REVISITING SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN THE WORLD TRADE ORGANISATION (WTO) DISPUTE SETTLEMENT SYSTEM

JIMCALL PFUMORODZE*

EMMA CHITSOVE**

Abstract

Special and differential treatment (hereinafter S&DT) provisions in the DSU are designed to assist developing countries and least developed countries (LDCs) in the WTO dispute settlement system. These provisions are meant to address the likely disadvantages that these countries would face in a legal dispute against developed countries. The latter have more resources and litigation expertise, hence the need for leveling the play field by providing S&DT provisions in the dispute settlement system. S&DT provisions have been in existence under the GATT dispute settlement system. Currently, the DSU and other WTO Agreements provide some S&DT provisions which may be used in the dispute settlement process. This paper seeks to evaluate the effectiveness of these provisions, whether they have been used and the impact of their use.

1. Introduction

Special and differential treatment (hereinafter S&DT) provisions in the DSU are designed to assist developing countries and least developed countries (LDCs) in the WTO dispute settlement system. These provisions are meant to address the likely disadvantages that these countries would face in a legal dispute against developed countries. The latter have more resources and litigation expertise, hence the need for leveling the play field by providing S&DT provisions in the dispute settlement system.

S&DT provisions have been in existence under the GATT dispute settlement system.[1] Currently, the DSU and other WTO Agreements provide some S&DT provisions which may be

used in the dispute settlement process. This paper seeks to evaluate the effectiveness of these provisions, whether they have been used and the impact of their use. It will then analyse the proposals which have been submitted by developing countries and LDCs on improving the S&DT in the WTO dispute settlement system. The last part of this paper will deal with recommendations and conclusions.

2. THE CONCEPT OF SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO

2.1 The essence of S&DT in the WTO

The primary purpose of S&DT provisions under the WTO is to support developing and least developed member participation and integration into the international trading system by providing special, more relaxed or flexible rules for them.[2] The need for such rules is due to the inherent disadvantage such countries are in compared to richer, more advanced developed countries.[3] These provisions are meant to "level the field of play"; by establishing rules that provide a fair balance between costs and benefits of new agreements, interests of both developed and developing countries strengthening the rule based system that would ensure the legitimacy and sustainability of these rules.[4]

Special and differential treatment in this context is to ensure proportionality of trade agreements commensurate with levels of development and capacity to manage burdens of the adjustment processes of membership. Traditionally Special and Differential treatment was designed to help developing countries to develop their economies through exports and

---

* LLB (Hons) (UZ); LLM (*Cum Laude*) (UWC and Amsterdam); LLD (Pretoria); Senior Lecturer, University of Botswana.
** LLB (Hons) (MSU); LLM; LLD (Pretoria); Lecturer, University of Botswana.

[1] For instance, see the Decision of April 1966 on Procedures under Article XXIII, BISD 14S/18. For a detailed discussion on this these provision see Mitchell A D (2006) A legal principle of special and differential treatment for WTO disputes *World Trade Review* (2006), 5: pp 445-469.

[2] Ngemuah Nongde, 'The Implications of 'the Dispute Settlement Understanding' Provisions on Special and Differential Treatment: A Giant Leap or Speedbreak for Developing Countries' (2021) 4 Int'l JL Mgmt & Human 1623

[3] E. I. Otor, 'The World Trade Organization (WTO) Dispute Settlement Mechanism in Developing Countries' (2015) 5 Int'l J Advanced Legal Stud & Governance 1.

