50) 1036

Cotton Yarn).⁵⁴ Prior to this time Pakistan had filed two cases under the GATT and joined a WTO case with multiple complainants.⁵⁵ At the time of filing the dispute, Pakistan did not have an effective institutional framework within the Ministry of Commerce, which could deal with WTO-related dispute settlement cases. However during the course of the dispute, WTO sections in the permanent mission in Geneva and the Ministry of Commerce were set up; as well as a 13-member high-level WTO council chaired by the Minister of Commerce.⁵⁶ The Cotton Yarn Case was successfully resolved in Pakistan's favour. In 2005 Pakistan filed another case against Egypt regarding anti-dumping duties on matches; this case was also concluded in Pakistan's favour.⁵⁷ Pakistan has participated in several cases as a third party and also has cases currently under consideration as potential complaints. The serving Ambassador to the WTO for Pakistan in 2008 elaborated on the advantages accruing to Pakistan due to its involvement in the WTO dispute settlement mechanism. He posited thus:

It is encouraging when we get positive results so we are more likely to see dispute settlement as an effective strategy. We know about the selection of lawyers and how to enter consultations. If it were the first time we would be completely lost but if we have experience it helps ...⁵⁸

The classic experience of Costa Rica is another example of how the WTO DSS has adequately resolved the trade dispute of developing countries. Costa Rica challenged the United States on the use of transitional safeguard provisions for cotton underwear (US - Underwear Case).⁵⁹ At the time the complaint was filed, foreign affairs officials were reluctant to proceed with the matter because they did not want to harm relations with the United States.⁶⁰

⁵⁴ World Trade Organization – Dispute Settlement: Dispute DS192 ‘United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds192_e.htm>, accessed 11 December 2012

⁵⁵ World Trade Organization – Dispute Settlement: Dispute DS58 ‘United States – Import Prohibition of Certain Shrimp and Shrimp Products’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>, accessed 11 December 2012

⁵⁶ World Trade Organization : ‘Managing the Challenges of WTO Participation, Case Study 34, Turab Hussain’ <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case34_e.htm> accessed 11 December 2012, also relevant, Turab Hussain, ‘Combed Cotton Yarn Exports of Pakistan to the United States: A Dispute Settlement Case’ (2005) 05-35, LUMS <http://cmer.lums.edu.pk/upload/CMER_05_36.pdf> accessed 11 December 2012

⁵⁷ World Trade Organization – Dispute Settlement: Dispute DS327 ‘Egypt – Anti-Dumping Duties on Matches from Pakistan’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds327_e.htm> accessed 12 December 2012

⁵⁸ Comment by Dr. Manzoor Ahmad, Ambassador and Permanent Representative to the WTO for Pakistan in an interview by Davis and Bermeo, Geneva, 30 June 2008 cited in Davis and Sarah (n 50) 1037

⁵⁹ World Trade Organization – Dispute Settlement: Dispute DS24 ‘United States Restriction on Imports of Cotton and Man-made Fibre Underwear’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds24_e.htm> accessed 12 December 2012

⁶⁰ John Breckenridge, ‘Costa Rica’s Challenge to US Restrictions on the Import of Underwear’ in Peter Gallagher, Patrick Low and Andrew Stoler (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (CUP 2005)

However, trade ministry officials insisted that the case was necessary to show evidence of a transparent, unbiased system and to maintain the benefits of open trade under the WTO for domestic industries. Costa Rica, despite its concerns about ‘testing the system’ alone, used the mechanisms available to it as a WTO member to ensure that important principles of the multilateral trading system were appropriately applied.⁶¹ The ‘system’ worked as intended in this case. Almost ten years after the dispute, both developed and developing countries regularly use the DSU process. This case, as an early test of the system, clearly points to some lessons.⁶² Anabel Gonzales of the Costa Rican legal team identified one lesson: ‘... never underestimate a trade conflict. Pay attention to it from the beginning and throughout the process.’ The United States probably underestimated both Costa Rica’s resolve and its capacity to prosecute the case. While the other countries identified by the United States as posing a threat to its underwear industry quickly agreed to settle with the United States, Costa Rica did not. The victory in the cotton case opened the door for future use of dispute adjudication by Costa Rica.

