LL.M. Final Thesis
Natural Resources and International Environmental Laws

Access to Justice in International Trade with Particular Focus on Developing & Least Developed Members in WTO

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Abstract

In this thesis I have examined theoretical and legal rationale for the reforms in World Trade Organization Dispute Settlement Understanding (WTO DSU). There is a dire need of reforms since investor state arbitration is failing. WTO DSU could be reformed in a way whereby all corporate entities private, public etc are allowed to access justice in international trade under the auspices of WTO, regardless of the pre requisite to be a member state and under WTO covered agreement. My particular focus remained on developing and least developed countries (LDC) since they are most disappointed, also it highlights the deficiencies in existing WTO DSU. Therefore, if their concerns are addressed then all corporate entities of WTO member states could also access justice equally and fairly.

Firstly, I investigated the failures of investor-state arbitration. Secondly I have identified special and differential treatment provisions (SDTs), which are applicable in all stages of WTO DSU. Thirdly, I have provided the contrast in domestic systems of developing/LDC members and developed members European Union (EU) and United States of America (USA). I have mentioned that developing and LDC members have to develop legal infrastructure similar to EU and USA as only this way they can participate in the system effectively. Fourthly, I apprised about some of the most important proposals of developing and LDC members, which are normative in nature and appear very reasonable. As in most cases they demand clarity in the existing terms of WTO DSU. Yes, capacity building i.e, intellectual, financial and legal is a challenge but it always remained on WTO agenda.

I Concluded by suggesting that reform is possible on the grounds that WTO DSU is outside the scope of single undertaking, moreover, para 44 of Doha Declaration points that positive reform in SDTs will be encouraged. The Committee on Trade is also asked to find ways to improve effect of SDTs. The Trade Facilitation Agreement coming into force in 2017, suggests that improvement and reform in WTO DSU is likely.
Acknowledgments

This thesis is dedicated to my parents: Ch. Altaf Hussain & Riffat Altaf. I am extremely thankful to my supervisor, Maria Elvira Méndez Pinedo, for her valuable advice during the drafting of this thesis. I also would like to express my sincere gratitude to my wife Saira Bashir and my sons, Hasan Yasir & Ibrahim Yasir. Generally, I am greatly indebted to all my relatives and friends for their support during writing of this thesis.
## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>World Trade Organization</td>
<td>WTO</td>
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<tr>
<td>World Trade Organization Dispute Settlement Understanding</td>
<td>WTO DSU</td>
</tr>
<tr>
<td>General Agreement on Tariffs and Trade</td>
<td>GATT</td>
</tr>
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<td>General Agreement on Trade in Services</td>
<td>GATs</td>
</tr>
<tr>
<td>Least Developed Countries</td>
<td>LDCs</td>
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<tr>
<td>Special &amp; Differential Provisions</td>
<td>SDTs</td>
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<tr>
<td>Most Favourite Nation</td>
<td>MFN</td>
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<tr>
<td>Trade Policy Review Mechanism</td>
<td>TPRM</td>
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<tr>
<td>European Union</td>
<td>EU</td>
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<tr>
<td>United States of America</td>
<td>USA</td>
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<tr>
<td>Alternate Dispute Resolution</td>
<td>ADR</td>
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<tr>
<td>Bilateral Investment Treaties</td>
<td>BITs</td>
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<td>International Investment Agreements</td>
<td>IIAs</td>
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<tr>
<td>Free Trade Agreement</td>
<td>FTA</td>
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<td>Black Economic Empowerment</td>
<td>BEE</td>
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<tr>
<td>United Nations Conference on Trade &amp; Development</td>
<td>UNCTAD</td>
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<td>International Centre for the Settlement of Investment Disputes</td>
<td>ICSID</td>
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<td>Advisory Centre on WTO Law</td>
<td>ACWL</td>
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<td>Appellate Body</td>
<td>AB</td>
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<td>GATT Dispute Settlement System</td>
<td>GATT DSS</td>
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<td>Vienna Convention on Law of the Treaties</td>
<td>VCLT</td>
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<td>Trade Related Aspects of Intellectual Property Rights</td>
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<td>Generalized System of Preferences</td>
<td>GSP</td>
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<td>Comprehensive Economic and Trade Agreement</td>
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<td>Transatlantic Trade and Investment Partnership</td>
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<td>UNCITRAL</td>
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<td>Court of Justice of European Union</td>
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<td>Market Access Unit</td>
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<td>TPRG</td>
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<td>Trade Policy Staff Committee</td>
<td>TPSC</td>
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<tr>
<td>WTO Dispute Settlement Mechanism</td>
<td>WTO DSM</td>
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<tr>
<td>African, Caribbean and Pacific Alliance</td>
<td>ACP</td>
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<tr>
<td>Gross National Product</td>
<td>GNP</td>
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<tr>
<td>Trade Related Technical Assistance</td>
<td>TRTA</td>
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<tr>
<td>Institute for Training and Technical Assistance</td>
<td>ITTC</td>
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<tr>
<td>Global Trade Related Technical Assistance Database</td>
<td>GTAD</td>
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<td>Investment Court Systems</td>
<td>ICS</td>
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CHAPTER 1

INTRODUCTION

1.1 Study Objective

The objective of this thesis was to investigate right to access justice in international trade law with a focus on World Trade Organization (WTO) law vis-à-vis developing and least developed countries (LDCs), especially investigating why the participation of developing and least developed members of the WTO is negligible, compared with the developed members like EU and USA. The author intends to defend the statement that WTO Dispute Settlement Understanding (DSU) with some amendments can provide access to justice in fair and equitable manner to all corporate entities i.e; public or private registered within the WTO member state. Therefore WTO DSU is fully competent and capacitated to provide a forum through which all corporate entities registered within a WTO member state independently or through respective member state governments can access justice in international trade law. The particular focus remained on the issue of equal access to justice under WTO DSU for developing and Least Developed Country members (LDCs) of the WTO, it is because if the challenges faced by developing and LDC members are addressed it will pave way for all the corporate entities to access justice in international trade.

The research topic is of immense importance since due to technological and scientific developments countries are more connected now than ever before, and consequently states are dependent on each other to grow their economies. Therefore in a present globalized world the role of WTO becomes pivotal especially when it comes to access to justice in international trade. The concept of globalization can work for the benefit of each and every member of WTO provided each member has the capacity and competency to utilize WTO institutional and legislative structure to access justice when disputes arise. These disputes could arise regarding trade barriers, protectionism, violation of intellectual property rights and subsidies etc. The member states are signatory to various kinds of agreements under the auspices of the WTO. However, there is one set of rules, World Trade Organization Dispute Settlement Understanding (WTO DSU), that is applicable to all WTO covered agreements. In some agreements there are some variations regarding application of WTO DSU, nevertheless the justice is served pertaining to WTO agreements in accordance with the WTO DSU.
The success of WTO DSU can be ascertained by the fact that there are several global entities, developed, developing and least developed that consider WTO DSU as most positive outcome of the Uruguay Round. The developed one’s e.g; EU (consisting of 28 member states) have after 2000, followed the concept of WTO DSU in all of their bilateral and multilateral trade agreements which are outside the scope of WTO agreements. The recent statistics confirms that WTO DSU is one of the achievements of the Uruguay Round. The WTO footprint can be seen in the economic policies of WTO member states which have a positive outcome of increased trade volumes. Since WTO is conferred with an authority to implement, administer, and facilitate multilateral trading agreements. It provides a forum for trade negotiations and dispute settlement, and to carry out functions such as trade policy review mechanism and subsequently formulating global economic policies. Most importantly as an institution the WTO realize the fact that not all member states possess same level of economic and intellectual resources. The WTO has so far within its given mandate has tried to facilitate developing and least developed member countries (LDC’s) by codifying special and differential treatment provisions (SDTs) within WTO DSU. All these aspects of WTO DSU are discussed in this thesis.

In the context of this thesis, developing member countries and LDC members would both be referred to as developing/LDC members of the WTO. However, where the contrast is drawn between the two then they have been termed separately. In the start of this thesis the discussion was about most widely used traditional dispute settlement mechanism, i.e; an investor state arbitration. It was discussed why arbitration has failed to win the confidence of its users. It was investigated, could WTO provide a reliable forum where an arbitration services can be provided to corporate entities to seek justice in international trade? Obviously the WTO DSU application is limited to states that are members of WTO. Nevertheless, I sought the ground of optimism that confirms that WTO is capable, competent and has the legal capacity existing within WTO DSU to cater the need of public, private corporate entities of the member states. As present, WTO DSU does not have any supportive clause to cater the needs of all public and private entities. It will be investigated what change need to be introduced so that WTO DSU has an holistic affect especially regarding non state corporate entities registered within the member states. A comparison has been drawn in an investor state arbitration and the WTO DSU.

Prime focus remained on investigating why developing/LDC member countries are reluctant to access justice under WTO DSU and how their participation can be improved. As the data till to date shows that the participation of developing/LDC members in trade disputes before WTO is negligible. I informed about how WTO rules, structure and SDT provisions have tried to facilitate
developing/LDC countries access to justice under WTO DSU. I also explained how developed countries e.g; US and EU have been able to use the system more effectively and on other hand developing/LDC countries in spite of having SDT provisions to assist them have been unable to utilize the system as effectively as utilized by developed countries. The author compared domestic systems of developed and developing/LDC countries. The deficiencies in domestic system of developing/LDC countries is a topic that requires discussion. The shortages at institutional level i.e; WTO DSU has been identified with a point of view of developing/LDC countries and proposals to reform made by developing/LDC countries are also discussed. Finally, I submitted two set of recommendations, one set of recommendations informs what needs to be done at domestic level in developing/LDC countries and the other set of recommendations informs about what reforms need to be introduced at institutional level in WTO DSU to ensure equal opportunity to access justice for developing/LDC countries in international trade under WTO DSU.

The area of research is important for the reasons, firstly, the area is open to development. Secondly, several countries have proposed to improve the existing system. Thirdly, all member states with few exceptions want amendment in WTO DSU, as there are certain aspects that all member states want to change. The concept of WTO DSU has proved to be very successful as not only it assisted in dispensation of justice but it became a lynchpin through which all WTO member states access justice in international trade. The result of having a better system will only result in global prosperity, justice and sustainable development. This thesis will be concluded with the set of recommendations, if adopted, may ensure improved WTO DSU under which right to access justice in international trade law especially vis-à-vis developing/LDC countries, is possible.

1.2 INTRODUCTION OF TOPIC.

While drafting international trade contracts, the parties to the contracts are keen to ink scope of the contract and monetary matters. At this point of time more often than not the parties do not discuss the dispute settlement clause which informs about the law and forum applicable to resolve trade dispute that may arise in particular to the international trade contract.

Since the contracts are formed in an environment when both the parties are enjoying the best of corporate mutual trust. Therefore, while concluding an international economic contract, the parties have the tendency to ignore discussing in detail the laws, the procedures and adjudications procedures applicable once dispute arises. There are four methods available to resolve trade
disputes at an international arena. These are negotiation, mediation, commercial arbitration and through Court of law. The first three methods are voluntary methods. The negotiation is about mutual consultations and it starts when one party informs other party of its grievances. Both parties then mutually discuss the issue. In mediation, a third party is appointed to settle dispute, there are some well reputed international bodies that provide rule based mediation services e.g. 2017 Arbitration Rules & 2014 Mediation Rules of the International Chamber of Commerce. The most popular and most utilized method of dispute resolution in international trade is of commercial arbitration. Almost all international trade contracts has arbitration clause in it. At this point it is important to mention that there are over 400 arbitration centers operating worldwide each of these arbitration centers have its own rules, regulations and guidelines. When the parties to an investment agreement sign an agreement the parties more often than not seldom bother to investigate, negotiate the dispute resolution clauses. In most cases they appoint arbitrator who is not aware of rules, regulations and procedure of arbitration center that both parties have opted for. It is no surprise that if someone is being informed of being named as an arbitrator at a time of signing of the agreement.

In an investor state arbitration it is a tribunal or any judicial body that enjoys status of a court. The arbitration between the private parties is usually conducted through nominated arbitration center. However, when there is investor state dispute, then several kinds of interests come into play. In short, in most cases the outcome is not satisfactory as either it is investors that influence the arbitration or it is the state policies that influence the arbitration. In most cases the final Award always remains open to challenge (because of procedural irregularity) before apex forum therefore the dispute resolution becomes time consuming. Therefore, one thing can be said with certainty that dispute resolution through investor state arbitration does not satisfy the expectations of the contesting parties. The mode of investor state arbitration for dispute resolution is very common feature of investment agreement between state and investors.

However, when it comes to WTO covered agreements in case of disputes WTO DSU comes into play. In this scenario, the most successful system that is available for dispute resolution between member states of WTO is the WTO DSU. It is a rule based system and has proved to be successful so far. The WTO dispute settlement understanding in Article 5 states that Director General acting in ex officio position may offer its good offices, conciliation and mediation services prior to initiation of dispute settlement process under WTO DSU. The parties to the dispute must mutually agree to invoke any of the said voluntary procedure, whereby good offices, conciliation and mediation can be adopted to resolve the disputes. Since through adoption of the voluntary
procedures there is no strict time limit in which the parties has to turn up with the conclusion, therefore parties have plenty of time to settle trade disputes. If the aggrieved party desire to pursue with the panel process, the process of good offices, conciliation and mediation may continue together with the panel process. Article 25 of the WTO DSU provides that arbitration procedure may be adopted as an alternative mean of dispute settlement provided that the legal issue between the contesting parties have been clearly identified, applicable procedures to arbitration have been agreed upon by the contesting parties and any third party/ies may join the arbitration proceedings subject to the approval of the contesting parties. All WTO members must be informed before the arbitration process takes place. Therefore it can be said that WTO DSU has covered all such dispute settlement procedures that involve third party as an adjudicator. The exception is negotiation which is done between the parties formally or informally. The only impediment in the way of settling all trade disputes pertaining to international trade before WTO is that WTO DSU can only be utilized by the WTO members and only as regard to WTO covered agreements. If this impediment can be removed all sort of corporate entities (e.g. public, private and states etc.) can access justice in international trade before WTO. In doing so the states can assume a role of guarantor that ensures execution of WTO decisions.

Since WTO DSU is hailed as a jewel in the crown of WTO. This is because it strives to provide level playing ground to all member states. The other positive things about WTO DSU is that it has strict time periods, its decisions are binding in nature, the rules of interpretation are based on Vienna Convention on Law of the Treaties 1969 (VCLT), thus there is more predictability and transparency. Article 3.2 of the WTO DSU states that the provisions of WTO covered agreements will be interpreted under customary rules of interpretation of public international law. The most stunning aspect of the WTO DSU is that it has 11 provisions which are specifically embedded to facilitate developing/LDC members. These 11 provisions are commonly referred SDT provisions. These SDTs come into play subject to two conditions, firstly, when the dispute settlement process has begun and secondly the developing/LDC has asked to invoke such provisions. Generally these SDTs facilitate developing/LDCs by providing extended consultation periods, and enforcement of less onerous penalties when inconsistent measure has been adopted by the developing/LDC member/s etc. There are other institutions specifically working to assist developing/LDC members, after the dispute have been initiated, these are the Advisory Centre on WTO Law (ACWL), The WTO Secretariat’s Legal Affairs Division and The WTO’s Institute for Training and Technical Cooperation. These institutions assist in capacity building of developing/LDC members through training and providing funding. So that
developing/LDCs can understand and utilize WTO DSU. However, it has been noticed that the participation of developing and LDC members remained very little when compared with developed members like EU and USA. It is so because WTO DSU and embedded SDTs and other helpful provisions come into play only once dispute has started and not prior to initiation of dispute, in other words facilitative provisions contained within WTO DSU does not come to play at an upstream stage, i.e; at domestic level of member states. To make best use of SDTs and supportive provisions for the developing and LDCs the role of ACWL and Legal Affairs Division of the WTO secretariat need to be extended to member state domestic level. It is not that WTO DSU as it is today is ideal for the developed members. There are many things that need to be changed with the perspective of developed members’ e.g; EU and USA as well. I am optimist about reform in WTO DSU, my optimism is based on the fact that WTO DSU is not a part of single undertaking and therefore can be reformed independently.

The reform at the WTO DSU will alone not suffice. To ensure access to justice to public, private and state entities at international trade the developing/LDC members are also required to take steps at their domestic level to ensure that they are in a position to fully utilize the SDT provisions contained in WTO DSU. The developing and LDC members have to legislate and form institutions especially looking after WTO related matters, systematically. The EU and USA both have very organized legal infrastructure that helps them to utilize the system for their benefit. The developing/ LDC members need to overcome the scarcity of trained human and intellectual resources and in this regard there is need to have trained personals that can further teach WTO DSU at university level. The developing/LDC member states may seek support from ACWL and WTO Secretariat etc. This seems simple but in reality it is not. The developing and LDC members are reluctant or have no capacity to invest at their domestic level. This is attributable to the fact that they have negligible share in international trade moreover, they often come across situations that if they contest any inconsistent measure they may jeopardize their chances of financial assistance as they might have to contest inconsistent measure against developed member who could also be assisting them in other or similar trade sector. The position of these developing and LDCs become even more pitiful when they are acting as an answering party as while defending there is very little time to consult or prepare reply, these developing and LDCs often shun such contest. Due to stringent time line there is very little time available for the ACWL, Legal Affairs Division to assist in preparation of reply in short span of time, this is because their assistance can only be sought once dispute has initiated. This scenario can be changed if WTO help them form sectorial based consortium or forming a group on the basis of geography as seen in the case of
EU (In 1951, European Coal and Steel Community (ECSC), by only six European countries) so that collectively they form tangible economic power.

The effective internal system of developed members, EU & USA is responsible for the increased participation of these developed members in WTO disputes. Both EU and USA has used information technology very effectively. Through information technology they have provided requisite information to corporate entities regarding making or defending WTO complaint. In EU apart from Trade Barrier Regulation, there is Article 207 of Treaty of the Functioning of the European Union (TFEU) and the Units of DG Trade e.g; Country Desks and Market Access Units are the methods available that enables member state to challenge inconsistent trade measure. EU is equipped with some of the best law firms of the world to cater with WTO disputes. Moreover, there are several independent firms who play vital role in convincing, investigating any inconsistent trade measure. USA has similar attributes, however it has section 301 to 310 of the Trade Act 1974, which deals with inconsistent trade measure. Independent firms also play effective role in USA in lobbying. It is pertinent to mention that these developed members have relevant legislation with infrastructure to confront trade measure.

Soon after when WTO DSU was formulated the LDC’s were very active and enthusiastic about putting forth their reservations and their proposals however, with the stalemate in Doha Round and afterwards the Developing members generally and LDCs particularly lost their interest. Nevertheless, few of their proposals appear to be very legitimate and appeal common sense. It is not necessary that WTO membership accede to all of their proposals, nevertheless, there were quite a few that if accepted can really make lot of difference and hence increased participation of developing and LDCs can be ensured. Effort to ensure increased participation of developing and LDCs go hand in hand with the concept of SDTs and sustainable development. The increased participation will be directly proportional to the notion of providing increased opportunity to access justice to developing and LDCs in international trade.

1.3 SOURCES USED

For the purpose of this thesis both primary and secondary sources of law were used. The WTO law is founded on well-established international agreements (GATT etc). The WTO DSU is a fundamental document which was subject to rigorous examination. Along with WTO DSU, international agreements are used to substantiate the arguments. The WTO case law, The ICSID case law relevant to investor state arbitration have been subject of discussion. Beside domestic legislations of countries like South Africa, Pakistan. The legislation applicable at EU and USA
will also be subject of keen observation. The EU case law along with EU statutory instruments would be discussed in detail. As far as secondary resources are concerned books written by renowned scholar of the concerned field are referred to. Similarly, articles in journals are information available of institution’s web site have been referred to the website of WTO, Europa and ICSID have proved very useful.

1.4 STRUCTURE OF THE THESIS

Now I shall inform about the content of this thesis, the chapters heading and their main content. Through Table of Contents I provided chapters headings and sub headings informing about the content of that particular chapter. Although index will inform about the headings and page numbers but following description can give reasonably good idea about the content. The content of this thesis is as follows:

In Chapter 1 I have informed about study objective, sources used, structure of thesis and methods and methodology adopted in this thesis. In Chapter 2 I have informed about the pros and cons of investor state arbitration, the reasons for its failure are discussed, I have drawn comparison between investor state arbitration system and world trade dispute settlement understanding. A brief over view of the WTO has also be given. While concluding I mentioned that WTO DSU has a provision enshrined in it that allows for arbitration. However, that arbitration facility is only available to WTO members and that too for WTO covered agreements. I had informed that it is possible with an execution of new international treaty that the scope of WTO DSU may be extended to include all corporate entities i.e; public, private registered with a WTO member state to seek justice n international trade independently or through member state. The State may become guardian, guarantor or surety to protect the rights of the prevailing party. In the wake of failure of investor state arbitration the WTO DSU give hope as arbitration under its auspices may prove beneficial for the parties.

In Chapter 3, I discussed what WTO DSU presently holds for developing/LDC member countries. In doing so I have briefly discussed the evolution of dispute settlement system from GATT years to present form of WTO DSU and special facilitation provisions, in the form of special and differential treatment provisions vis-a-vis developing/LDC member countries. The principle as to how the classification of developing/LDC countries is made. The concept of SDT provisions from GATT years till to date is discussed. In this chapter my focus remained on SDT contained in WTO-DSU. These SDTs are especially enshrined to facilitate developing/LDC members to access justice in international trade. In order to achieve the intended outcome the
developing/LDC members enjoy waivers from some of WTO principles, the most important being principle of most favourite nation (MFN) and the other important principle is of reciprocity. I have very briefly defined these principles. The past, present and future of SDT provisions have been discussed. Then I informed about the bodies involved in facilitating access to justice from dispute initiation stage to the implementation stage. Regardless of classification, I informed about the challenges that are commonly faced by the WTO members in assessing justice under WTO DSU. It is so that not only developing/LDC members want reform but developed members of WTO also need to reform the system to access justice in international trade effectively. I discussed remedies available along with compliance issues in WTO DSU. Whilst the WTO DSU is applied on developing/LDC members the SDTs influence both composition of the bodies and their functions, there is a paradigm shift when one of the contesting party falls under the definition of developing/LDC member. I have deliberated on each stage and informed how SDT effects the procedure so as to facilitate developing/LDC members in accessing justice under WTO DSU. In Chapter 4 I have informed how developed members (EU & USA) domestic system has enabled them to access justice under WTO DSU, in a very effective manner. I investigated the domestic mechanism and most relevant up to date legislation formulated by these developed members that enable them to access justice before WTO so efficiently. In this chapter I covered the domestic system of EU, USA and role of independent firms in convincing governments to pursue with any trade dispute before WTO DSU. I looked into developing/LDC members and informed about the challenges they face at their domestic level, which discourages them to participate in a dispute settlement under WTO DSU. Wherever appropriate I relied on statistics to prove my point. Finally, while concluding in the light of information provided I have informed what steps need to be taken by developing/LDC member governments to utilize the system with as effectiveness as utilized by developed members. In Chapter 5 my focus remained on how to institutionally reform WTO DSU to ensure that WTO DSU effectively assists developing/LDC members in access to justice under WTO DSU. In Chapter 5 some very important proposals forwarded by developing/LDC members regarding different stages were discussed i.e; Proposals as to WTO upstream assistance, proposals regarding pre panel stage, proposals regarding panel and appellate body stages, proposals regarding SDT provisions during dispute settlement proceedings, proposals regarding the implementation stage, proposals regarding administrative sanctions finally nullification and impairment concept was discussed. In the light of aforesaid I concluded by informing what proposals got support and what is required to gain support for rest of proposals.
I have tried defending my statement that, it is absolutely possible that a WTO DSU can be turned into an ideal dispute settlement system by ensuring access to justice to all corporate entities, whether private or public, registered within a member and particularly for the developing & LDC members of WTO who are ensured privileged treatment but still are reluctant to pursue with the present dispute settlement mechanism of the WTO.

While concluding I have informed about the outcome of my investigation into the thesis topic. I informed about salient features of my findings step by step. Finally in the light of my observations and investigation I made recommendations regarding what is least required for ensuring access to justice to all corporate entities of member states i.e; public, private along with the member states. I am confident and optimistic that thesis topic is interesting and worthy of carrying out research. The reform in WTO DSU and developing/LDC members domestic legal infrastructure is need of an hour as it may help realize to achieve the objective of at par, equal access to justice in international trade particularly under WTO DSU for developing/LDC members.

1.5 METHODS & METHODOLOGY

This thesis was carried out in five steps. In first step I have informed about the challenges faced by investor state arbitration and the comparison between investor state arbitration and system of adjudication provided by WTO DSU. The scope whether private members can acquire right to access justice as regards to their high value commercial disputes under WTO DSU against other corporate public and private entities of other member states. What needs to be done to these corporate entities to access justice under WTO DSU. In this step I explained WTO structure, functions, principles of WTO and definition of developed, developing/LDC and least developed countries etc.

In second step, WTO DSU was discussed in detail and to understand the working of the WTO DSU I have discussed some basic but fundamental concepts of WTO. The functions and principles of WTO was discussed. In this step the focus remained on the stages and bodies involved in dispensation of justice under WTO DSU.

In third step, I discussed what WTO DSU has to ensure access to justice in international trade. The provisions of the WTO DSU that enable and facilitate the developing/LDC members was discussed. Special emphasis was on the topic of SDT provisions contained in WTO DSU, which are intended to assist developing/LDC members. The causes, why in spite of SDT provisions the developing/LDC countries or LDCs failed to utilize the WTO system. In this step the approach
of EU and USA was discussed and it was analyzed how EU and USA have been successful in evolving a system whereby they are able to utilize the system at optimum level. This stage was concluded by informing what measures need to be taken at institutional level (at WTO) so as to ensure that developing/LDC countries would be able to use the system with same efficacy.

In fourth step, foregoing in view the model that has been adopted by EU and USA, it was apprised what steps need to be taken by developing/LDC members, at their national level so as to create a domestic legal culture similar to EU and USA so that developing/LDCs become able to claim or defend more actively and competently before WTO DSU. Finally I concluded by giving two sets of recommendations. The first set of recommendations sets out measures that need to be taken by developing/LDC members at national level so that the governments become legally bound to bring or defend claim before WTO DSU. Second set of recommendations indicates what measure needs to be taken at WTO level to assist and encourage the developing/LDC countries and to ensure their active participation at WTO DSU.
CHAPTER 2

ACCESS TO JUSTICE IN INTERNATIONAL TRADE

2.2 Introduction

In this chapter I have discussed access to justice in international trade, justice at international trade is lynch pin of global trade as investors always want a system where their rights are protected. Until recently investors and host states used to prefer investor state arbitration as a mode of settlement of dispute. There are various reasons for the parties opting out of for investor state arbitration. In this chapter I shall assess the pros and cons of investor state arbitration. There are certain trade agreements which falls under the auspices of WTO and hence as regard to WTO agreements, disputes arising thereof can only be adjudicated under WTO DSU. This draws attention towards a contemporary system whereby access to justice is available, though subject to two conditions i.e; only member states can access justice and under WTO agreements. Therefore in this chapter I intend to conclude which system is more secure, fair and predictable for accessing justice in international trade. Therefore it is important to know at the outset what are the functions and principles of the WTO. It is imperative to inform that within WTO, members are categorized according to their economic condition. Prima facie classification hints that WTO is founded upon the principle of discrimination. However, it was observed that discrimination was only to ensure fairness. How far WTO has been successful in ensuring fairness will be discuss in next chapter.

2.2 World Trade Organization (WTO)

In this section I have informed about what WTO stands for? How developed, developing/LDC and members are classified? What functions WTO carries out? What principles govern WTO? How does WTO dispute settlement system works? Briefly introducing SDT provisions and briefly informing how they assist developing/LDC members? By answering these questions I provided insight into the scope of the WTO as an institution dispensing justice in international trade. The WTO came into existence as a result of Marrakesh Agreement on 1 January 1995. 123 Nations signed Marrakesh Agreement on 15 April 1994.2 It replaced its predecessor General Agreement on Tariffs and Trade (GATT) which came into existence in 19483. As at today there are 164 member states, at present the WTO member states are in the process to finalizing Doha

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Development Round which was initiated in 2001. The stalemate in negotiations constitute major impediment to revive new WTO negotiations. This stalemate in negotiations has caused uncertainty and disappointment among WTO members generally and within developing and LDC members’ particularly.\(^4\) In WTO there is distinction between developed, developing and LDC countries. In the absence of any specific rule it is entirely up to WTO member as to how it defines itself. The countries that identify themselves as developing/LDC country may face challenge from other WTO member when they utilize the provisions exclusively meant for developing/LDC countries.

