

UNIVERSITY OF THE WESTERN CAPE

LAW FACULTY

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International Trade and Investment Law (Mode I)**

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TOPIC:

WTO Dispute Settlement: Challenges faced by developing countries in the implementation and enforcement of the Dispute Settlement Body (DSB) recommendations and rulings.

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DECLARATION

I declare that, **WTO Dispute Settlement: Challenges faced by developing countries in the implementation and enforcement of DSB recommendations and rulings**, is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Jimcall Pfumorodze

Signed:

May 2007



DEDICATION

To my wife, Marian



ACKNOWLEDGEMENT

It is difficult to mention all the people who deserve to be thanked for their assistance in the preparation and final submission of this paper. However, there are some that deserve special mention within the scope of a brief acknowledgement statement.

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KEY WORDS

Arbitration, Developing countries, Dispute Settlement Body (DSB), Doha Development Agenda, enforcement, Least Developed Countries (LDCs), international trade disputes, international tribunals, rulings, World Trade Organisation (WTO).



ACRONYMS

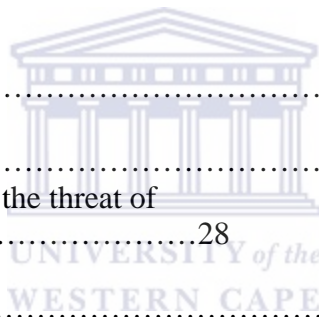
AB	Appellate Body
DSB	Dispute Settlement Body
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
LDCs	Least Developed Countries
MFN	Most Favoured Nation
SPS	Sanitary and Phytosanitary Measures
WTO	World Trade Organisation



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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION AND STATEMENT OF THE PROBLEM

The WTO dispute settlement system which in 1995 succeeded the system under GATT 1947 is one of the major developments in the international dispute settlement¹. It fosters a rule based dispute settlement system as opposed to a power based system². However, despite the creation of a power based and binding system, the system still has a weak enforcement mechanism. Some commentators say that this was an outcome of a compromise between the negotiators³. On one hand, they wanted a strong dispute settlement system and on the other they wanted a weaker enforcement mechanism. This was to balance the interests of negotiators who were aware that their countries may be involved in WTO dispute settlement as both complainants and defendants, so they wanted to insulate themselves from both sides. As complainants, they wanted their case to be heard under a rule based system and as defendants they wanted to have the policy space not to implement the DSB rulings which are politically sensitive or which are against their interests.

Thus it should be clear from the onset that a weak enforcement mechanism was intended and was an outcome of a compromise. Although the enforcement system is weak, developed countries are able to use it against each other and against developing countries.

¹ See Fukunaga, Y (2006) 42

² Jackson, J. H (1997) 1

³ Hudec, H (1999) 1. See also Jackson, J.H (1997) 3

They can effectively use retaliation⁴, or the threat of retaliation, in most cases⁵. On the contrary, developing countries cannot effectively use retaliation against developed countries due to the fact that their economies are weak. The main problem therefore is that developing countries are left without any effective remedy in the WTO dispute settlement. This study seeks to explore the challenges which are faced by developing in enforcing DSB recommendations and rulings and to suggest for mechanisms which should be put in place to assist developing countries when they are faced with non-compliance by developed countries.

The second problem is that the WTO remedies are only prospective in nature. The current remedies only focus on inducing compliance instead of focusing on compensating for the injury which has been suffered by the complainant. Thus presently the compensation is quantified from the period the reasonable time of period to implement DSB rulings lapses⁶. It does not seek to compensate the injured party from the date of infringement. This would in turn give the responding parties an incentive to delay the dispute settlement proceedings as much as they can while benefiting from an infringement of WTO Agreements. This is unfair and trade restrictive and needs to be solved in order to improve the implementation and enforcement of DSB rulings.

1.2 AIMS OF THE RESERCH PAPER

This paper seeks:-

- (a) To examine the legal framework of implementation and enforcement of DSB recommendations and rulings.
- (b) To investigate the trend of non-compliance with BSD recommendations and rulings where a complainant is a developing country.

⁴ This term is usually used to refer to suspension of concessions and other obligations in terms of Article 22 of the DSU

⁵ A study undertaken by Bagwell et al (2003) shows that developed countries do retaliate against each other like in *EC Banana III* case where the US retaliated against the EU.

⁶ See Article 22 of the DSU

- (c) To evaluate the effectiveness of the implementation and enforcement of DSB rulings and recommendations.
- (d) To critically analyse proposals which have been tabled by Members for the reform of implementation and enforcement of DSB rulings during the ongoing DSU reform negotiations.
- (e) To make recommendations for the DSU reform in relation to the implementation and enforcement system of the DSB recommendations and rulings.

1.4 SIGNIFICANCE OF THE RESEARCH

The significance of this study is based on the above highlighted problems. This research on the challenges faced by developing countries in the enforcement of DSB recommendations and rulings is important especially at this moment where more developing countries are actively participating in the WTO dispute settlement system as complainants, defendants and third parties. A total of 356 complainants have been notified to the WTO, and 135 of which are complaints from developing countries⁷. This high level of utilization of the WTO dispute settlement system shows a growing confidence in the system. The above figures also show that developing countries are also utilizing the dispute settlement system⁸.

It is important for negotiators and policy makers from developing countries to understand the challenges they are facing and to be able to suggest useful improvements in their proposals during the on going DSU review negotiations. With such an understanding, it increases the participation of developing countries not only during the negotiation process but ultimately in the dispute settlement process itself. This in turn ensures the security and predictability, which is the cornerstone of the WTO dispute settlement system.

⁷ WTO Statistics, WT/DS/OV/29, 9 January 2007

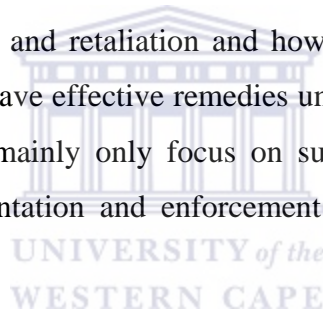
⁸ See Mosoti, V (2006) 17, where the author analyzed the participation of African countries in the first decade of WTO dispute settlement.

1.5 RESEARCH HYPOTHESIS

The investigative assumption, which the proposed research will examine, is that the DSB enforcement mechanism is not effective in ensuring compliance with recommendations and rulings especially when the complainant is a developing country. Remedies available in the WTO cannot be utilised effectively by developing countries. This failure by the enforcement mechanism to take in to account the interests of developing countries calls for a reform of the system with a view to affording effective remedies to developing countries.

1.6 SCOPE

The subject area under consideration is a vast one. For this reason this research will mainly focus on compensation and retaliation and how these can be improved so that developing countries can also have effective remedies under the WTO dispute settlement system. Thus this paper will mainly only focus on substantive issues, as opposed to procedural issues, of implementation and enforcement of DSB recommendations and rulings.



1.7. RESEARCH METHODOLOGY AND CHAPTERS OVERVIEW

This study shall basically be literature based with emphasis on the analysis of the relevant available literature on the subject matter. The study shall rely on both primary and secondary sources of literature. On primary sources regard will be given to WTO Agreements, WTO cases, WTO case statistics, and WTO Members' proposals.

On secondary sources reference will be taken from various background papers, books, and academic or scholarly articles. Various internet sites will be consulted for relevant up-to-date data and information.

This paper is comprised of five chapters. The first chapter gives an introduction and general statement of the problem; the second chapter covers the legal framework of implementation and enforcement of DSB rulings and recommendations, the third chapter provides statistics and a case study, chapter four discusses proposals for reform and is followed by recommendations and conclusion in chapter five.

CHAPTER TWO

WTO DISPUTE SETTLEMENT SYSTEM: THE LEGAL FRAMEWORK OF IMPLEMENTATION AND ENFORCEMENT OF DSB RULINGS AND RECOMMENDATIONS

2.1 INTRODUCTION

This chapter begins with an overview of the WTO dispute settlement system. The main thrust of this chapter is on the substantive issues relating to the implementation and enforcement of DSB rulings and recommendations, namely compensation and retaliation.

2.2 OVERVIEW OF THE GATT/WTO DISPUTE SETTLEMENT SYSTEM

2.2.1 Brief Background

The period preceding the World War II was marked by isolationism and this partly contributed not only to the Great Depression but also to the World War II⁹. In a bid to solve these economic concerns, in July 1944, the parties attended a conference at Breton Woods, New Hampshire where the IBRD (World Bank) and IMF were formed. In 1945

⁹ Palmeter, D (2004) 1

the US issued a proposal for an International Trade Organization (ITO) but this soon proved to be fruitless as the US Congress refused to approve it¹⁰.