Also, there are times when the consequences of not filing a complaint far outweigh the high cost of filing. The Costa Rican government in the Underwear Case had an overriding desire to respond to the U.S textile safeguard measures because they risked losing 100 million dollars’ worth of trade.⁶³ The situation of Ecuador further illustrates this point. Ecuador is one of the world’s largest banana exporters. During the famous EU (European Union) banana era, Ecuador incurred losses of more than 500,000 dollars a day. It rushed its accession to the WTO, in order to file a complaint against the EU on this issue; so as not to incur further losses.⁶⁴

Developing countries have also obtained relevant experience by joining a complaint that another state has already initiated. Peru did this in 1995 when it joined Canada and Chile to challenge an EU – labeling policy. It also received help from the Canadian government to pursue the case.⁶⁵ After this first experience, Peru subsequently instituted a matter alone in a dispute that raised legal issues about labeling standards relative to Sardines.⁶⁶ A mutually agreed solution was reached by the European Communities and Peru pursuant to Article 3.6 of the DSU on the 25th of July 2003. Similarly, when the EU filed a complaint against the US on the issue of safeguards on steel imports, China

⁶¹ World Trade Organization - Managing the challenges of WTO participation: case study 12 ‘Costa Rica’s Challenge to US Restrictions on the Import of Underwear’ John Breckenridge <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case12_e.htm> accessed 13 December 2012

⁶² *ibid*

⁶³ Anabel Gonzalez - Costa Rican Legal Team in the Underwear Case telephone interview by Davis and Bermeo, 11 August 2008 cited in Christina Davis and Sarah Bermeo (n 50) 1038

⁶⁴ James Smith ‘Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute’ [2006] GWU 3

⁶⁵ World Trade Organization - Dispute Settlement, Dispute DS12: ‘European Communities — Trade Description of Scallops’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds12_e.htm> accessed 14 December 2012

⁶⁶ World Trade Organization - Dispute Settlement, Dispute DS12: ‘European Communities — Trade Description of Sardines’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm> accessed 14 December 2012

joined as a party to the dispute three weeks later.⁶⁷ Through this method, China was able to gain valuable experience on the WTO process.

Relevant experience may also be gained by being a defendant in a WTO case.⁶⁸ The situation of Indonesia illustrates this. A complaint was filed against Indonesia by the EU, United States and Japan in a dispute about its automobile policy in 1996.⁶⁹ Two years later, Indonesia filed its first WTO case against Argentina about safeguard measures on footwear.⁷⁰ In 48 years of membership in the GATT/WTO, Indonesia had never filed a case, but after this first case it went on to initiate two more, for a total of three in nine years.⁷¹

The WTO DSU has also successfully resolved disputes through mediation as evidenced in the Thailand issue on Tuna Export to the EC (Formerly European Community now EU). The players in this case were Thailand and the Philippines on the one hand and the EC on the other. The initial challenge faced by Thailand was how to persuade the EC to enter into discussions on the matter. After this hurdle had been crossed, a formal letter requesting mediation was jointly submitted to the Director-General of the WTO. The matter was resolved amicably through mediation. This case is a good example of how developing country members were able to use their WTO rights to secure more equitable treatment from a developed country trading partner. Thailand's Minister of Commerce, Adisai Bhodharamik, expressed it thus:

... in resorting to the dispute settlement process, we did not seek to confront, but opted for friendly persuasion and understanding. After all, the EC is one of our major trading partners, and a very important consumer not only of Thai tuna but in other sectors as well. We intended to avoid at all costs doing anything that would jeopardize our long-standing and good relationship with the EU...⁷²

The arguments presented above posit that the WTO DSS has been effective in resolving developing countries' trade disputes. Now let us examine the second argument that analyses the challenges and paradoxes experienced by developing countries in the WTO DSS.