The country that identify itself as developing country cannot enjoy that status automatically. As far as the LDC member countries are concerned they are recognized by the United Nations. There is an agreement that all LDC’s should be afforded concessions but there is no agreement as to how and to what extent such concessions would be applied.\(^5\) There are approximately 150 member states of the WTO that classify themselves as developing/LDC countries. These countries play extremely important role in global economy. The WTO DSU is designed to afford concessions to developing and LDC members through SDT provisions,\(^6\) these provisions provide extended time periods for the enforcement of agreements and obligations, assistance to developing/LDC countries regarding capacity building, access to WTO dispute settlement process, technical assistance and market access,\(^7\) etc. The developed countries have agreed to assist LDC’s, subsequently many developed countries have unilaterally waived import duties and import quotas on all LDC’s. The SDT provisions require all WTO members to protect the trade benefits of developing/LDC countries.\(^8\)

The main functions of the WTO are to oversee the administration, implementation and operation of the covered agreements.\(^9\) WTO also offers medium for negotiations and for resolving

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disputes.\textsuperscript{10} In addition to this WTO review national trade policies and propagate to assure coherence in trade policies so that they are aligned with global economic policy making. WTO also function as a center of research and provide information through valuable publications regarding international trade. It works closely with other two elements of the Bretton Woods System, the World Bank and International Monetary Fund.\textsuperscript{11} WTO is a rule based, member driver organization. At WTO all decisions are made by the member governments, and the rules are the outcome of negotiations amongst members.\textsuperscript{12}

WTO work by upholding five principles. These principles are non-discrimination, reciprocity, binding and enforceable commitments, transparency and principle of safety valves. For this thesis I shall discuss principles of non-discrimination and reciprocity as both developing and LDC members are exception to these principles. The non-discrimination principle consists of two main ingredients; these are Most Favoured Nation (MFN) rule, and the national treatment policy. Both are entrenched in the significant WTO rules on goods, services, and intellectual property.\textsuperscript{13} The MFN rule oblige WTO member to afford the most advantageous circumstances of trade to all other WTO members, if a member allows trade concessions to any particular WTO member/s,\textsuperscript{14} then it has to afford concession to all other members. In short it could be said "Grant someone a special favour and you have to do the same for all other WTO members."\textsuperscript{15} As per MFN principle the WTO Panel decided that breaching party must confer trade benefits to the countries who have suffered as a result of use of illegal measure by the defending country.\textsuperscript{16} The obligations contained in WTO DSU are divisible and thus are not\textit{ erga omnes} in nature, for example, albeit not mentioning all of divisible obligations the MFN Principle, the SDT provisions are applicable to members according to their status i.e; whether they are developed, developing or LDC

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member. Secondly, principle of Reciprocity functions to limit the extent of free riding which is an outcome of MFN rule reciprocal concessions means to confirm that gains will be realized. Exceptions to the MFN principle permit preferential treatment for developing/LDC countries, regional customs unions and free trade areas.

2.2.1 WTO Dispute Settlement System (WTO DSU)
In 1994 annexed with the “Final Act” WTO members signed on the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) at Marrakesh. WTO DSU is of pivotal importance in multilateral trading system. The WTO Dispute Settlement Body (DSB) has performed a distinctive function towards the stability of the global economy. The WTO members have agreed that in a case of dispute between WTO members only WTO DSU will be utilized.

However, under Article 5 WTO DSU, parties are encouraged to resolve issue amicably. The WTO has also suggested that process could be expedited if any party to the dispute is keen to settle the dispute in lesser time period. The WTO DSU Article 25 provides for the option of arbitration as one of the means available for the resolution of disputes. Though WTO member states avoid using arbitration proceedings. This may be because both the parties have to agree as to appointment and procedure of arbitration. It is submitted that in the presence of well settled WTO DSU parties prefer standard adjudication process of dispute settlement. The WTO provides speedy justice as it has strict time lines, well defined procedural/evidential rules, which come into effect automatically. In recent years investor state arbitration remained subject to criticism. Investor state arbitration in bilateral agreements was once considered to be most viable way of resolving disputes. However, with the passage of time it has become subject to severe criticism.

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23 Mutually Agreed Solutions” as "Preferred Solution"”. WTO official website.
Since there are hundreds of arbitration centers providing arbitration services to the private members. These arbitration centers have different adjudication principles and thus there are inconsistencies as to how these centers work. Moreover, investors belonging to different geographical locations have different expectations from the system e.g; some arbitration centers require evidence to be proven on strict standards and as per some centers a statement on affidavit stands sufficient. In the following section I informed about the pros and cons of investor state arbitration especially vis a vis private party and state. Since WTO scope is to adjudicate matters among/between member states and that too pertaining to WTO agreements. Therefore disputes regarding agreements which are not covered under WTO are adjudicated through arbitration.

2.3 Pros and Cons of Investor State Arbitration

Under customary international law an individual has no independent right to access justice before international forum. However, recent developments of treaty law suggests that in the field of foreign investment law such right to private investor/s has not only been acknowledged as irrefutable right but an assured right. Various regional, bilateral and multilateral foreign investment treaties have afforded foreign investors a right to obtain justice from an international arbitral forum. Since arbitrators are expected to deliver ex aequo et bono and it is one of the reason of increased reliance on arbitration. Beth A Simons states that over the period of time the right has been modified from investor-state claims to the investor-state arbitration. The international investment treaties confer investors with four rights without recourse to national legal system. These rights are, the right to choose the adjudication forum, the right to claim monetary compensation, the right to institute a claim against a country without satisfying the condition of exhausting all local remedies and the right to execute awards before national courts. By virtue of this shift in the rights, the private entities now enjoy direct access to an international arbitral tribunal without involving investor’s home state in a trade dispute.

In today’s world any mechanism of settlement of disputes other than litigation falls under the definition of Alternate Dispute Resolution (ADR). Predominantly, ADR constitute procedures

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like arbitration, mediation or conciliation. Among the stated procedures arbitration is the most relevant to this paper. Therefore I briefly dwell upon the most important institutions that facilitate international investment arbitration. Since arbitration could take place in various forms, therefore there exist no statutory definition of arbitration.  

The arbitration confers certain advantages e.g; members usually mutually agree on the arbitrator, arbitration takes less time and is less expensive. It is a private procedure and binding and thus parties have limited opportunity to Appeal. Arbitration confers neutrality. Nevertheless, arbitration procedure may also have certain disadvantages e.g; in arbitration members give up the right of Appeal. Where the case is complex, and involves high financial stakes or requires expert opinion then arbitration may become expensive. Moreover, since rules of evidence are relaxed, an evidence of a lesser value might become admissible which in normal circumstances is not admissible before a formal court, judge or jury. In most arbitration proceedings the witness statement is filed in a written form, usually through affidavit. Moreover, in the absence of well-defined evidential rules contesting party may not get an opportunity to cross examine the witnesses. Similarly, there is a limited right of discovery.

In arbitration legal rights of the members are ascertained/assessed and arbitral awards are binding in nature but does not follow automatic enforcement. The Arbitration agreement provides a procedure through which arbitration proceedings take place. Moreover, when it comes to arbitral awards, there is United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959, commonly known as “New York Convention”, it has 159 state members. It is considered as one of the most important convention as regards to the international trade law. As per New York Convention, countries that are party to this convention must recognize and enforce arbitral award regardless of place where arbitration proceedings took

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32 Ibid 231.
place.\textsuperscript{36} It is because of New York Convention that different mechanism of international commercial arbitration has become acceptable for the members to enter into commercial agreements. It is pertinent to mention that a matter can only be referred to arbitration if the members have written arbitration clause in an agreement\textsuperscript{37}, which clearly refers arbitration as a mode of settling disputes or they have separate agreement wherein the members have agreed to refer particular dispute to arbitration.\textsuperscript{38} Otherwise both members can resort to litigation, a system available by default. The New York Convention was not formulated overnight, it has been observed that the two Geneva Protocols of 1923 and 1927 provided basis for the enforcement of arbitration agreements and awards, and the United Nations through New York Convention has strengthened the provisions enshrined in these two protocols.\textsuperscript{39} As far as procedures to be adopted during the course of arbitral proceedings are concerned, the members enjoy full control as to how proceedings should take place e.g; especially regarding evidence i.e; as to how evidence is to be recorded etc.\textsuperscript{40} In the light of aforesaid it is stated that arbitration has its own advantages and disadvantages. Having said that the best thing is that the arbitration procedure only comes to play if members mutually agree.

2.4 Investor State Arbitration is failing

In recent years there are many instances that informs that foreign investors in particular and generally the state parties to bilateral investment agreement have impliedly and expressly expressed their dissatisfaction towards investor state arbitration system. The particular focus of criticism was as regards to time lines, costs, remedies and weak or no appellate forum.\textsuperscript{41} This thereby put question mark on the legitimacy of the investor state arbitration system. On the other hand WTO DSU have seemed to cater all the weaknesses as regards to the said issues. Thus WTO DSU holds more legitimacy. As per Taylor John legitimacy can easily be defined as an expectation that justice will be done and therefore recourse to fair legal procedure give sense of

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Thus failure of legitimacy in investor state arbitration system had far reaching consequences. In investor state arbitration there is no guarantee that arbitration process would be consistent, affordable, transparent and would therefore provide adequate remedies to the aggrieved party (SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan, 2003 and SGS Société Générale de Surveillance S A v Republic of the Philippines, 2004). To overcome these weaknesses in investor state arbitration system the stakeholders have started relying on bilateral investment treaties (BITs). The bilateral investment treaties have an effect of excluding adverse impact of investor state arbitration system. In doing so many decisions are made that are contrary to the regulatory laws of the state, which prioritize public services to its citizens (Aguas del Tunari S A v Bolivia, 2005, and Azurix Corp v Argentina, 2006). Moreover, state regulatory safeguards as regard to health, environmental issues and other services for citizens were pronounced unlawful so as to appease foreign investors (Philip Morris Asia Limited v. The Commonwealth of Australia, 2012, and Vattenfall v Federal Republic of Germany, 2013). On some occasions the matters pertaining to state security were over looked and the review carried out by the tribunal does not gave importance to relevant material (CMS Gas Transmission Company v The Argentine Republic, 2005, and Enron Corporation and Ponderosa Assets L P v Argentine Republic, 2007).

Such inconsistent outcome of the investor state arbitration has forced South American countries i.e; Ecuador, Bolivia and Venezuela to withdrew from ICSID convention. In 2007, 2009 and 2012; Bolivia, Ecuador and Venezuela have respectively served their notices of denunciation to ICSID. Indonesia has also served its notice of discontent with various BITs in 2014. There are several other countries that have shown their discontent with international investment arbitration, although investor state arbitration is founded on public international law. USA has also

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43 SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan, ICSID ARB/01/13 (2004).
44 SGS Société Générale de Surveillance S A v Republic of the Philippines, ICSID ARB/02/6 (2005).
45 Aguas del Tunari S A v Bolivia, ICSID ARB/02/3 (2005).
46 Azurix Corp v Argentina, ICSID ARB/1/12 (2006).
48 Vattenfall v Federal Republic of Germany, ICSID Case No. ARB/12/12 (2012).
amended its model bilateral Investment Treaty (BIT). The amendment allowed USA to have more regulatory control compared to foreign investors especially over matters of environment, health, safety and labour rights. In 2012 USA through its model BIT authorized foreign investors to have more say as it introduced appellate process.

In 2011, Australia devised a trade policy stating that it will not include investor-state dispute settlement provision in international investment agreements (IIAs). However, following change in government in 2013 Australia did include investor state arbitration clause in Australia-Korea Free Trade Agreement (FTA) which had a clause ‘General Exceptions’ with respect to commitments similar to WTO exception provisions, similar to the GATS Article XIV and GATT Article XX.

South Africa, in 2009 had issued Trade Policy to create balance between foreign investors and state. As a result the South African cancelled BITs with various European countries and sought to utilize domestic courts structure to settle trade disputes. The South African government published a bill in 2013, titled “South African Draft Bill on Promotion and Protection of Investment 2013”. This bill had no provision of investor state arbitration. It was believed that the bill was prepared because of an outcome of a case, Piero Foresti, Laura de Carli and Others v The Republic of South Africa. In this case foreign investors contested the South Africa’s policy of Black Economic Empowerment (BEE) in international arbitration. This Bill was staunchly opposed and later only with little amendment a Protection of Investment Act 2015 was enacted. The new Act gave vast powers to the Minister. The new Act empowers the Minister of Trade and Industry to make regulations pertaining to, legal procedure and appointment of mediators and take all steps to achieve the objectives of the new Act. To satisfy foreign investors the act contained provision that foreign investors will ‘not be treated less favourably than South

54 Ibid, Article 28(10).
58 Piero Foresti, Laura de Carli and Others v The Republic of South Africa ICSID case no ARB(AF)/07/1 (2010).
African investors’. It also has words that such equal treatment will be afforded only ‘in like circumstances’. However, it seems that South Africa wants to prioritize South Africa’s interests, which in my opinion is a justified and balance approach. However, it puts South Africa in an adverse bargaining position while making an investment agreement.

In 2014, Germany also voiced its concerns over investor-state arbitration and opposed adoption of such system with EU-US trade agreement. Germany favours settlement of international trade disputes at state courts, thereby confirming more state control. Germany expressed same point of view on EU-Canada Comprehensive Economic and Trade Agreement (CETA). Other than several countries who have expressed their dissatisfaction many other stake holders are not satisfied with the current investor-state dispute settlement mechanism. A Report issued in 2011 by the Committee on International Trade of the European Parliament regarding International Investment Policy of the EU, the Report categorically mentioned that most of existing BITs serve the interests of foreign investors whilst overlooking the development concerns of the host state. The Report stated that existing dispute settle mechanism is marred by dilemmas of inconsistent interpretation and absence of model BITs. The Report pointed out that there is no standard mechanism of interpretation.

The Report went on to criticize wide discretionary powers conferred upon the arbitrators to interpret investment principles. Such overriding powers result in lack of transparency and the absence of appellate forum to address flaws committed during arbitration process severely denting the credibility of the system. The Report emphasized that in the absence of well understood legal principle of exhaustion of all local remedies before dispute could be initiated at an international forum, substantially put host state at a disadvantage.

In 2010, renowned scholars on the subject of investor-state arbitration from all over the world made a public statement showing their discontent with the investor-state arbitration system. Notable of these scholars were Gus Van Harten and David Schneiderman etc. These scholars

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63 Ibid, Para J (24).
64 Ibid Para J (31).
have emphasized firstly, that settlement of dispute should only take place through independent judicial arrangement. Secondly, a right of a state to pursue public welfare needs to be recognized and thirdly, that arbitrators should take into account the public interests when they interpret investment principles. In the light of aforesaid it can be observed that all is not well with the investor state arbitration, the disappointment is at the global scale. In following section I drew comparison between the investor state arbitration and dispute settlement mechanism provided under WTO.

2.5 Comparison between Investor State Arbitration and WTO

According to WTO latest Report of 2015, there were over 500 disputes filed so far. In 20 years the filing of 500 cases indicates that WTO DSU is delivering and enjoys legitimacy. During 47 years of GATT only 300 cases were instituted before GATT dispute settlement system (GATT DSS). Therefore, it is concluded that it is in the interest of international trade that we have an impediment free system of trade and in that respect it is imperative to have a rule based international dispute settlement system.

It can be argued that WTO successfully has answered shortcomings of investor state arbitration system. These shortcomings include costly litigation process, lack of procedural time lines, excessive damages awards, interference in state policy and absence of appellate forum. As per World Investment Report of 2010, United Nations Conference on Trade & Development (UNCTAD), it was informed that investor state arbitration costs are very high. It was estimated it costs about USD 350 to USD 700 per hour to engage one arbitrator. This costs rises if the adjudication process is time consuming or involves complex legal issues. In an ICSID Report a case can cost between 1 million to 21 million USD depending upon number of arbitrators involved and a day may cost USD 3000. Since most cases involved numerous lawyers and at least three arbitrators.

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69 Ibid, Para 3.
According to a study conducted under the auspices of WTO the average cost of a case under WTO DSU is about USD 500,000 this cost covers Consultations, Panel and Appeal stage, this is with respect to developed members however when it comes to developing/LDC members the fees are considerably low. The low cost of litigation for developing/LDC members at WTO is attributed to certain factors. Firstly, because of the assistance by Advisory Centre on the WTO Law (ACWL). This center provides legal services to developing/LDC countries. It has represented respondent developing/LDC countries in several disputes at concessional rates and free legal assistance was provided to LDC members. Moreover, WTO Secretariat also provides legal training to WTO members. Secondly, as per Art 8(11) and 17(8) of the WTO DSU at Panel and Appellate stage WTO members are exempted from paying costs to the members of Appellate Body. In this way members always have option to challenge any decision that any of the members find is infringing its right. This facility also assist in development of WTO jurisprudence and results in more refined and sophisticated legal adjudication. Thirdly, in accordance with the Art 27(2) of the WTO DSU, the WTO Secretariat is responsible to provide legal assistance to the developing/LDC countries. Such provisions enable economically small under developed countries to compete with economic power houses like EU and USA etc. Therefore, WTO has a structure that provides level playing field to all members, WTO intention to assist developing/LDC is unquestionable. The investor state arbitration system can be improved by following WTO type of structure and by adopting system like WTO will add legitimacy to the investor state arbitration system and facilitate access to justice regardless of contesting member’s economic condition.

Another negative aspect of investor state arbitration system is too much time consumption before judgment is actually pronounced. It is mentioned in a recent study carried out by ICSID that on average it takes 4 to 5 years to settle a dispute. There are several cases that are still pending adjudication. Just to name a few, the case of Antoine Goetz v. Burundi, which was

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73 Art 17(8), WTO DSU <https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17> retrieved on 10 July 2018.
75 Antoine Goetz and others v. Republic of Burundi ICSID Case No. ARB/01/2 (2012).
initiated in 2000 and was finalized in 2012. Similarly, *EDF International S.A. v. Argentina*\(^{76}\), which started in 2003 and ended in 2012. This case took 9 years to finalize.

In contrast WTO DSU provides comparatively lot stricter time line in which dispute may be decided. Article 20 of the DSU provides that where there is no Appeal, the dispute may be decided in 9 months and in case of Appeal further 3 thus it takes total of 12 months. However, as per Article 12(9) and Article 17(5) if case involves complex question of law the Panel or Appellate Body may in writing inform about the causes of delay and seek formal permission. Presence of such provisions ensures that the rights and obligations will be pursued actively and such adjudication will be fair as it will be swift and allows party to rectify any material irregularity committed at Panel stage. Moreover, as per Article 3(2) and Article 3(7) of DSU certainty and predictability are strengths of WTO DSU. The need of rule based dispute resolution system can be assessed by the fact that many countries are avoiding to sign BITS especially due to ineffective dispute resolution. The states are keen to have institutions that have well defined dispute resolution laws, so as to achieve maximum consistency and certainty.\(^{77}\)

The other drawback of investor state arbitration system is that it is more determined on awarding heavy punitive damages instead asking the respondent state to correct the inconsistent measure. The keenness on awarding excessive damages influence foreign investors to make baseless claims to buy more time and to intimidate the host state.\(^{78}\) In the case of *Hulley Enterprises Limited (Cyprus) v The Russian Federation*\(^{79}\), the amount claimed by three former shareholders of former Yukos Oil Company was about USD 114 billion. The investor-state arbitration often becomes a tool in the hands of foreign investors, which provides an opportunity to foreign investors to extort money from the host state well above foreign investor can gain from business activity. This is because when loss of future business opportunity is calculated (usually it is calculated for further 20 years) the amount become massive. Moreover, when such litigation is in process the foreign investor is always in a position to dictate social development and trading policies of the host state. Foreign Direct Investment (FDI) could be


\(^{79}\) Hulley Enterprises Ltd. v. Russian Federation (PCA Case No. AA 226)
life line of any country’s economy and these BITs are often not able to strike balance between state’s economic development and constitutionally protected rights of the people.\(^{80}\)

In contrast as per Art 19(1)\(^{81}\), the WTO DSU initially focuses on ensuring that the inconsistent measure is abolished and it is rectified so as to come in conformity with WTO agreement. Once Panel or AB decision is adopted under Art 21(3),\(^{82}\) the respondent party is duty bound to inform DSB as how it will enforce decision and rectify inconsistent measure. It is to be noted that under Art 22(1),\(^{83}\) in contrast to investor-state arbitration system, the damages and concessions etc, are only considered when the defaulting party is unable to rectify inconsistent measure in conformity with WTO agreements. Therefore it is suggested that investor-state arbitration system can prove beneficial and gain legitimacy if same strategy of correcting inconsistent measure is adopted.

In investor state arbitration system there is no uniform system for standard of review.\(^{84}\) Some tribunals are submissive to host states while others are not.\(^{85}\) This divergent approach causes inconsistency in decision making \textit{CMS Gas V. Argentina (2005)}.\(^{86}\) In contrast WTO DSU expressly states in Article 11\(^{87}\) that Panel is to apply uniform standard of review. In the case of \textit{EC Measure concerning Meat and meat products}\(^{88}\) (para 116 &115). In these two paras Appellate Bench emphasized that the standard of review must reflect balance in approach. Whereas to achieve consistency in decisions at investor-state arbitration, there is a need of treaty whereby deference may be allowed as regards to government measures and policies taken for the purpose of public welfare.


The other important thing which is required in an investor-state arbitration is an appropriate appellate structure. There is no doubt that stakeholders recognize the need of appellate forum however, there is difference in approach. Some suggest that a provision allowing an Appeal should be incorporated at an institutional level i.e; ICSID system\textsuperscript{89} and others say that such structure should be embedded in the bilateral investment treaties\textsuperscript{90}. Moreover, some suggest that there is a need of an independent body, an appellate court like WTO appellate body.\textsuperscript{91} At present under Article 52(1) in ICSID convention a tribunal can only rectify minor errors and omissions. There are number of ways to provide remedy to the aggrieved party. Firstly, under ICSID Article 50(1) there is a need to have correct interpretation of the award. Secondly, in accordance with ICSID Art 49(2) the opportunity to supplement and rectify challenged measure must be utilized. Thirdly, under ICSID 51(1) is that an award may be corrected or amended if any new conclusive fact comes to light. Fourthly, an award may be annulled if there is no valid agreement, award has been issued on matters that falls outside the investment agreement, award is in conflict with the public policy etc.

In contrast WTO Appellate Body has jurisdiction to hear Appeals from Panel Reports as regard to legal points only. This provides AB, a superior position as compare to the Annullment Committee and National Courts hearing investor-state trade disputes. Annullment Committee prime function is to rectify procedural errors made in arriving a decision. Whereas at WTO AB, there is a system that carries out strict scrutiny so as to confirm that correct legal decision is made.\textsuperscript{92} Moreover, the permanent nature and location of the WTO AB ensures that it is an independent, impartial, fair and just body actively working to deliver justice. In contrast in most investor-state arbitration systems the arbitrators are not professionally trained and since they are appointed by the members there is always a question mark as to their independence and legitimacy. The non-permanent nature of appointment of arbitrators in an investor-state arbitration system couple with lack of security as to their tenure is other damning factor, since these arbitrators are appointed on case to case basis thus this inconsistency raise many doubts as to the fairness of the system. At WTO DSU Panels consists of adjudicators who are used to work in like circumstances, they enjoy protection as they remained on list of Panel for some

\textsuperscript{89} Erin E Gleason, 'International Arbitral Appeals: What are we so afraid of?' (2007) 7(2) Pepperdine Dispute Resolution Journal 269, 287.
time hence a permanent nature and ever developing jurisprudence enormously helps WTO bodies to enjoy the credibility such system need to have.

In the light of aforesaid, it can be said that WTO DSU have evolved since GATT years (from 1947). WTO DSU that exist today is one of the best dispute settlement understanding. It is not perfect yet and it still have scope to be better, this itself is an advantage. It can be said without a doubt that when WTO-DSU is compared with investor state arbitration it is a far better system as WTO DSU enjoys more legitimacy, cost effectiveness, less time consumption, having stricter time lines and preferring to rectify inconsistent measure instead of awarding heavy damages. WTO DSU objective is to abolish inconsistent trade measures, it does not affect state trade policy as it is ratified by the state, it has an appellate forum and uniform standard of review and last but not the least the judges that serve on the WTO Panel are well conversant with WTO law.

The WTO DSU with little reform can serve private/public corporate entities of the WTO member states. However, for that purpose the member states need to draft new treaty allowing private/public corporate entities to utilize WTO DSU and on other hand making it obligatory on the member state to guarantee execution of the decisions. It is possible as public/private corporate entities assets are within the territory of the member state, along with insurance companies that guarantee monetary interests of aggrieved parties. Thus WTO DSU system could live up to its full potential. There is every reason to expect WTO DSU to accommodate any potential concerns.

2.6 Conclusion

It has been observed that the right of individual (e.g corporations, company etc) to seek justice in international trade not only exist but is also protected. There are over 400 international commercial arbitration centers that provide arbitration services to private and state members. These arbitration centers also provide model arbitration laws to be followed by the members if they choose to carry out arbitration independently. The main aim of these arbitration centers is to enhance trade and this can only be ensured when investors feel that they enjoy legal protection in case of breach of any term of the investment agreement. In this regard the agreements and conventions such as New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 signed by host state ensures investors that the award of dispute adjudicated by arbitration would be final and binding on the contesting parties. The New York Convention
has large membership of 156 state members. The arbitration laws or models made by arbitration centers are more or less same however, some of these arbitration centers enjoy popularity on geographical basis. It has been observed that recently investor state arbitration has been subject to dissatisfaction. Whereas WTO DSU has provision of arbitration. However such provision is only available to WTO signatory member state. The WTO DSU has evolved over a long period of time and out of hundreds of proposals made there are about 45 proposals that are being considered seriously. It can be said without a doubt that when WTO DSU is compared with investor state arbitration it is found to be far better system, since it enjoys more legitimacy, cost effectiveness, less time consumption, strict time lines, and focused on abolishment of inconsistent trade measure, without interfering with state trade policy, it has an appellate forum, uniform standard of review and last but not the least the judges that serve on the WTO Panel are well equipped and conversant with WTO law. All these attributes are somewhat missing in investor state arbitration. Thus WTO DSU, clearly has an edge over all other contemporary systems for the dispensation of justice in international trade.

The WTO DSU has the capacity to serve public and private entities of the member states. For that purpose the member states need to draft new treaty allowing public/private entities to utilize WTO DSU. The amendment to this effect will make member state responsible for the compliance of WTO Panel decision. With state backing, and public/private entities assets within member state, along with insurance companies securing the interest of corporate entities. It is believed that presence of tangible assets of corporate entities will ensure that there would be no frivolous complaints. The WTO may apply special and differential treatment provisions contained in WTO DSU to public/private entities of the member states belonging to developing/LDC members. There is every reason to expect that it can be possible. It is admitted that WTO DSU at its present form requires reform. Therefore with the reform being imminent why not facilitate public/private corporate entities in their individual capacity before WTO DSU. This seems to be a win win situation for all the stakeholders. There is no guarantee that initially system will serve private/public entities of the member states perfectly but bearing in the mind the evolution of WTO DSU to its present form it can confidently be said that it would be the step at a right direction.

When it comes to state vs state, the WTO DSU mechanism is utilized most frequently and effectively regarding WTO covered agreements. The WTO approach is that developed members must assist developing/LDC members. The developing/LDC members are helped through SDT
provisions (which will be dealt in next Chapter) in WTO DSU. Thereby trying to provide level playing field to developing/LDC members. The WTO DSU also contains provision of arbitration. This arbitration process has been utilized once and that too after Panel report had been adopted. That referral to arbitration was with respect to the implementation stage. The members asked to determine level of nullification and impairment of benefits incurred due to violation indicated in Panel report. It is submitted that once public/private entities are allowed to utilize WTO DSU then they may opt to prefer normal procedure.