However, it should be noted that although the ITO did not come into fruition, the governments were interested in relaxing tariffs and other trade restrictions more rapidly hence the negotiation for the GATT 1947. This led to the Geneva Final Act which consisted of the text of the GATT 1947 and the schedules of tariff commitments made by the 25 governments taking part. It also included a Protocol of Provisional Application (PPA), a measure intended to be a temporary expedient, but which ended up being fundamental to GATT 1947 for its 47 years of existence¹¹. On 1 January 1995 the GATT was overtaken by the WTO. There are some fascinating differences between the dispute settlement under the GATT 1947 and under the WTO and these will be discussed below.

2.2.2 Dispute Settlement under the GATT 1947

Hudec (2003) noted that the early dispute settlement in GATT reflected its diplomatic roots to the extent that the process was initially dubbed as conciliation and not dispute settlement¹². Davey (1987) observed that the goal of the process was more to reach a solution mutually agreeable to the parties than to render a decision in a legal dispute¹³.

GATT 1947 had only two provisions dealing with dispute settlement, namely Article XXII and XXIII¹⁴. However, Articles XXII and XXIII did not contain any specific procedures to be followed by disputing parties or even the Contracting Parties in

¹⁰ Gardner, R (1980) 1

¹¹ Palmeter, D (2004) 4

¹² Hudec, R (1993) 12

¹³ Davey, W J (1987) 65

¹⁴ Article XXII deals with consultations, while Article XXIII deals with nullification and impairment. Under Article XXIII, an aggrieved party could make written representations or proposals to another party who is causing harm. If this party did not fully address the situation, the complainant was authorized to refer the matter to the contracting parties who would in turn investigate and make recommendations. Article XXIII: 2 permitted the Contracting Parties to authorize the complainant to suspend the application of tariff concessions or other GATT obligations to the offending member in appropriate cases.

resolving a dispute. Some formalities were added later on in subsequent negotiation rounds and Ministerial Conferences¹⁵.

The GATT dispute settlement had fundamental shortcomings. Bossche (2005) noted that the manner in which key decisions were taken, that is, the establishment and composition of a panel, the adoption of panel reports and the authorization of suspension of concessions, were all taken by the GATT Council by consensus¹⁶. Thus the responding party could delay or block any of these decisions and paralyze or frustrate the operation of the dispute settlement system¹⁷. Thus it can be concluded that under GATT 1947, the dispute settlement system was entirely in the hands of the parties. Hudec (1999) made the following interesting remarks concerning GATT dispute settlement system:-

' The sentiment at the time was that dispute settlement worked better on the whole if defendant governments participated on a voluntary basis, and that it would not be productive to try to force governments into adjudicatory rulings they are not prepared to accept'.¹⁸

Concerning remedies, the GATT 1947 provided for three remedies only namely recommendation to comply, compensation and the suspension of concessions or any other obligations under the covered agreements¹⁹. However, as noted above, these remedies were not effective due to the issue of positive consensus. Thus, it should be noted that from the onset the governments showed no political commitment to make an effective system of implementation and enforcement of rulings and recommendations²⁰. This shows that the weakness of the WTO dispute settlement system

15 For instance, during the Tokyo Round (1973-79) the Contracting Parties adopted the 'Undertaking on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, which included an annex setting out an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement.

¹⁶ Bossche, P (2005) 172

¹⁷ However, the potential of the respondent to block the proceedings under GATT 1947 should not be overemphasized as a study undertaken by Hudec (1993) shows that from 1947 to 1992; the losing party eventually accepted the results of an adverse panel report in approximately 90% of the cases¹⁷. Note should be taken of the fact that still Members would exercise their power to block in sensitive matters, especially in the 1980s.

¹⁸ Hudec, E (1999) 1

¹⁹ See Articles XXII and XXIII of GATT 1947

²⁰ Hudec, E (2000) 1

is a design and not an accident. However, it is the developing countries who are the biggest losers in this system hence the need to improve the enforcement mechanism.

2.2.3 Dispute Settlement under the WTO

The WTO dispute settlement system which came into operation in 1995 was innovative. It is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).²¹ Its prime objective is the prompt settlement of disputes between WTO Members concerning their rights and obligations under the covered agreements. There are two important policy considerations referred in the DSU namely, protecting the security and predictability of the DSS and satisfactory settlement of disputes²². Jackson (1997) argues that these two policy issues may conflict with each other as sometimes the need to reach a satisfactory settlement may compromise the security and predictability of the dispute settlement system.²³

Boosche (2005) noted the following new innovations in the dispute settlement system.²⁴ First, the quasi-automatic adoption of requests for the establishment of panels, of panel reports and of the request to authorize suspension of concessions. Secondly, the strict time frames for various stages of the dispute settlement process and lastly, the possibility of appellate review of panel reports.²⁵

The DSB plays a very crucial role in WTO dispute settlement system particularly in ensuring implementation and enforcement of its rulings and recommendations²⁶. It is made up of all the representatives of every WTO Member and it deals with disputes arising under any of the WTO Agreements, and it does so in accordance with the

²¹ Annex 2 to the Agreement Establishing the World Trade Organisation .

²² Article 3(2) of the DSU

²³ Jackson, J (2004) 109

²⁴ Boosche,P (2005) 172

²⁵ However, the same learned author observed that the WTO dispute settlement system retained some characteristics of power-based dispute settlement through diplomatic negotiations regarding consultations, the role of the Dispute Settlement Body (DSB) and the confidentiality of the proceedings

²⁶ The DSB is the WTO General Council with a dispute settlement hat

provisions of the DSU. The DSU confers compulsory jurisdiction on the DSB for the purpose of resolving disputes.²⁷ The DSB establishes dispute settlement,²⁸ adopts reports from panels and the Appellate Body,²⁹ maintains surveillance of implementation of rulings and recommendations it adopts,³⁰ and authorizes the suspension of concessions and other obligations under the covered agreements, if its rulings and recommendations are not acted upon timely.³¹ It also deserves mention at this juncture that WTO reports are adopted automatically unless there is a consensus to the contrary.³²

2.3 IMPLEMENTATION AND OF DSB RECOMMENDATIONS AND RULINGS

2.3.1 Introduction

Although there are many procedural aspects on the implementation and enforcement of DSB rulings, this section will primarily deal with remedies available when the DSB ruling is in favour of the complainant. The remedies available in the WTO dispute settlement system are provided for in the DSU³³. The primary and preferred remedy is the withdrawal or amendment of a WTO inconsistent measure³⁴. However, sometimes the respondent may not be able to comply promptly and the complainant may have one of the following temporary remedies namely compensation and suspension of concessions or other obligations.³⁵

²⁷ Article 1 of the DSU

²⁸ Article 1 of the DSU

²⁹ Article 21 of the DSU

³⁰ Article 19 of the DSU

³¹ Article 22(2) of the DSU

³² Article 1 of the DSU

³³ Article 22 of the DSU

³⁴ Article 22.2 of the DSU

³⁵ The latter remedy is also known within the WTO jurisprudence as retaliation, or trade sanction or countermeasures.

2.3.2 Compensation

This is usually where a respondent offers to reduce its tariff on another product which is of interest to the complainant so as to solve the imbalance in trade which has been caused by the respondent's violation of WTO Agreements.³⁶ Compensation is given on an MFN basis.³⁷ This remedy has attracted a lot of criticism in that it is ineffective and does not ensure compliance with DSB recommendations and rulings.³⁸ In cases where the respondent fails to withdraw or amend a WTO inconsistent measure, both parties have to agree to compensation. Parties seldom reach an agreement with regard to compensation. So far compensation was agreed upon in 3 cases only.³⁹ Compensation concerns only damages suffered in the future, so it is prospective and not retroactive.

Palmer (2003) succinctly captures the setbacks of compensation in the following words:

Neither the complaining nor the responding government normally would have interest in compensation. In accepting compensation, the complaining government agrees to a solution that does nothing to the industry experiencing trade damage as a result of the non-complying measure; in offering compensation the respondent government effectively selects an "innocent" industry to pay the bill, in the form of less protection, for the benefits conferred on the favored industry. Both governments are likely to look upon this exercise as a "lose-lose" proposition.⁴⁰

³⁶ Compensation can also be in other forms other than tariff reductions. For instance, in *Japan-Alcoholic Beverage II case*, the parties agreed on compensation which took the form of temporary, additional market access concessions for certain products of interest to the original complainants. See *Japan - Taxes on Alcoholic Beverages - Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes* WT/DS10/15 , WT/DS11/13, WT/DS8/15.

³⁷ Article 22.1 of the DSU.