⁶⁷ World Trade Organization - Dispute Settlement, Dispute DS252: 'United States – Definitive Safeguard Measures on Imports of Certain Steel Products' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm> accessed 14 December 2012

⁶⁸ (n 50)

⁶⁹ World Trade Organization - Dispute Settlement, Dispute DS54: 'Indonesia - Certain Measures Affecting the Automobile Industry' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm> accessed 14 December 2012

⁷⁰ World Trade Organization - Dispute Settlement, Dispute DS54: 'Indonesia - Certain Measures Affecting the Automobile Industry' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm> accessed 14 December 2012

⁷¹ (n 50) 1038

⁷² Nilaratna Xuto, 'Thailand Conciliating a Dispute on Tuna Export to the EC' in Peter Gallagher, Patrick Low and Andrew Stoler (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (CUP 2005)

4. CHALLENGES OF THE DISPUTE SETTLEMENT PROCESS INVOLVING DEVELOPING COUNTRIES

Nottage has identified significant problems that limit developing-country participation in the WTO dispute settlement proceedings.⁷³ He opines that a major constraint is that developing countries lack expertise in WTO law as well as sufficient resources to fund external WTO lawyers.⁷⁴ Bown supports this position and argues that the WTO DSS is overly complicated and expensive; thereby making it extremely difficult for developing countries to overcome the human and financial resources that are expended in the process.⁷⁵ The legal fees incurred in the Japan and United States case dealing with the issue of Measures Affecting Consumer Photographic Film and Paper was recorded by the Panel Report to be in excess of 10 Million US dollars.⁷⁶ Indeed, this is an outrageous amount for a developing country (especially the relatively poor ones) to provide. Legal luminaries and world trade experts observe that the problem of high costs faced by developing countries is enhanced by their small trade shares and government budgets. They tend to have smaller aggregate trading stakes than their developed country counterparts.⁷⁷ Although the DSU contains in Article 27.2 certain provisions that address the cost and resource constraints, it is submitted that the experts can only assist in respect of the dispute settlement and cannot provide legal advice before a dispute is initiated.

Another fundamental problem with the WTO DSU is the auspicious fact that they are unable to appropriately enforce rulings through retaliation. Keen observers submit that developing countries with small domestic markets are unable to impose sufficient economic or political losses within the larger WTO members to generate the requisite pressure to induce compliance.⁷⁸ The suspension of trade concessions or obligations may be more detrimental to the developing country than the non-complying member.⁷⁹ This implies that there is little purpose in developing countries bringing WTO dispute settlement proceedings as they lack capacity to enforce rulings.⁸⁰ The situation of Antigua and Barbuda in the 2007 dispute case against the United States succinctly exemplifies this scenario.⁸¹ In its request for retaliation, Antigua and Barbuda observed that ceasing all trade with the United States would have virtually no impact on the US economy but would cause them untold hardship. The

⁷³ Hunter Nottage, 'Developing Countries in the WTO Dispute Settlement System' [2009] *GEG Working Paper*

⁷⁴ *ibid* at 3

⁷⁵ Chad Bown and Bernard Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' [2005] *JIEL* 889

⁷⁶ World Trade Organization: Dispute Settlement DS44 'Japan – Measures Affecting Consumer Photographic Film and Paper' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm> accessed 15 December 2012

⁷⁷ Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A case for a Small Claims Procedure' [2007] ICTSD. Available online at http://www.ruigian.org/ressources/Apea-NordstromShaffer_Small_Claims%20070723.pdf