Therefore reform on two points is required, firstly, allowing public/private corporate entities registered within WTO member state to access justice in their own capacity and secondly, application of WTO DSU on all investment agreements, not limited to WTO covered agreements. It is submitted that it is possible since WTO DSU is outside the scope of single undertaking, a treaty to reform will ensure that there exist a global system of dispensation of justice whereby access to justice could be ensured pertaining to all types of corporate/investment agreements and to all corporate entities i.e public/private etc of the WTO member states. The ratification and compliance by member states would provide security to the system.
CHAPTER 3
WTO DISPUTE SETTLEMENT UNDERSTANDING & DEVELOPING/LDC MEMBERS

3.1 Introduction

In last chapter it was argued what changes are necessary within WTO DSU to ensure that all corporate entities i.e., public/private registered within WTO member states can access justice independently and regardless of requirement of WTO cover agreements. Since the objective of this thesis was to investigate right to access justice in international trade law with a focus on WTO law vis-à-vis developing/LDC members and why developing/LDC members are reluctant to access justice under WTO DSU and how their participation can be improved? Therefore in this chapter it will be investigated what WTO DSU has in it to ensure access to justice in international trade and how WTO ensures that developed, developing and LDC members can access and utilize the system effectively and equally.

Since WTO DSU became functional from January 1, 1995, till December 31, 2016, WTO DSU dealt with 573 applications for consultations. It has given over 350 decisions. Four developed members, i.e.; US, EU, Canada and Japan participated in over 66% of the disputes and are four of the top ten users of the system. Apart from these four members, the other six members are considered developing/LDC members i.e; China, India, Brazil, Argentine, Mexico and Korea. In WTO, of total 164 members less than 25% of WTO member states are classified as developed members. This 25% of membership accounts for 57% of total Requests made for Consultations, 56.7% of total Panel Requests, 58.5% of total Panel Reports, and 62.7% of total AB Reports. Whereas developing members which constitute about 53% of total WTO member states only made 42.7% of total requests made for Consultations, 43.3% of total Panel Requests, 41.5% of total Panel Reports and 37.3% of total AB Reports.

Henrik Horn, Petros C. Mavroidis and Håkan Nordström has mentioned that with the perspective of LDCs, the statistics appears to be the most disproportionate and disappointing. LDC’s account for approximately 22% of total WTO membership, but they made negligible about 0.17% of total...

94 US, EU, Canada and Japan served as either complainants or respondents 518 times out of the 781.
requests for Consultations, and 0% of total Panel Requests, Panel Reports and AB Reports. The LDC’s only made one request for Consultations,\(^97\) Otherwise there is no participation whatsoever of LDCs in the WTO DSU. LDC’s share in world trade accounts to approximately 0.5% which is more than their proportional share vis a vis there participation in dispute settlement process, which is negligible.\(^98\) Joseph Francois, Henrik Horn & Niklas Kaunitz argued that proportionally as per their share in world trade, it would have been minimum of three requests for Consultations and two for Panel Requests.\(^99\) Alternatively proportional to the number of LDC members, it should have been at least 129 Requests for Consultations, 87 for Panel Requests, 58 for Panel Decisions, and 50 for AB Reports. As per Joseph Francois, Herik Horn and Niklas Kauntiz the LDCs proportionally should have instituted 2 disputes, when acting in individual capacity and 4.3, while acting collectively.\(^100\) At this point it is worth reminding that LDC status is not a self-proclaimed, this status is conferred by United Nations. It depends on the criteria of human resources scarcity, objective criteria of gross national income per capita and criteria of economic vulnerability.\(^101\)

It can be argued that WTO DSU in its present state is defective and does not live up to the expectations of all of its members. Therefore in this chapter I investigated what WTO DSU presently holds for developing/LDCs members? In doing so it is pertinent to investigate certain questions. Such as, whether WTO DSU at its present condition provides balance and level playing field to developing/LDC members? Whether WTO DSU have provisions that assist corporate entities and governments of developing/LDC members to participate in WTO dispute settlement at their respective domestic level? How the application of SDT provisions, Advisory Centre on WTO Law (ACWL) and technical assistance from WTO Secretariat could effectively utilize to assist the developing/LDC members? If developing/LDC members are positively discriminated then how this positive discrimination work for the benefit of developing/LDC members?

\(^{97}\) Being LDC Bangladesh submitted request for Consultation against India (DS306).


\(^{101}\) LDC criteria are reviewed every three years by the Committee for Development Policy of the UN Economic and Social Council (ECOSOC) <http://www.nationsonline.org/oneworld/least_developed_countries.htm> accessed 15 July 2018. Only 36 of them are WTO members.
members? What challenges/weaknesses WTO is facing regardless of classification of countries and does WTO DSU has a capacity to improve the existing system? The answer to the said questions will enable us to conclude as to what is present and what is required at WTO institutional level to ensure equal and fair access to justice to all of its member.

I begin by drawing comparison between GATT DSS and WTO DSU, as in this way I can explain the evolution of SDT provisions, special and treatment concept is very relevant to developing and LDC members. The role of Advisory Centre on WTO Law (ACWL) etc and the technical assistance available from WTO Secretariat also requires consideration. The concept of special and differential treatment is cross cutting policy matter therefore its impact as regards to developing and LDC members need to be understood as regards to WTO structure, functions and stages involved in WTO dispute settlement process. During the course of this chapter I shall keep informing the impact of SDTs in formation of adjudication panels, the decision making process and enforcement mechanism when any developing or LDC member is part of the dispute. However, most of SDTs come into effect when they are specifically asked for. I shall briefly discuss the remedies available and options available when there is no compliance. The discussion will lead to a logical conclusion and help analyze understand the intention of WTO DSU vis a vis developing/LDC members.

3.2 From GATT to Present WTO DSU

It has been a long journey from GATT to present day WTO Agreement. GATT was a multilateral agreement its purpose was to regulate international trade by removing trade barriers between member states. GATT was signed in 1947 by 128 countries. GATT scope was initially limited to trade in goods only, whereas WTO purpose was to govern GATT and its scope was extended to regulate trade in services and trade related aspects of intellectual property rights, as well.

In GATT there was a permanent Appellate Body that settle disputes among members and review findings. The GATT DSS had evolved over the period of approximately 50 years on the grounds of Article XXII (Consultations) and XXIII (Nullification or impairment) of GATT 1947. During GATT years the members were free to use GATT provisions Articles XXII and Article XXIII pertaining to consultation and dispute settlement provisions. These Articles come into play when one WTO member state alleges that member state has taken any measure which has

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violated GATT or in some way annulled the advantages due to the claiming party under the WTO agreement. The GATT DSS was modified and improved through Uruguay Round (1986-1994). As a result a WTO DSU was formulated, the new dispute settlement system is often termed as a “jewel in the crown of WTO” and one of the successes of Uruguay Round. Now it is over 24 years old and still all member states have considered it as one of the most positive outcome of the Uruguay Round. The WTO DSU was founded upon and adhered to same Article XXII and XXIII of GATT 1947. GATT did not set out detailed dispute settlement procedures therefore GATT signatories formulated a precise procedure that includes ad hoc Panels and other practices.

3.3 A Comparison between GATT DSS and WTO DSS

The GATT dispute settlement System (GATT DSS) though apparently functioned quite well but it definitely had certain weaknesses these include, a requirement to have consensus based decision-making process, which allowed answering defendant against whom dispute was instituted to block the formation of a dispute settlement Panel and consequently blocking the adoption of a Panel Report by the GATT Members. Since appointment of panels, imposition of sanctions, adoption of rulings were only possible through positive consensus thus GATT DSS system suffered with latent and patent defects hence GATT DSS became subject to criticism. Lack of deadlines and lack of discipline in monitoring and enforcement of Panel Reports even when Reports were adopted highlighted other impediments. Thus it GATT DSS is more of a diplomatic nature, and hence utilized diplomatically.

After Uruguay Round, the resultant WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO DSU) revealed intent of establishing a method that is fairer, far more predictable in outcome than the traditional diplomatic system. Though still WTO DSU contains diplomatic aspect as its objective is to achieve a “mutually agreed solution” and have provisions that may promote a negotiated result. The WTO DSU is more “rule-bound” (quasi automatic and quasi-judicial) and transparent than the dispute settlement system

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developed under GATT.\textsuperscript{108} The WTO DSU has remedied the inherent defects of GATT DSS and with negative consensus rule there are automatic steps to follow e.g; formation of Panel & Appellate Body (AB), automatic adoption of Panel/Appellate Body Reports and automatic permissions of countermeasures against the violating party. The dispute settlement system under WTO has provided integrated framework to which all WTO agreements adhere to with negligible differences. So far the new system proved extremely effective.

David Mc Rae states that there are four characteristics of the WTO DSU that helped developed developing and LDC countries to access justice in international trade.\textsuperscript{109} Firstly, strict time periods, and binding decisions which resulted because of reverse consensus rule under Article 16.4 and 17.4. Secondly, the interpretation is based in accordance with the Article 31 of the Vienna Convention on Law of the Treaties 1969\textsuperscript{110} (VCLT). This helped contesting member states to understand how the obligations laid in the WTO covered agreements and Rules of Dispute Settlement Understanding will apply, thereby enhancing predictability. Thirdly, the existence of clear cut principles of interpretation and extensive body of jurisprudence resulted in transparency and consistency. Fourthly, the compliance record is exquisite and shows reliability and popularity of the WTO DSU.\textsuperscript{111} The WTO DSU provides that dispute resolution may be consistent with the covered agreements and mutually acceptable.\textsuperscript{112} Nevertheless, having informed about the strength of the system the current system still has certain weaknesses. The critics consider that all these strengths have some negative aspects. For example frequent use of the system has an adverse effects on diplomatic relations. Despite of deadlines it takes long time to solve disputes. As far as interpretation approach is concerned it is believed that interpretation of laws is too rigid and lack flexibility. It has also been alleged that Appellate Body (AB) has in some instances ignored textual interpretation altogether and AB has gone far ahead on its own to liberalize trade and has therefore given decisions which in ordinary circumstances AB would not have been competent to pronounce (e.g judicial economy). Lastly it is admitted that there prevail good rate of compliance but still it is not good enough.\textsuperscript{113} Moreover, if the inconsistent trade

\begin{itemize}
\item \textsuperscript{108} Mervyn Martin, ‘WTO Dispute Settlement Understanding and Development’ (2013) 13 Nijhoff International Trade Series 51.
\item \textsuperscript{111} Ibid. p 5.
\item \textsuperscript{112} Article 3.7, DSU. <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3> accessed 15 July 2018.
\item \textsuperscript{113} Ibid. p 5, 6.
\end{itemize}
measure is conflicting with the WTO agreement still during the course of adjudication the complainant continue to suffer financial loss. Strangely there is no concept or provision of interim relief to the complainant party therefore there is no immediate concept of relief against alleged breach of WTO agreement. The successful party remained deprived of any compensation for the loss suffered prior to, during the adjudication process and till the implementation of the decision. Moreover in the event of non-implementation all members do not possess same capability to resort to suspension of obligations. Furthermore, it has been noticed that sometimes suspension of concession by prevailing party proved useless and ineffective. Enforcement has always remained a challenge firstly, because of unequal economic status of the WTO members and secondly, very few examples whereby remedy was in the form of monetary compensation.

3.4 Rules of Interpretation

The Maxim is *Lex specialis derogate legi generali* is applicable on WTO obligations as WTO law overrides general/national law that may be inconsistent with it.\(^{114}\) The WTO agreements identify two sources of law, these are, WTO covered agreements and the international agreements where international law is applicable.\(^{115}\) Moreover, under Article XVI.1, WTO Agreement, the procedures, decisions and customary practice pursued by the GATT Contracting Members all through the GATT years shall also be adhered to. The WTO adjudicating bodies have found Panel/AB Reports, customary international law (Article 31 of VCLT), rulings and recommendations made by several WTO institutions (e.g Councils and Committees) as *travaux préparatoires*\(^{116}\) of the WTO Agreement. The WTO Appellate Body (AB) confirms in WTO dispute settlement proceeding that the “general rule of interpretation”\(^{117}\) provided in Article 31 of the VCLT 1969\(^{118}\) includes an interpretative rule as enshrined in international law regarding Article 3.2. Article 31 provides that a treaty or other international agreement “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\(^{119}\) *Jus Cogens* or pre-emptory norms are


\(^{116}\) The travaux préparatoires (French: "preparatory works", in the plural) are the official record of a negotiation. Sometimes published, the "travaux" are often useful in clarifying the intentions of a treaty or other instrument. This is reflected in Article 32 of the Vienna Convention on the Law of Treaties (VCLT).

\(^{117}\) Ibid.


\(^{119}\) Ibid.
codified in VCLT. The AB followed the interpretation rules as enshrined in the VCLT 1969. The teleological expressions as contained in the preamble/recitals has enormously contributed in uniformity and trust on international trade law jurisprudence.

3.5 Concept of Special & Differential Treatment in GATTt and WTO DSS

As mentioned in last chapter special and differential treatment is a cross cutting policy matter, for example, General Agreement on Trade in Services (GATS) : Article IV and Article XII provides that developing/LDC members may be encouraged to participate in international trade and that developing/LDC members may restrict trade in services so as to address their respective problems of balance of payments etc. The WTO DSU is also no exception to SDT provisions. It has always remained a challenge and continues to be so to strike a balance so as to ensure both developed and developing/LDC members face same set of pre requisites prior to accessing justice before WTO. Therefore this area has always remained an area of concern. The WTO DSU has introduced 11 SDT provisions, to facilitate developing/LDC members and to ensure free, fair and balanced opportunity to access justice by all WTO membership i.e; regardless of their status.

The concept of special and differential treatment is as old as GATT 1948 agreement. The evolution of SDT provisions can be described in four stages, the first stage (1948-1973) dates from 1948 to Tokyo Round held in 1973. The second stage start from Tokyo Round in 1973 till 1979. The Third stage covers period of post Tokyo Round to Uruguay Round (1979-1995). The fourth stage is in progress (1995-in progress) it started after Uruguay Round. In first stage, the issues relevant to market access were main focus of discussions. In second stage efforts were focused around abolition of discriminatory measures against developing/LDC members exports, mainly through Article XVIII (non-tariff trade measures), read along with 28 November 1979 Declaration on Trade Measures Taken for Balance of Payment Purposes and Decision on Safeguard Action for Development purposes. It provide entitlement to developing/LDC

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120 VCLT 1969, Article 53, Article 64.
123 Youssef, Hesham, ’Special and differential treatment for developing countries in the WTO’ (South Centre 1999) 5.
members to restrict imports so as to protect their industries and overcome balance of payments problems.

Part IV of GATT, introduced the concept of non-reciprocal preferential treatment for developing/LDC members. In 1965, Part IV added three new Articles with Article XXXV. The Part IV was titled “Trade and Development”. The three Articles added were firstly, Article XXXVI which recognized development requirements, market access issues and provided non reciprocity flexibility to the developing/LDC members (no binding tariff regime). Secondly, Article XXXVII was export specific and obligated developed members to improve exports from developing/LDC members into developed member markets. However, developing/LDC members could not enforce Article XXXVII through any retaliatory measure. Finally, Article XXXVIII was about affording developing/LDC members vis a vis export earning, industrialization and growth.126

The third stage was characterized by the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing/LDC Countries, this is commonly known as "Enabling Clause"127. This was considered to be a first step whereby SDT provisions were introduced as they specifically address development needs of developing/LDC members.128 The Enabling Clause provided a perpetual legal protection to Generalized System of Preferences (GSP) for SDT under GATT agreements. There are about 150 SDT provisions existing in WTO agreements.129 As a result of this in GATT PART IV principle of reciprocity was restated. According to some commentators Tokyo Round was considered very useful for the developing and LDC members. However some commentators argued that due to no active engagement of developing/LDC members which is mainly attributed to their very limited size of economy, there is very little or nothing to be expected from developing/LDC members. Hence developing/LDC members lacked any importance, the commentators substantiated this by stating, firstly, that GATT has no control over the developing/LDC members trade policies and secondly due to limited role of developing/LDC members, they were left out from the main stream. Nevertheless, the concept of SDTs evolved in the third stage.

126 Ibid. p.12.
127 Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT BISD, 26th Supp, 203, GATT Doc L/4903 (1979)(Multilateral Trade Negotiations Decision, adopted on 28 November 1979) (‘Enabling Clause’).
129 The Enabling Clause, Article XVIII and Part VI GATT are of basic importance.
In 1966 Special Procedures were adopted in disputes that involved developing/LDC members. These procedures could be divided into three steps. Firstly, when Consultation process is failed between developing/LDC member and developed member then Director General WTO could mediate for the resolution of dispute. Secondly, if reconciliation is not successful then the developing/LDC member may refer the matter to Panel. Thirdly, WTO members may allow retaliatory measures by developing/LDC members and if such measures proved futile the other WTO members may introduce new measures, a concept of collective retaliation.\textsuperscript{130}

The Doha Declaration on SDTs along with Decision on Implementation Related Issues and Concerns\textsuperscript{131} mandates Committee on Trade and Development (CTD) to apprise about the existence of SDTs which are important to assist developing/LDC members and SDTs which have some importance can be binding. The Doha Declaration goes on to state that there is a need to find effective ways whereby developing/LDC members can use them effectively. In 2013, Bali Ministerial Conference devised a mechanism to review and analyze SDTs implementation during CTD Dedicated Sessions. The CTD sessions are required to take into account existing operability of the SDTs and to submit recommendations to concerned WTO bodies. The agreement establishing main WTO agreement specifically states that developing/LDC members should be benefited from international trade.\textsuperscript{132} As regards to this thesis the SDT relevant to WTO DSU stated that developing/LDC members should be entitled to flexible (relaxed time lines) application of WTO trade rules and also should be exempted from strict application of WTO rules.

In the light of aforesaid it has been observed that concept of SDT is a matter of serious concern and shows that at an institutional level there always remain intention that developing/LDC members remain at par with the developed members. Apart from SDTs the WTO at an institutional level established departments that are specific to assist developing/LDC members. The two of the major sources of assistance are Advisory Centre on WTO Law (ACWL) and Law division of the Secretariat of the WTO.


3.6 Advisory Centre on WTO Law (ACWL)

Advisory Centre on WTO Law (ACWL) has been providing valuable assistance to developing/LDC members. Soon after WTO DSU was formulated the under the auspices of an agreement made in 1999, the Agreement Establishing the Advisory Center on WTO Law (ACWL), The ACWL was made on 15 July 2001. The Centre is based at Geneva and has 37 members. The Centre purpose is to provide legal guidance pertaining to WTO DSU, particularly to developing/LDC members, economies in transition and developing/LDC custom territories. The list of entitled members are enumerated in Annex II of the Agreement Establishing the Centre. All LDC members are entitled to get the Centre’s assistance without having to become members.133

According to ACWL Report of 2017, in 2017 ACWL has given legal opinion on 186 requests made by developing members.134 Since the inception of ACWL the ACWL has given 2500 legal opinions, provided assistance in 56 disputes i.e; 20% of total disputes.135 The institutional structure of the ACWL is composed of three major sections. Firstly, the General Assembly, which is composed of all members. Its function is to observe general working of the Centre and to prepare annual financial budget. Management Board consisting of 6 members, acting in their individual capacities. Of these six members, one is from the least developed countries, two belong to developed countries and three are from economies in transition and developing custom territories. Therefore, developing/LDC members were accommodated at management level. The Management Board decides about the operations of Centre and informs General Assembly. Executive Director is responsible for the external representation of Centre and manage day to day affairs of ACWL, he is also an ex officio, member of the Management Board. The ACWL generates its finances from the Endowment Fund, through charging fee from developed and developing/LDC members (as per categorization), and through voluntary contributions.136

The procedure of seeking legal assistance starts from a formal written request asking clearly the issue about which the legal assistance is required. The ACWL usually within two days provide reply and tries to provide assistance as soon as possible. The legal assistance could take many forms, from opinion writing to preparing briefs, training and representations etc. The standard of

135 Ibid.
confidentiality applied is of same standard as applied to WTO staff members involved in dispute settlement process at Panel or appellate stages of dispute settlement process. The legal assistance is available on all stages involved in dispute settlement process. However, for complainants it is suggested that they should apply for legal assistance prior to the initiation of dispute settlement process.137

As far as fee of technical assistance is concerned, it is paid from the ACWL’s Technical Expertise Trust Fund. As per categorization made WTO member countries are afforded concessions. 90% of the technical fee of LDC member is paid from the Technical Fund. However, LDC’s are not charged any fee when they intend to participate as a third party.138

3.7 WTO Secretariat and Technical Assistance

Under the WTO Secretariat the activities of technical assistance are coordinated by the Institute for Training and Technical Cooperation (ITTC). The Committee on Trade and Development (CTD) look after all Trade Related Technical Assistance (TRTA) affairs. The activities under TRTA are in line with progressive learning strategy of CTD which includes training, monitoring and evaluating technical assistance activities. The Nairobi Ministerial Declaration 2015 stated that “We note the substantial progress in WTO's technical assistance and capacity building, which focus on the needs and priorities of beneficiary Members. We recognize that dedicated facilities such as the Standards and Trade Development Facility and the Trade Facilitation Agreement Facility are making an important contribution towards assisting developing country Members and LDCs to implement relevant WTO agreements. We also reiterate the importance of targeted and sustainable financial, technical, and capacity building assistance programmes to support the developing country Members, in particular LDCs, to implement their agreements, to adjust to the reform process, and to benefit from opportunities presented.” Therefore assisting developing/LDC members is part of WTO Secretariat manifesto.

The technical assistance is especially focused at providing training to the government officials of the developing and LDC members, particularly belonging to Africa. The WTO provides about 300 technical trainings to about 14,000 government officials. The training is also provided with the view to keep geographical balance. About one third of training is focused on Africa alone. Statistically speaking about 45% of technical assistance is allocated to Africa. Training

comprises of courses, training sessions, seminars etc. They provide up to date knowledge to the government officials, journalists, activists belonging to NGO’s, academics and parliamentarians etc. The technical assistance activities are carried out with the collaboration of renowned international organizations who hire highly skilled WTO consultants, professors and lecturers from across the globe. Financial requirements are looked after by WTO, the budget is generated through the contribution of member states. In last few years there had been decline in contributions mainly due to global financial crisis.\textsuperscript{139}

In 2010 a database Global Trade Related Technical Assistance Database (GTAD) was established so that information can be exchanged involving partner agencies regarding provision of technical support actions. Since 2010, the GTAD introduced national and regional projects and training course. The search engine enables the user to search through various parameters, such as beneficiary country or trade category etc.\textsuperscript{140}

\section*{3.8 WTO Dispute Settlement Bodies, Stages and Procedures}

In this section I shall particularly inform how developing/LDC members are assisted in formation of dispute settlement bodies, the concession afforded at different stages and procedure adopted vis a vis developing/LDC members. The stages and time lines are provided in ‘Appendix A’ of this thesis.

\subsection*{3.8.1 Ministerial Conference}

The Ministerial Conference is the apex decision making body of the WTO. The Dispute Settlement Body (DSB) sends Panel Report to the Ministerial Conference. Ministerial Conference is held once in two year. It may take decisions as regard to any matter that is covered under WTO.

\subsection*{3.8.2 Dispute Settlement Body (DSB)}

This is the body that adjudicates the dispute at first instance. It is a quasi judicial and quasi automatic body and works like domestic tribunal. DSB is an administrative body comprising of all WTO members. Under Article 2 of the DSU, DSB function include formation of dispute settlement Panels, referring cases to arbitration, conducting arbitration and issuing Panel Reports and keeping a vigilant eye over enforcement of rulings and recommendations made in the

\textsuperscript{139}WTO Trade Related Technical Assistance <https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm> accessed 15 July 2018.
\textsuperscript{140}Global Trade Related Technical Assistance Database (GTAD) <http://gtad.wto.org/> accessed 15 July 2018.
Reports. The DSB comprises of ad hoc dispute settlement Panels and a standing Appellate Body (AB).\textsuperscript{141} There is no concept of permanent Panel at WTO and each time a new Panel is formed.\textsuperscript{142} This promotes fairness. The Panel usually consists of three experts in one case, the number of Panelists could be increased to five. Whenever there is a dispute involving developing/LDC member then it is mandatory that a panel form must contain at least one panelist from the developing member. The preferable composition of 3 member Panel would be like; one member shall belong to a developing/LDC country and remaining two would belong to countries which are not party to the dispute. Once Panel Report is accepted it becomes binding on members.

The DSB also suspend concessions in case a state party that does not comply with the WTO rulings and recommendations.\textsuperscript{143} The legal effect of Panel/Appellate body Reports is that once they are adopted by the DSB they become binding only to the extent of contesting members. They have no precedent value.\textsuperscript{144} However, Panels and Appellate Body consider earlier Reports so as to enhance “security and predictability” of the multilateral trading system.\textsuperscript{145} Thereby, upholding “legitimate expectations” of WTO members. The WTO DSU contains new features like “reverse consensus” or a consensus for not to carry out any particular action.\textsuperscript{146}

3.8.3 Dispute Settlement Appellate Body (AB)

Appellate body (AB) is a permanent body of seven members. It evaluates legal aspect of the Report submitted by the Panel. AB members are appointed by DSB through consensus, initially for the period of four years\textsuperscript{147} and they can be reappointed second time.\textsuperscript{148} The AB at appeal stage confirms that correct law has been applied and the composition of the Panel was according to WTO DSU e.g; confirming that Panel has minimum requisite one member from the developing member country, when one of the contesting party is developing/LDC member. AB members are usually expert in law mostly relevant to covered agreements or particular subject matter. They

\textsuperscript{142} DSB established under Article 2, DSU <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3> accessed 15 July 2018.
\textsuperscript{145} DSU Article 3.2 <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3> accessed 15 July 2018.
\textsuperscript{147} Article 2.4, DSU <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#2> accessed 15 July 2018.
are the persons of recognized authority. These members are not associated with any government.

3.8.4 Special Dispute Initiation Procedure for Developing/LDC Members

It is pertinent to mention that at domestic level WTO as an institution has no role, to help any member in deciding to initiate dispute before WTO. The WTO jurisdiction is limited in two ways, firstly, it can only hear claims pertaining to WTO covered agreements by WTO member and secondly it can only apply WTO law when adjudicating upon any dispute.

A complaining developing/LDC member can invoke the more quick procedure by virtue of 5th April 1966 Decision. This procedure takes precedence over the standard procedure laid down under Article 4, 5, 6 and 12 of the WTO DSU, however such procedure cannot be activated when firstly, in view of the Panel the time limit afforded for the Report is insufficient and secondly when there is dissimilarity between the rules/procedures of Article 4, 5, 6 & 12 and rules contained in the 1966 Decision. In such situation the rules/procedures contained in the Decision shall prevail. (Ordinarily it is called Article 3.12 difference). The time frame laid down in the decision has only been complied once under GATT 1947.

As per the Decision, if the consultations among contesting parties fail then:

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153 Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the members to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.
1) The DG upon the request of developing/LDC member conducts Consultations through his good offices. If matter is decided then a decision as per mutual agreement between the parties is made.

2) If after intervention of DG good offices, within 2 months, the consultations prove futile, then DG may upon the request of either member submits his Report. Thereafter a Panel with the assent of the members is formed.

3) The Panel takes into account all relevant factors, such as challenged measure and its impact on the economy of developing/LDC member.

4) The Panel has 60 days to make its final decision. However, this time limit can be extended with an approval of complaining member.

3.8.5 Consultations\(^{155}\) (Article 4)

Where quick procedure by virtue of the Decision of the 5\(^{th}\) April 1966 is not applied then standard procedure is applied. In standard procedure upon request of the consultations made by one member state to other member state, the other member state has 30 days from the date the formal request by complaining member is made to enter into consultations.

At consultation stage, through SDT provision Article 4.10, the WTO members are obligated to give special attention to the difficulties faced by developing member state and their peculiar trade interests. Under Article 4.10 if the dispute involves developing member and where the questionable measure is taken by the developing member then the time period of consultations stage can be extended through mutual agreement.\(^{156}\) If members still fail to find any solution after the expiry of consultation period then under Article 12.10, which is another SDT provision, the DSB Chairman can extend the period and give more time to contesting members to come up with the solution. If dispute does not settle at the Consultation stage then dispute moves in to Panel Stage, following futile consultation a Panel is formed.

As regard to LDC member Article 24.1 WTO DSU provides that special procedure ought to be adopted when LDC member is party to a dispute. The article states that at all stages of dispute settlement process LDC member must be afforded concessions. Article 24.2 states that in disputes involving LDC, on failure of Consultation process and upon request by LDC member,


the Chairman of the DSB or Director General should try to settle dispute by using their good offices, mediation and conciliation.