³⁸ See Palmer, D (2004) 364

³⁹ In 2 of these the parties agreed on tariff reductions as compensation. See *Japan-Alcoholic Beverages II*, Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/ 41, 26 February 1998 and *Turkey –Textiles*, DSB, Minutes of Meeting, WT/DSB/M/116, and 31 January 2002. In one case, monetary compensation was agreed upon, see *US – Section 110(5) of US Copyright Act (US- Section 110(5))*, Notification of Mutually Satisfactory Temporary Agreement, WT/DS160/23, 26 June 2003.

⁴⁰ Palmer, D (2003) 364

The other criticism of compensation is that because of the MFN rule, trade compensation can be very expensive.⁴¹ In addition, it may be very difficult to find products on which compensation can be offered and which are of interest for the complainant. Compensation should also be attractive for the affected industry otherwise it may be difficult to sustain politically especially where the case has been initiated as a result of a complaint by the industry.⁴²

Thus the serious flaws of compensation are that it is counter productive, it does not offer relief to those actually damaged and it damages innocent bystanders. So this remedy needs to be revisited to make it more effective.

2.4.2 Suspension of concessions or other obligations/ Retaliation

This is provided for in Article 22 of the DSU. It usually takes the form of drastic increases in custom duties by the complainant on selected products of export interest to the offending Member.⁴³

Retaliation was originally intended to restore the reciprocal balance of benefits between the Contracting Parties.⁴⁴ The Appellate Body has added that the suspension of concessions is expected to achieve another goal, namely to ‘induce compliance’⁴⁵. In the WTO, the level of retaliation shall be equivalent to the level of nullification and impairment of benefits caused by violating measures.⁴⁶ When assessing the nullification or impairment of the benefits, Arbitrators limit their calculation to a quantifiable trade

⁴¹ See Bourgeois, J (2006) 37

⁴² See Bourgeois J (2005) 45

⁴³ Retaliatory measures can also take the form of suspension of other obligations rather than the suspension of tariff concessions. For instance, in *US-1916 Act*, the EC requested the DSB to authorize the suspension of the application of the obligations under GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent to the 1916 Act against imports from the US. See Award of the Arbitrator, *United States- Anti-Dumping Act of 1916- Arbitration under Article 21.3 (c) of the DSU*, WT/DS136/11, WT/DS162/14, 28 February 2001, p. 38.

⁴⁴ See Dam, K W (1970) 196. See also Long, O (1985) 78

⁴⁵ See Article 22.6 Arbitrations’ Award (US), EC- Bananas III (supra)

⁴⁶ The arbitrators of Article 22.6 stated that the term ‘equivalent’ connotes a ‘correspondence, identity or stricter balance’ than what was required under the ‘appropriateness’ standard of Article XXIII: 2 of GATT 1947. See Article 22.6 Arbitrations’ Award (US), EC- Bananas III (supra)

loss caused by violating measures.⁴⁷ This approach is different from that of Panels that regard to the nullification or impairment broadly as including both quantifiable and unquantifiable loss⁴⁸. Thus it can be argued that it is illogical to make a party responsible for violations based on a broader concept of nullification and impairment, and at a later stage, to allow retaliation equivalent to a narrower concept of nullification and impairment of benefits.⁴⁹

The other practical difficulty is that the approach which limits the calculation to trade loss does not accurately reflect the reality of the nullification or impairment caused by violating measures.⁵⁰ For example, an illegal SPS measure would not affect the complaining party only but will also have an economic impact on industries with related export goods. If the complaining party is a developing country, the trade loss caused by such an illegal SPS measure can destroy the whole economy.⁵¹ Hence a need to amend the DSU to reflect the needs of developing countries in the assessment of the nullification and impairment by taking into account the broad economic impact of illegal measures.⁵²

Retaliatory measures themselves would be inconsistent with WTO obligations were they not authorized by the DSB. The entire concern of the WTO is trade liberalization. Retaliatory measures are trade restrictive and consequently they compound the negative effect of a violation. The result is a setback to the whole system.

Developing countries can not effectively employ retaliation against developed countries. If they try to do so, it hurts them by cutting access to foreign goods and or making those goods expensive for domestic consumers. The suspension of concessions and other obligations by the complaining party may not effectively influence the trade flows and trade policies of a developed country. For instance, in *EC-Bananas III case*, Ecuador was authorized to apply retaliatory measures for an amount of US\$201.6 million a year but

⁴⁷ See Fukunaga, Y (2006) 42. See also Article 22.6 Arbitrations' Award (US), EC- Bananas III (supra)

⁴⁸ See Article 22.6 Arbitrations' Award (US), EC- Bananas III (supra)

⁴⁹ See Fukunaga, Y (2006) 43.

⁵⁰ See Charnovitz, S (2001) 611

⁵¹ See Charnovitz, S (2001) 168

⁵² See Jurgerson T, (2005) 327. See also the African Group Proposal

found it impossible to make use of this possibility without causing severe damage to its own economy.⁵³ The authorisation as given in 1999 but up to now Ecuador has not retaliated because it is not feasible. She lacks the economic muscle to wrestle against the EC. This serves to confirm the notion that developing countries lack adequate enforcement mechanisms under the WTO dispute settlement, hence the call for reform.

2.5 CONCLUSION

This chapter has traced the development of the WTO dispute settlement system from its early roots under GATT 1947 to GATT 1994. It has been shown that although under GATT 1994 the implementation and enforcement of the DSB was improved, there is still no political commitment to make the system effective. It was also shown that the current enforcement mechanism is in favour of developed countries at the expense of developing countries. Thus there is a need to devise an enforcement mechanism which can also be utilized by developing countries in the event that they are faced with non-compliance by developed countries. The next chapter provides a case study which further highlights the dilemma of developing countries when they are faced with a situation of non compliance by developed countries.

⁵³ Award of the Arbitrator, *European Communities-Regime for the Importation, Sale and Distribution of Bananas- Arbitration under Article 21.3 (c) of the DSU*, WT/DS27/15, 7 January 1998, DSR 1998: I, 19

CHAPTER THREE

IMPLEMENTATION AND ENFORCEMENT PROBLEMS: STATISTICS AND CASE STUDIES

3.0 INTRODUCTION

This chapter begins by providing statistics on participation of developed and developing countries in the WTO dispute settlement, and statistics on authorizations of suspension of concessions. The second part of this chapter will consider a case study which deals with challenges faced by developing countries in the implementation and enforcement of DSB recommendations and rulings.

3.1 STATISTICS

3.1.1 TABLES

Table A⁵⁴

ANALYSIS OF COMPLAINTS BY DEVELOPED/DEVELOPING MEMBERS

⁵⁴ Adapted from WTO statistics , WT/DS/OV/29, 9 January , 2007

COMPLAINTS BY DEVELOPED COUNTRY MEMBERS	
Respondents – Developed	133
Respondents – Developing	82
COMPLAINTS BY DEVELOPING COUNTRY MEMBERS	
Respondents – Developed	78
Respondents – Developing	57
COMPLAINTS BY BOTH DEVELOPED AND DEVELOPING COUNTRY MEMBERS	
Respondents – Developed	6
Respondents – Developing	0

Table B⁵⁵

	Active Compliance Panels ⁵⁶	Adopted Appellate Body and Panel Compliance Reports ⁵⁷	Arbitrations on Level of Suspension of Concessions ⁵⁸	WTO Authorizations of Suspension of Concessions ⁵⁹
Reporting period/ date	on reporting date	since 1.1.1995	since 1.1.1995	since 1.1.1995
Number	4	19	16	15

3.1.2 COMMENT ON STATISTICS

Table A shows that in 82 cases where the developed countries were complainants, developing countries were respondents. There are 78 complainants made by developing countries in which the developed countries were respondents. It is only in 58 cases where

⁵⁵ Adapted from WTO statistics, WT/DS/OV/29, 9 January, 2007

⁵⁶ This category encompasses pending or suspended panel or appellate review proceedings pursuant to Article 21.5 of the DSU.

⁵⁷ This category includes reports resulting from proceedings under Article 21.5 of the DSU.

⁵⁸ This category covers arbitration proceedings pursuant to Article 22.6 and 22.7 of the DSU and Article 4.11 of the Subsidies Agreement.

⁵⁹ This category covers authorizations granted by the WTO pursuant to Article 22.7 of the DSU and Article 4.10 of the Subsidies Agreement.

developing countries complained against their fellow developing countries. These statistics indicate that developing countries are also actively participating in the WTO dispute settlement system. What is worrying is that there are many cases where developing countries are complaining against developed countries. The problem is that in the event that the DSB has ruled in favour of developing countries and there is no compliance with such a ruling, there is very little which developing countries could do to ensure compliance by developed countries.