⁷⁸ Xuto (n 72) 5

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ World Trade Organization – Dispute Settlement: Dispute DS285 'United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> accessed 15 December 2012

relatively low volume of trade (approximately 180 Million US dollars or 0.02 per cent of all annual exports from the US) could easily be shifted elsewhere. Ecuador experienced a similar situation with the EC – Bananas III case.⁸² Ecuador imports less than 0.1 per cent of total European Communities (EC) exports. The Arbitrator presiding on the dispute examined the ability of Ecuador to retaliate against the EC and stated thus:

... given the fact that Ecuador, as a small developing country, only accounts for a negligible portion of the EC's exports of these products, the suspension of concessions is unlikely to have any significant effect on demand for these EC exports ... in situations where the complaining party is highly dependent on imports from the other party it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the part seeking suspension of concessions than for the other party ...

Developing countries are also deterred from using the WTO DSS because majority of them lack domestic mechanisms to identify and communicate trade barriers to WTO lawyers.⁸³ Shaffer suggests that developing countries should request the assistance of development agencies and foundations to remedy this anomaly.⁸⁴ Another prominent scholar opines that an independent Special Prosecutor or Advocate could be recruited to identify potential WTO violations on behalf of developing countries.⁸⁵ It is argued that another reason for developing countries' reluctance to initiate WTO disputes is because they are afraid of political and economic pressures from the developed countries. Their vulnerability in areas such as development assistance and preferential market access makes them largely unable to counter threats to withdraw preferential tariff benefits or foreign aid.⁸⁶ Although, one cannot provide practical scenarios of these pressures occurring, yet many developing countries perceive that such consequences might flow from their initiation of a WTO dispute.⁸⁷

Another major flaw with the WTO dispute mechanism according to Nottage, is the high proportion of developing-country trade occurring under preferential rules that are not part of enforceable WTO dispute settlement proceedings.⁸⁸ A WTO member may enforce the rules under which it trades in WTO dispute proceedings only if those rules are part of enforceable WTO law. The AB presiding over the United States Mexico dispute regarding Taxes on

⁸² World Trade Organization – Dispute Settlement: Dispute DS27 'European Communities – Regime for the Importation, Sale and Distribution of Bananas <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm > accessed 15 December 2012

⁸³ Roderick Abbot, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995 – 2005' [2009] *ECIPE Working Paper 1*, 12 - 13

⁸⁴ Gregory Shaffer, 'The Challenges of WTO Law, Strategies for Developing Country Adaptation' 5(2) (2006) *WTR* 184

⁸⁵ Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development' [2002] *WTR* 36

⁸⁶ (n 84) 193

⁸⁷ Nottage (n 73) 11

⁸⁸ Hunter Nottage 'Trade and Development' in Daniel Bethlehem et al (eds), *Oxford Handbook of International Trade Law* (OUP 2009)

Soft Drinks confirmed that the WTO dispute system cannot be used to determine rights and obligations outside the covered agreements.⁸⁹

It has also been argued that the provisions of the S&D are inefficient in solving developing countries disputes. Lekgowe observes that Article 4(10) of the DSU that discusses Special Attention to the Problems of Developing Countries is fraught with numerous weaknesses. In his words;

... The provision only urges and advises members to give special attention to the particular problems and interests of developing countries and therefore is not a mandatory provision. The provision is more declaratory than operative and does not provide any operative content, it does not state exactly who gets what assistance from whom. As a result, it does not create an enforceable obligation on the part of the members ...⁹⁰

Lekgowe also contends that the provision for extension of time available to developing countries pursuant to Article 12 (10) DSU possesses overriding limitations. He submits that the advantage it carries is only available to a developing country that is a defendant; the extension of time is not available to a developing country that is a complainant.⁹¹ Also, the provision only applies to extension of time in respect of consultation time frames and not time frames at the implementation stage.⁹²