3.8.6 Panel Stage Proceedings (Articles 12, 15, Appendix 3)

After the constitution of the Panel, written and oral arguments of the disputing members are observed. In view of the submissions made by the disputing members, the Panel sum up facts and arguments, thereafter, the Panel issues explanatory Report to both members. After review, final Report is given to the disputing members and it is disseminated to all WTO Members.

Under Article 12.10, a SDT provision, without affecting overall time limit in which the Panel is to decide the dispute the Panel allow a defending developing/LDC member to submit its defence within (extended) sufficient period. In one dispute on the request of developing/LDC member, in spite of complainant objection, the Panel provided 10 extra days to a developing/LDC member to submit its first written reply.\(^\text{157}\) Similarly, under Article 12.11, a SDT provision, states that if developing/LDC member requests to invoke SDT provisions then Panel Report must inform how such SDT provisions have been applied. The SDT provision is also applicable to composition of the Panel. This is when one of the contesting party is a developing/LDC country then under Article 8.10, DSB is obligated to appoint at least one Panelist on the demand of the developing/LDC member.

Third party participation rights at Panel stage are conferred subject to proof that third party has substantial interest, in dispute pending adjudication, the disputing parties consent is a pre requisite. Private organizations/individuals are entitled to submit amicus curiae briefs directly to Panel\(^\text{158}\)and to AB.\(^\text{159}\)In accordance with DSU Appendix IV, Panel may appoint expert review groups. In this stage strict confidentiality is maintained.

3.8.7 Adoption of Panel Reports/Appellate Review (Articles 16, 17, 20)

If there is no Appeal against the Panel Report or DSB decides not to adopt the Report after reaching consensus then Report is to be adopted at a DSB meeting within 60 days once Panel

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\(^{158}\) Ibid.

\(^{159}\) Article 17.9, DSU <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17> accessed 15 July 2018.
Report is provided to WTO Members. Right to Appeal against the decision is limited on the grounds of legal interpretation and issues of law involved in the Panel Report.

The time period of Appeal is extendable to 90 days where intention to Appeal was made within 60 days of Panel Report. The WTO Appellate Body (AB) must deliver a Report that clearly, reverses, support or alter the Panel Report. The Report issued by the AB is to be accepted by the DSB and accepted by the contesting members unconditionally. However where DSB by consensus within 30 days after distributing Report to the members come to the conclusion that Report should not be adopted then such Report is not adopted. There is a time limit of 9 months from the date the Panel is formed to the date the DSB considers the Panel Report for adoption. In case of Appeal the aforesaid time limit is extended to 12 months or as mutually agreed by the contesting members.

3.8.8 Implementation of Panel and Appellate Body Reports (Article 21)

Where a WTO decision pronounced that the defending member has breached any duty under WTO agreement the member has to notify DSB of its compliance strategy within 30 days from the date the Panel Report and any AB Report are adopted. Alternatively defending must inform within reasonable time period. The reasonable period of time has been defined as firstly, a time which is suggested by the member and approved by DSB. In one dispute involving developing member, an arbitrator whilst relying on Article 21.2 DSU allowed extra 6 months for the implementation of its ruling. Under Article 21.7 of the DSU on request of developing/LDC member the DSB is obligated to consider taking appropriate action along with surveillance and status Report. Under Article 21.8 DSU, in taking appropriate action, the DSB must take into account the questioned measure and its impact on the economy of the developing/LDC member.

3.9 REMEDIES FOR NON COMPLIANCE

If a losing member fails to comply, and does not abolish the measure complained of within the stipulated reasonable time then losing member may have to pay compensation. Compensation is not calculated in the form of financial payments. Usually the compensation is by affording a

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161 Article 17.6, DSU <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17.6> accessed 15 July 2018.
165 Award of the Arbitrator, Indonesia — Autos (Article 21.3), para. 24.
benefit e.g; tariff reduction e.t.c. The other way in which the compensation is afforded, is that the losing member may become subject to cancellation of concessions which are equivalent to the level of impairment or nullification. Through Article 24(1) the members are asked to exercise restraint in raising dispute against LDC member and if nullification or impairment is resulted because of the inconsistent trade measure adopted by LDC member. The Article 24(1) further states that complaining member should be very considerate in asking for suspension of concessions or any other obligations or seeking compensation against LDC member.

3.9.1 Surveillance of Implementations and Recommendations

Article 21 of the WTO DSU is most relevant to surveillance of implementation and recommendations. Article 21.5 WTO DSU states when contesting party disagree as regard to the compliance by the defending member. Then either of the contesting member can ask to summon the compliance Panel.

3.9.2 Compensation and Suspension of Concessions (Article 22)

The successful party to a dispute may ask that the loosing member may discuss a compensation agreement when loosing member could not obey the WTO decision within stipulated compliance period. Failure to reach any decision would authorize suspension of concessions.

3.10 GENERAL DEFICIENCIES IN WTO DSU

WTO DSU suffer from Non liquet, regardless of the classification of WTO members. As WTO lack of enforcement mechanism, sequencing and retaliatory measures etc. It is imperative that proposals regarding reforming the said deficiencies are addressed. The deficiencies are discussed briefly as follows:

3.10.1 Lack of Enforcement

In WTO DSU there is no provision of mandatory enforcement and therefore it can be argued that the WTO lack enforcement or execution mechanism and hence has no binding effect. However, a prevailing member may suspend concessions or obligations in a trade sector which is relevant

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168 n 113,115.

169 Elena Katselli Proukaki, ‘The problem of enforcement in international law: countermeasures, the non-injured state and the idea of international community’ (Routledge 2010) 227,228.
to area in which dispute arose.\textsuperscript{170} If this is not possible on the grounds that it is “not practicable or effective,” the prevailing member may then suspend concessions in any other sector which is part of the same WTO agreement. However, suspension of concessions in any other sectors under the agreement is not “practicable or effective” and “the circumstances are serious enough,” the member may like to suspend concessions or obligations under other WTO agreement, or “cross-retaliate.”\textsuperscript{171}

### 3.10.2 Sequencing

One of the problem arose in DSU as a result of gaps is of “sequencing”. It was first noticed in 1998-99 at a compliance stage of US complaint against European Union Banana import regime.\textsuperscript{172} DSU provides that successful member may ask for permission regarding retaliation measures within 30 days once compliance period has expired.\textsuperscript{173} Whereas, DSU also states that any difference regarding availability or sufficiency of compliance are to be finalized through WTO dispute settlement procedures, this also comprise of resorting to Panels.\textsuperscript{174} Once dispute arise there is 90 daytime limit in which compliance Panel Report is prepared. The compliance Panel Report is Appealable.\textsuperscript{175} Article 21.5 of the procedure deadline is different than Article 22 deadline. Article 21.5 does not provide any detail regarding how compliance is to be ascertained and how a successful member may exercise retaliation under Article 22. It is normally conceived and Members accept that if a compliance Panel discover that where a member has not complied then successful member may continue with its retaliatory measure demand i.e; once 30 days DSU time limit has expired.

### 3.10.3 Removal of Retaliatory Measures

The other major deficiency in WTO DSU is that it is mute as regards to termination of the retaliatory measure which was earlier authorized, especially when the defending member has rectified the complained measure.

\textsuperscript{173} Article 22, DSU <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#22.3> accessed 15 July 2018.
\textsuperscript{175} Ibid.
3.11 Challenges and Proposals to Improve WTO DSU

In last section I have informed that WTO DSU also has deficiencies and these deficiencies are present and posing a challenge to WTO members regardless of their classification. The challenges to WTO DSU could be classified as short term and long term challenges. The short term challenges include binding dispute settlement process for the third parties in the dispute, lack of provision of adequate trade remedy, lack of enforcement, sequencing and removal of retaliatory measure once inconsistent trade measure has been removed, the challenge of ensuring transparency as the Panel and Appellate body hearings are conducted in private and confidential. The long term challenges include, it takes considerable period of time to settle disputes when more members join the dispute, e.g when 10 or more members join the dispute. Over the period of time the dispute settlement through WTO DSU has increased this at one hand indicates that trust on the WTO DSU has increased on the other hand it high light the fact that WTO dispute settlement bodies are under staffed and exponential increase of work load requires recruiting qualified staff to tackle enormous work load. It may be argued there remains challenge that countries that can move forward unilaterally or bilaterally or under regional free trade agreements may not utilize WTO DSU and instead they may mutually agree to utilize on other dispute settlement bodies and procedures. Though Article XXIV provides a hierarchy, still there is a danger that a decision could be made that is in direct contravention of WTO DSU.\(^\text{176}\)

As far as proposals are concerned, several proposals have been forwarded by WTO members which are subject to rigorous debate. The proposals advocate that there is a need to have permanent body of Panelists, the application of two stage approach to the amicus curiae briefs, enhancement of third party role in DSU, enhanced role of WTO Secretariat in DSU, more elaborate and detailed notification of settlement between the members, increase in the number of members in AB and the proposal to have non-renewable term of 6 years for the members of AB etc.\(^\text{177}\)

All member states have found WTO DSU as a successful concept. The present WTO DSU is very much different from the dispute settlement procedure in GATT. Nevertheless there are numerous proposals for reform till to date. The Doha Ministerial Declaration had on its plan “negotiations on improvements and clarifications” in the DSU “on the work done thus far.” In

\(^{\text{176}}\) Ibid, p.16, 17,18.
Uruguay Round it was decided that within 4 years a review of WTO DSU would be conducted. The review was initiated in 1997 but there is no outcome as yet. Despite rigorous consultations and some success in reaching consensus in other areas WTO members are still unable to conclude anything as regard to WTO DSU.\(^{178}\) Although it is not subject to single undertaking and thus can easily be amended and passed.\(^{179}\) Most recently Bali Ministerial Conference (2013) set an example that suggests that multilateral law making is still possible. The Annex 1 A of the WTO Agreement was amended for the incorporation of Trade Facilitation Agreement to become part of WTO legal system in 2017.\(^{180}\) Article X-8 of the WTO agreement provides that amendment in in current WTO DSU can only be made through consensus.

### 3.12 Conclusion

It is observed that WTO DSU is more capacitated than its predecessor GATT DSS as it intend as in present WTO DSU the structure, purpose and functions of dispute settlement bodies are designed in such manner that they facilitate and assist developing/LDC members. The developing/LDC members could get correct and timely advice through Advisory Centre on WTO Law (ACWL) and technical legal assistance i.e; trainings through the WTO Secretariat. The embedded special and differential treatment provisions comes into play once the dispute is initiated and developing/LDC members have formally requested for such assistance. Despite of an in built protective and supportive system for the developing/LDC members. The least developed member participation in particular is negligible. In the light of investigation carried out I have analyzed and arrived to the conclusion that the negligible or little participation by developing/LDC members is attributed to the fact that WTO institutional support comes into play once the dispute is initiated, in other words, there is no institutional support available at member state domestic level or at an upstream stage.

I find it safe to suggest that during the dispute settlement process there is no negative discrimination between the members, rather concept of positive discrimination prevails to assist developing/LDC members i.e; asymmetrical support. Therefore WTO DSU without a doubt is in dire need to be reformed. A reform is needed in WTO DSU so as to allow WTO to provide upstream assistance to developing/LDC members. It is important that ACWL and WTO

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\(^{179}\) Chad P Bown, ‘Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement’ (The Brookings Institution Press 2010) 37.  
Secretariat are allowed to assist developing/LDC member effectively at their domestic level. By doing so the ACWL or WTO Secretariat can provide legal assistance and technical training so as to enable domestic stake holders in preparing a case i.e complaint and defence. It was observed that when developing/LDC members are respondents in a WTO dispute then due to strict time limits they have very limited time and intellectual resources to prepare for the reply etc. therefore upstream assistance would enormously help improve situation for the developing/LDC members. The SDT provisions are specifically embedded to assist developing/LDC members. It is apparent from the text of WTO DSU that WTO intends to support developing/LDC members. Since SDT concept is a cross cutting policy matter therefore not only it has it influence on the structure and functions of the WTO but on all agreements and ancillary matters of WTO.

There are 11 SDT provisions in WTO DSU, including Article 3.12 which states that if a complaint is based on the covered agreement and the developing member has complained against the developed member then developing member can adopt quicker procedure i.e; without following Article 4,5,6 and 12, although there are some exceptions to this provision. Article 4.10 states that during the course of Consultation developing member interests must be afforded with careful consideration. Article 8.10 provides that when a dispute involves developed member, subject to request by the developing member the panel formed must have at least one panelist from the developing member country. Article 12.10 states that during the course of consultations if it is found that inconsistent measure has been applied by the developing member then an extended time period for consultations should be afforded and if the matter remained unresolved then Chairman DSB may intervene to extend time limit, so that matter can be settled amicably. Article 12.11 states that where developing member is a party to a dispute, and SDT is invoked, then Panel or Appellate Body shall inform how SDT was invoked and how developing member was effectively facilitated. Article 21.2 states that as far as surveillance of implementation of recommendations and rulings is concerned the interests of developing member should be given due consideration. Article 21.7 states that in context of surveillance of implementation of recommendations and rulings if the matter is raised by developing member the DSB should take steps suitable to developing member in the circumstances. Article 21.8 further states as regard to surveillance of implementation of recommendations and rulings, where the complaint is brought by the developing member The DSB while deciding what steps need to be taken should take into account the trade impact of the measure questioned and also the effect of such measure on the economy of the developing member. Article 27.2 states that WTO Secretariat is bound to assist developing member, subject to developing member request, by providing legal experts to assist
in dispute before WTO. Lastly, provisions Article 24(1) and Article 24(2) are the only two provisions that refer to LDC members. According to Article 24(1) and Article 24(2) the WTO DSU bound all members of WTO to be considerate during all stages of dispute settlement process when a dispute involves LDC member. Moreover Article 24.2 emphasize reconciliation, compromise and amicable settlement when nullification or impairment has resulted due to the adoption of the inconsistent measure adopted by the LDC member. The said SDTs stand testament to the fact that WTO has intended to assist developing and LDC members in the best way possible.

Moreover, like any other system WTO DSU also face challenges. It is pertinent to mention that there are many challenges that are faced by all of WTO membership alike. The challenges could be classified as short term and long term challenges. The short term challenges include binding dispute settlement process for the third party members in the dispute, the challenge of provision of adequate trade remedy, the problem of sequencing, absence of enforcement mechanism of the Panel decision, the removal of retaliatory measure once inconsistent trade measure is removed, the challenge of ensuring transparency, as the Panel and Appellate body hearings are conducted in private and pleadings of members also remain confidential during the dispute settlement process etc. The long term challenges include prolong dispute settlement process, especially when more members join the dispute, e.g when 10 or more members join the dispute etc. Some of the proposals as regards to the WTO dispute settlement process have been forwarded by WTO members are noteworthy obviously these will be subject to rigorous debate these proposals include proposal to have permanent body of Panelists, the application of two stage approach to the amicus curiae briefs, an enhancement of third party role in DSU, enhanced role of WTO secretariat in DSU, more elaborate and detailed notification of settlement between the members, increase in the number of members in AB and the proposal to have non-renewable term of 6 years for members of AB etc.

Since, WTO DSU attracted positive response therefore its work load has increased manifolds, at one hand it shows the trust and reliability of the system on the other hand it indicates that due to heavy work load there is a need of more qualified staff. Moreover, it is a challenge that countries that can move forward unilaterally or bilaterally or under regional free trade agreements may not utilize WTO DSU and instead they may rely on other dispute settlement bodies or procedures. Such independent bilateral agreements often put developing/LDC members at an disadvantage as they enjoy weak bargaining position whereas WTO DSU has automatically embedded
protective and supportive system in the form of SDT provisions protecting interests of developing/LDC members.

Having informed of pros and cons of the current WTO DSU the most important aspect of current WTO DSU remains that it is open to reform. This open ended approach is very significant as it keep hopes alive. The repeated commitment to improve the system provides an opportunity to the WTO membership to keep identifying the obstacles and subsequently formulate solutions to such obstacles, for example, whether it is a Ministerial Conferences or any of the Rounds the desire to improve the system always remained there. In Uruguay Round it was decided that within 4 years a review of WTO DSU shall be conducted. Despite rigorous consultations and some success in reaching consensus in few areas, the WTO members are still unable to conclude anything as regard to WTO DSU. Doha Ministerial Declaration had on its plan “negotiations on improvements and clarifications” in the DSU “on the work done thus far.” Having said that there is every reason to be optimistic as WTO DSU is outside single undertaking or package deal therefore reforms or amendments can take place very easily. The advantages of WTO DSU are obvious, it without a doubt a jewel in the crown of WTO, simply indispensable. The only way forward is to reform it according to needs. Many of its deficiencies are acknowledged, therefore, it is legitimate to expect that WTO DSU would be reformed so as to best serve WTO membership. A reformed WTO DSU would create an adjudication system that would provide an equal and fair access to justice to all of its membership in international trade.
Chapter 4

DEVELOPED MEMBERS AND ACCESS TO JUSTICE IN WTO
DISPUTE SETTLEMENT SYSTEM

4.1 Introduction

In the last chapter I have concluded that WTO DSU has an in-built system to facilitate developing/LDC members in dispute settlement process. That supportive system comes into play to assist developing/LDC members, in variety of forms, i.e; from the composition of the members of the adjudicating bodies, their functions and to the application of special and differential provisions of the WTO DSU etc. In short, wherever possible, WTO as an institution facilitate developing/LDC member/s when the member formally requests for the application of special and differential treatment. To my utter disappointment the statistics I mentioned in the last chapter gave a disappointing picture about the participation of developing members in general and about LDC members in particular. For instance, LDC’s accounts for approximately 22% of the total WTO membership, but they made paltry about 0.17% of total requests for Consultations, and 0% of total Panel Requests, Panel Reports and AB Reports.  

So far only one LDC made request for Consultations, it can be said, it is no participation whatsoever of LDCs in the WTO DSU. LDC’s share in world trade accounts to approximately 0.5% which is more than their proportional share vis a vis there participation in dispute settlement process, there participation is negligible. Proportionally as per their share in world trade, it should have been minimum of three requests for Consultations and two for the Panel Requests.  

Alternatively proportional to the number of LDC members their share would be at least 129 Requests for Consultations, 87 for Panel Requests, 58 Panel Decisions, and 50 AB Reports. So as per stats their participation is negligible.

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184 TN/DS/W/90, 16 July 2007, ‘Diagnosis of the Problems Affecting the Dispute Settlement Mechanism – Some Ideas by Mexico’
186 According to the model for predicting number of dispute initiations developed by Francois, Horn & Kaunitz the LDCs ought to have initiated 2 disputes, when acting individually, and 4.3, if acting collectively, as part of a union.
In this chapter I will answer, does well established domestic legal infrastructure of developed members helped them participate more frequently in WTO DSU? and if yes, does developing/LDC members have similar kind of legal infrastructure, that can assist public/private parties of developed members to convince their respective governments to pursue WTO compliant/defence at WTO DSU? If the answer is No, then how a domestic legal infrastructure can be created so that developing/LDC members have similar domestic infrastructure to developed members? I have further investigated what is required by developing/LDC members to enable their domestic legal structure to be at par with the developed members?

In EU there are many laws that facilitate local industry/corporate entities so as to convince government of the member state to pursue with the WTO complaint/defence. In this chapter I focused EU’s WTO specific trade defence instruments. In this chapter following EU I covered the domestic legal system of USA, last but not the least I have discussed the role of independent firms in convincing governments to pursue with the WTO complaint before the WTO DSU. The independent firms, undoubtedly have enormous effect on any WTO member state government to pursue with the case before WTO; both as complainant or defendant. The independent firms role is of great significance as they have lot of finances available to pursue with the trade investigations and can effectively convince governments to take action, in the light of evidence these independent firms gather. Finally, I compared developing/LDC members domestic system with the developed members domestic system and inform about the challenges developing/LDC are confronting in contesting a trade disputes before WTO DSS. Wherever appropriate I provided statistics to prove my point. While concluding in the light of information available I informed how EU and USA domestic systems became well equipped to enable corporate entities to pursue respective governments to access justice before WTO DSU and informed about the shortcomings and challenges faced by developing/LDC members and how their participation in WTO DSU can be increased?

The WTO as its structure and operation stands today is far from fair and just technocratic practice. It is so because the developed members are better placed to use resources to compete in WTO DSS as compared to developing/LDC members who are reluctant to access justice under WTO DSU or participate as a third party in WTO dispute settlement process on the
grounds that it is costly and can produce uncertain results.\textsuperscript{187}Prima facie, it look simple but it requires political will and allocation of resources towards right direction. The first step seems to be having proper legislation that provides some sort of road map as to how an inconsistent measure could be identified? How to interact with the breaching party to settle dispute, prior to get formally involved in dispute? How to have a mutually acceptable investigation and outcome which both members agree to? It is not as easy as it seems but definitely an outcome of investigation could enormously assist developing/LDC members in making a decision to continue with a WTO complaint. The requisites seems to be the availability of finances and intellectual capacity and need of carrying out correct investigations at domestic level. This can only be achieved through formulating focused legislation, setting up of specialized institutions, conducting credible trade related investigations and taking all stakeholders on board, to assess the volume of damage caused because of the inconsistent trade measure. To achieve this objective public, private partnership is required, whereby local industry gets support from developing/LDC member government.

\subsection*{4.2 Developing /LDC Members & WTO DSS}

The WTO DSU is now more about determining legal rights of the members. The WTO DSU is semi-autonomous as it is founded on international legal jurisprudence.\textsuperscript{188} Since 1995 to 2015, over 573 WTO trade dispute submitted for settlement.\textsuperscript{189} As per Global Trade Alert since November 2008, 5,775 measures have been legislated by G-20 countries alone ‘that discriminated against some foreign commercial interests’\textsuperscript{190} and number of requests have decreased. From period 1995 to 2004 (first decade), 324 requests for Consultation were made, 109 Panel and 64 Appellate Body Reports were issued. From 2004 till 2014 (second decade) ‘only’ 164 Consultation Requests were made and ‘only’ 89 Panel and 51 Appellate Body Reports were issued.\textsuperscript{191} First decade saw USA acted as defendant in 40 per cent of Appellate Body cases. In second decade the USA acted as defendant in 51 per cent of Appellate Body Cases.\textsuperscript{192} The EU

\textsuperscript{189} Information published by the WTO on its official website and by the service WorldTradeLaw.net, updated May 2017.  
\textsuperscript{192} Statistics compiled from the World Trade Organization (WTO) web site <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed on 3 November 2016.
participation is also in similar ratio. Therefore the system is successful as it facilitated access to justice under new WTO DSU. Now it needs to be seen why EU and USA access WTO to seek justice more frequently when compared with the other developing/LDC members and what characteristics they have that developing/LDC members lack? This requires discussion on the domestic system of EU and USA. This discussion culminates informing about the need to adopt better procedural laws at the domestic level of developing/LDC members. In following sections I shall inform about the steps taken by EU and USA at their domestic level.

4.3 EU and WTO

As opposed to most of developing/LDC members, EU is highly organized member of the WTO. In this section I shall inform how EU institutions, EU law and stakeholders (member states) utilize well developed system prior to participating in WTO DSU. To seek justice in international trade especially under WTO DSU the developing/LDC members ought to have institutions, laws and supportive system similar to EU. It is pertinent to mention that EU as we see today was founded upon the concept of European Coal and Steel Community (ECSC), wherein there were only six European countries in 1951 and with the passage of time the membership grew and today there are 28 EU member states in Treaty of the Functioning of the European Union (TFEU), commonly referred to as Lisbon Treaty. Thus first up, the EU is representative of 28 countries of Europe and hence it has diverse economic strengths as different countries within EU have different type of booming economic sectors e.g; if Germany has established auto industry; Holland has a booming dairy industry etc. The EU trade strength is based on mainly two things, the diversification of trade (trade sectors) and high trade volumes due to geographical unification. Therefore it is correct to suggest that EU make best use of the concept of economies of scale.

With high trade volumes, unification the most important thing is the organized structure of EU institutions. The EU Commission with the prior permission of the Council represents EU in different WTO bodies e.g Council for the trade in goods and Committee for Trade and Environment etc.). The Commission during the negotiations process remains in contact with EU member states through Trade Policy Committee. The Trade Policy Committee is a working group which is competent to discuss trade policy matters. Commission keeps European Parliament updated on WTO through International Trade Committee (INTA). It is the Commission that starts

WTO Complaint with the EU Council which is competent to suggest retaliatory measures. Whenever an agreement is discussed the EU Commission seeks formal authorization of EU Council & European Parliament before concluding an agreement on the behalf of the EU. In making policy decisions the European Commission also take concerned stake holders into confidence e.g; civil society etc. On other hand developing/LDC member unfortunately does not have the diverse economy, neither they are united on the basis of trade sectors nor on geographical basis to utilize the concept of economies of scale and last but not the least there exists no or a very weak domestic organizational structure which can assist developing/LDC member access justice before WTO. The institutionally organized EU structure is quick to identify and rectify any trade detrimental action. It is a matter of observation that the more organized EU in representing itself to the trading partners, the EU appeared more effective in achieving its goals.

EU and member states are entitled to take trade protective measures (9th Ministerial Conference Bali). The WTO Safeguard Committee keeps an eye on member states and EU to ensure that developing/LDC members are given special consideration while applying safeguard actions since these safeguard measures can only be applied on the imports from the developing/LDC member if its particular product supply is more than 3% of the total imports of that particular product or if more than one developing/LDC members have collectively have over 9% of total import share of that particular product. The member states are duty bound to inform the Safeguard Committee about the investigation and decision made in this regard. Pursuant to the said authorization to take trade defence measures the EU has its own set of regulations and there are numerous of them. There are several kind of trade defence instruments. These instruments are relevant to actions against imports into EU. These instruments provide criteria for identifying inconsistent trade measures and the investigation procedure, the time line and the

forum before which final decision is to be taken. In this thesis I shall focus on trade defence instrument especially relevant to WTO.

4.3.1 EU OR Member State Who is Competent to Act?

As regards to the concept of ‘exclusive competence’, internal cohesiveness is a top priority (Art 3 & 207 of TFEU). Both EU and member state enjoys ‘shared competence’ and can represent common interests (Art 4 TFEU). Where the EU has no legislative role there is very little or no cohesiveness/competence e.g; foreign policy (Art 6 of TFEU defines policy areas). Under the Lisbon Treaty, foreign direct investment became part of the EU Common Commercial Policy (CCP), thereby authorizing European Commission to discuss on behalf of the EU matters like liberalization and protection of investment.

Court of Justice of European Union (CJEU, formerly ECJ) was asked to give its opinion regarding competences of the member states and EU to finalize WTO agreements.\(^{198}\) This made CJEU to look at two aspects firstly, regarding EU competence to sign Multilateral Agreement on Trade in Goods. Secondly, external competence to formulate TRIPS and GATS.\(^{199}\)Pertaining to Trade in Goods all agreements fall within the competence of CCP\(^{200}\). However as regards to GATS and TRIPS both member states and EU are competent to conclude agreements jointly.\(^{201}\) CCP falls in sole competence of EU\(^{202}\) and is codified in Title II of Part V\(^{203}\) of the TFEU.\(^{204}\) The supportive principles to CCP are stated in other parts of TFEU e.g Article 218. EU is a custom union\(^{205}\) and its aim is to ‘contribute, in the common interest of the harmonious development of world trade. This can be seen by the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers’\(^{206}\). Therefore CCP stands for democracy, equality, rule of law, cohesion and realization of the principles of international law.\(^{207}\) In contrast developing/LDC members lack democracy, rule of law, cohesion

\(^{199}\)Ibid.
\(^{201}\)Ibid. 34.
\(^{203}\)Titled External Action by the Union.
\(^{204}\)Articles 205-207 TFEU.
\(^{205}\)Articles 28 and 32 TFEU.
\(^{206}\)Article 206 TFEU.
and realization of principles of international law. This is most evident in case of African states (mostly LDC’s) or states where there is no democracy and rule of law.