Table B shows that since 1995, the DSB has adopted 19 Appellate Body and Panel Compliance Reports and that there were 16 arbitrations on the level of suspension of concessions. It also reveals that the WTO has authorized suspension of concessions in 15 cases. This shows that retaliation is not widely used in the WTO. In most cases developing countries refrain from requesting authorization of suspension of concession because they are unable to retaliate due to their weaker economical muscle⁶⁰. Guatemala did not request authorization to impose countermeasures against the EC for the failure of the latter to implement the panel and AB report on Bananas⁶¹. Likewise, Honduras did not request authorization to impose countermeasures against the EC for the failure of the latter to implement the panel and AB report on Bananas⁶². This explains why the rate of retaliation is low. These statistics also militates against the proposal by some Members that there should be tradable remedies in the WTO .It shows that Members are not willing to utilize retaliation in their even in their own cases and it is most unlikely they would by the right to retaliate.⁶³ This serves to indicate that there is need to formulate effective and practical remedies in the WTO if developing countries are to benefit from the system.

⁶⁰ See Bagwell, K (2003)1

⁶¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas- WT/DS27*. See WT/DS/OV/29,9 January 2007

⁶² *European Communities – Regime for the Importation, Sale and Distribution of Bananas- WT/DS27*. See WT/DS/OV/29,9 January 2007

⁶³See proposal by Mexico, WTO. 2002. ``Dispute Settlement Body - Special Session - Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding -Proposal by Mexico," November 4, catalogue record TN/DS/W/23.

3.2 CASE STUDY: EC-BANANAS III⁶⁴

3.2.1 FACTS

In 1996, Ecuador, Guatemala, Honduras, Mexico and US contested the new EU banana regime at the WTO, claiming that it discriminated against their producers and marketing companies. The object of attack was the allocation of quotas. The WTO panel report found that the EU banana import regime was in violation of the WTO non-discrimination and market access rules. On appeal, the Appellate Body endorsed most of the panel's conclusions.

During 1998, the EU revised its regime. It continued to maintain two tariff rate quotas, but assigned import quotas for non-ACP bananas on the basis of historical market shares and abolished the operator categories for allocation of licenses. Consultations regarding the WTO-consistency of the new measures were inconclusive. Just before January 1999, the US sought authorization to retaliate. To this EU responded that the US should first obtain a panel finding that the new mechanism did not conform to WTO rules⁶⁵ something Ecuador then requested. The DSB reconvened the original panel to examine both requests. Concurrently, the US sought authorization from the DSB to retaliate against the EU in the amount of US\$520 million, to which the EU responded with a request for arbitration. The panel determined the level of nullification suffered by the US to be equivalent to US\$191.4 million. The US was subsequently authorized to raise to raise duties against the EU by that amount.

Towards the end of 1999, Ecuador also sought and obtained authorization to retaliate. Ecuador argued that its merchandise imports from the EU were too small to allow full retaliation (set at \$200 million by the arbitrators) to occur against imports of EU goods. It

⁶⁴ *European Communities – Regime for the Importation, Sale and Distribution of Bananas- WT/DS27*. See WT/DS/OV/29,9 January 2007

⁶⁵ This is the basis of the so called sequencing problem

obtained authorization to suspend concessions under other agreements, including TRIPS, after having exhausted the possibilities for retaliating against the of EU consumer goods.

Guatemala, Honduras and Mexico did not seek authorization for retaliation.

3.2.2 COMMENTS ON THE CASE

The above case is very significant in the history of the WTO dispute settlement system. This was the first time the request for retaliation was made by a developing country. This was also the first time where the approval for cross- retaliation was sought. Cross-retaliation refers to a situation where a winning party is authorized to suspend concession on other sectors apart from those being the subject matter of the case.⁶⁶ This was also the case in which the sequencing problem surfaced⁶⁷.

In this case Ecuador was authorized to suspend its commitments under the General Agreement on Trade in Services (GATS) and under the TRIPS Agreement, in addition to the imposition of duties. However, despite all this, Ecuador did not retaliate against the EU because doing so would not have any significant effect on the EU because the Ecuadorian economy is too small. This serves to show that developing countries cannot effectively retaliate against developed countries. It also shows that cross- retaliation is not an effective solution to developing countries.⁶⁸ Since Ecuador could not retaliate on its own, and cross-retaliation could not help either, it can be suggested that it is high time collective retaliation is considered in the WTO if developing countries are to make any significant retaliation against developed countries.⁶⁹ However, the merits of this proposal will not be considered here but in the next chapter.

⁶⁶ See Alavi ,A (2007) 25

⁶⁷ This problem is discussed in detail in the next chapter

⁶⁸ See Subramaniam A, (2000) 1 on a discussion on whether TRIPS can serve as an enforcement device for developing countries where it is argued that this cannot be effective and it may have an undesirable effect on limiting market access and attracting investment by developing countries.

⁶⁹This proposal was made by India and its effect is that where a Member has been found to be in violation of the WTO Agreement(s) and has failed to comply with the DSB recommendation or ruling, there should be joint action by all other Members on the suspension of concession. The effect of this is that there will be withdrawal of market access commitments by all Members of the WTO

In contrast to Ecuador, the US was authorized to retaliate in the sum of US\$191.4 million and it successfully raised the duties against the EU in that amount. This shows that retaliation against a developed country may only be effective when it is done by another developed country. Hence the need to find remedies which can be beneficial to developing countries.

Guatemala, Honduras and Mexico did not request authorization to retaliate against the EC for the failure of the latter to implement the panel and AB report on this case. As complainants they were also interested in finding an effective remedy but the WTO dispute settlement did not give them any. Unlike Ecuador, they refrained from seeking any authorization to retaliate. After having participated in the whole long process of the WTO dispute settlement up to the Appellate Body, they got what they wanted only on paper and could not enforce it. This is one of the reasons why developing countries shun from participating in the WTO dispute settlement. They have no incentive to do so since they are not assured of an effective remedy. This calls for a reform of remedies to accommodate the needs and interests of developing countries.

3.3 CONCLUSION

The above information has illustrated that developing and least developed countries are becoming more active in bringing cases in the WTO. However, it has also been shown that in cases of non-compliance such developing countries have no effective means to ensure compliance by their stronger counterparts, developed countries. This calls for rethinking of WTO remedies and this is the subject matter under consideration in the next two chapters.

CHAPTER FOUR

PROPOSALS FOR DSU REFORM

4.1 INTRODUCTION

The preceding three chapters have highlighted the problems which are currently being faced by developing countries in the enforcement of DSB recommendations and rulings. This chapter will focus on the attempts which have been made by Members to solve some of these issues with a view to smoothening WTO dispute settlement system and to make it effective from 1995 to date.

4.2. THE EVOLUTION OF DSU REFORMS

The history of DSU reform is succinctly put by Davey (2004).⁷⁰ Discussions on reforming the WTO dispute settlement system began in 1997 in response to a decision that has been adopted at the Marrakech Ministerial Conference by which Members agreed to review the DSU within four years.⁷¹

⁷⁰ Davey ,W (2004) 1

⁷¹ Decision on the Application and Review of the Understanding on the Rules and Procedures Governing the Settlement of Disputes, in WTO, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 465 (WTO 1994).

The DSU Review began in 1998. Members did not seem to have much ambition and they seemed to be satisfied by the then prevailing system.⁷² Many general proposals for change were discussed but only very few technical ones garnered much support⁷³. January 1999 witnessed the so-called Bananas case where there was a dispute between the EC and US over the procedures to be followed when a Member allegedly fails to implement DSB recommendations within a reasonable period of time permitted by Article 21 of the DSU.⁷⁴ Although the matter was finally amicably resolved, Members felt the need to remove the ambiguities that existed in the text of Articles 21.5 and 22 of the DSU. The DSU review finally came to an end on July 30, 1999, but Members did not reach any consensus.⁷⁵

4.3 THE DOHA MANDATE

In 2001 the reform of the DSU was put on the Doha mandate. The November 2001 Doha Ministerial Declaration provides as follows:

'30. We agree to negotiations on improvements and clarifications of the DSU. The negotiations should be based on the work thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter'.⁷⁶

The dispute settlement negotiations were put on a 'fast track' than the remaining negotiation subjects. This can be explained by the fact that the Members did not want the proposed reforms to become hostage to trade-offs in the general negotiations under the

⁷² See WT/DSB/W/74 for a summary of suggestions on how the review might be conducted.

⁷³ Davey (2004) 1

⁷⁴ *European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27.*

⁷⁵ However, the discussion still continued in a group led by Suzuki and eventually led to the proposal to amend the DSU to be made at the Seattle Ministerial Conference. The proposal as made at Seattle involved several major changes. Although there was considerable support for the proposal, no action on any issue was taken at Seattle, see WT/MIN (99)/8 & Corr.1. These changes include resolving the sequencing problem between Articles 21.5 and 22, and detailed provisions for the implementation and surveillance of WTO dispute settlement.