5. THE ROLE OF THE ADVISORY CENTRE IN DISPUTES INVOLVING DEVELOPING COUNTRIES

The Advisory Centre on WTO Law (ACWL) is an independent inter-governmental organization established in 2001 with the predominant aim of providing support, legal advice and training on WTO law. Their mission is to provide developing countries and 'Least Developed Countries' (LDCs) with the legal capacity necessary to enable them to take full advantage of the opportunities offered by the WTO.⁹³ The ACWL's legal services to developing countries are provided for free or at heavily subsidised rates. Their services are financed predominantly by developed countries endowment funds and developing countries contributions. Since July 2001 the ACWL has provided direct legal assistance in 38 WTO disputes and 5 cases through external legal counsels.⁹⁴ Support is given in WTO panel, Appellate Body and implementation proceedings, and in reaching mutually-agreed solutions.⁹⁵ The ACWL offers developing countries an opportunity to acquire experience that goes beyond the legal representation of a private law firm.⁹⁶ The centre

⁸⁹ World Trade Organization – Dispute Settlement: Dispute DS308 'Mexico – Tax Measures on Soft Drinks and Other Beverages' <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm> accessed 16 December 2012

⁹⁰ Gosego Lekgowe, 'The WTO Dispute Settlement System: Why it doesn't Work for Developing Countries?' [2012] SSRN

⁹¹ *ibid* at 9

⁹² *ibid* at 9 - 10

⁹³ Advisory Centre on WTO Law: 'ACWL's mission' <http://www.acwl.ch/e/about/about_us.html> accessed 16 December 2012

⁹⁴ Advisory Centre on WTO Law: 'Assistance in WTO Dispute Settlement Since July 2001' <http://www.acwl.ch/e/disputes/WTO_disputes.html> accessed 14 December 2012

⁹⁵ *ibid*

⁹⁶ (n 50) 1039

provides access to low-cost legal opinions and also works closely with officials from home governments when litigating a dispute.

The ACWL was criticized as being unable to provide non-technical inputs for developing countries required in WTO disputes.⁹⁷ However, this concern has been addressed to a considerable extent.⁹⁸ A technical expertise trust fund has been set up to subsidize the costs of contracting technical experts for developing countries. The Fund is financed by voluntary contributions of developed country Members. Denmark, the Netherlands and Norway have contributed to the Technical Expertise Fund.⁹⁹ The fund has been used on several occasions to assist developing countries in acquiring scientific, economic and domestic law expertise presented in disputes.¹⁰⁰ Although the ACWL does not address all the constraints faced by developing countries in accessing the WTO DSS, it is argued that the ACWL's intervention has greatly mitigated their lack of expertise in WTO law.¹⁰¹

6. POSSIBLE REFORMS OF THE WTO DSS

The DSU mechanism is perceived to be of considerable benefit to developing countries. The shift from a 'power' to a 'rules based' system permits even the smallest and weakest economic powers to enforce the rules under which they trade and consequently provide unprecedented security and predictability in their trading relation.¹⁰² Although, a more balanced playing field has been achieved, developing countries still face difficulties in terms of resources and capacity to utilize the system effectively.¹⁰³ It is respectfully submitted the DSS should be reformed. The DSS is somewhat slow and takes ages for a reasonable conclusion to be arrived at.¹⁰⁴ The EU-Latin American Banana dispute which ended after 20 years of negotiations shows how slow the system can be. Although the 'mutually agreed solution' signed by the EU and Latin American countries consisted of 6 individual disputes;¹⁰⁵ it is highly unacceptable and inexcusable for a trade dispute to take this long. Severe hardship would have undoubtedly been experienced by the developing countries concerned while the grievance complained of would have continued unabated.

An accelerated mode of settling disputes needs to be adopted for future situations.