Under public international law the independent accession of the WTO agreements made both EU and member states competent, independently. This make three scenarios possible, these are, when EU seek justice under WTO DSU. Firstly, the EU can access justice under WTO DSU by independently pursuing the matter, secondly, the member state can individually access justice under WTO DSU and finally, both EU and member state can jointly access justice under WTO DSU. It is pertinent to mention that EU has accessed justice under WTO DSU independently far more times than compared with EU & member state jointly or member state individually. In short all three options have been utilized. It is important to ascertain when a conduct of member state becomes attributable to EU? As regards to this sensitive question there is no authoritative answer in WTO jurisprudence. Regardless of the outcome of Lisbon Treaty where EU appears to be sole responsible to deal with the matters of WTO law, there continue to be unabated trend of joint complaints against EU and member states. There are instances where EU and member states responsibility was contended before WTO dispute settlement proceedings. The WTO Panels have concluded that regardless of the outcome of Libson Treaty whereby member states have shifted powers to EU to deal with WTO related matters on exclusive basis, the responsibility rests with the member states individually, as this approach correspond and compliments public international law principles. This approach is supplemented by the fact that where an inconsistent measure has been reported within EU it is ultimately the member state which has to remedy that inconsistent measure. This approach seems to comply with the principle of international responsibilities of the state. As ultimately it is the member state that has to amend or modify such inconsistent measure. It is submitted that EU is the only entity having actual power to provide juridical restitution, as it can remedy any inconsistent measure through exercise of its powers. The EU has the power to overrule any of the member state legislation which is contrary to its legislation, which is directly applicable. By conceding to EU the exclusive competence in dealing with WTO related matters, EU member states have acceded to the fact that the decision of EU will be binding. This is very much similar to what we observe in highly harmonized customs and tariffs matter. In such matters member states are duty bound to follow directly applicable EU legislation. Similarly, EU has an authority to amend and withdraw legislation which is inconsistent with WTO principles and agreements. Hence there are three ways whereby

208 Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001
a trade interests of EU or EU member state are protected, firstly by EU, secondly by member state and thirdly jointly. This aspect entails that the system is well equipped intellectually and financially to come up with the decision in the light of evidence to participate in WTO dispute. The developing/LDC members with weak organizational structure and scarcity of financial and intellectual capacity are not capable to contest, let alone to identify and investigate the consequences of adverse effects of inconsistent trade measure.

4.3.2 Private Rights in EU & International Law

The EU has developed a system whereby private parties are empowered to convince member state, EU or both member state and EU to contest inconsistent trade measure before WTO. In the Nottebohm case, where Liechtenstein was barred according to customary international law to represent its nationals as ‘genuine connection’ was considered missing. It was thought that the state cannot protect the rights of private companies as there is no genuine connection between private company and the state. As far as WTO is concerned it is well established principle that only member states are entitled to participate in disputes before WTO. In Van Gend Loos the CJEU stated that ‘To ascertain whether the provisions of international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.’ As regards to direct effect, CJEU stated that:

‘The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the [Union], implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. […] The conclusion to be drawn from this is that the [Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also

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210 Kate Parlett, ‘The Individual in the International Legal System: Continuity and Change in International Law’ (First Published, Cambridge University Press 2011) 3.

211 David Harris, ‘The Protection of Companies in International Law in the Light of the Nottebohm Case’ (1969) 18 The International and Comparative Law Quarterly 275, 288.


their nationals. Independently of the legislation of Member States, [Union] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’ Ibid.

4.3.3 Doctrine of Direct Effect and WTO

In the *International Fruit Company* case CJEU for the first time applied the doctrine of direct effect to GATT and subsequently observation was set out in the *Van Gend en Loos* case. The CJEU decided whether the GATT is binding on EU and CJEU decided that it is applicable. To decide whether GATT can have direct effect, the Court indicated, similar to *Van Gend en Loos* that, ‘for this purpose, the spirit, the general scheme and the terms of the General Agreement must be considered’. Foregoing in view the contested legislation, the CJEU without mentioning the language of the Article XI GATT stated that Article XI does not confer any rights on individuals which they can pursue before the courts. Till today the CJEU remained consistent in its stance. It was confirmed in *Portugal Vs. Council* The Court stated ‘by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in [Union] or Member State courts.’ One of the main reason for not giving direct effect to the WTO law could be that the other trading partners have also not conferred direct effect to WTO rules. Since WTO rules does not have direct effect in EU, it is only Trade Barrier Regulation (TBR) that acts like a bridge and allow Union corporate entities to rely on international rules. Thereby access to justice in under WTO is conferred on private corporate entities through TBR. The TBR first came into existence in 1995 and since the numerous TBRs have been introduced. The TBR is an instrument that has been updated regularly, EU laws are the fastest developing laws. Alternatively, it can be successfully

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216 International Fruit Company Case (n.244) para 7.
217 Ibid, para 18.
218 Ibid, para 20.
219 International Fruit Company (n 244) para 27.
argued that EU is performing its function wonderfully and where deficiencies come to notice, such deficiencies are removed immediately.

4.3.4 Trade Barrier Regulation acting as a bridge between WTO & EU

Historically, international trade has been considered as a field for international law to regulate and it has always been difficult for the private parties in making their voices heard at this forum.224

In *International Fruit Company* the CJEU has barred itself from interpreting the GATT. A contrasting approach was adopted in *Fediol Case*, where it was stated ‘[…] [T]he particular feature of GATT is the broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in cases of exceptional difficulty, and the settling of differences between the contracting parties.’225 In this case the “ECC Seed Crushers and Oil Processors’ Federation’ applied before CJEU for the cancellation of Commission decision. Since Commission has declined to examine commercial practices of Argentina regarding export of soya under New Commercial Policy Instrument (NCPI), predecessor of the TBR.226 The CJEU while passing its judgment depended on *International Fruit Company* case and stated that GATT has no direct effect.227 The Court went on to state that if GATT does not have direct effect it does not prohibit court from applying rules contained in GATT. Thus it can be inferred that if TBR refers to any particular opinion of WTO agreements228 Then *Fediol* decision could be relied to challenge the Commission’s decision. *Fediol* case has opened a new avenue for the EU corporate entities to claim on the basis of WTO Law, by utilizing TBR. Especially in a situation when these corporate entities are challenging Commission decision. It is imperative at this stage to draw distinction between the doctrine of direct effect regarding WTO rules from the doctrine of interpretation of WTO rules vis-a-vis TBR. Through *Fediol* the CJEU demonstrated that WTO rules are applicable within EU, without fettering much about the doctrine of direct effect.

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226 Ibid. Fediol case above para 1.
227 Ibid. para 19.
The CJEU has prohibited WTO law to take direct effect in European Union. Nevertheless, whenever a corporate entity complains under TBR by relying on WTO rules, the CJEU has always interpreted WTO terms. Hence in short EU prohibit WTO rules to have direct effect in Union but EU has always remained competent to interpret WTO rules through utilizing TBR.

4.3.5 Trade Barrier Regulation (TBR)

TBR entails an investigation procedure it is for the benefits of e.g; importers, exporters and customers, etc. Following investigation if inconsistent measure is not corrected then the matter may go to WTO dispute settlement procedure.\(^{229}\) The first Trade Barrier Regulation (TBR) relevant to WTO was first introduced in 1996, Council Regulation (EC) 3286/94,\(^{230}\) so far 25 TBR have been introduced till 2015.\(^{231}\) The last TBR Regulation (EU) 2015/1843\(^{232}\) came into force on 5\(^{th}\) November 2015, it has repealed the earlier Council Regulations. The Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 lays down Union procedures in the field of the Common Commercial Policy (CCP) to ensure that in order to ensure the exercise of the Union’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification),\(^{233}\) hereafter referred to as TBR. To initiate a TBR complaint an EU entity is required to provide credible evidence, proving that an unlawful trade measure has been taken by other party\(^{234}\).

4.3.6 Procedure under TBR

Trade Barrier Regulation (EU) 2015/1843\(^{235}\) dated 5\(^{th}\) November 2015, is currently applicable. The TBR can be invoked by EU entity if there is sufficient evidence that a trade obstacle is causing harm to the commercial interests of the EU entity. The TBR defines trade obstacles as “any trade practice adopted or maintained by a third country in respect of which international


\(^{233}\) Ibid.

\(^{234}\) Article 6(2), TBR.

trade rules establish a right of action…...”\textsuperscript{236} The TBR consists of four stages: first, permissibility, second; domestic investigation, third; international dispute settlement procedure, fourth; review of retaliation. I have annexed ‘Appendix B’ to explain procedure. The procedure under the TBR is as follows:

Complaint regarding inconsistent trade measure is made before the Commission. TBR provides three ways through which inconsistent trade measure can be challenged. First, when the complaint is instituted by the Union industry/any person.\textsuperscript{237} Second, when Union enterprise in its private capacity institutes a complaint.\textsuperscript{238} The complaints so instituted must be accompanied by sufficient evidence.\textsuperscript{239} Copy of the complaint is sent by Commission to all member states.\textsuperscript{240} Third, when the member state make complaint to the EU Commission.\textsuperscript{241} The request of member state must also be accompanied by sufficient evidence.\textsuperscript{242}

In the light of complaint/request an investigation is carried into alleged inconsistent trade measure,\textsuperscript{243} if it is transpired that that the measure is harmful then action is initiated pursuant to common commercial policy (CCP).\textsuperscript{244} On the contrary if it is found that the complaint lack sufficient evidence then complaint is terminated or suspended.\textsuperscript{245} The Commission and the concerned member state/s are bound to keep all exchanged information confidential.\textsuperscript{246} It has been observed that TBR have not been utilized often. Till to date only about 27 TBR investigations have been carried out. It means that hundreds of disputes contested by EU under WTO DSU went without going through TBR procedures. Rather EU entities have used far less formal way of communicating its concerns to the Commission i.e; by simply writing an application to the EU indicating its concern. EU being an independent member of the WTO initiated the investigation into the alleged adverse measure. Along with informal way of highlighting adverse measures other mechanism always remained available to the EU entities to inform Commission about the inconsistent measure. In this respect beside TBR, Article 207 is the most important one.

\begin{itemize}
\item \textsuperscript{236} Article 2(1) (a), TBR.
\item \textsuperscript{237} Article 3(1), TBR.
\item \textsuperscript{238} Article 4(1), TBR.
\item \textsuperscript{239} Article 4(2), TBR.
\item \textsuperscript{240} Article 5, TBR.
\item \textsuperscript{241} Article 6 (1), TBR.
\item \textsuperscript{242} Article 6(2), TBR.
\item \textsuperscript{243} Article 9, TBR.
\item \textsuperscript{244} Article 13, TBR.
\item \textsuperscript{245} Article 12, TBR.
\item \textsuperscript{246} Article 10, TBR.
\end{itemize}
4.3.7 Few Examples of TBR effect

EU consider concept of Trade Barrier Regulation as a very useful instrument to protect its trade interests vis a vis WTO rights. Since 1995 TBR assisted EU exporters to promote their business outside EU markets. For example, in 2003, on institution of Complaint by European Association of Pharmaceutical Industries and Associations – EFPIA and investigation by EU Commission. EU compelled Turkish authorities to amend their system so as to nullify the effects of regulations interfering with imported goods. The EU stance was that the regulations are discriminatory and lacked transparency and hence affecting sale of imported pharmaceutical products. As a result of EU stance Turkish authorities modified their system and no further penalization of imported products took place.247 Similarly, a Colombian tax law discriminates against imported motor vehicles, a complaint was brought by Volkswagen (AG) against enforcement of value-added tax (VAT). The imposition of tax was challenged as such measure was discriminatory toward some foreign cars manufactures and was protecting local cars manufacturers, unfairly. After going through TBR complaint procedures, the EU Commission pursued the matter with the Colombian authorities who then decided to abolish tax measures which were discriminatory. As a result EU car exporters were ensured fair and just treatment in Colombia.248 The EU Commission on complaint by Conseil Interprofessionnel du Vin de Bordeaux, settled an issue with Canada which led to protection of geographical indications (GI’s) of wines “Médoc” and “Bordeaux”, these terms being protected as GIs.249

4.8 Other Mechanisms In EU Law To Curb Inconsistent Trade Measures

However, it is pertinent to mention that The TBR complaints procedure is not applicable to bilateral agreements. TBR is strictly WTO specific.250 The TBR limits the Locus standi, inter alia to EU corporate entities. As regards to bilateral trade disputes mostly it is Article 207 TFEU which considered most appropriate.

Since TBR is WTO specific hence in this thesis I limit discussion to TBR only. The TBR has its own dis-advantages and weaknesses. Since TBR is a resource and time consuming uncertain

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249 Ibid.
process. The EU corporate entities prefer using bilateral channels prior to utilizing TBR, in this way they blow the whistle and EU on its own get indication to act. The biggest disadvantage with TBR is that at maximum TBR can only achieve abolition of inconsistent trade measure. It cannot obtain monetary compensation. Therefore regardless of cumbersome expensive procedure it entails for proving inconsistent trade measure the outcome is not so appealing for the EU businesses. Moreover, TBR requires credible evidence prior to initiation of complaint before WTO. This is time consuming and puts aggrieved business entity in danger of getting bankrupt even before the outcome of the dispute. The trade associations in EU are also reluctant to utilize TBR, because TBR lacks confidentiality, requires credible evidence, which is very challenging as it is intellectually and financially burdensome.

There other mechanisms apart from Article 207 TFEU to challenge inconsistent trade measures applied by third parties, include Assistance from Other Units of DG Trade and Country Desks and Market Access Units (MAU). All of the mentioned mechanism can be utilized simultaneously. Article 207, is preferred by EU trade associations as through this mechanism EU member state can apprise Commission of inconsistent measure, without indulging in cumbersome, expensive and time consuming evidence collecting procedure, as under Article 207, less stringent prima facie proof of inconsistent measure is required etc. Moreover, EU/member state prior to utilizing TBR can use diplomatic channels to inform third party government about the inconsistent measure and achieve rectification forthwith diplomatically.

The Market Access Unit (MAU). It is responsible to tackle measures that are responsible for hindering market access to industrial products, technical barriers and providing trade facilitation especially to developing/LDC countries imports etc. The services of Market Access Unit can be utilized by private person, companies and organizations. The Unit first verify the information/evidence received and thereafter tries to settle the issues between the members.

The office of DG Trade also looks into inconsistent trade measure. It follows EU Commission policy. The DG trade negotiate with non EU countries that are doing trade with EU. DG Trade

253 n. 280 (Crow & Moring) p. 25.
also work to improve market access for the importers and exporters. It ensures that fair trade practices are followed and along with that it analyze the social and environmental impact of trade.

4.9 United States of America and WTO

United States of America has participated most in the WTO disputes settlement process. Roughly its participation stands at about over 40% of total disputes till to date. In USA, United States Trade Representative (USTR) is a government agency that is mainly accountable for forming and recommending United States trade policy to the President. The USTR conducts negotiation pertaining to trade at both bilateral and multilateral levels. Two important entities, e.g; Trade Policy Review Group (TPRG) and Trade Policy Staff Committee (TPSC), assist USTR in forming US government trade policy.

The USTR is a part of the Executive Office of the President. It has offices in Geneva, Brussels, Belgium and Switzerland looking after USA trade interests. The head of the Special Trade Representative office is a cabinet level position but technically it is not a part of the cabinet as USTR is not a head of any of US government department, it is part of executive office of the President. The USTR is nominated by the President which is then appointed through voting in the Senate. The USTR informs President about the trade related matters. It works along with the Department of Commerce, Agriculture and other relevant departments that analyze the impact of questioned measure.

4.9.1 Section 301 of Trade Act 1974

The USA has achieved trade liberalization by relying on two actions. These are multilateral and unilateral actions to access justice under WTO DSU. Multilateral actions are carried out within the auspices of GATT/WTO and unilateral actions are carried out through Section 301 Trade Act 1974. Since unilateral actions involved actions at national level and influence decision making at domestic level. As this chapter is focused on access to justice in international trade with a focus on WTO therefore I have investigated how a decision to complain or defend at WTO DSU is made within USA, therefore, Section 301 Trade Act 1974

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and its working will be discussed in this chapter. Generally, the WTO DSU has proved beneficial to US. At multilateral level during GATT years USA has successfully deployed strategies based on its political influence and superior economic position to open foreign markets. However, through unilateral actions under section 301, USA has intimidated to impose sanctions e.g; threatening to block access to the USA markets. These threats were one of the points of negotiations in Uruguay Round and as a result USA conceded to the expansion and upgradation of GATT dispute settlement system and hence this constitute one of the reason WTO DSU came into existence in 1994. At unilateral level, Section 301 to 310 of the Trade Act of 1974 (hereinafter referred to as the “Trade Act”) is of great importance, President is authorized to take appropriate action, inclusive of retaliation to secure the removal of any adverse trade policy, act, or practice adopted by other country. Such practice may constitute a measure which is unreasonable, unjustified or discriminatory and has an effect equivalent to obstructing US trade in any manner whatsoever. Section 301 authorizes USTR on its own accord or on the petition filed by any firm or industrial association to invoke investigations. During the course of investigations the USTR discuss the adverse measure with the other country and to reach a settlement before going to the WTO. The settlement could be a monetary compensation or withdrawal of an adverse measure. Alternatively, at all material times USTR under the law is capable of applying enforcement actions, which may constitute retaliatory measure forthwith. Now a days, USA under the Trump administration is exercising protectionism against goods of several countries, especially against EU and Chinese products. This protectionism is exercised through invoking Article 301 of the Trade Act 1974. Chinese government has submitted complaint before WTO against USA unilateral imposition of tariffs, an inconsistent trade measure.

In 1990’s, Section 301-310 of the Trade Act 1974 (hereinafter referred to as “Trade Act”) was challenged by many WTO members. The WTO members were of the view that no retaliatory measure could be enforced against other WTO members without prior approval of the WTO. The WTO Panel Report dated 19 October 2013, endorsed the stance of WTO members that any action against WTO members without approval of WTO is contrary to the WTO Understanding on Rules and Procedures Governing the Settlement of Rights, and constitutes

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violation of WTO agreement. The USTR websites provides list of international investigations carried out between 1974-1998 under GATT and WTO. In the case, US - Sections 301-310 of the Trade Act 1974 (DS – 152),260 there were 17 state members who have joined the proceedings as third party. In this case EC alleged that Sections 305 and 306 of 1974 Trade Act 1974, imposes rigorous time limits in which unilateral decisions and trade endorsements by US must be made, and therefore Sections 305 and 306 are against and incompatible with Article XVI:4 of the WTO Agreement; Articles 3, 21, 22 and 23 of the WTO DSU and Articles I, II, III, VIII and XI of GATT 1994. Sections 305 & 306 do not allow US to comply with WTO DSU rules, when WTO DSU ruling regarding conformity of measures made in the light of recommendations of DSB. The effect of Sections 305 and 306 of USA Trade Act is that they cancel the benefits that are available directly or indirectly to EC under GATT 1994. These Sections 305 and 306, therefore amounts to defying the objectives conferred under GATT 1994 and WTO. The Panel Report of this case was circulated on 22 December 1999.

4.9.2 Procedure under Section 301

Investigation are carried out under Section 301, commonly referred to as Section 301 investigations. These investigations are carried out when a petition is filed by the third party or on the initiative of USTR. For example the discretionary punitive provisions of the ‘Super 301’ can be invoked where any foreign country trade policies are found to be unreasonable or discriminatory and adversely affects US trade interests.261 Once a petition is filed the USTR has 45 days to start an investigation. Usually the petitioner before filing a complaint consult USTR office. The USTR provides the petitioner with all information relevant to his draft petition. The correspondence or communication is informal and does not bind USTR. The USTR informs the petitioner about any deficiencies in his petition. The petitioner is also afforded an opportunity to get advice from inter agency, the ‘Section 301 Committee’. The Section 301 Committee comprises of representatives from the department of state, commerce, the treasury, agriculture, justice, labour, council of economic advisers and the office of management and budget. Moreover, under Section 305, USTR office is bound to provide petitioner with information as regards to other country’s trade policy. The USTR is expected to answer all the relevant questions as regard to other country. Therefore the USTR office

261 Chantal Thomas, Joel P Trachtman (eds), ‘Developing Countries in the WTO Legal System’ (1st edn, OUP 2009) 10.
contact all relevant departments or institutions in order to provide latest and accurate
information to the petitioner. The USTR office informs petitioner of all options available as
well as about the scope of maintainability of his petition, in the light of complete information.
US has introduced strict time lines so has to proceed with the process of investigation swiftly.\textsuperscript{262}

If the Petitioner considers viable to proceed with the petition then, a formal petition is filed.
The petition must contain information about the petitioner, his trade and relationship with US
industry. He must substantiate that he is an interested party, his significant economic interest
is at stake and his rights under the bilateral or multilateral trade agreements (under WTO
agreements etc) could be breached. The petition must explain the breach of any of obligations
contained in the trade agreements, and as a result loss or injury suffered by him thereof. The
petition must inform about the identity of other country and the act, practice or policy which is
unreasonable, unjustifiable or discriminatory and which constitutes a restriction or obstacle to
the US trade. The petition must refer to any legislation which the petitioner wants to contest or
rely upon. The petition must provide arguments that justifies invoking of Section 301. The
petition must inform about any other relief which he is seeking along with Section 301
petition.\textsuperscript{263}

Following all information available the USTR contacts with other country. If other country
does not reply within reasonable time, the USTR may proceed with the matter on the basis of
best information available. As soon as formal petition is filed with the USTR, the USTR
circulates the copies of the petition to the inter agency, the Section 301 Committee and ask
each agency to provide written comments within two weeks. The Chairman of Section 301
Committee informs USTR of its decision to carry out investigation within 45 days after filing
of petition. The USTR decision with reason of initiation of investigation is published in Federal
Register. If a decision is made not to initiate the investigation, this negative decision is also
published in the Federal Register. The USTR decision to initiate or not to initiate investigation
is discretionary. Even if there is a blatant violation of trade obligations and loss has been
incurred such decision is made in the light of US trade policy and along with opinion as to what
is in the USA best interests. There is no option of judicial review of such decision. As far as

\textsuperscript{262} Zachary Harper, ‘The Old Sheriff and the Vigilante: World Trade Organization Dispute Settlement and Section
301 Investigations In to Intellectual Property Disputes’ (January 25, 2018) 1,11

\textsuperscript{263} Mitsuo Matsushita, Thomas J Schoenbaum, Petros C Mavroidis, and Micheal Hahn, ‘The World Trade
discretion is concerned, President Trump is stating that his decision is in America’s best interests and for security reasons has recently imposed \textit{ad valorem} duty on Chinese products, the total amount of duty so far imposed is about $250 billion, China says it will reciprocate the act.\textsuperscript{264} Thus at present USA is on its course to ultimately collide with WTO\textsuperscript{265}, since discretionary powers are used without giving too much consideration. Under Section 301, unlike anti-dumping and countervailing duty laws, Section 301 provides lot of room for the President’s discretion. During the course of investigation the USTR with all of its resources try to solve the issue, in this regard it remains constantly in touch, through inter agencies, with the other country and with the local stakeholders. The decision is made at the lowest level within inter agencies. Each representative of the inter agency in Section 301 Committee is given an opportunity to submits his/her comments, unless unanimous agreement is reached between the contesting parties, the petition is not forwarded to President for his decision unless a clear cut decision is arrived. In case of non-agreement at Section 301 Committee the matter is taken up at Assistant Secretary Level, Trade Policy Review Group and if the decision is still not made the matter is further referred to cabinet level, Economic Policy Council. The inter-agency process is the most important element of the Section 301 proceedings. The USTR is also required to seek advice from Advisory Committee on Trade Negotiations to see the extent of impact Section 301 could have on US. Meanwhile the avenue of consultation with both the public and private stakeholders stay open.

Following exhaustion of all mandatory procedures of investigation and after trying all options to settle the matter amicably with the other country. The USTR concludes its decision on the petition. In the light of conclusions and recommendations made by the USTR the Report is sent to the President to make a final decision. The President has 21 days to make a decision, however, this time can be extended, if President seeks any further information. The President’s action may constitute retaliation in the form of imposing import restrictions on other losing party’s goods and services or by increasing tariffs or validating any other action within his powers. The President’s decision must be published in the Federal Register. Once President’s decision is made public, the requirements under Section 301 are deemed to have met. However,


any parallel or additional actions regarding the petition always remain available to the petitioner.

4.10 Role of Independent firms in developed members: EU & USA

The domestic decision-makers (domestic corporate entity) rely upon the industry to inform them about foreign trade barriers and about WTO agreement violation, typically involving public–private partnerships, to know what is required by the industry, it is usually the starting point. Therefore it is correct to suggest that independent firms also have a role in influencing states to access justice under WTO DSU where they can successfully prove that any inconsistent trade measure is in operation. Private members have a right to become part of WTO dispute settlement process in number of ways, these rights include, the right to submit amicus curiae briefs, right to observe, and at domestic level right to bring law suits directly, etc. Term "private members" is not limited to types of corporations or firm who suffered as a result of obstructing trade measure. Legal firms have little rights in WTO cases since only governments can institute cases before WTO. During the course of dispute the legal firms have two rights. Firstly, the right to have information available during the WTO dispute settlement process and hence the right to submit amicus curiae briefs and secondly, in some of WTO members like USA and EU (member states), the firms have right to file petition domestically, especially pin pointing there concern as to particular adverse impact of inconsistent trade measure. Under Section 301, Trade Act 1974 in US and under Section 207 TEFU or under TBR, etc; in EU. This is done to convince the respective governments to take up case before WTO. Most of the claims brought by developed members, i.e; EU & USA before WTO DSU are due to domestic lobbying.

For example, in the EC-Bananas case, in this case several countries were complainants all have crucial trade interests. This case depicts excellent example of transnational lobbying. The

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268 Ibid.
270 Ibid.
US was the most active complainant against EU discriminatory banana import regime. In this case private and public networks of each complainant country assisted and cooperated due to resource interdependency. Public networks coordinated with their governments effectively, since only WTO member states are eligible to file complaint before WTO. The industry coordinated with the public networks so as to make available all the relevant information, e.g; financial and organizational data, questioned measure and its adverse effects were noted etc. to bring claim before WTO.\(^{272}\) In the case of Japan-Film,\(^{273}\) where US based, Kodak firm, through political lobbying was successful in convincing US to file WTO complaint in order to get market access in protectionist Japanese film market. To counter, Kodak Fuji firm effectively lobbied in Japan. Both governments, USA and Japan responded positively to the domestic private actors and it can be said that it was a case between Kodak and Fuji rather than USA and Japan.

There are situations when private members face trade barriers at domestic level and governments are unresponsive. In such situations the only suitable way available to firms is transnational lobbying. In this regard among several cases two cases are worth mentioning, these are US-Gambling\(^{274}\) and EU-Footwear (China).\(^{275}\) In US-Gambling case, the firms switched their focus from national authorities to the government of Antigua and Barbuda and similarly in EU-Footwear (China) case the firms turn to Chinese government. Similarly, in Australia–Tobacco Plain Packaging (Ukraine),\(^{276}\) firms successfully lobbied in convincing respective governments. There are firms that are known to conduct domestic and transnational lobbying. These firms who conduct lobbying have special characteristics e.g; intellectually and financially resourceful, politically active, having global connectivity and having capacity to raise issue at national level by utilizing social media. With those characteristics these firms are resourceful enough to provide relevant information and are capable to politically mobilize the stakeholders\(^{277}\) in Honduras, Cuba, the Dominican Republic, Indonesia and Ukraine, to institute

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\(^{272}\) Japan – Measures Affecting Consumer Photographic Film and Paper, DS44 (hereafter Japan–Film).


WTO complaint against Australia’s adverse trade measure regarding plain packaging for tobacco products. In these cases transnational lobbying by private members proved fruitful and inconsistent trade measures were successfully challenged. In *EU-Renewable Energy (China)*, a case where China filed successful complaint regarding illegal imposition of import duties on solar panels, a measure adversely affecting the renewable energy sector.