⁷⁶ WT/MIN (01)/DEC/1.

Doha Mandate.⁷⁷ It is also worth noting that the DSU negotiations had to take note of the negotiations which were done before November 2001.

After several formal and informal meetings, these negotiations culminated into a consolidation of proposals in a document called the Chairman's Text of 28 May 2003.⁷⁸ However, it proved impossible for the Members to reach an agreement on a Text by end of May 2003. Even though the Members did not reach an agreement, it is interesting to note that this was the first time Members attempted some comprehensive DSU reforms. The next section discusses in detail the Members proposals. It is no longer important to distinguish between proposals which were included in the Chairman's Text and those which were not because Members agreed to open up to new proposals, so proposals in the Chairman's Text no longer carry any special weight.⁷⁹

4.6 MAJOR PROPOSALS FOR DSU REFORM

4.6.1 Introduction

This section deals with some crucial proposals which are under consideration during the ongoing DSU reform negotiations. It evaluates various proposals with a view to find and to recommend those proposals which will benefit developing countries in the implementation and enforcement of DSB recommendations and rulings. For the sake of convenience, these proposals can be arbitrarily classified as follows: those which seek to enhance compliance with DSB rulings generally, proposals which seek to enhance the threat of retaliation, proposals which seek to enhance the value of compensation and those which seek the improvement of the special and differential treatment in the WTO

⁷⁷ See Kessie, E (2004) 115

⁷⁸ TN/DS/9, pp.3-19.

⁷⁹ See WT/GC/M/81, para. 72 (meeting of 24-25 July 2003), where it was agreed that '(i) that the time for the conclusion of the negotiations on clarifications and improvements of the DSU be extended by one year, that is, to conclude the work by May 2004 at the latest, (ii) that this continued work build on the work done to date, and take account proposals put forward by Members as well as the text put forward by the Chairman of the Special Sessions of the DSB; and (iii).....'

dispute settlement system. These categories are not cast in stones and may sometimes overlap.

4.6.2 Proposals to enhance compliance with DSB rulings generally

4.6.2 (a) Time periods

There is a proposal which seeks to shorten some time periods in the DSU and more specifically on the panel report adoption, appeal and adoption of report and reasonable period for implementation.⁸⁰ It is suggested that the issue of shortening of time periods should not override the ultimate goal is the WTO dispute settlement system, namely to secure certainty, predictability and security of the system. This is one of the areas where the input of Members of the Appellate Body is useful. Members should avoid making proposals alone without consulting some important stakeholders whose experience is important. Thus is suggested that the Members should take note of the experience of the Appellate Body members and the WTO Secretariat in making some procedural changes to the DSU.⁸¹

India and others have also proposed that the reasonable period of time for implementation by a developing country should be 15 months, with a 2 year period applicable if a change has to be made to a statute or a long held policy.⁸² The period of time which India is suggesting is too long. It is better if the panels take it on a case by case basis otherwise some developing countries may delay unnecessarily.⁸³

There is also a proposal to put a new Article 3.13 is proposed that would allow any time period in the DSU to be extended by mutual agreement of parties⁸⁴. This proposal may lead to delays especially in the implementation and enforcement of DSB rulings and recommendations. Thus this proposal is not acceptable because it may be manipulated by

⁸⁰ See The Chairman's Text TN/DS/9,pp.3-19

⁸¹ See Ehlermann, C (2004) 105-114

⁸² See Ehlermann, C (2004) 105-114

⁸³ See Mavroidis, P (2004) 61-74

⁸⁴ See The Chairman's Text TN/DS/9,pp.3-19

bigger states at the expense of weaker ones. They may use their economic strength to influence the extension of periods under the DSU and this compromises the security and predictability of the dispute settlement system

4.6.2 (b) Making the Order to Comply Unambiguous and Making Use of Suggestions

Article 19 of the DSU provides as follows:

'1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement⁸⁵. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements'.

The orders to comply are framed in the most general terms. It should also be noted that the suggestions which may be given by the panels or the Appellate Body are non binding and may be resisted by the defendant. This vagueness of general orders gives the defendant the room to find politically acceptable means of compliance which may not be acceptable to the complainant, and this may drag the case on and on by setting compliance panels. In addition the said vagueness may enable large countries to manipulate smaller states into accepting partial compliance.⁸⁶

Thus it is suggested that the panels and the Appellate Body make more specific orders or recommendations. In addition they should make use of suggestions as provided in Article 19 of the DSU. However, due to the fact that the panels are ad hoc and not permanent staff, it is difficult for them to make such orders and suggestions due to lack of time. Thus if the specific orders are to be made, this may require an institutional change of making permanent panelists.

⁸⁵ With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

⁸⁶ Hudec, R (1999) 10

4.6.2 (c) Strengthening the Compliance Monitoring System of DSB

Article 21.6 of the DSU gives the DSB the role of keeping under surveillance the implementation of adopted recommendations and rulings. This surveillance by the DSB needs to be strengthened since it can be one of the ways of putting pressure on the Member which has violated the WTO Agreements. Since the issue of non-compliance can be raised by a Member during the DSB meetings, it gives room for other Members to show their interest in seeing Members abiding by their commitment. This is also commendable in that developing countries would be able to voice their concern together in support of each other.

The Chairman's Text also significantly elaborates surveillance procedures. It proposes to modify Article 21.3 of the DSU to require that a Member shall inform the DSB no later than 10 days following the adoption of the DSB recommendations of intentions to comply with such a ruling or recommendation. Currently the time period is 30 days.⁸⁷ This proposal is acceptable as it is aimed at shortening the time for the implementation of DSB rulings and recommendations.

4.6.2 (d) Provisional remedies

This is a proposal by Mexico which seeks to add a system of provisional remedies in the WTO.⁸⁸ The essence of this proposal is that panels should have the authority to recommend interim measures in the form of a suspension of the challenged measure pending a final determination on its legality.

This proposal attracts much criticism.⁸⁹ First, it raises the question whether such interim measures should be limited to cases of particularly serious WTO violations. Secondly, if the panels need to evaluate economic damage in order to recommend an interim measure, this would imply significantly longer panel procedures, thereby defeating the essence of

⁸⁷ See Article 23.1 of the DSU

⁸⁸ TN/DS/W/40

⁸⁹ See Bourgeois ,JHJ (2006) 143

interim measures. Thirdly, it is difficult for countries to suspend legislative measures and some administrative measures like anti-dumping measures. Fourthly, it would be inappropriate to authorize retaliation before the determination of compliance. Fifthly, it raises the issue of whether the respondent party would be compensated if the final ruling does not confirm the illegality of the measure. Sixthly, provisional remedies are difficult to implement in practice given that panels are appointed on an ad hoc basis. It may be difficult for non-permanent panels to assume such a task. Finally, it can be difficult for Members to agree on circumstances which call for such provisional remedies.⁹⁰ As a result of the above criticism, it can be said that in the short term this proposal is not accepted in the short. Perhaps it may be accepted in the long term.

4.6.2 (e) Retrospective Remedies

There is a debate in the legal literature as to whether the DSU can be read as providing retrospective damages⁹¹. However, the understanding of Members is that the DSU only concerned with prospective remedies.⁹² Thus currently the multilateral trading system is about a balance of rights and obligations with WTO remedies to preserve future trading opportunities rather than to redress past injury⁹³. It is recommended that WTO law should provide for both prospective and retrospective remedies. Customary International Law provides both for prospective and retrospective remedies. This is also provided for in the Draft Articles of the International Law Commission⁹⁴. The implication of this is that a Member who is found to be in violation of WTO law should have the obligation both to stop the illegal act and to provide reparation for the damage suffered by the injured party. In international law, the leading case is that of *Chorzow factories* in which the following was stated:

⁹⁰ See Davey, W.J (2004) 36

⁹¹ See Mavroidis ,P (2004) 1

⁹² See Bercero, G and Garzotti, P (2006)140

⁹³ Although retrospective damages were granted in the WTO DSS in Australia-Subsidies provided to Producers and Exporters of Automotive Leather DS126/Rw, adopted 11 Feb.2000

⁹⁴ Available at <http://www.un.org/law/ilc/convents.htm>. accessed on 6 March 2007

‘Reparations must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed’.⁹⁵

This is commendable in that it will give the offending country an incentive to comply early with the rulings and recommendations of the DSB since the longer they take to comply the more they are to pay. This then removes all the present incentives for delay in the dispute settlement process especially on the implementation and enforcement. Some authors have argued that retrospective damages are contrary to the fundamental notion of constitutional and democratic governance.⁹⁶ For, instance, there are significant constraints on the ability of the governments to recall subsidies already provided legally and in good faith to private companies.