[4] Bacchus J and Manak I, The Development Dimension: Special and Differential Treatment in Trade (Abingdon, Oxon; New York, NY: Routledge, 2021)

to enable them to pursue policy options that they considered appropriate for development.[5] The Preamble of the WTO underscores the economic development of developing countries as a major objective and encourages positive effects by developing country members to actualise it. WTO agreements also reflect the underlying intent of S&DT and policies to support the development and integration of developing countries into the global trading system.[6] S&DT provisions specifically aim to enhance trading opportunities for developing countries, protect their interests and allow flexibility in taking a new trade obligations as well as in the use of trade policy instruments.[7]

The WTO Secretariat prepared a note on S&DT provisions, which it updates on a regular basis. Its analysis shows that a total of 155 provisions in the WTO Agreements contain S&DT provisions.[8] In terms of typology, the S&DT provisions fall into six broad categories:

(i) Provisions that aimed at increasing the trade opportunities of developing country members,[9]

(ii) Provisions that require WTO Members to safeguard interests of Developing country members,

(iii) Provisions that allow Developing Country Members some flexibility of commitments of Action, and use of Policy instruments,

(iv) Provisions that pertain to Transitional Time Periods,

(v) Technical Assistance Provisions,

(vi) Provisions that Relate Specifically to Least-Developed Countries (LDCs).

3. The WTO Dispute Settlement

3.1 Brief Background

[5] Ukpe, A. and Khorana, S. (2021), "Special and differential treatment in the WTO: framing differential treatment to achieve (real) development", *Journal of International Trade Law and Policy*, Vol. 20 No. 2, pp. 83.
[6] Ibid.
[7] Ibid.
[8] V. Hedge '*Special and Differential Treatment under the World Trade Organisation: A Legal Typology Working Paper N0. 227(2020)12.*
[9] E. Uche '*Special and Differential Treatment in International Trade Law: A concept in Search of Context' North Dakota Law Review: VOL. 79*: (2003)852.

The period preceding the World War II was marked by isolationism and this partly contributed not only to the Great Depression but also to the World War II[10]. In a bid to solve these economic concerns, in July 1944, the parties attended a conference at Breton Woods, New Hampshire where the IBRD (World Bank) and IMF were formed. In 1945 the US issued a proposal for an International Trade Organization (ITO) but this soon proved to be fruitless as the US Congress refused to approve it.

However, it should be noted that although the ITO did not come into fruition, the governments were interested in relaxing tariffs and other trade restrictions more rapidly hence the negotiation for the GATT 1947. This led to the Geneva Final Act which consisted of the text of the GATT 1947 and the schedules of tariff commitments made by the 25 governments taking part .It also included a Protocol of Provisional Application (PPA), a measure intended to be a temporary expedient, but which ended up being fundamental to GATT 1947 for its 47 years of existence[11]. On 1 January 1995 the GATT was overtaken by the WTO. There are some fascinating differences between the dispute settlement under the GATT 1947 and under the WTO and these will be discussed below.

3.2 Dispute Settlement under the GATT 1947

Hudec (2003) noted that the early dispute settlement in GATT reflected its diplomatic roots to the extent that the process was initially dubbed as conciliation and not dispute settlement[12]. Davey (1987) observed that the goal of the process was more to reach a solution mutually agreeable to the parties than to render a decision in a legal dispute[13].

10 Palmeter, D and Mavroidis, P (2004) *Dispute Settlement in the World Trade Organisation*: *Practice and Procedure* (2nd Ed) Cambridge.

[11] Andrew D. Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5 World Trade Rev 445; Palmeter, D and Mavroidis, P (2004) *Dispute Settlement in the World Trade Organisation*: *Practice and Procedure* (2nd Ed) Cambridge, pp 4.

[12] Hudec, R Hudec, RE, (1999) *Essays on the nature of International Trade Law*, Cameron May. pp. 12

[13] See Davey, W J (2001) "Has the WTO dispute settlement exceeded its authority79 *Journal of International Economic Law* 43; Davey, WJ (2004) 'Reforming WTO dispute settlement', *Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 04-01*, available at http://ssrn.com/abstract=495386 ; Davey, WJ (2005) "The WTO dispute settlement system: The first ten years" 8 *Journal of International Economic Law* 17.

GATT 1947 had only two provisions dealing with dispute settlement, namely Article XXII and XXIII[14]. However, Articles XXII and XXIII did not contain any specific procedures to be followed by disputing parties or even the Contracting Parties in resolving a dispute. Some formalities were added later on in subsequent negotiation rounds and Ministerial Conferences[15].