4.11 Reasons for Negligible Participation of Developing/LDC members inr WTO DSU

It is clear that to understand WTO DSU, WTO member requires experienced staff and intellectually equipped experts to understand the implications of each step involved in WTO dispute settlement process. It is a fact that all WTO members are not equally equipped to establish their respective legal rights. The disparity becomes far more visible when dispute involves developed member/s at one side and developing/LDC member/s at other. The legal rights can only establish if the contesting members have knowledge of WTO Panel and Appellate body procedures e.g; what guidelines they adhere to while making decisions, though earlier decisions of these bodies are unbinding but the approach of these institutions can be assessed through their prior decisions. This can be best understood by legal experts that are experienced in representing before WTO dispute settlement process. The developing/LDC member lack organized structure like EU where Commission equipped skilled human resources handle WTO disputes. In the case of US there is US trade representative to handle disputes. Both EU and USA have specialized legislation in the form of TBR and Section 301-310 Trade Act 1974 to challenge inconsistent measure and to seek justice at WTO. Developing/LDC lack such institutions and laws. Such deficiency makes it extremely difficult for them to access justice from WTO adjudicating bodies. Due to the enormous capacity of EU & USA the statistics till to date shows that US and EU have utilized WTO DSS far more than any other WTO member, their participation ratio in WTO DSS has been far more than their share in global trade. Moreover, on several occasions both US and EU have participated as third party, where US and EU were neither claimant nor defendant. Such participation has proved to be of great benefit for EU & US, for two reasons. Firstly, it helps to increase their capacity to know the procedure i.e; how the rules are interpreted and these developed members are always adapting and improving themselves and hence they perform better in dispute settlement system. The developed members are in better position to understand the pros and cons of any provision

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of WTO DSU. This experience of extensive participation enable them to advocate, project any amendment that is suitable to them, while inexperienced developing/LDC members have very little or no knowledge of implication it has for them. Since the modification in the WTO laws could only take place through consensus, hence it is a political process, which requires effective lobbying beforehand. The WTO negotiating round, which is held once in a decade is a forum where such consensus could take place. The developed members have all the pre requisite knowledge and are better positioned to get best out of such negotiating opportunities.

WTO although follow common law approach of following precedents set by its prior decisions, akin to approach followed in developed members, judicial systems. Although WTO does not adhere to strict common law approach of binding precedent. Nevertheless, due to better understanding of WTO jurisprudence and rigid WTO political process USA and EU are always capable and competent to threat developing/LDC members as they are dominant in trade relation. Since in most cases a developing/LDC member livelihood is dependent on developed countries. Therefore developing/LDC members succumb to their threats. Moreover, because of uncertainty of the outcome of the disputes, exorbitant legal costs to contest and the fear of withdrawal of trade concessions by the developed contestants, developing and LDC members stay reluctant to contest. Developing/LDC members have little or no command on the subject.  

As far as initiation of complaint is concerned till 1st January 2013, USA and EU have collectively initiated over 40% of the total disputes whereas Asian members have only initiated about 21% of disputes, but when it comes to LDC member the answer is, no complaint has been instituted by LDC member.

In the light of aforesaid the developed members had so far benefited when they bargained under the shadow of WTO law. This helped them get desired outcome. The developed member’s ability to enforce costs on opposition and high capacity to incur costs has significantly affected the outcome of WTO litigation in their favour. Therefore it is safe to suggest that under present WTO system if developing/LDC members do not devise proactive strategy to harness intellectual and financial capacity then they will continue to remain unable to access justice at WTO especially when compared with the developed members.

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280 Ibid. p 671.
Most developing/LDC members have inadequate, name sake legislation in place, for example, Pakistan, a developing member also have trade defence legislations pertaining to Anti-dumping, Subsidies and Countervailing Measure and Safeguards etc. However the burden to prove inconsistent measures rests with the local industry, in other words there is no government support. Since Pakistan is a developing member, it is almost next to impossible that local industry which is also sub divided into various sectors would hire investigators on their own, in most cases the foreign investigators are required since there is very little or no expertise at domestic level to investigate and collect data. It is very costly and in most cases it just not feasible, bearing in mind the trade interests and trade volume involved. Therefore obliging developing/LDC members to pursue claim or defence under WTO DSU, especially with weak or non-existential domestic legal infrastructure is too unrealistic.

In a typical third world country like Pakistan, domestic legislation with regard to trade remedies consists of the Anti-Dumping Duties Act 2015\textsuperscript{282}, the Countervailing Duties Act 2015\textsuperscript{283} and the Safeguard Measures Ordinance 2002\textsuperscript{284} (as amended from time to time) etc. More or less all developing members as well as LDC members have similar set of laws. Such legislations gives an impression as country has all the relevant legislation in place, but nobody has the capacity, the resources both intellectual and financial to investigate the inconsistent measure. The existing legislations are burdensome and cause of distress for the target consumers. Foregoing in view the developed members, EU and USA domestic system, private members, companies, big organizations have an organized way to convince their respective governments to access justice more effectively before WTO.

\section*{4.12 Conclusion}

In the light of aforementioned I conclude that developed members EU & USA have in place an effective internal system for identifying inconsistent trade measure and have the resources

\textsuperscript{282} Anti Dumping Duties Act, 2015 [1538 (2015/Ex. Gaz.) p. 749-789
\textsuperscript{284} Safeguard Measures Ordinance, 2002 Ordinance, (XXXII of 2002)<
intellectual, financial and institutional to carry out credible investigations. The presence of well-organized system guarantees that developed member corporate entities can access justice before WTO DSU effectively. Extensive EU legislation and various kind of legal options stand testament to the fact that EU as an institution has necessary legislation in place, and that legislation process is updated and improved on regular basis, precisely for that reason there were 24 Trade Barrier Regulations before the existing one was introduced. The TBR is WTO specific and hence it is used prior to initiating dispute before WTO. The EU system has been made simple mainly due to the dissemination of information and use of information technology. The corporate entities through their legal department can easily get informed about the guidelines and steps required to be taken under the legislation. Other than that the investigation mechanism hold credibility. In other words, institutional integrity and competence plays a significant role. As a result a corporate entity in EU is encouraged to contest an inconsistent trade measure before WTO. The EU, the member state and EU/member state jointly can claim/defend before WTO dispute settlement process. This simply highlights that there are 28 countries and EU itself to put in its resources to challenge inconsistent measure.

The TBR has its own disadvantages and weaknesses. Since TBR is a resource and time consuming uncertain process. The EU Commission after conclusion of TBR investigations prefer using bilateral channels to rectify inconsistent trade measure. The biggest disadvantage with TBR is that at maximum TBR can only achieve abolition of inconsistent trade measure. It cannot obtain monetary compensation. Therefore regardless of cumbersome expensive procedure it entails for proving inconsistent trade measure the outcome is not so appealing for the EU businesses. TBR requires credible evidence prior to initiation of complaint before WTO. This is time consuming and puts aggrieved business entity in danger of getting bankrupt prior to the outcome of the investigation. Moreover TBR lacks confidentiality as all information is shared between stakeholders, although TBR has special provision for upholding confidentiality but it is of no practical impact. The TBR requires credible evidence prior to investigating inconsistent trade measure, which is very challenging as it is intellectually and financially burdensome. These are the reasons because of which only to date approximately 27 TBR investigations have been carried out. Although hundreds of cases have been contested by EU. It is so because on most occasion the EU applicants have just written informal application to Commission just mentioning harmful effects of inconsistent trade measure. The EU Commission carried out rest of investigations on its own and proceed with the matter.
Other mechanisms are more popular and are utilized frequently in EU, Article 207 and assistance from the other units of DG Trade i.e; Country Desks and Market Assess Units are all methods available that enables member state to challenge inconsistent trade measures by third parties. These mechanisms are mostly used bilaterally. As to invoke these mechanism only prima facie proof of inconsistent measure is required. By utilizing these methods EU before initiating a WTO complain diplomatically convince third party about the inconsistent measure and requires its rectification.

As far as USA is concerned Section 301 of the Trade Act 1974 is the most important and effective instrument that helps access justice before WTO. Section 301 entitles US President to take appropriate steps including decision to exercise retaliation to remove inconsistent (discriminatory and unjustified etc.) measure to protect USA commerce. Under Section 301 the United States Trade Representative (USTR) is obligated to obtain compensation or abolition of questioned measure. However, in the presence of independent trade agreement, the dispute settlement procedure laid down in that particular agreement, ought to be followed. The most important and somewhat bothersome aspect of Section 301 is that it allows the President to take steps independent of WTO. It means regardless of the pendency of dispute before WTO the President of USA could take enforcement measures. In 1990 many WTO members challenged that concept but the efforts remained futile as WTO concluded that this could only be challenged after approval of WTO dispute settlement body.

The role of independent firms is of great significance in convincing governments to claim/defend before WTO DSU. Independent firms work is quite remarkable in EU and USA as they act as an effective tool to perform transnational lobbying to assist developed members to access justice under WTO DSU. These independent firms initiate their work by doing domestic lobbying and may indirectly target their own respective governments. The main players are local export relying firms acting as a complainant and import relying firms as defendant. These independent firms also carry out foreign venue shopping i.e; by convincing foreign governments to institute complaints within other WTO member states. As I discussed earlier, on many occasions their efforts proved successful. To operate effectively these firms require a system where they can raise their voice, hold seminars and inform trade community. Therefore they possess certain peculiar characteristics like they are internationally very active, very competent to mobilize target industry, they are sector specific and are much focused. Equipped with these characters and doing that work on full time basis make them expert in convincing. The work of independent firms also involve funding research, investigation and
finding evidence. The data these independent firm collect is credible due to the fact it is gathered with the support of local industry. The work carried out by these firms just put governments into jump start position to initiate WTO case, as most of the investigation done by these independent firms is credible and admissible.

Having investigated EU and US domestic system of bringing/defending WTO complaints. I found sharp contrast between developed members (EU & US) and developing/LDC members domestic legal culture vis a vis WTO complaint/defence mechanism. I came to a conclusion that the lack of participation of developing/LDC members is attributed to the fact that developing members generally and LDC members particularly lack: legislation, institutional structure, intellectual & financial capacity, trade volume, WTO assistance at upstream stage e.g; intellectual and financial as major reasons for negligible participation of developing and LDC members at WTO.
CHAPTER 5

DEVELOPING/LDC MEMBERS PROPOSALS TO REFORM WTO DSU TO ENSURE EQUAL ACCESS TO JUSTICE

5.1 Introduction

In chapter 4, the disparity in the domestic legal system of developed and developing/LDC members have been investigated. I have observed that the absence of relevant legislation, lack of institutional (WTO) support, scarcity of financial and intellectual resources at domestic level are some of the many reasons that hold back developing/LDC members (at upstream level) from accessing justice under WTO DSU. On the other hand, a well-organized and disciplined system at national level, which is sufficiently equipped with legal expertise, relevant legislation and having financial and intellectual resources to collect data/evidence enable developed members, particularly EU and USA, to participate and to access justice with relative ease in disputes before WTO. Definitely lot of work needs to be done by developing/LDC members at their national level to create system similar to the developed members. Correcting domestic structure is necessary to make developing/LDC members to have improved or at par participation with developed members before WTO. However, steps alone at domestic level might not prove suffice. There is a need to take some major steps at WTO institutional level as well so as to enable developing/LDC member to be absolutely at par with developed members.

The WTO institution needs to adopt two prong strategy firstly, how as an institution WTO can help developing/LDC members at their national level? Secondly, what reforms are necessary at an institutional level to ensure developing/LDC member get equal access to the justice under WTO DSU. In this chapter I tried to find a way forward to see if there is any ground work done in that direction.

It may seems difficult but it is definitely not impossible, especially bearing in mind that WTO in its present form have embedded several provisions in all of its covered agreements to support developing/LDC members and is open to reform. Many forums are available whereby discussions are being carried out as to how to improve present WTO DSU, so the intention to reform WTO remains unquestionable. Therefore in this chapter I have first investigated the institutional role WTO can play in providing upstream assistance within the national paradigm of developing/LDC member and how corporate entities of developing/LDC members can get WTO assistance? Secondly, I have focused on dispute settlement process and some proposals
to reform WTO dispute settlement process. Special emphasis remained on proposals regarding SDTs and dispute settlement process. Thirdly, proposals regarding administrative sanctions will also be a part of discussion. Then concept of nullification and impairment will also be discussed with regard to developing/LDC members. Finally, I concluded by informing what seems realistically possible to reform WTO at an institutional level so that it can assist developing/LDC members in assessing justice vis a vis WTO.

5.2 Proposal Regarding WTO Upstream Assistance

One cannot question the intention of the WTO to support developing/LDC members. The WTO wants to help developing/LDC members and introduction of SDTs along with the establishment of Advisory Centre on WTO Law (ACWL) & WTO Secretariat activities regarding technical assistance, stand testament to this fact. The further reforming of WTO DSU is possible, since as per Paragraph 47 of the Doha Ministerial Declaration the negotiation regarding amendments in DSU will not be subject to single undertaking. It is understandable that not all proposals for reform are acceptable but some proposals that may significantly facilitate developing/LDC members seem a reality. The suggestions for the amendments in the DSU could be given effect autonomously. There are approximately 45 proposals for amendments in WTO DSU pertaining to developing and LDC members and it is not possible to discuss each one of them. However, the demand made through proposals are very much identical. These include proposals as to how to deal with inactive disputes, initiating new stages, i.e; referring/remanding cases back to the Panel when any fact comes to light at an Appeal stage which have been overlooked earlier at Panel stage.

Until 2007 there was no developing/LDC member which has participated in a dispute under WTO DSU as a respondent, the only participation by the developing/LDC member was in the capacity of third party. Security and predictability, featured in Article 3 of the DSU are two


286 In EC – Bananas, WT/DS27, Cameroon, Cote d’Ivoire, Ghana and Senegal participated as third members with a view to safeguarding their preferences under the EC’s banana regime. In EC – Export Subsidies on Sugar, WT/DS265/266/283, Cote d’Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland and Tanzania participated as third members to defend their preferences under the Sugar protocol. In US – Subsidies on Upland Cotton, WT/DS267, Benin and Chad participated as third members given the importance of cotton to their economies. In EC – Asbestos, WT/DS135, Zimbabwe participated as a third party because of its broader export interest in asbestos. In US – Shrimp, WT/DS58, Nigeria and Senegal participated as third members because of their export interest in shrimps <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>Chronological> List of Disputes cases (just put in case number and details will be provided) accessed on 15 July 2018.
major features of this present WTO DSU.\textsuperscript{287} Perhaps Article 3 WTO DSU is the most convincing and promising clause for the developing/LDC members that informs that developing/LDC members are able to access justice in multilateral trading system on same footings as developed members. Unfortunately, even after over 20 years the developing/LDC members do not feel secure and are still uncertain to predict about the outcome of any dispute to which they are party (i.e; complainant/defendant).

To understand the challenges faced by developing/LDC members I particularly discussed the members of Sub-Saharan African region, which are the least developed members and if some of their proposals are accepted it will assist both developing/LDC members alike in WTO DSU. This is because these members are in a dire need of reform and support from other WTO members. Initially these countries have actively participated and submitted proposals\textsuperscript{288} and pointed out the problems they came across when it comes to the participation in Dispute Settlement Mechanism (DSM). The Doha Round is still in negotiating process and no outcome is expected soon. To keep Doha Round alive the negotiations were shifted to issues like agriculture and services. As a result the developing/LDC members lost interest, as operational proposals require more in depth analyses, resultantly due to negligible involvement of LDCs in Doha Round negotiations the input of LDCs remained minimal. It is still unclear as to how these developing/LDC members would deal with the negotiations regarding dispute settlement system.

The proposals made by the African members pertaining to reform in WTO DSU recognized three main hurdles, firstly access impediments, secondly poor and unfitting kind of retaliatory system and finally absence of scope of improvement in the WTO DSU. The absence of scope of improvement in WTO DSU refers to WTO DSU organs acting beyond its scope, void of development friendly decisions and inability of the DSU organs to pass decisions which could be development friendly and the act of WTO DSU organs beyond their scope especially vis-a-vis existing SDT provisions and their applicability calls for change. Having said so it became certain that WTO has become indispensable for the economy of any country.\textsuperscript{289}


\textsuperscript{288} Sub Saharan African countries have tabled five proposals dealing with more than 20 issues.

The foremost concern remains the access impediments in access to justice under WTO DSU. The impediments of access to justice at WTO can be addressed only by reforming DSU so as to bind WTO to assist corporate entities in developing/LDC members prior to initiation of the dispute. Prior to informing how it is possible I need to illustrate problems faced by developing/LDC members briefly. There are numerous reasons because of which developing/LDC members are reluctant to utilize WTO DSU. Some of the most important are cited below:

Firstly, it is an established fact that if a member state has higher trade volume it is bound have higher presentation in the WTO DSU. This precisely is the case with EU and USA as they have diverse economy.\textsuperscript{290} So firstly, one reason that developing/LDC members are not accessing justice more frequently under WTO DSU is that these countries are economically smaller (have less trade volume) and less economically diversified. Secondly, uncertainty of the outcome of a trade dispute is a major reason because of which the developing/LDC members shun to participate in WTO DSU. Other than uncertainty, the developing/LDC members face challenges like lack of market access and lack of trade promotional interests as major concern.\textsuperscript{291} Since they have little capacity to incur economic losses when they are contesting dispute with developed members therefore contesting a dispute is never their top priority. It is not that they could lose market access or suffer economic loss if they lose a case before WTO DSM. The real threat to developing/LDC member is that even if they prevail in a trade dispute there always remain a danger of losing market access or suffer economic loss, especially if they have a preferential trade agreement with the responding state, and if they enjoy special arrangements.\textsuperscript{292} The extreme poorer developing/LDC members even if somehow manage to prevail they are unable to withdraw concessions against the responding developed state, a state which may be providing bilateral financial assistance/quota to the successful developing/LDC member. Moreover, developing/LDC member may not participate in WTO DSM because of the reason that by challenging any inconsistent trade measure they might be indirectly opposing policies which they themselves benefitted from or it might have adverse impact on the bilateral


relations between the contesting members. These developing/LDC members may have independent bilateral agreements which may also be jeopardized.

Moreover, developing/LDC members by and large consider WTO DSU as biased and discriminatory towards them. As developing/LDC members are of the view that WTO DSU has become too complex and technical. Moreover, after the formulation of WTO DSU, politics has little or no role to play in dispute settlement therefore now there is a need to be more focused on legal technicalities. WTO dispute management could be divided into two parts i.e; upstream management; that deals with issues prior to when the complaint has been initiated before the WTO DSU. At this upstream stage the member’s national or domestic infrastructure plays a very important role, as at this stage developing/LDC member decides whether or not to go ahead with complaint/defence. This crucial decision could only be correctly be made if developing/LDC members have resources and expertise to collect correct information, data, evidence with an ability investigate inconsistent trade measure correct adverse impact. Therefore to achieve that objective, internal institutions need to have capacity to effectively convince developing/LDC member government to make correct final decision, whether to contest a case or not. The enhanced capacity of the institutions would automatically improve predictability and security.

Therefore, it is submitted that WTO as an institution could not be oblivious of the concerns of developing/LDC members at their respective national level. WTO at an institutional level need to devise strategy to assist corporate entities within developing/LDC member domestic level to simplify too complex and too technical aspect of WTO claim/defense preparation, thus helping them through legal advice and gathering of evidence which hold credence. In this regard Advisory Centre on WTO Law (ACWL) role needs to be extended to upstream stage. This can be only be done if WTO DSU is reformed so that Advisory Centre may become competent to assist at domestic level. As far as certainty and predictability is concerned this problem can be settled in the light of Article 3 of the WTO DSU. Here again the Advisory Centre scope of legal advice need to be extended so that it can advise prior to the initiation of the dispute at national level, especially when developing/LDC member is a defendant and there is limited time window to reply. As far as problem of less trade diversification and trade volume

295 Ibid, Page.
is concerned, the developing/LDC member within the scope of WTO DSU frame work must be allowed to form grouping on the basis of geography or on the basis of trade sectors. In this way the threat of spoiling of bilateral trade relations can substantially be reduced. This sectoral or geographical grouping could also assist developing/LDC to handle issue of market access and promotional trade interests as everything would be done on the behalf of group of countries and thus developing/LDC member rights could be better protected.

I submit it is practicable and possible to reform WTO DSU so as to enable WTO and its bodies to assist at the upstream stage. What is required is to see the spirit of WTO DSU. The Advocacy in this concern need to argue the purpose of classification of members, Article 3 of WTO DSU, role of Advisory Centre, concessions afforded at dispute settlement stages through SDTs. I submit developing/LDC have a good case and there is every likelihood that WTO will reach out to assist developing/LDC at their domestic level. Last but not the least it will definitely help trade across the globe and will bring more prosperity to poverty stricken developing/LDC members. WTO can observe EU example how it manages to pool in the resources and interests of numerous states. EU represent 28 members therefore as an entity EU has substantial trade volume even when it comes to independent industrial sector. It did not happen overnight, but it just illustrates that if correct direction is followed a similar system on geographical or sectoral basis is not far from reality. There are numerous proposals introduced by developing and LDC members, I shall discuss some of the most practicable proposals.

5.2.1 Responsibilities of the Secretariat: Disclosure of Information to LDC members

The African group proposed to modify Article 27.1 of the WTO DSU (TN/DS/W/15) by adding following paragraph:

"The Secretariat shall maintain a geographically balanced roster of legal experts from which developing/LDC and least-developed country Members may select experts to assist them in dispute settlement proceedings. Notwithstanding the reference to impartiality in the provision of legal and other services by the Secretariat, the legal expert shall fully discharge the functions of counsel to the developing or least-developed country Member party to a dispute."

This proposal got support from many members when discussed in special session. However, it was not accepted for the reasons that when Advisory Centre on WTO is working, there is no need to introduce this amendment. Since Advisory Centre charge fee after considering the developing/LDC member economic condition. The African group was of the view that such
services be provided at no fee at all. Here it is important to argue that at present Advisory Centre assistance is limited to downstream stage i.e; once dispute has been initiated. Therefore there is dire need of assistance at upstream stage.

5.2.2 WTO Fund on Dispute Settlement

The African group proposed to have new Article 28 to be introduced in WTO DSU. Which would read as follow:

“1. There shall be a fund on dispute settlement to facilitate the effective utilization by developing/ and least-developed country Members of this Understanding in the settlement of disputes arising from the covered agreements.

2. The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget. However, to ensure its adequacy, the fund may additionally be funded from extra-budgetary sources, which may include voluntary contributions from Members.

3. The General Council shall annually review the adequacy and utilization of the fund with a view to improving its effectiveness and in this regard it may adopt appropriate measures and amendments to this Understanding.”

The Chairman Text partially mention this proposal. Therefore it got partial attention. It is submitted that if WTO assistance can be extended to domestic level then this proposal may argued that may become acceptable.

5.2.3 Proposals Regarding Pre Panel Stage

The LDC members, particularly the African countries stated that when there is a conflict as to the terms of the WTO agreements the matter shall be referred to the General Council for the determination under Article IX:2 of the WTO agreement. This suggestion failed to muster support from WTO membership for the reasons. Firstly, it would be time consuming and WTO Panel and Appellate Body may deviate from the settled rules of WTO DSM and secondly that Article IX: 2 entitles General Council to adopt authoritative interpretation by three-fourth majority.

LDC members identified two types of impediments which restrict developing/LDC members to access WTO DSU. Firstly there are upstream impediments, since in most developing/LDC members there is no state policy as to how to assist a complainant prior to the initiation of
complaint. The problem is further aggravated by the fact that WTO has not established any institution that can assist domestic stakeholders with the investigation and to assist domestic stakeholders to take a timely decision to proceed with the complaint. Since there are no institutions legally obligated to investigate at domestic level, developing/LDC members are at an disadvantage and as a consequence they have negligible participation in WTO disputes.\textsuperscript{296} It is unlikely that a developing/LDC member would bring case before the WTO DSU as there exists no credible system to assess trade loss. Moreover, the SDT provisions can only come into effect once the case is initiated before the WTO. Hence the upstream obstacles faced by the developing/LDC members are altogether over looked by WTO and SDT is a post complaint factor. The issue become further complex as developed members show no interest in assisting developing/LDC members, perhaps this is because of absence of adoption of any mechanism at upstream level, which might put them at disadvantage. Moreover, the developed members could argue that asking for assistance on pre initiation stage would be beyond the mandate of “improvements and clarifications” in dispute settlement mechanism of WTO. This inability of developing/LDC members greatly benefit developed members of the WTO.

The sub-saharan African countries group have proposed that DSM should “provide for assistance in the form of pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and expenses entailed, [and] compilation by the WTO Secretariat of all applicable laws including past decisions to be fully available to and usable by both the members and the Panels/Appellate Body in each individual case.”\textsuperscript{297} This proposal did not touch the issue of upstream case management, however, it is proposed that WTO may bear the expenses of lawyers. Here it would prove effective and practical if law firms and lawyers are allowed to assist developing/LDC members on pro bono basis.\textsuperscript{298}

5.3 Proposals Regarding Post Dispute Settlement Process

The LDC members have proposed numerous proposals regarding procedure that they desire to be followed, in this regard they made proposals as regard to different stages of the WTO DSU. I first informed about the proposals made regarding Pre Panel Phase, then proposals relevant to Panel and Appellate stage and lastly about the Implementation stage. I informed about some


of the most important and practically adoptable proposals that were discussed by LDC members. It is true that when these proposals were made many of them could not gather support. Some of the most important proposals which did not get ample support by WTO membership are discussed below. Nevertheless, they gave insight as to what reforms LDC members desire to have in WTO DSU.

5.3.1 Proposal regarding Consultation stage

Since African countries lack financial and legal resources they have argued that consultations provision may be amended so that dispute may be settled prior to entering into Panel stage. The opponent to this suggestion stated that this will provide opportunity to the respondent member to prolong the decision making process.

African countries have suggested to amend WTO DSU in a way that consultations requests made by developing/LDC members should be accepted, each time it is made, provided they are submitted under Article XXIII of GATT 1994. However, law states that WTO members can join consultation phase under Article XXII within 10 days after the circulation of request and they need to prove that they have “substantial interest” in the case. 299

It is pertinent to mention that the term “substantial interest” or “substantial trade interest” has not been defined in DSU. Member countries define it themselves prior to making consultation request. According to GATT 1994, a “substantial interest” constitutes market share of over 10%. Article 4.11 WTO DSU provides that if a consultation request is refused a fresh request can be made. So far developing/LDC members have not utilized this provision. The opponent to this proposal stated that WTO DSU is meant to adjudicate disputes between contesting members and hence affording third party rights will only prolong the process and may result in deviation from the main objective of dispute resolution. Countries like Canada, India, Norway, New Zealand, Brazil and Argentina suggested “all or nothing” approach. According to which the responding member may accept all requests for participation or none. 300

African members used the language of both Article 4.10 and Article 12.11 WTO DSU and made a proposal to the Committee on Trade and Development (CTD), that developed members, Panel and Appellate Body written decisions inform how special consideration to the substantial

300 Ibid.
interests of developing/LDC members have been given. The African Group considers that the language of Article 4.10 is very weak as it does not bind developed members to consider substantial interests of developing/LDC members. African countries expected that this proposal will bind developed members to have conclusive consultations rather than a routine meetings prior to the dispute resolution process. At present members who are not directly involved in a trade dispute may participate in Consultation process, Panel stage and/or at an Appellate stage. Most of WTO members support such participation, if proper balance is maintained between the contesting members and third members. To name few cases in which third party rights were granted are EC-Banana III, EC-Trade Preferences, EC-Export Subsidies on Sugar and EC-Hormones etc. There are many instances when third party rights have also been refused, for example, in Panel Report on US 1916 Act and in Australia Salmon Case. Several proposals were made to ensure third party rights to participate in accordance with Article 10.3 of WTO DSU. Many studies have been carried out so as to evaluate the advantage of third party rights to the developing/LDC members. However, the true scope of third party rights is still uncertain and limited. Nevertheless, there seems to be consensus among members that third party must have rights and therefore clarity is required. The African countries group have supported Costa Rica’s proposal allowing third party rights to be part of proceedings at any stage of the case. The African group submitted that Article 10.2 WTO DSU wording “substantial interests” should enable developing/LDC

308 David Evans, Celso De Tarso Pereira, 'DSU Review: A View From the Inside’ in Rufus Yerxa and Bruce Wilson (eds), ‘Key Issues in the WTO Dispute Settlement: the First Ten Years’ (Cambridge University 2005) 261.262.
members to have third party rights. SDT provisions 12.10, 8.10 and 27.2 in WTO DSU should be amended to incorporate term “third party”.  

Since African countries have only 5% or little more trade share in international trade therefore African members intend to amend Paragraph 2 of Article 10 of WTO DSU as follow:

"For purposes of developing and least-developed country members, the term "substantial interest" shall be interpreted to include, any amount of international trade; trade impact on major domestic macro-economic indicators such as employment, national income, and foreign exchange reserves; the gaining of expertise in the procedural, substantive, and systemic issues relating to this Understanding; and protecting long-term development interests that any measures inconsistent with covered agreements and any findings, recommendations and rulings could affect".