Mavroidis (2004) supports the introduction of retrospective remedies in the WTO and even argues in a compelling manner that these retrospective remedies can be given in the WTO without any change to the current to the current DSU.⁹⁷ He argues that retrospective remedies are the result of judge made law as the case of *Australia Leather* Article 21 litigation has confirmed.⁹⁸ The calculation of the nullification and impairment should be in line with Public International Law. It is submitted however, that there is need for a clear provision to be included in the DSU rather than to rely on uncertain and unpredictable judicial activism. This is more so given that the WTO dispute settlement does not include the principle of precedent.

Ehlermann (2004) also supports the introduction of retrospective remedies but seems to be hesitant on two issues.⁹⁹ First, it concerns the difficulties which may be faced in evaluating damages for the past. However, since the panels have proved to be effective in proving the level of nullification and impairment for the future in spite of the difficulties in quantification. Then it can be argued that they may also be capable of calculating the damages suffered in the past. The second hesitation is on avoiding any further

⁹⁵ 1929 PCIJ Series A, No 8,4,p.21.

⁹⁶ Goh, G (2003) 545-564

⁹⁷ Mavroidis (2004) 405

⁹⁸ Australian Leather case supra

⁹⁹ Ehlermann ,C (2004) 105-109

strengthening of the existing dispute settlement system as long as the political decision making process remains weak as it is. Enabling the dispute settlement to order both prospective and retroactive remedies would be strengthening the dispute settlement system which the said learned author is cautious about.

Bourgeois (2006) argues that there are good policy arguments in support of retrospective arguments.¹⁰⁰ Retrospective remedies counteract the incentive for protracting the dispute settlement proceedings, they are a deterrent against potential violators and more appropriate compensation for nullification and impairment suffered by the offended WTO Member.

In conclusion, although there are criticisms leveled against the introduction of retrospective damages in the WTO dispute settlement system, it is argued that there is a strong and compelling case for the introduction of such damages and it is recommended that in the ongoing DSU negotiations, Members should take the stance for the provision of retrospective damages as this has basis in logic and is also in tandem with the principles of public international law.

4.6.3 Proposals to enhance the threat of retaliation

4.6.3 (a) Member sanction

This proposal calls for the amendment of the DSU so as to reflect that WTO Members whose measures have been found to be inconsistent with their obligations, cannot bring forward a complaint on any issue against another WTO Member unless they have first complied with their obligations.¹⁰¹

However, the problem with this measure is that it can lead to growing disregard of the WTO rules by a Member who has been sanctioned. In addition, these sanctions are trade

¹⁰⁰ See Bourgeois, JHJ (2006) 37

¹⁰¹ See Mavroidis, P (2004) 400

distorting as other Members may act against the sanctioned Member's interests knowing that it cannot complain. There other problem would be on whether the sanctioned Member would be able to complain against violations which were done when it was under sanctions.

It is suggested that if such sanctions should be included in the WTO, they should be limited in time or even over a specified subject matter¹⁰².

4.6.3 (b) Collective Retaliation

This proposal was made by India and its effect is that where a Member has been found to be in violation of the WTO Agreement(s) and has failed to comply with the DSB recommendation or ruling, there should be joint action by all other Members on the suspension of concession. The effect of this is that there will be withdrawal of market access commitments by all Members of the WTO.¹⁰³

The above suggestion may work in favour of developing and countries in that where a developing country could not have retaliated; collective retaliation seems to create enough pressure to induce compliance by the respondent of whatever stature. For instance, if the US fails to comply with the recommendations or rulings of the DSB in the *US-Gambling case*,¹⁰⁴ all other WTO Members including the heavy weights like the EC, China and Japan would join the retaliation process. This may induce the US to comply because industries in the US would put pressure on the US government to comply. Such pressure could not be generated if Antigua and Barbuda threaten the US with retaliation.

¹⁰² See Mavroidis ,P (2004) 400

¹⁰³ See Qureshi, A.H (2004) 475

¹⁰⁴ *United States – Measures Affecting the Cross-Border Supply of Gambling WT/DS285 – United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services -WT/DS285*.See WT/DS/OV/29, 9 January 2007

Even though the above proposal is enticing, it has its own setbacks. First, this proposal perpetuates retaliation. Retaliation by itself is trade restrictive and collective retaliation is even more trade restrictive. Secondly, it is most likely that Members would not agree with such a proposal especially given some Free Trade Areas (FTAs) and trading blocks and bilateral agreements some countries are in. It would be difficult to deny market access in such relationships. Thirdly, it would not compensate the affected industries for the harm caused by a violation.

Broek (2003) argue that this proposal is legally unrealistic and legally unsound.¹⁰⁵ The argument is that the nature of the obligations in the WTO is inherently reciprocal, and it can not be assumed that a Member has a legal interest in the performance of the WTO obligation *per se*, independent of individual benefits. Ehlermann (2004) points out that the implementation of DSB recommendations is expected to be achieved through the interactions of the parties in the course of dispute resolution.¹⁰⁶ Thus if collective retaliation is implemented this may complicate the implementation process and fundamentally alter the structure of the WTO dispute resolution system. As a result, it can be argued that collective retaliation should not be implemented in the WTO.

4.6.3 (c) Tradable Remedies

This is one of the drastic proposals for reform of the DSU and it was introduced by Mexico.¹⁰⁷ It states that:

“The suspension of concessions phase poses a practical problem for the Member seeking to apply such suspension. That Member may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests...There may be other Members, however, with the capacity to effectively suspend concessions to the infringing Member.” (WTO, 2002, p. 5)

¹⁰⁵ Broek, N (2003) 127

¹⁰⁶ Ehlermann (2004) 112

¹⁰⁷ WTO. 2002. “Dispute Settlement Body - Special Session - Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding -Proposal by Mexico,” November 4, catalogue record TN/DS/W/23.

The Mexican proposal gives the rationale for tradable remedies within WTO as follows:

“Incentives for Compliance: Facing a more realistic possibility of being the subject of suspended concessions, the infringing Member will be more inclined to bring its measure into conformity.” (WTO, 2002, p. 6)

and

“Better readjustment of concessions, since the affected Member would be able to obtain a tangible benefit in exchange for its right to suspend.” (WTO, 2002, p. 6)

This explanation given by Mexico is to a larger extent reflective of the predicament of developing countries when they reach the suspension of concessions phase of WTO dispute.

In a technical paper written by Bagwell et al (2003),¹⁰⁸ their theoretical results supports the Mexican proposal that auctioning of countermeasures in the WTO can lead to both better incentives for compliance and better readjustment of concessions. The third potential benefit they identified is that by auctioning countermeasures in the WTO, the existing right of retaliation may be more efficiently allocated to the WTO Members who value this right highly. In addition, the Mexican proposal offers the a possibility of to injured WTO Members to get something from the dispute settlement mechanism without putting into question the legal nature of the existing contract, that is, the predominantly de-centralized system of enforcement in the WTO. However, these authors did not propose a concrete re-design of the DSU. They also highlighted the need to consider the political effects of such tradable remedies.

Research undertaken by Potipiti (2005) went further on how such a design of tradable remedies would work in practice.¹⁰⁹ It was observed that a buyer with the lowest valuation for the good may get the good and the allocation is inefficient. It was also noted that numerical results suggest that the optimal mechanisms cannot be implemented by an

¹⁰⁸ Bagwell, K et al (2003) 1

¹⁰⁹ Potipiti, T (2005) 1

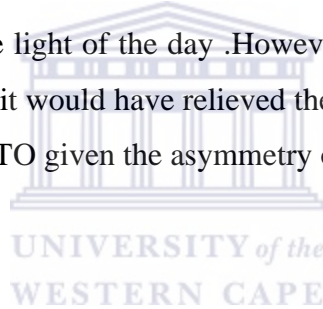
ordinary auction scheme. Thus it was concluded that allowing retaliation to be tradable might weaken rather than strengthen the WTO enforcement system.

Bronckers (2005) argues against this idea of tradable remedies. In his criticism against both tradable remedies and collective remedies they stated as follows:

‘While recognizing that the position of some developing countries merits differentiated treatment, these two proposals continue to require the retaliating country to shoot itself in the foot, and to create costs for innocent bystanders. In the case of tradable retaliation rights, one can also seriously wonder why one country would buy another country’s problems, only to then shoot itself in the foot on someone else’s behalf’.¹¹⁰

In practice, retaliation has been resorted to in very few cases. From 1995, it has been authorised only in 15 cases.¹¹¹ This suggests that there may be very limited market, if any, for a transfer of retaliation rights.¹¹² Due to the problems associated with retaliation and the political ramifications which can arise from tradable remedies, it is most unlikely that this proposal would see the light of the day. However, it should be noted that if this proposal were to be successful, it would have relieved the developing countries in finding a way to getting a remedy in WTO given the asymmetry of power in the WTO.