The GATT dispute settlement had fundamental shortcomings. Bossche (2005) noted that the manner in which key decisions were taken, that is, the establishment and composition of a panel, the adoption of panel reports and the authorization of suspension of concessions, were all taken by the GATT Council by consensus[16]. The responding party could delay or block any of these decisions and paralyze or frustrate the operation of the dispute settlement system[17]. Thus, it can be concluded that under GATT 1947, the dispute settlement system was entirely in the hands of the parties. Hudec (1999) made the following interesting remarks concerning GATT dispute settlement system:-

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

Concerning remedies, the GATT 1947 provided for three remedies only namely; recommendation to comply, compensation and the suspension of concessions or any other obligations under the

---

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

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

[16] Bossche, P and Zdouc W (2017) *The Law and Policy of the WTO. Text, Cases and Materials* Cambridge University Press, pp. 185.

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

[18] Hudec, R Hudec, RE, (1999) *Essays on the nature of International Trade Law*, Cameron May. pp. 12. See also Pfumorodze J (, (2011),"WTO remedies and developing countries", Journal of International Trade Law and Policy, Vol. 10 Issue: 1 pp. 83 – 98.

covered agreements[19]. However, as noted above, these remedies were not effective due to the issue of positive consensus. Thus, it should be noted that from the onset the governments showed no political commitment to make an effective system of implementation and enforcement of rulings and recommendations[20].

3.3 Dispute Settlement under the WTO

The WTO dispute settlement system which came into operation in 1995 was innovative. It is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[21] Its prime objective is the prompt settlement of disputes between WTO Members concerning their rights and obligations under the covered agreements.[22] There are two important policy considerations referred to in the DSU namely; protecting the security and predictability of the DSS and the satisfactory settlement of disputes[23]. Jackson (2000) argues that these two policy issues may conflict with each other as sometimes the need to reach a satisfactory settlement may compromise the security and predictability of the dispute settlement system.[24]

Boosche and Zdouc noted the following new innovations in the dispute settlement system.[25] First, the quasi-automatic adoption of: requests for the establishment of panels, panel reports and the request to authorize suspension of concessions. Secondly, the strict time frames for various stages of the dispute settlement process and lastly, the possibility of appellate review of panel reports.[26]

The DSB plays a very crucial role in WTO dispute settlement system particularly in ensuring implementation and enforcement of its rulings and recommendations. It is made up of all

[19] See Articles XXII and XXIII of GATT 1947.
[20] Hudec, R, (1999) *Essays on the nature of International Trade Law*, Cameron May. pp. 12.
[21] Annex 2 to the Agreement Establishing the World Trade Organisation .
[22] Antoine BOUET and Jeanne METIVIER, "Is the Dispute Settlement System, 'Jewel in the WTO's Crown', Beyond Reach of Developing Countries" (2020) 156(1) Review of World Economics 1 at 2.
[23] Article 3(2) of the DSU.
[24] Jackson, JH, (2000) *The Jurisprudence of GATT and the WTO*, Cambridge.
[25] Bossche, P and Zdouc W (2017) *The Law and Policy of the WTO. Text, Cases and Materials* Cambridge University Press, pp. 185.
[26] However, the same learned author observed that the WTO dispute settlement system retained some characteristics of power-based dispute settlement through diplomatic negotiations regarding consultations, the role of the Dispute Settlement Body (DSB) and the confidentiality of the proceedings.

the representatives of every WTO Member and it deals with disputes arising under any of the WTO Agreements, and it does so in accordance with the provisions of the DSU. The DSU confers compulsory jurisdiction on the DSB for the purpose of resolving disputes.[27] The DSB establishes dispute settlement,[28] adopts reports from panels and the Appellate Body,[29] maintains surveillance of implementation of rulings and recommendations it adopts,[30] and authorizes the suspension of concessions and other obligations under the covered agreements, if its rulings and recommendations are not acted upon timely.[31] It also deserves mention at this juncture that WTO reports are adopted automatically unless there is a consensus to the contrary.[32] It is submitted that such a case is inconceivable because it supposes a situation where a 'winning nation' from the Panel ruling would invariably vote against itself. However, the enforcement of DSB rulings are beyond the scope of this paper, whose main focus shall be on the S&DT provisions in the DSU and other ancillary measures which are meant to promote the participation of developing countries in the WTO dispute settlement mechanisms.[33]