This definition was rejected on the grounds that this will enable all developing/LDC members to inevitably acquire substantial interest in any proceedings. Thereby resulting in prolong proceedings. Moreover, this proposal was defeated as it would not change anything. As currently members who wish to become third party in a trade dispute may become party when Panel is established at DSB. The third party rights are also conferred if a member communicates its intention within 10 days from the day Panel is appointed.

The African group has also proposed to amend Para 3 of the Article 10 of WTO DSU as follows:

"Third members shall receive all the documentation relating to the dispute from the members, other third members, and the Panel without prejudice to the provisions of paragraph 2 of Article 18. Third members, if they request, shall have a right to attend the proceedings and to be availed the opportunity to put written and oral questions to the members and other third members during the proceedings." This proposal was reflected in Chairman’s text and recently 7 members have made similar proposals. Therefore it can be argued that this proposal enjoy some support from WTO membership.

311 Mervyn Martin, ‘WTO dispute settlement understanding and development’ (Martinus Nijhoff Publishers 2013) 141.
Withdrawal of inconsistent measure before or during Consultation stage

The African members have proposed that Article 3.6 of the DSU may be amended by rearranging existing provision as Paragraph (a) and following paras may be added:

b) if the developed member have adopted measure that hurts trade interests of Developing/LDC members and if such measure is withdrawn during consultation process or within 90 days prior to the commencement of Consultations. Under Article 4 WTO DSU such withdrawal shall be notified to the DSB, individually or jointly within 60 days of the withdrawal. The notification must inform about the measure challenged, reasons for withdrawal, financial loss suffered by the developing/LDC member and an account of what happened at the consultation stage. Moreover, if the members have no agreement as to the amount of injury incurred then under Article 25 WTO DSU, the matter may be referred to an arbitrator.

c) If the injury incurred by developing/LDC member is due to withdrawn measure, then DSB on the request of developing/LDC member may award financial compensation. A compensation that DSB may deem appropriate. The value of compensation should be ascertained under Article 25 of the WTO DSU and may be implemented under Article 21 and 22 of the WTO DSU.

d) The request mentioned in para © (above mentioned) can be made at the DSB meeting, when withdrawn measure is considered or within 60 days. Delay may only be allowed when circumstances justify such delay.

The African members made this proposal so as to avoid adverse effect of inconsistent measure which may be put in force by the developed member and which is withdrawn prior to the consultations or during consultations. The developing/LDC members which do not have developed industries can suffer significant loss due to inconsistent measure. The consequences of having such measure for long time could be more disastrous for developing/LDC members, as challenging inconsistent measure is a time consuming and cumbersome process for the developing/LDC members. Therefore not only the withdrawal of

313 Ibid, Para II.
the inconsistent measure but monetary compensation is necessary to make loss good suffered by developing/LDC members. Mexico made similar sort of proposal.

This proposal was tabled before the special session. The proposal was refused because of the reason that special session only has a mandate to improve WTO DSU and to give interpretation and clarifications. It was feared that acceptance of this proposals may change fundamentals of WTO DSU. Moreover, this proposal only speaks about the developed member’s duty and it does not talk about the developed member rights in case if inconsistent measure is adopted by the developing/LDC member.

The concept of mandatory monetary compensation may be introduced especially when there is no viable system of retaliation is available especially when developing and LDC members or corporate entities belonging therefrom. If monetary compensation is allowed then the role of insurance companies (domestic or cross border, as most developing/LDC members have deficient insurance culture) may also be introduced. This concept itself has many financial aspects attached to it. It could turn into a phenomenon through which member states know they will not be burdened with cost, the corporate entities feel safe as in return of premium paid by them they can take bold decisions. The insurance companies would get business opportunities as they would be paid premium by the corporate entities to cover their risks. It can create millions of jobs at global scale in insurance sector alone. I see it as, a win win situation for all.

5.3.2 Proposals Regarding Panel & Appellate Body Stages

African Countries have proposed that Article 7 of the WTO DSU should be amended by including following paragraphs as paragraphs 4 and 5.

4. When developing/LDC or least-developed member is participating in a dispute settlement, the Panels should in consultation with relevant development institutions shall consider and state findings stating development implications raised in a dispute and shall look into any negative affect its findings/rulings or recommendations may have on the social and economic welfare of the developing/LDC member. The DSB shall fully take Panel findings, recommendations or ruling into account while making its decision.

5. After taking into account development aspect. The General Council shall review the DSU every five years. To ensure that development goals have been met.
This proposal also could not get support from the WTO membership and was not reflected in Chairman’s text. It was so that it was felt that this will divert the WTO DSU structure from its main objective of settling trade disputes. Moreover, it is not necessary that all Panelists are capable of carrying out social economic analyses and there is a danger that this proposal can only politicize rule based WTO dispute settlement mechanism.

The African Group also proposed that Article 17.4 of WTO DSU shall be amended as follow:

"The members to the dispute may Appeal a Panel Report. Third members in the Panel proceedings, if they request, shall have a right to attend the proceedings and have an opportunity to be heard and to make written submissions to the Appellate Body. Their submissions shall also be given to the members to the dispute and shall be reflected in the Appellate Body Report." This proposal was accepted by numerous members however it was stated that it will delay the dispute settlement process. The Chairman was of the view that such rights may be afforded at an Appeal stage. This had an advantage for the African members, as it will assist in their capacity building.

5.3.3 Proposal Regarding Special & Differential Treatment during Proceedings

The SDT provisions in the DSU are not applicable automatically, the developing/LDC members have to ask for them. There are two types of SDT provisions, for example DSU Art 8.10, which states that when there is a dispute between developing/LDC member and developed member there ought to be one Panelist from the developing/LDC member and under DSU Art. 12.11 making it obligatory on Panel to inform about the SDT invoked by the developing/LDC member in a trade dispute. The other type of SDT are exclusive for the developing/LDC members e.g; DSU Art 3.12 giving developing/LDC members an opportunity to use alternate dispute resolution methods. The developing/LDC members have used the first type of SDT very frequently but developing/LDC members have not utilized the second type of SDTs. This is because the developing/LDC members want to be at par with the developed members and developing/LDC members may thought that by utilizing procedural privileges may affect the legitimacy of the decision. The avoidance of second type of SDTs

have put developing/LDC members at disadvantage. On the other hand the utilization of first type of SDT provision has never helped developing/LDC members significantly.

The Paragraph 44 of Doha Ministerial Declaration provides mandate for the negotiations on the subject of SDTs.\(^{318}\) It states that SDTs are integral part of the WTO agreements and acknowledged that some members have proposed Framework Agreement on Special and Differential Treatment.\(^{319}\) The Declaration also states that SDT provisions\(^ {320}\) shall be reviewed so as to make them more effective, operational and precise. Marc L Busch suggests that EU and USA seem to be satisfied with the existing DSM and they are oppose to any radical changes.\(^ {321}\) The developed members are of the view that radical changes fall outside the scope of “improvements and clarifications” asked for under Paragraph 30 of the Doha Declaration.

When initial negotiations took place few developing/LDC members submitted proposals relevant to SDTs.\(^ {322}\) Kenya submitted one proposal (TN/DS/W/42),\(^ {323}\) one joint proposal was submitted and three proposals were submitted by three other countries (TN/DS/W/17\(^ {324}\), TN/DS/W/18 and TN/DS/W/19). In general the proposals submitted by developing/LDC members thus far emphasize generally on normative issues. I focused on the main African proposals i.e; TN/DS/W/15, TN/DS/W/17, TN/DS/W/42, TN/DS/W/18 and TN/DS/W/19 as I believe if these proposals are adopted then almost all of developing/LDC members will have increased participation and trust on the system.\(^ {325}\)

As far as downstream obstacles are concerned, ie; once the case is initiated, African countries identified through proposal (TN/DS/W/15, Para.8) that SDT provisions do not address the issue of “lack or shortage of human and financial resources, and little practical flexibility in selection of sectors for trade retaliation”. Some developing/LDC members proposed that non-binding

\(^ {325}\) WTO texts are cited here in the main text, using their WTO symbol. Their full references can be obtained by inserting the symbol at http://docsonline.wto.org/gen_search.asp?searchmode=simple> accessed 15 July 2018
SDTs should be made legally binding so as to have fully operational effectiveness. These members state proposed that by changing the words from “should” to “shall” will make SDT provisions obligatory. Few members proposed (TN/DS/W/42)\(^{326}\) that to setup a ‘Fund on Dispute Settlement’ which would serve developing/LDC members. The differentiation is and will continue to remain and there is likelihood that it will prove more equitable and effective.\(^{327}\)

One issue is evident and that is, that the SDT provisions do not explicitly state who can receive assistance, kind of assistance, from whom and how. This can be observed in Art. 4.10,\(^{328}\) which states “……during consultations Members should give special attention to the particular problems and interests of developing/LDC country Members”. The WTO DSU is silent on this. The provisions need to be expressive. As regards to SDT, Article 12.11\(^{329}\) emphasize that consideration must be given to development issues that has been raised by the developing/LDC member in a trade dispute.

African Group Proposal to Amend Article 13 WTO DSU:

African Group propose amendment into Article 13 of the DSU by adding following paragraph as paragraph No: 3.

3. "For the purposes of this Article, “the right to seek information and technical advice” shall not be construed as a requirement to receive unsolicited information or technical advice.” It is clear that African Group intended to give NGO’s and IGO’s right to submit amicus curiae briefs. This proposal faced opposition by developed members as they stated that there is already such concept available in DSU. Many members opposed this on the grounds that Panel and Appellate Body would transgressed their mandate.

Proposal as to separate opinions of Panelists and Appellate Body members:

The African Group was of the view that Panelists and members of the Appellate Body should give their opinion separately in writing if they disagree with the ruling. To meet that end the


African group wanted to change Article 14.3 and 17.11 of the WTO DSU with the following provision:

"[Each Panelist [Appellate Body member] shall deliver a fully reasoned, separate written opinion stating clearly the party which has prevailed in the dispute. Where two or more [Panelists] [members] are in agreement, they may decide to provide a joint opinion. The majority of opinion shall be the decision of the [Panel] [Appellate Body].]"

In special session this proposal was challenged on the grounds that there is already a provision in the DSU allowing Panelist or members to record their opinion in writing. Moreover, this proposal if accepted would have smooth, effective and amiable working of the Panel and Appellate Body. More importantly the judgment will lose anonymity if Panelists and members identities are disclosed. The African group admitted that it is possible under WTO DSU but they contended that such practice is obsolete and therefore in the interest of fair trial there is no harm in adopting this proposal.

Proposal regarding discovery of new fact in post Panel stage:

In the present system Appellate Body is only entitled to look into matters pertaining to law and legal interpretation. Appellate Body is barred to look into factual findings that may come to notice at an appellate stage, therefore important facts relevant to the members especially involving developing/LDC members may never get attention at the Panel stage. Therefore it is a question to be answered whether or not the Appellate Body be authorized to remand the case back to the Panel, if something worthy come to light?

Proposal regarding Composition of Panel:

The developing/LDC members also proposed to amend Art 8.10 regarding composition of the Panel. The African Group have proposed that any dispute involving developing/LDC member, must have one of Panelist that belongs from the developing/LDC member. This will append fairness to the system and it will also assist in capacity building of the developing/LDC member. In disputes involving developing/LDC member having a Panelist from developing/LDC member would provide satisfaction that SDT provisions would be adhered to whenever situation ask so. This proposal as it stands seems beneficial but it has been observed that most of the Panelists from developing/LDC members are appointed in their private capacities and they have no government links. Moreover, usually it is the Panelists of Egypt and South Africa who have been appointed as Panelist in developing/LDC member disputes.
Therefore this proposal might not assist as much as expected in building capacity of each and every developing/LDC member. It is pertinent to mention that the African group did not give clear opinion as to the proposal of EU (Formerly EC), whereby EC advocated for a permanent Panelists.

5.3.4 Proposals Regards to the Implementation Stage

It was proposed that the final stage of WTO DSU is of implementation, the answering member is provided with reasonable time to comply with the DSB ruling or recommendations. If answering member could not comply or compliance is disputable between the two contesting governments or the Respondent government concludes that the compliance is impossible then it may agree to offer trade compensation. The successful party may ask for the authorization to retaliate the DSB may impose limited trade sanction on respondent, if it fails to comply. The sanction so imposed should be on the trade sector of dispute. If it is not possible or not effective the sanction can be imposed on other trade sectors but pertaining to same WTO agreement.

5.4 Compliance & Compensation

In 90% of the cases WTO members have complied with the ruling that was pronounced against them.\(^330\) In this regard Article 22 of the WTO DSU provides remedy available. The most sought after remedy is financial compensation agreed between the members. Such compensation may take one of two forms, firstly,” trade compensation” in which if responding member does not want to comply may offer other party larger market access and relaxed duty regime in other sectors. Since compensation has to be non-discriminatory, the opening of market access will benefit prevailing party if it is only a sole exporter, otherwise it will further aggravate the competition with other exporters. Therefore this kind of remedy does not get favour from either sides. The other remedy is monetary compensation\(^331\) which have been mutually agreed between contesting members only on two occasions. The positive aspect of the monetary compensation is that it is not subject to the principle of the most favorite nation (MFN) and is suitable for both members. The illustrative example in this regard is the case of US-Upland Cotton,\(^332\) where there was a dispute between Brazil and USA, regarding subsidies afforded by

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\(^{331}\) N 113, pp 84, 204, 428.

USA in cotton sector. Because subsidies of Brazil suffered financial loss of $294.7 million annually. The USA now keeps its subsidies for cotton exported by Brazil and pay $147.3 million annually to Brazil.

Kenya, a developing member has proposed that monetary compensation shall be made compulsory whenever compensation is offered to developing/LDC member. African countries often become third party beneficiaries in cases instituted between other members. The African, Caribbean and Pacific Alliance (ACP) reacted to *US-Upland Cotton Case*. The other problem is that the monetary compensation does not necessarily support the affected sector. This results in lack in interest to pursue case by affected sector. For example, in US-Copyrights Section 110(5) case where compensation went to European performing rights instead of actual complainant, the Irish Performing Rights Agency. The first and the only case in which US paid monetary compensation to the EU. The monetary compensation whether voluntary or mandatory is unenforceable. There is need to strengthen enforcement mechanism.

5.4.1 Retaliation

Due to insignificant share in the International trade the developing/LDC members can not retaliate appropriately against developed and financially strong members. As there always remain the possibility that developing/LDC members may suffer more adverse effects of retaliation then getting benefit from exercising retaliation. Moreover, some developing/LDC members simply does not have the capacity to retaliate. Therefore if developing/LDC members can access WTO DSU without fear of adverse consequences, then there could be increased hope to access justice by the developing/LDC members. The concept of enforcement is synonymous to “retaliation.” It takes the form of counter measure resulting in suspension of concession and other obligations. The word retaliation has not been defined anywhere in WTO DSU. Nevertheless, Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles") by the International Law Commission (ILC) in August 2001, endorse

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333 TN/DS/W/42 Para VIII. WTO texts are cited here in the main text, using their WTO symbol. Their full references can be obtained by inserting the symbol at <http://docsonline.wto.org/gen_search.asp?searchmode=simple> accessed 15 July 2018.


335 N 113, p. 427.
The same concept as mentioned in Article 49(1)\textsuperscript{336} of ILC Articles on State Responsibility.\textsuperscript{337} The important thing to know how much retaliation is to be applied. In this context Article 22.4 DSU provides the guideline, it states “The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”

However, retaliation has always remained inconsistent. The arbitrators have stated in \textit{EC-Bananas III (US)} (Article 22.6 EC) case that objective of countermeasure is to compel compliance. “[T]his purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is equivalent to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for countermeasures of a punitive nature.”\textsuperscript{338} This position was reaffirmed in \textit{US-1916 Act (EC)} (Article 22.6), where EU requested to have antidumping law similar to US regulation. It was considered illegal. The arbitrator stated, “Leaving aside for the moment the issue of whether we can examine the EC measure, we would reiterate that similar or even identical measures can have dissimilar trade effects. Stated another way, similar or identical measures may not result in the required equivalence between the level of suspension and the level of nullification or impairment.”\textsuperscript{339}

At WTO equivalent counter measure must be adopted regardless it may yield to the expectation of effectiveness. If we compare \textit{Bananas III case} with \textit{US-Upland Cotton case}, we see in \textit{US-Upland Cotton case}, the suspension of obligation was required to be “appropriate.” In this instance punitive damages were allowed.

5.4.2 Cross Retaliation

As per Article 22.3 DSU retaliation takes off first by suspension of concessions or obligations of respondents rights in the same sector in which prevailing WTO member suffer damage and if it proves ineffective then retaliation could be under the same agreement and as a last resort retaliation could take place under other WTO agreement. For example Antigua or Ecuador may not be able to retaliate effectively to recover damages from EU or US by blocking their goods

\textsuperscript{336} “An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.”


\textsuperscript{338} WTO Arbitrators Decision, EC – Bananas III (US) (Article 22.6–EC), WT/DS27/ARB, 9 April 1999, para 6.3.

or services but they can do so by suspending their intellectual property rights. In 2013 Antigua successfully obtained approval from DSB for suspending US intellectual property rights. Antigua have negotiated with Pirate Bay to host file server, so that music, films and software can be downloaded freely. Cross retaliation may not be an ultimate solution, but it certainly hits where it hurts, it is matter of a great concern in USA and has proved to be an extremely useful remedy. It is such an important issue that it is on number 2 on the list of subjects open for DSU reforms. In this regard there is a proposal made in 2002, by developing/LDC members which enjoys good support of WTO membership. Developing/LDC members proposed to remove the “impractability and ineffectiveness” conditions. Since it is difficult to clearly identify bigger and smaller developed members and hence question arises whether such right is conferred only as regards to developed country respondents or developing/LDC country respondents.

5.4.3 Collective Retaliation

There are two more proposals to reform the retaliation procedure. One is of collective retaliation. It means other WTO members would be able to support the prevailing WTO member by retaliation on its behalf. However, there are many questions how it will get into practical effect. Firstly, why any other WTO member will get into the shoe of prevailing member and adversely affect concessions and obligations of responding member. Why “shoot yourself in the foot?” Secondly, if a WTO member is affected it would probably already in dispute before WTO. Thirdly, retaliation is a temporary measure which will stay in force until the inconsistent trade measure is removed, once a recalcitrant member complies, the right of

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retaliation will be lost forthwith. Fourthly, if that is possible then US and EU may start settling scores and hence it will not result in trade friendly environment. Lastly, if there are three potential retaliators how to divide the retaliatory amount among them and who act first, in short the collective retaliation constitutes collective action dilemma. The Early reaction to this proposal were not encouraging.\textsuperscript{347}

The other problem with collective retaliation is that even if the collective countermeasure is tabled it may not be successful, as was observed when Mexico tabled such proposal in 2002.\textsuperscript{348} The opponent argued that it would be ineffective as developed members will abuse it and importantly it is against the principles of WTO DSU.\textsuperscript{349}

5.5 Proposal Regarding Administrative Sanctions

There is a proposal that if after all options have been utilized and responding member fails to comply then ‘administrative sanctions” can be tried. It may be in the form of disqualification of representative of the non-complying member. It is similar to a situation as if someone fails to pay its debt. If the arrears are not paid for one year, the representative can be barred from participating in WTO Committee on Finance, Budget and Administration. If the member has not paid for three years, then the defaulting member may be denied technical assistance and training, except those which are essential for the performance of its obligations under Article XIV:2 of WTO Agreement. However, the least developed members (LDCs) would be exempted from administrative sanctions.\textsuperscript{350} At present administrative sanctions can only be imposed through consensus, therefore there is a need to change voting rules for applying this type of sanctions. Negative consensus principle may be utilized to impose such sanctions.

5.6 An Alternative: Revisiting “Nullification and Impairment”

Till to date there is a deadlock. It is possible that cross retaliation may be allowed. However, its cons cannot be overlooked. As far as administrative sanctions are concerned the requirement to get consensus to adapt them seems very difficult. The only proposal that is possible is the

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\textsuperscript{347} WTO Dispute Settlement Body, TN/DS/25, 21 April 2011, WTO Dispute Settlement Body, JOB/DS/10, 15 June 2012.

\textsuperscript{348} WTO Dispute Settlement Body, DSU Negotiations – Proposal by Mexico, TN/DS/W/23, 4 November 2002.

\textsuperscript{349} WTO Dispute Settlement Body, Minutes of Meeting Held on 13–15 November 2002, TN/DS/M/6, 31 March 2003, para 18 (Chile), para 33 (Argentina), para 39 (Canada), para 42 (Norway), para 46 (Peru), para 48 (Pakistan), para 50 (Cuba), para 52 (Poland), para 55 (Hong Kong), para 57 (EU), para 58 (Malaysia), para 63 (Philippines).

\textsuperscript{350} GATT Secretariat, Measures to Deal with Members in Category IV of the Administrative Arrangements on Arrears, GATT Docs PC/7, L/7578, 13 December 1994

right of cross retaliation to be conferred on developing/LDC members. It has its own implications but it has support of WTO membership.

Article 22.4 defines injury “nullification or impairment” of “benefits”. As far as market access loss is concerned, it is a loss that happens due to market access obstructions. Simon Schropp states that it is not correct to calculate loss just on the basis of loss of trade. As trade is one aspect, the more important aspect that needs to be taken into account is the loss of sustainable development. Especially when it comes to developing/LDC members where they have very few sectors in export regime (the only sector where they can exercise equivalence), hence loss suffered is not just economic but developmental also.

Since development is one of the WTO’s most important goal therefore while calculating loss of developing/LDC members, the drop in Gross National Product (GNP) needs to be taken into account. Having said that, so far practice of Article 22.6 points to the consistency. Therefore, what is required is an initiative by arbitrators to interpret Article 22.4 authoritatively with Article XI:2 by WTO members. Only such activism would help developing/LDC members. It is likely that retaliatory measure may hurt complaining party more than responding party. However, along with automatic right of collective and cross retaliation with option to enforce administrative sanctions. There is every reason to believe that developing/LDC members would feel more secure once WTO DSU is reformed.

The issue of external transparency has got most WTO member divided. Being divided on external transparency means that WTO members do not agree on how and to what extent public can be involved during Panel proceedings or submit their opinions into the WTO DSU process in the form of amicus curiae briefs.

5.7 Conclusion

The existing dispute settlement system is in dire need of reform. The reformed system may ensure that developing/LDC members may access justice under WTO DSU without any hidden or obvious impediments. The WTO DSU in particular and generally all the WTO agreements

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have proactively tried to cater the needs of the developing/LDC members. There are over 400 proposals made for the amendment in WTO DSU. For the purpose of this thesis, after going through numerous proposals I found the Kenya Proposal, TN/DS/W/42 as containing more or less all of the amendments which are required by developing members. As far as LDC members I found the proposal TN/DS/W/17, moved by developing and LDC members as most suitable, as it is representative of developing and LDC members’ point of view. As far STDs is concerned I found proposal TN/DS/W/19 by LDC members as most suitable of representative of their concern. The proposals made by the African members, a group of LDC members, pertaining to reform in WTO DSU recognized three main hurdles. Firstly, access impediments. Secondly, poor and unfitting kind of retaliatory system and finally absence of scope of improvement in the WTO DSU. Since reform could take place through consensus. Nevertheless, it is a fact that WTO has become indispensable for the economy of any country.

In order to understand what can assist developing/LDC members achieve the objective. I have analyzed proposals put forth by developing members generally and by sub-saharan African countries/LDC members in particularly, as they are the most disappointed group of WTO members. As far as proposals made by developing/LDC members regarding upstream stage. The developing/LDC members are of the view that WTO must set up a development fund specific for developing and LDC members by inserting Article 28 titled ‘WTO Fund on Dispute Settlement’. The developing/LDC member want the role of ACWL and role of WTO Secretariat may also be extended to upstream stage, this will also comply with the Article 3 of the WTO DSU whereby predictability and certainty of WTO DSU is deemed important. By extending role of ACWL and WTO secretariat developing/LDC members would be afforded with intellectual and financial assistance. The developing/LDC members have also proposed that a list of experts belonging to developing/LDC members be kept on WTO roster and in case of dispute, developing/LDC members may utilize services of those experts. Since experts from developing and LDC member can better understand the impediments faced by developing LDC members.

The developing/LDC members have made some proposals as regard to pre Panel stage. The African states stated that when there is a conflict as to the terms of the WTO agreements the matter shall be referred to the General Council for determination under Article IX:2 of the WTO agreement. Regarding Consultation Stage African countries have suggested to amend WTO DSU in a way that consultations requests made by developing/LDC members should be accepted, each time it is made, provided they are submitted under Article XXIII of GATT 1994.
Moreover, the request for Consultation should be accepted without applying condition of limitation period of 10 days and without proving 'substantial interest' condition. African members used the language of both Article 4.10 and Article 12.11 and made a proposal to the Committee on Trade and Development (CTD), regarding disputes between developing/LDC member and developed members. The developing/LDC members proposed that Panel and Appellate Body written decisions shall inform how special consideration to the substantial interests of developing/LDC members have been given. The African Group considers that the language of Article 4.10 is very weak as it does not bound developed members to consider substantial interests of developing/LDC members.

The African countries group have supported Costa Rica’s proposal allowing third party rights to be part of proceedings at any stage of the case. The African group submitted that Article 10.2 wording “substantial interests” should enable developing/LDC members to have third party rights. It was suggested that SDT provisions 12.10, 8.10 and 27.2 should be amended to incorporate term “third party”. Moreover, it was proposed that if an inconsistent measure is withdrawn within consultation process then under Article 4 of the WTO DSU such withdrawal shall be notified to the DSB, individually or jointly within 60 days of the withdrawal. The notification must inform about the measure challenged, reasons for withdrawal, financial loss suffered by the developing/LDC member and an account of what happened at the consultation stage. If the members have no agreement as to the amount of injury incurred then under Article 25 WTO DSU, matter may be referred to an arbitrator. The compensation may be ascertained under Article 25 and implementation of such compensation should be through Article 21 and 22 of the WTO DSU.

As far as Proposals regarding Panel and Appellate Body stages are concerned the developing/LDC members proposed that Article 7 of the WTO DSU may be amended so that development implications of any trade dispute involving developing/LDC member could be ascertained. The ruling must give account of developmental aspect, so that developmental goals can be effectively met. The third party rights under Article 17.4 should be extended so that they may become party to any dispute and may have a permission to submit their brief before Appellate stage so that capacity of the developing/LDC members could be enhanced.

As far as proposals regarding SDT provisions are concerned, there are two type of SDT provisions, first one only comes into play when developing/LDC member request to invoke it and the second type of SDTs are exclusive for developing/LDC members, and are activated
regardless of request these are activated when developing/LDC member is a complainant. The first type of SDTs provide special procedure, a swift procedure that override certain procedural provisions to facilitate developing/LDC members The developing/LDC members have never used first type of SDTs e.g; Article 3.12 WTO DSU. However, developing/LDC members have not benefited from the second type of SDTs either e.g; Article 4.10 etc. The African members stated that SDTs do not address the issue of lack of human, intellectual and financial resources, they also proposed that non-binding SDTs should be made binding in nature. It was also proposed that SDT provisions should be free from ambiguity and inform clearly who can receive assistance, kind of assistance, from whom and how, etc. The developing/LDC members have proposed that they have the right to seek information and technical advice. The developing/LDC members are keen to use NGO's and IGO's to work for their benefit.