4.6.3 (d) Cross Retaliation



Cross-retaliation refers to a situation where a winning party is authorized to suspend concession on other sectors apart from those being the subject matter of the case.¹¹³ This is meant to increase developing countries’ capacity to retaliate. However, even the case of *EC Bananas III* has shown that cross-retaliation by developing countries may do nothing against the economy of a trading block like the EU or large economies like the US. As a result, the proposal is not feasible as it hurts the economies of developing countries and faces all other setbacks of retaliation mentioned above.

¹¹⁰ Bronckers, M (2005) 101

¹¹¹ See WTO statistics, WT/DS/OV/29, 9 January , 2007

¹¹² See Bourgeois, JHJ (2005) 37

¹¹³ See Alavi ,A (2007) 25

4.6.3 (e) The sequencing problem

This proposal seeks to resolve the conflict in Articles 21.5 and 22. This issue which became apparent in the Bananas case has been discussed in the previous chapter. The proposal is aimed at amending the DSU to clearly show that the application for suspension of concession should only be done after it has been proven that the purported compliance by the respondent was inadequate. It is suggested that this proposal should be accepted by Members so that the issue may be settled so as not to rely on bilateral settlement of the issue as was done by the EC and US in the EC Bananas case¹¹⁴.

4.6.3 (f) Procedures to terminate retaliation

The present DSU does not provide for a procedure to terminate the suspension of concessions and other obligations put in place by complaining parties if there is still a disagreement on compliance after implementing parties have taken new measures to comply. Thus there is a need for an institutional mechanism to authorize the withdrawal of suspension of concessions and other obligations. It is suggested that the parties should be allowed to use the Article 21.5 panels to request a withdrawal of a DSB authorization of suspension of concession and other obligations¹¹⁵.

4.6.4 Proposals to enhance the value of compensation

4.6.4 (a) Request for compensation

The Chairman's Text proposed a new Art.22.2 *bis* which would deal with requests for compensation¹¹⁶. Once a request is made, the responding Member would be expected to

¹¹⁴ European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27

¹¹⁵ See Suzuki, Y (2006) 367, where the said author calls the procedure a 'mirror mechanism' which allows the party to apply for the withdrawal of retaliation. This problem is also linked with that of lack of incentives for compliance, where a party can be rewarded for partial compliance. However, the author argues that such incentives may have an overall negative effect on compliance and resultantly perpetuate trade restrictive measures.

¹¹⁶ See The Chairman's Text(supra)

make a compensation proposal within 20 to 30 days. Non-trade compensation is explicitly mentioned as a possibility. The aim of this change is to promote use of compensation, as opposed to suspension of concessions because compensation is trade liberalizing yet suspension of concessions and other obligations achieves the opposite. This proposal is acceptable as it seeks to expedite the implementation process and also to promote compensation rather than retaliation, which is trade restrictive.

4.6.4 (b) Financial or Monetary Compensation In the WTO

Where a respondent has failed to withdraw or amend a WTO inconsistent measure, the current system of remedies in the WTO provides Members with a choice between trade compensation and retaliation. Trade compensation can only be achieved where both complainant and respondent agree and this is usually difficult to achieve. This may lead to punishment of innocent industries in both complainant and respondent Members' territories. Retaliation distorts trade and developing countries have no muscle to retaliate against developed countries without seriously hurting their own economy.¹¹⁷

Resultantly, it is recommended that financial compensation should be introduced in the WTO dispute settlement system. Repatriation by governments of injury for which they are held liable is acceptable under public international law.¹¹⁸ This remedy was proposed in the GATT for the first time in 1966.¹¹⁹ There are also proposals to the same effect in the ongoing DSU negotiations.¹²⁰ Bronckers and Broek (2005) support the proposal and succinctly capture the following compelling advantages of financial compensation¹²¹. First, it is not trade restrictive. Secondly, it helps redress injury. Thirdly, it may work better to induce compliance. Fourthly, it does not lead to disproportionate burden on

¹¹⁷ See E.C Bananas supra

¹¹⁸ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd session (September 2001), Supplement No.

(A/56/10), Chp.IV.E.1 available at <http://www.un.org/law/ilc/convents.htm> accessed on 3 April 2007

¹¹⁹ See Report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM, TD/F/4, (4 March, 1966).

¹²⁰ See Preparations for the 1999 Ministerial Conference-The Dispute Settlement Understanding (DSU), Communication from Pakistan to the General Council, WT/GC/W/162 (1 April 1999). See also Least Developed Countries' proposal TN/DS/W/17, of October 2002, at point 13. See also the proposal of Ecuador, TN/DS/W/33, of 23 January 2003, at 4.

¹²¹ Bronckers, M (2005) 101

innocent bystanders. Fifthly, it can be a disincentive to foot-dragging in the implementation and enforcement process. Sixthly, it is in line with general public international law and finally, it can add an element of fairness.

The same authors also discussed the systemic issues and other setbacks poised by financial compensation.¹²²

In the end, they provided the following as the key elements of financial compensation.¹²³

1. that the DSU should be amended and make specific provision for financial compensation as a remedy.
2. that financial compensation should provide for compensation for the damages caused
3. that the distribution of the money for compensation be within the sovereign discretion of each Member
4. that the victim should have the right to choose traditional trade retaliation and the new monetary damage remedy
5. that the monetary damages should be retroactive to the time of infringement
6. that the financial compensation would be preset at a certain annual amount of financial compensation for all types of violations
7. that only developing countries, and LDCs should be allowed to claim financial compensation for an initial period of time and;
8. that a system of financial compensation could be put in place for all covered agreements.

The said authors recommended that the financial compensation should not be a replacement of the other remedies in existence but should co-exist with them.¹²⁴

It is submitted that the above approach is commendable and is acceptable in logic and in principle. Its main strength is that it seeks to broaden the existing framework of remedies rather than trying to invent a new system. This approach is likely to be acceptable to

¹²² Bronckers, M et al (2005) 119

¹²³ Bronckers, M et al (2005) 124

¹²⁴ Bronckers, M et al (2005) 124

Members especially the developing countries since they are likely to receive a tangible cure in the event of any violation against them.

In *US-Copyright case*¹²⁵, US and EC made a mutually satisfactory temporary agreement in terms of Article 22 of the DSU where the US makes a payment to a specific private body in the EC as a temporary arrangement during implementation. O'Connor and Djordjevic (2005) in their commentary to the above case acknowledged that a system of monetary compensation is acceptable in principle.¹²⁶ They advanced that such a change would require the amendment of the DSU to clearly reflect the monetary compensation and it should not be left to judicial activism as in the above case. In addition, consideration should be given on how such compensation should be administered in the WTO Members' national legal systems for the purpose of ensuring the basic principles of transparency and predictability.

Although this suggestion has a lot of strength, it also has its setbacks. For many Members it may require authorization by legislature, and this could imply significant delays.¹²⁷ The other challenge is that financial compensation is hardly practical in big cases and at the same time it may provide too easy way out of compliance in small cases. There are some situations where this remedy does not make sense, for instance, it is not an efficient remedy to stabilize a non-compliance situation with the provision of subsidy to the affected industry in the complainant Member.¹²⁸

Despite the above criticism this remedy warrants consideration. It could introduce an element of greater equity in view of the fact that developing countries that may lack sufficient retaliation power can be compensated financially. This remedy is practical and achievable, and is in the interest of developing countries. It should be considered seriously in the ongoing negotiations.

¹²⁵ WT/DS160/8

¹²⁶ O'Connor, B and Djordjevic, M (2005) 127

¹²⁷ Bourgeois JHJ (2006) 43

¹²⁸ Bourgeois ,JHJ (2006) 44

4.6.5 Proposals for the improvement of special and differential provisions in the WTO dispute settlement system.

4.6.5 (a) Adding a development dimension to the Dispute Settlement

The LDC Group and the African Group have proposed adding a requirement that a panel make a finding on the development implications of the issues in a case and consider adverse impact that its findings may have on the social and economic welfare of a developing country in a case. The DSB is supposed to take such findings into account in making its recommendations.¹²⁹

Davey (2004) noted that given controversies over what policies are in the best development interest for developing countries, it is not clear what such a requirement should add in practice.¹³⁰ Moreover, the heart of the requirement is that the DSB should take such findings as are made of these issues into account in making its recommendations.¹³¹ However, given the way in which the DSB makes such decisions, that is, by reverse consensus, it is not clear how it would ever take such findings into account in a meaningful way. Thus this can be an example of an SDT provision that would be very difficult to operate in practice.¹³²

4.7 CONCLUSION

This chapter has shown that there are numerous proposals for DSU reform. However, most of these proposals are either too radical or are far more trade restrictive therefore undesirable. Since the WTO dispute settlement is still evolving, it may be too early to adopt radical proposals which may fundamentally alter the operation of the DSB. Thus there is a need to strike a balance between improving and preserving the WTO dispute

¹²⁹ TN/DS/W/42,p.2 (Kenya, on behalf of the African Group): TN/DS/W/37, p.1 (Haiti, on behalf of the LDC Group)

¹³⁰ Davey, W.J (2004) 40

¹³¹ Davey, W.J (2004) 41

¹³² Davey, W.J (2004) 41

settlement system. The next chapter gives some general and specific recommendations for the improvement of the WTO dispute settlement system.