Domestic systems to identify and communicate trade barriers to WTO lawyers should be improved upon. The current DSU review negotiations "do not address this limitation to the effective use of the system for many developing

⁹⁷ Bown and Hoekman (n 75) 876

⁹⁸ (n 73) 5

⁹⁹ Advisory Centre on WTO Law: 'Technical Expertise Fund' <http://www.acwl.ch/e/disputes/tech_exp_fund.html> accessed 16 December 2012

¹⁰⁰ Nottage (n 73) 5

¹⁰¹ *ibid*

¹⁰² Nottage (n 73) 17

¹⁰³ Gregory Shaffer and Ricardo Melendez-Ortiz, 'Dispute Settlement at the WTO: The Developing Country Experience' [2012] ICTSD 8

¹⁰⁴ Abbot (n 83) 50

¹⁰⁵ World Trade Organization: (cases DS16, DS27, DS105, DS158, DS361 and DS364) between the EU and Latin American countries <http://www.wto.org/english/news_e/news12_e/disp_08nov12_e.htm> accessed 16 December 2012

countries.”¹⁰⁶ Public-private networks to assist export sectors should be developed to communicate trade barriers to the government and to increase capacity building for conveying those barriers to WTO lawyers for legal assessment.¹⁰⁷

The scope of rules under which developing countries trade as part of the enforceable WTO law should be increased. The pertinent consideration should not be whether the developing countries should have preferential treatment, but where and in what form it would be most effective.¹⁰⁸

A permanent panel or body in the WTO would strengthen dispute settlement process. The present dispute system where panelists are on ad-hoc basis has led to problems. A permanent body will reduce the amount of time spent in constituting panels because panelists would now be readily available. So, the situation where panelists juggle from their home country to Geneva would be highly reduced, it will also lead to better dedication from panelists because they will now be employed on permanent basis rather than on ad-hoc basis.

The major problem of developing countries is lack of legal assistance in WTO. The Advisory Centre on the WTO Law should be strengthened to provide quality legal assistance to developing countries. It was created in 2001 to create a level playing ground for developing countries to be abreast of their rights and obligations under the WTO Agreement. The amount charged for this service may be too exorbitant for poor countries, legal assistance should be provided free to the poor countries who cannot afford it or in the alternative a trust fund should “be established to help finance the costs of retaining external experts.”¹⁰⁹

The power of the DSB to accept panel and appellate reports should be stopped. In the DSB, there is a possibility that such report could be rejected. There is a likelihood of influence in the DSB, a powerful country can still block a report if it can muster the support of the other countries.

7. CONCLUSION

There is no generic answer as to whether the WTO Dispute system has been effective in resolving the trade disputes of developing countries. To some experts, the DSS has failed the developing countries, whereas other experts aver that some developing countries have reaped benefits from their participation in WTO DSS. Also, in comparison with other similar international organizations, dispute settlement in the WTO can be considered to be successful. However, the largest bloc of members of the WTO, the African Group’s participation in dispute settlement has been negligible. Here, no African country has ever initiated a dispute under the DSU.¹¹⁰ African states constitute the majority of members of the LDC countries in the WTO. Bangladesh is the only LDC country that has initiated a dispute at the DSU

¹⁰⁶ (n 73) 13

¹⁰⁷ *ibid*

¹⁰⁸ Mari Pangetsu, ‘Special and Differential Treatment in the Millennium: Special for Whom and How Different?’ (2000) 23 (9) *TWE* 1295

¹⁰⁹ Van Der Borgh supra (n 24) 1232

¹¹⁰ David Evans & Gregory Shafer, ‘Introduction’ in Gregory Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (ICTSD 2010)

and the dispute did not go beyond the consultation stage of the DSM.¹¹¹ Thus, until African states in the WTO attain increased participation in dispute settlement, the DSU and DSM should not be considered as being successful.¹¹²

Opportunities and challenges for developing countries have occurred. It is opined that if meaningful steps are taken to reform the process in the ways suggested above, the DSS will become more attractive for developing countries to participate actively.

¹¹¹ *ibid*

¹¹² Victor Mosoti, 'Does Africa Need the WTO Dispute Settlement System' (ICTSD Resource Paper No. 5 2003).