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As regards to the final stage of implementation, the developing/LDC member proposed that if it is difficult to comply with DSB ruling or recommendation then the successful party may settle in taking compensation, or by applying retaliation. If this is impossible then sanction may be imposed in same trade sector of dispute. If still it is not possible then sanction can be enforced on other trade sector covered under same WTO agreement. The developing/LDC members have also proposed that financial compensation should be made compulsory whenever developing/LDC member prevail in a dispute. The developing/LDC members have proposed that due to insignificant share in international trade the developing/LDC member cannot retaliate effectively therefore WTO may allow collective retaliation. Till to date there is a deadlock. It is possible that cross retaliation may be allowed. However, its cons cannot be overlooked. As far as administrative sanctions are concerned the requirement to get consensus to adapt them seems very difficult. The only proposal that is possible is the right of cross retaliation to be conferred on developing/LDC members. It has its own implications but it has support of WTO membership.
It is heartening to inform that apart from the proposal regarding third party rights and proposal regarding cross retaliation there is very little or no support for other proposals. More often than not the proposals were not discussed in detail by stating that radical changes fall outside the scope of “improvements and clarifications” asked for under Paragraph 30 of the Doha Declaration. The question that I ask to myself, Is it possible for most of the aforesaid proposals to gain support? The answer is ‘Yes’ it is possible to reform WTO DSU since it is not a part of single undertaking. It is possible but it requires effective lobbying. The developed world needs to understand that least developing/LDC members are very rich in resources (human capital, natural resources), all what is required is a credible system in place to utilize those resources. The world economy will benefit from developing/LDC member resources and similarly developing/LDC members will also reap benefits. It is important that an opportunity be given to developing/LDC members, at least to the extent that they don’t lose hope in WTO DSU system and they feel they can access justice with same ease as developed members do. I do not doubt the intention of the WTO, the presence of SDT provisions in WTO DSU stand testament to the fact that WTO wants to assist developing/LDC members. The first step could be to allow those proposals that do not drastically amend WTO DSU to be part of reform. Afterwards, each proposal vis-a-vis relevant WTO provision may be discussed among WTO members. I am hopeful if matters are discussed frequently, a better outcome is certain, a win win situation for all. It all comes down to do with effective lobbying, the developing/LDC members need to unite so that their voice could be heard, and WTO needs to be considerate to their demands. There is always a first step and thereafter all systems improve gradually.
CHAPTER 6

CONCLUSION

The objective of this thesis was to investigate right to access justice in international trade law with a focus on World Trade Organization (WTO) law vis-à-vis developing and least developed countries (LDCs), especially investigating why the participation of developing and least developed members of the WTO is negligible, compared with the developed members like EU and USA. The author intends to defend the statement that WTO DSU with some amendments can provide access to justice in fair and equitable manner to all corporate entities i.e; public or private registered within the WTO member states.

At present the WTO DSU can only be assessed by WTO members that too regarding WTO covered agreements only. However, it is submitted that the WTO DSU has the capacity and competence to adjudicate on international trade dispute regardless of the requirement that the parties to the dispute must be WTO members and signatories of WTO agreements. It was observed that there are several other contemporary systems providing access to justice in international trade, the author is of the view that it is the member state through which dispute is contested before WTO DSU thus public private entities can be regulated through respective member state. The WTO DSU could become a single forum that performs dispute resolution function and provide access to justice in international trade. The first point of optimism is that WTO has 164 member states and over 96% of global trade/Economy falls within its scope. Therefore it’s a fact that a system exists that can provide certain, predictable and fair access to justice in international trade.

The contemporary systems of dispute resolution as nominated under bilateral agreements or multilateral agreements have more often than not has been, an arbitration. There is overwhelming reliance on arbitration. Most investment agreements have a arbitration clause stating that in case of dispute matter would be referred to arbitration. The arbitration clause does not inform about the competence of the arbitrator nor it informs about the procedure that would be adopted when dispute takes place. When dispute takes place parties are at loggerheads and it is impossible to find agreement as to the procedure that would be adopted in carrying out arbitration.

At present there are over 400 arbitration centers providing arbitration services in international trade. Therefore, because of so many varied systems providing arbitration the confusion is
certain. As far as investor-state arbitration is concerned recently it has been subject to severe criticism. The Investor state arbitration has never come clean from the allegations of biasness, lack of transparency and lack of independence. The lack of trust on investor state arbitration has got many countries amending their bilateral investment treaties these countries include EU, USA, South Africa, Australia, Germany etc.

Alternative to standard adjudication by WTO Panel and Appellate Body, parties may use arbitration procedure under Article 25.1 of the WTO DSU. The award of such arbitration remained subject to Article 21 and Article 22 of the WTO DSU. Thereby the outcome is subject to the WTO rules and procedures. However, mostly parties prefer to settle dispute through standard WTO dispute settlement process. Since WTO DSU is a comprehensive dispute settlement system therefore most member prefer to follow standard procedure of dispute resolution, and there is no harm in it. It is important to draw contrast between arbitration conducted by arbitration centers and arbitration option available under WTO DSU. The arbitration under the auspices of WTO is deemed more appropriate, predictable, and transparent as it is carried out by arbitrators who are expert in the field of arbitration, since DG WTO can assist in appointment of arbitrator/s. Arbitration or dispute settlement process of WTO is by far more organized and credible then any of contemporary arbitration center. In this context it is important to mention that WTO as an institution has a system in place whereby it is easy to know recognized and renowned professionals of WTO law. The WTO law practitioners can be located and asked for assistance (to act as an arbitrator or as a legal advisor) subject to terms and conditions etc.

The WTO adjudication process is not subject to the doctrine of stare decisis. Nevertheless, several of WTO past rulings serve as persuasive authorities to understand the approach of the panelists and understand the working of WTO Panel and Appellate Body. Hence it is correct to suggest that level of arbitration at WTO addresses the issue of transparency, certainty and predictability in a far better way than randomly selected arbitrators and/or arbitration forums. Thus if reform is made allowing participation of all public and private entities registered within member states to utilize WTO DSU then arbitration option or standard of dispute settlement process at WTO DSU is better equipped to assist private, public and state members. The impediments that come across in this regard are of two types; firstly, only the member states of WTO can utilize the system and secondly member states can utilize WTO DSU only regarding WTO agreements. These impediments can only be removed if all member states draft a Treaty allowing their respective private and public corporate entities to seek justice under
WTO DSU. In doing so the member states has to take responsibility of enforcement/execution and implementation of the rulings, recommendations made by WTO panels or Appellate Body. As far as restriction of WTO agreements are concerned these restriction subject to consensus can be also be removed. To achieve these objectives a new treaty among WTO members need to be drafted.

The WTO DSU dispute settlement process enjoys legitimacy, predictability, certainty, it is cost effective, less time consuming, have stricter time lines, instead of awarding heavy damages WTO DSU focus is to abolish inconsistent trade measure, it does not affect state trade policy as it is ratified by the member state, it has appellate forum, uniform standard of review and last but not the least the judges that serve on the WTO Panel are adept in WTO law and often are recognized as someone having in depth knowledge of WTO law.

The recent participation statistics suggest that WTO DSU is a credible and worthy system. It is rightly said as jewel in the crown of WTO, as all member states find it as the most positive outcome of the Uruguay Round. The WTO DSU is a single set of dispute settlement rules that apply to all WTO multilateral agreements, with some very specific rules applicable to some of WTO agreements. Along with the reform to allow participation rights to private and public corporate entities of the member state there is a need to reform the role of Advisory Centre on WTO Law (ACWL) and role of WTO Secretariat (providing technical assistance) so that technical assistance can be afforded to developing and LDC members at an upstream stage. By allowing upstream assistance the Advisory Centre on WTO Law or WTO Secretariat can extend financial and intellectual assistance to domestic stakeholders; i.e; the private and public entities of the developing/LDC members. Technical Division of the WTO Secretariat can effectively assist domestic stake holders. The role of these institutions at upstream stage is of pivotal importance since only then all the stakeholders at upstream level would be better positioned to participate in WTO dispute settlement process. This can be best achieved through developing primary source of law. In this way role of Advisory Centre and Technical Division of WTO Secretariat can be extended to the national/domestic sphere of WTO members, generally to developing and particularly to LDC members.

Institutional reforms would not alone suffice, the developing and LDC members would also have to introduce legal reforms within their domestic setup so as to enable domestic stakeholders to seek assistance from Advisory Centre on WTO Law and from Technical and Cooperation Division of WTO Secretariat. Hence in this regard the coordination between WTO
and a member state is essential to get best out of the reforms. All such reforms require proactive and practical steps taken both at an institutional level and at a member state level. It is submitted that Advisory Centre on WTO Law (ACWL) and WTO Secretariat should be allowed through domestic legislation to extend their scope of assistance within domestic legal infrastructure of the developing/LDC members. As understood at downstream stage, the role of Advisory Centre on WTO LAW and technical support on WTO Law provides both intellectual support to the contesting developing/LDC members with varied concessional rates depending upon the classification of member state as enumerated in Annex II of the Agreement Establishing the Centre. This Advisory Centre assistance function may also be extended to upstream stage so that Advisory Centre can provide assistance to member states, its institutions and stake holders. The role of Advisory Centre at an upstream stage could be of great benefit, importance and of crucial importance especially when developing/LDC members are acting as a respondent in a case. It is so because WTO has strict time lines so there is very limited time to reply and hence with the assistance of Advisory Centre at domestic level the developing/LDC member would be able to submit well thought out reply. It is submitted that the provision of the Advisory Centre assistance at an upstream stage would trigger positive paradigm shift in WTO DSU since developing and LDC members could meet the intended objectives enshrined in WTO DSU supplemented by SDT provisions. Therefore it is the domestic system where intellectual expertise and financial assistance from Advisory Centre could be best utilized.

A bare reading of WTO DSU, a primary source of law, prima facie provides that SDT provisions are specifically embedded to assist developing/LDC members. It is apparent from the text of WTO DSU that WTO intends to support developing/LDC members. Since SDT concept is a cross cutting policy matter therefore not only it has it influence on the structure and functions of the WTO but on all agreements and ancillary matters of WTO. There are 11 SDT provisions in WTO DSU, including Article 3.12 which states that if a complaint is based on the covered agreement and the developing member has complained against the developed member then developing member can adopt quicker procedure i.e; without following Article 4,5,6 and 12, although there are some exceptions to this provision. The Article 4.10 states that during the course of Consultation developing member interests must be afforded with careful consideration. Article 8.10 provides that when a dispute involves developed member, subject to request by the developing member the panel formed must have at least one panelist from the developing member country. Article 12.10 states that during the course of consultations if it is found that inconsistent measure has been applied by the developing member then an extended time period
for consultations should be afforded and if the matter remained unresolved then Chairman DSB may intervene to extend time limit, so that matter can be settled amicably. Article 12.11 states that where developing member is a party to a dispute, and SDT is invoked, then Panel or Appellate Body shall inform how SDT was invoked and how developing member was effectively facilitated. Article 21.2 states that as far as surveillance of implementation of recommendations and rulings is concerned the interests of developing member should be given due consideration. Article 21.7 states that in context of surveillance of implementation of recommendations and rulings if the matter is raised by developing member the DSB should take steps suitable to developing member in the circumstances. Article 21.8 further states as regard to surveillance of implementation of recommendations and rulings, where the complaint is brought by the developing member The DSB while deciding what steps need to be taken should take into account the trade impact of the measure questioned and also the effect of such measure on the economy of the developing member. Article 27.2 states that WTO Secretariat is bound to assist developing member, subject to developing member request, by providing legal experts to assist in dispute before WTO. Lastly, provisions Article 24(1) and Article 24(2) are the only two provisions that refer to LDC members. According to Article 24(1) and Article 24(2) the WTO DSU bound all members of WTO to be considerate during all stages of dispute settlement process when a dispute involves LDC member. Moreover, The WTO emphasize reconciliation, compromise and amicable settlement when nullification or impairment has resulted due to the adoption of the inconsistent measure adopted by the LDC member. The said SDTs stand testament to the fact that WTO has intended to assist developing and LDC members in the best way possible.

Even with the facilitation of afore mentioned 11 SDT provisions in WTO DSU, the participation of developing in general and particularly of LDC members remained negligible. Very few developing members have repeatedly contested the inconsistent measures and mostly when they have contested it was observed that they have contested under compulsion. In normal circumstances the developing members generally and LDC members avoid to participate in WTO dispute settlement process but when they are acting as respondent party they participated under compulsion, since they intend to protect their trading interests e.g; they are getting financial and intellectual aid from the same developed member who has deployed inconsistent trade measure etc.
On the other hand it has been observed that rate of participation of developed members EU/USA in WTO DSS for making claim/defence before WTO exceeds many times as compared to developing or LDC members of the WTO. It has been noticed that developed members, US and EU have made laws and created forums where they can raise the issue with their respective stakeholders EU bureaucracy is under legal duty to assist domestic stakeholders (e.g; corporate entities private or public etc). Extensive EU legislation and various kind of legal options stand testament to the fact that EU as an institution has necessary legislation in place, and that legislation process is updated and improved on regular basis, precisely for that reason there were 24 Trade Barrier Regulations before the existing one was introduced. The TBR is WTO specific and hence it is used prior to initiating dispute before WTO. The EU system has been made simple mainly due to the dissemination of information and use of information technology. The corporate entities through their legal department can easily get informed about the guidelines and steps required to be taken under the legislation. Other than that the investigation mechanism hold credibility. In other words, institutional integrity and competence plays a significant role. As a result a corporate entity in EU is encouraged to contest an inconsistent trade measure before WTO. The EU, the member state and EU/member state jointly can claim/defend before WTO dispute settlement process. This simply highlights that there are 28 countries and EU itself to put in effect its enormous resources to challenge inconsistent measure. The WTO specific TBR has its own defects and to date only about 27 investigations have been carried out. Most of the disputes that went to WTO were initiated through filing of in formal letter to the Commission and rest of work is carried out by EU itself, the EU using its resources carried out investigations taken member states on board etc. The other mechanism available within EU are Article 207, assistance from the other units of DG Trade i.e; Country Desks and Market Assess Units etc.

As far as USA is concerned Section 301 of the Trade Act 1974 is the most important and effective instrument that helps access justice before WTO. Section 301 entitles US President to take appropriate steps including decision to exercise retaliation to remove inconsistent (discriminatory and unjustified etc.) measure to protect USA commerce. Under Section 301 the United States Trade Representative (USTR) is obligated to obtain compensation or abolition of questioned measure. However, in the presence of independent trade agreement, the dispute settlement procedure laid down in that particular agreement, ought to be followed. The most important and somewhat bothersome aspect of Section 301 is that it allows the President to take steps independent of WTO. It means regardless of the pendency of dispute before WTO
the President of USA could take enforcement measures. In 1990 many WTO members challenged that concept but the efforts remained futile as WTO concluded that this could only be challenged after approval of WTO dispute settlement body.

Moreover, with respect to developed members particularly EU and USA the role of independent firms in convincing governments to claim/defend before WTO DSU cannot be ignored. Independent firms work is quite remarkable in EU and USA as they act as an effective tool to perform transnational lobbying to assist developed members to access justice under WTO DSU. These independent firms initiate their work by doing domestic lobbying and may indirectly target their own respective governments. The main players are local export relying firms acting as a complainant and import relying firms as defendant. These independent firms also carry out foreign venue shopping i.e; by convincing foreign governments to institute complaints within other WTO member states. As I discussed earlier, on many occasions their efforts proved successful. To operate effectively these firms require a system where they can raise their voice, hold seminars and inform trade community. Therefore they possess certain peculiar characteristics e.g; they are internationally very active, very competent to mobilize target industry, they are sector specific and are much focused. Equipped with these characters and doing that work on full time basis make them expert in convincing. The work of independent firms also involve funding research, investigation and finding evidence. The data these independent firm collect is credible due to the fact it is gathered with the support of local industry. The work carried out by these firms just put governments into jump start position to initiate WTO case, as most of the investigation done by these independent firms is credible and admissible.

In the case of developed members there is relevant legislation. The law creates obligation and hence someone is bound to carry out work within the law. Whether it is TBR as in the case of EU or Section 301 Trade Act 1974 for USA. It has been observed that both TBR and section 301 were and are subject to criticism. Nevertheless, it is seen that if a member state has effective legislation in place it creates obligation to act against inconsistent trade measure. The absence of law creates no obligation hence no one is legally answerable to anyone. Without legal framework at domestic level along with lack of financial resources the domestic stakeholders in developing/LDC member states remain helpless and handicapped. I would suggest that the lack of well-developed domestic legal infrastructure is the biggest reason for developing/LDC members’ negligible participation in WTO DSU.
WTO DSU also have deficiencies and these deficiencies are cause of concern for present and posing a challenge to WTO members regardless of their classification. The challenges to WTO DSU could be classified as short term and long term challenges. The short term challenges include binding dispute settlement process for the third parties in the dispute, lack of provision of adequate trade remedy, lack of enforcement, sequencing and removal of retaliatory measure once inconsistent trade measure has been removed, the challenge of ensuring transparency as the Panel and Appellate body hearings are conducted in private and confidential. The long term challenges include, it takes considerable period of time to settle disputes when more members join the dispute, e.g when 10 or more members join the dispute. Over the period of time the dispute settlement through WTO DSU has increased this at one hand indicates that trust on the WTO DSU has increased on the other hand it high light the fact that WTO dispute settlement bodies are under staffed and exponential increase of work load requires recruiting qualified staff to tackle enormous work load. It may be argued there remains challenge that countries that can move forward unilaterally or bilaterally or under regional free trade agreements may not utilize WTO DSU and instead they may mutually agree to utilize on other dispute settlement bodies and procedures.

I have observed that all systems whether it is investor state arbitration, WTO specific TBR in EU domestic legal system or USA Section 301 Trade Act 1974 and WTO DSU itself needs reform. All of the said systems have their deficiencies. Still all of their deficiencies all these systems are very beneficial for the world trade. It would be very unfair if we overlook developing and LDC member point of view. The developing and LDC member have made some very useful proposals. After going through numerous proposals I found the Kenyan Proposal, TN/DS/W/42 as containing more or less all of the amendments which are required by developing members. As far as LDC members I found the proposal TN/DS/W/17, moved by developing and LDC members as most suitable, as it is representative of developing and LDC members’ point of view. As far STDs is concerned I found proposal TN/DS/W/19 by LDC members as most suitable of representative of their concern. The developing/LDC members are of the view that WTO must set up a development fund specific for developing and LDC members by inserting Article 28 titled ‘WTO Fund on Dispute Settlement’. So that they can be obtain intellectual and financial assistance. The developing/LDC members have also proposed that a list of experts belonging to developing/LDC members be kept on WTO roster.
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overlooked. As far as administrative sanctions are concerned the requirement to get consensus to adapt them seems very difficult. The only proposal that is possible is the right of cross retaliation to be conferred on developing/LDC members. It has its own implications but it has support of WTO membership.

It is apparent that WTO through WTO DSU has committed itself to assist developing/LDC members. It is suggested that WTO may assist developing/LDC members to make groups on geographical basis or as regards to trade sectors etc. Moreover, Developing/LDC member states need to understand that things might not happen overnight, for example, the present day EU was once European Coal and Steel Corporation (ECSC) formed in 1951, a unification for the purpose of business. Therefore any sectoral or geographical alliances by developing/LDC members within WTO will enormously help developing/LDC members and they may benefit from the concept of economies of scale to their advantage. The trade diversification will also come along when unification happens as there will be an incentive to pool in resources, therefore there are many trade sectors in which grouping can be made. It appears to be a step towards right direction though it will take time before a formidable developing/LDC block will be formed. However, the example of ECSC do shed a light as to what direction developing/LDC members need to work. With increased trade volumes along with SDTS to support developing member the developing/LDC members would be better positioned to deal with matters like retaliation, compliance and withdrawal of concession and increased market access etc. The overall outcome will have global benefits in the form of sustainable development and growing international trade.

Before describing my reasons for being optimistic about WTO as an international forum where developing and least developed members particularly and all WTO membership generally along with the corporate entities registered within the member states can access justice equally and fairly, I would recommend certain recommendations regarding upstream and downstream stages followed by reason of me being optimistic about reforms. These recommendations are as follows:

**UPSTREAM RECOMMENDATIONS**

1) A Treaty may be drafted whereby all WTO member states allow their private and public corporate entities to contest disputes under WTO in their own capacity. However, execution and implementation of WTO decisions, rulings and recommendations remain member state responsibility.
2) It is necessary that WTO as an institution ensure that developing and LDCs are fully assisted at upstream level. For this purpose Article 27.2 should be amended so that, WTO Technical Cooperation Division of WTO Secretariat along with ACWL can assist developing as well as LDC members within their domestic system. The Technical Division may assist in collecting the evidence and analyzing the correct impact of the inconsistent measure etc.

3) Moreover, upstream assistance role of Advisory Center on the WTO law may also be extended so as to assist corporate entities within developing and LDCs.

4) There is a need to have fund to overcome financial scarcity which is faced by the developing and LDC members regarding investigating or preparing pleadings for disputes before WTO. The Fund may also be utilized in paying fee of legal experts hired by developing and LDC members. The Fund may also be allowed to collect voluntary contributions.

5) WTO as an institution to increase trade volumes and to create trade diversification the WTO may help developing and LDC members in forming groups on the basis of trade sectors or on the basis of geography. The LDC member has to look out for opportunities to create consortium on the basis of sectoral trade or geographical basis. This will help developing/ LDCs members to effectively retaliate and implement rulings. Moreover, this will tackle the issues of low trade volume, trade diversification and collective retaliation etc. effectively.

6) As regards to domestic legal infrastructure of the developing and LDCs, there is a need to have institutions developed through legal process enjoying statutory protection and carrying out legal function to investigate, assist stakeholders in claiming or defending at WTO. This may be similar to Section 301 of US or contemporary procedures adopted in EU i.e Trade Barrier Regulation, Article 207 and/or Units of DG Trade e.g; Country Desks and Market Access Units etc.

7) The Ministry of Trade & Industry or any Government office responsible for trade and Industry within developing/LDC member must set up a section or an office specifically to assist domestic stakeholders within the developing and LDC members. This department should not only inform about the procedures or statistical data but it also initiate training local lawyers in WTO law. Initially Law professors from EU and US may be asked to train the local entities e.g; government officers, NGO’s, lawyers and teachers etc. In this regard WTO Secretariat and/or Advisory Centre may provide the financial and advisory assistance. Once reasonable number of native officials are
trained then these officials could further be employed to train WTO law. Countries with extreme poverty may get financial assistance for paying staff appointed to train.

**DOWNSTREAM RECOMMENDATIONS**

1. WTO DSU Articles consisting of SDTs may be made clear, concise and identify the beneficiaries of SDT clearly.
2. Ensure that Developing and LDC are not impaired and ensure that all the SDTs enshrined within WTO DSU are fully utilized and serve the purpose they are intended for i.e; effectively applied at all stages of the dispute settlement process.
3. The Fund of the WTO Secretariat should be utilized for the capacity building, both financial and intellectual, of developing and LDC members.
4. Third party may be afforded right of effective participation, without fulfilling the requirement to satisfy “substantial interest” condition. The third party so participated shall be entitled to receive documentation from other parties. They should also be allowed to Appeal in the dispute. The overriding objective should always be to achieve justice, and there must be no compromise as to the fairness of the process, even if it results in making process lengthy.
5. If a new fact came to light the Appellate Body must have the right to remand case back to the Panel stage.
6. It is to be ensured that at all material times the concept of sustainable development remains the top priority, whilst trade interest are important but without the concept of sustainable development (safety of human, animal, plant health and environment, etc.), a progress can never be considered as actual progress.
7. The concept of mandatory monetary compensation may be introduced especially when there is no viable system of retaliation is available especially when developing and LDC members or corporate entities belonging therefrom. If monetary compensation is allowed then the role of insurance companies (domestic or cross border, as most developing/LDC members have deficient insurance culture) may also be introduced. This concept itself has many financial aspects attached to it. It could turn into a phenomenon through which member states know they will not be burdened with cost, the corporate entities feel safe as in return of premium paid by them they can take bold decisions. The insurance companies would get business opportunities as they would be paid premium by the corporate entities to cover their
risks. It can create millions of jobs at global scale in insurance sector alone. I see it as, a win win situation for all.

REASONS FOR OPTIMISM

1. Doha Ministerial Declaration had on its plan “negotiations on improvements and clarifications” in the DSU “on the work done thus far.” Paragraph 47 Doha Declaration stated that reform to WTO DSU is outside single undertaking or package deal therefore it is submitted that reforms or amendments WTO DSU can take place easily. It seems easy because it has been observed that ante Doha Declaration almost all of General Council, Committee and Ministerial Conference meetings special attention has been afforded to the problems and difficulties faced by developing/LDC members in WTO DSU. The acknowledgement at this level is the most potent force that can help reform WTO DSU.

2. It was agreed as per Paragraph 44 of the Doha Declaration that SDT provisions shall remain open for review so as to strengthen them and making them more operational and effective. If para 44 of the Doha Declaration on SDTs is put into effect, then positive amendments would certainly become part of existing SDTs.

3. Most recently Bali Ministerial Conference (2013) set an example that suggests that multilateral law making is still possible. The Annex 1 A of the WTO Agreement was amended for the incorporation of Trade Facilitation Agreement (TFA) to become part of WTO legal system in 2017. This gives a direction towards a procedure that could be resorted to if reforms are to be made.

4. Moreover, the Doha Declaration on SDTs along with Decision on Implementation Related Issues and Concerns mandates Committee on Trade and Development (CTD) to apprise about the existence of SDTs which are important to assist developing/LDC members and SDTs which have some importance can be made obligatory upon all members. The Doha Declaration goes on to state that there is need to find effective ways whereby developing and LDC members may become enable to use SDTs effectively. The 11 SDTs within WTO DSU also stand testament to the fact that WTO is keen to assist developing and LDC members. The General Council of the WTO have extensively discussed and acknowledge the issue of capacity building of developing/LDC members both intellectually and financially. This factor if highlighted properly would enormously benefit developing and LDC members.
5. The INGOs and NGOs have also raised the issue of capacity building along with local and international stakeholders. It is submitted that there is sufficient support available to reform the system.

6. In 2013 Bali Ministerial Conference devised a mechanism to review and analyze SDTs implementation during Committee on Trade and Development dedicated sessions. The CTD sessions are required to take into account existing operability of the SDTs and to submit recommendations to concerned WTO bodies. The agreement establishing main WTO agreement specifically states that developing and LDC members should be benefited from international trade. This is further supplemented by the fact that Article 24(1) and Article 24(2) advocates discount to be afforded to LDC’s during all stages of dispute settlement process.

My reasons to be optimistic for reform in WTO DSU are based on concrete grounds. The aforesaid reasons provide sufficient opportunity for reform. If upstream and downstream recommendations are considered the concerns of developing and LDC members could be addressed effectively. I am hopeful if recommendations are considered there will be a WTO DSU that caters the need of all corporate entities, registered within WTO member states with respect to justice in international trade, under the auspices of WTO. It will provide credibility to the WTO DSU, which has often been referred to as the jewel in the crown of the WTO. It is difficult but not impossible. After all there is always a first step.
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Appendix A

Flow Chart of the Dispute Settlement of WTO

Consultations (Art. 4)

Panel established by Dispute Settlement Body (DSB) (Art. 6)

Terms of reference (Art. 7)
Composition (Art. 8)

Panel examination

Normally 2 meetings with parties (Art. 12),
1 meeting with third parties (Art. 10)

Interim review stage
Descriptive part of report sent to parties for comment (Art. 15.1)
Interim report sent to parties for comment (Art. 15.2)

Review meeting with panel upon request (Art. 15.2)

Panel report issued to parties
(Art. 12.8; Appendix 3 par 12(j))

Panel report issued to DSB
(Art. 12.9; Appendix 3 par 12(k))

DSB adopts panel/appellate report(s)
including any changes to panel report made by appellate report (Art. 16.1, 16.4 and 17.14)

Appellate review
(Art. 16.4 and 17)

max 90 days

Dispute over implementation: Procedures possible, including referral to
initial panel on implementation (Art. 21.5)

Possibility of arbitration on level of suspension procedures and
principles of retaliation (Art. 22.6 and 22.7)

Implementation report by losing party of proposed implementation within 'reasonable period of time' (Art. 21.3)

In cases of non-implementation, parties negotiate compensation pending full implementation (Art. 22.2)

Retaliation
If no agreement on compensation, DSB authorizes retaliation pending full implementation (Art. 22)
Cross-retaliation: same sector, other sectors, other agreements (Art. 22.3)

During all stages good offices, conciliation, or mediation (Art. 5)

Export review group
(Art. 13; Appendix 4)

Courtesy: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm
Appendix B

OVERVIEW OF THE TBR PROCEDURE

Submission of Complaint to the European Commission

Admissibility review (normally 45 days)

Initiation of Examination Procedure (Notice published in Official Journal of the European Union)

EU examination procedure (5-7 months) · The Commission sends questionnaire to the parties concerned · Possible visits to the premises of the parties concerned · Parties concerned by the results of the procedure may register their interests in the procedure (within 30 days from publication)

Report to TBR Committee

Commission Decision to initiate WTO DSU processes (no deadline)

Commission requests WTO consultations (no deadline)