CHAPTER FIVE

DSU REFORMS: RECOMMENDATIONS AND CONCLUSIONS

5.1 INTRODUCTION

The question of reform of the WTO dispute settlement system is very important to the WTO Members. The issue of strengthening the implementation and enforcement of DSB recommendations and rulings directly affects the level of enforcement pressures which would be applied to governments in violation of WTO obligations. Changes in this area confront the central issue of how strong the WTO Members want their legal system to be.¹³³ It should also be noted that whatever the legal niceties of the recommendations to be taken, the issue of reforming the DSU rests with the WTO Members who make their decisions by consensus, so the reforms should be acceptable to all Members.¹³⁴ This underpins some of the difficulties in reforming the DSU.

There are different schools of thought on the manner and nature of the DSU reforms pertaining implementation and enforcement of DSB rulings and recommendations. On one hand, some prefer to preserve and strengthen the existing system. Thus they speak of 'broadening the existing remedies.'¹³⁵ On the other hand, some are suggesting revamping the whole system and starting an alternative system of implementation and

133 For the discussion on how the improvement in implementation and enforcement will affect WTO Members, see Hudec (2000) 1-19

134 Article IX of the Agreement Establishing the World Trade Organisation.

135 Hudec, R (1999) 19

enforcement.¹³⁶ While the latter seems to be innovative and enthusiastic, it is always important to note that a sweeping and radical change is difficult to get especially when dealing with states. In the first place it should be noted that a weak enforcement was deliberate and unless there is a political will to change by Members, no radical changes can be adopted¹³⁷. Thus this chapter will suggest a mixed bag, which is, preserving and strengthening the current regime while at the same time accommodating some new ideas on improving the system.

The next part will deal with general recommendations for reform which are drawn from the discussion in previous chapters, and will be followed by specific recommendations which seek to formulate a new package of remedies. The final part will be the conclusion. It should be taken into account that although these recommendations focus on implementation and enforcement of DSB rulings, they cannot be done in clinical isolation but they form part of broad and interrelated reforms which need to be done to the WTO dispute settlement system.

5.2 GENERAL RECOMMENDATIONS

- It is recommended that Panels and the Appellate Body make specific orders or recommendations, which are not broad. They should avoid orders that are too general and open to many interpretations, making it possible for developed countries to manipulate weaker countries concerning compliance.
- It is recommended that the Panels and Appellate Body should make use of suggestions as provided in Article 19 of the DSU. This would give guidance to the parties on how best they can implement the DSB recommendations and rulings. In the event of a dispute over whether the measures taken by the losing defendant have led to full compliance with DSB recommendations and rulings, it is usually the original panel which becomes the compliance panel. Instead of waiting until a dispute arises, it is suggested that the panelists and the Appellate

¹³⁶ Charnovitz, S (2001) 792

¹³⁷ Hudec, R (1999) 1

Body be proactive in giving suggestions on implementation. This may as well expedite the implementation process.

- It is recommended that the time in which a member needs to notify the DSU of its intention to comply with a recommendation or ruling according to Article 21.3 be reduced from 30 to 10 days.
- It is recommended that the DSU be amended to solve the sequencing problem on Article 22.5 and 22 of the DSU.
- It is recommended that the reasonable period of time for implementation be kept as it is but the compliance panels should take the special needs of developing countries on case by case basis where a developing country is a losing defendant.
- It is recommended that the compliance monitoring mechanism of the DSB should be strengthened.
- There is a need to look for new tools for improving the interaction between the WTO and domestic process. However, the discussion on such a mechanism is beyond the scope of this paper.
- There is need for clarification on how the interests of the developing countries are to be taken into account in terms of Article 21.7 and 21.8 of the DSU. Such clarification should make such a special and differential provision legally binding, justiciable and enforceable.
- It is suggested that DSU reform negotiators should take note of the experience of the Appellate Body and the WTO on some procedural changes to the DSU.
- There is a need for a procedure to terminate suspension of concessions and other obligations if there is still a disagreement on compliance after implementing parties have taken new measures to comply.

5.3 SPECIFIC RECOMMENDATIONS

The previous chapter provided many proposals for DSU reform and most of them were criticized to show their suitability to be included in the WTO dispute settlement system. Given the need for developing countries to access the remedies under the WTO dispute

settlement system, it is recommended that the following model of remedies be adopted by the WTO.¹³⁸

The WTO dispute settlement system should adopt financial compensation and the payment should be quantified from the date of the infringement. The key elements of this model are as follows:

- There is need to amend the DSU to clearly include financial compensation as one of the remedies. This new remedy should co-exist with current remedies, namely compensation and retaliation.
- Retroactivity should be in the WTO dispute settlement system. This would mean that financial compensation, compensation and retaliation should be quantified from the time of infringement, or at least from the date of commencement of dispute settlement proceedings.
- Financial compensation should be awarded to developing and least developed countries only.
- There should be a transparent mechanism on how such financial compensation should be distributed in the receiving countries in order to benefit the affected industries, otherwise that money may be diverted for other use and this would erode the benefit of this remedy and would also hinder and affect international trade.
- Where a developing country is a losing defendant, it should not be expected to give monetary compensation to developed countries.
- Use of trade compensation and financial compensation should be encouraged.
- This remedy should co-exist with other remedies which are already in place in the WTO dispute settlement system.

The weaknesses of this model is that financial compensation cannot replace the withdrawal of an offending measure .Secondly, the money which is supposed to compensate the affected industries can be misused if there are no proper mechanisms to curb such misappropriation. The loans and grants from IMF and World Bank which are

¹³⁸ This model modifies proposal offered by Bronkers and Broek (2005) 124

supposed to be used for development are misused¹³⁹. Thus developing countries need to improve on governance and stakeholders' participation within a country. The other inherent weakness which is not peculiar to this remedy is that the developing country would be at a loss if the developed Member does not have the political will to pay financial compensation. The developing country would be back to square zero.

However, the strength of this remedy is that it is less trade restrictive and has the potential of compensating for injury incurred if compensation is granted retroactively. Secondly, it can give a defendant who is under a temporary political pressure a leeway for not complying with the DSB recommendations and rulings. Thirdly, it does fundamentally alter the existing remedies, thus it can be easily be acceptable to WTO Members. It can be said that the merits of financial compensation with a retroactive element outweighs its demerits. Developing countries have been clamoring for this remedy for over four decades now and it's high time financial compensation be taken seriously in the WTO.¹⁴⁰ Thus this proposal is accepted both in logic and in principle.

5.4. CONCLUSION

Reform of the DSU needs a political commitment from Members of the WTO. Apart from the above remedies, there is need a for community pressure among the Members to obey WTO recommendations and rulings. Members should use the DSB meetings to put pressure on those countries who do not comply with DSB rulings. This naming and shaming mechanism is important in international relations and would create enough incentive to comply with DSB recommendations and rulings. It is hoped that over a long period of time, there would be no need to resort to cohesive measures to ensure

¹³⁹ See Development Committee (2006) Strengthening Bank Group engagement on governance and anticorruption [siteresources.worldbank.org/DEVCOMMINT/Documentation/2104651/DC2006.0017\(E\)-Governance.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/2104651/DC2006.0017(E)-Governance.pdf) accessed on 27October 2006

¹⁴⁰ See Report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM,TD/F/4, (4 March, 1966).

compliance but the peer pressure from other Members would force a Member to comply in order to be a ‘good citizen’ in the international community.

In the meantime, however, it is recommended that compliance panels should have a more active role taking the special circumstances of the developing and least developed countries in the implementation and enforcements of DSB recommendations and rulings. At the same time, developing and least developed countries should be united and speak with one voice and negotiate for more binding special and differential treatment provisions and more effective enforcement mechanisms within the WTO dispute settlement system in the ongoing DSU reform negotiations.



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