4. Existing S&DT provisions in the Dispute Settlement System.[34]

There are S&DT provisions from the consultations stage to the implementation phase of the WTO dispute settlement process. This section will analyse these provisions, stage by stage, and evaluate whether they have made any practical difference for developing countries and LDCs.[35]

---

[27] Article 1 of the DSU.
[28] Article 1 of the DSU.
[29] Article 21 of the DSU.
[30] Article 19 of the DSU.
[31] Article 22(2) of the DSU.
[32] Article 1 of the DSU.
[33] Kristin Bohl, 'Problems of Developing Country Access to WTO Dispute Settlement' (2009) 9 *Chi-Kent J Int'l & Comp L* 1.
[34] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Annex 2 to the Marrakesh Agreement Establishing the WTO in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, GATT/WTO Secretariat, Geneva (1994). See Alavi, A. (2007) 'On the (Non-) Effectiveness of the WTO's Special and Differential Treatments in the Dispute Settlement Process', *Journal of World Trade* (41) 3. For a discussion of Special and differential provisions in the DSU see Dispute Settlement System Training Module**:** CHAPTER 11 Developing countries in WTO dispute settlement http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm accessed 20 January 2024.
[35] Tania S et al, Reimagining the Special and Differential Treatment Provisions in the WTO's Dispute Settlement Understanding, *Asian Journal of International Law* (2024), 14, 123–153; Ronald Cullen Kerr Welsh, 'Special and Differential Treatment: A New Factory Explaining LDC Engagement with the WTO Dispute Settlement System?' (2018) 2018 Int'l Rev L 310.

4.1 Consultation Stage

Members should give special attention to particular problems and interests of developing countries.[36] This provision is problematic; it uses the term 'should' which is not mandatory instead of 'shall' which makes it compulsory. In addition, this provision is vague. For example, the term 'interests of developing countries,' is very debatable.[37] Where a developing country is a defendant, parties may agree to extend the time for consultations and in the absence of such an agreement the DSB chairperson can extend the time period for consultations.[38] This is a good provision since it gives developing countries more time to prepare their cases.

4.2 Panel Process

In any dispute in which a developing country is involved, the panel shall include at least one panelist from a developing country, if the developing country involved in a dispute so requests.[39] This provision is welcome, but it can be criticized in that it does not make it automatic to have a panelist from a developing country. Thus, there is a need for improvement by making the inclusion of such a panelist automatic. Alavi (2007) argues that this provision has been used without any apparent impact on the rulings.[40] On the other hand, Mosoti (2003) is of the view that this provision is 'more about building the confidence of developing countries in the system than it

[36] DSU Article 4.10.

[37] See *European Communities—Trade Description of Scallops*, request by Canada (WTO Document WT/DS7), Peru (WTO Document WT/DS12) and Chile (WTO Document WT/DS14). The request by Chile to be joined in consultations, requested by Canada with the European Communities, is contained in WTO Document WT/DS7/2. Chile voiced a complaint during a DSB meeting, at which its joint request with Peru for a Panel in this was considered. Chile stated that its request for consultations with another (developed) Member "had been disregarded by the Communities thus discriminating against and impairing Chile's interests in deviation from the provisions of Article 4.10 of the DSU", See Minutes of Meeting of the DSB, 27 September 1995, WTO Document WT/DSB/M/7 (27 October 1995).

[38] See Article 4.10 and Article 12.10 of the DSU. Khan P and Asif Khan M A, "GATT (1947) and WTO Dispute Settlement Systems: A Comparative Analysis" (2018) 49(73) *Journal of Law and Society* 13; Kuruvila PE, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism" (1997) 31(6) *Journal of World Trade* 171; Delich V, "Developing Countries and the WTO Dispute Settlement System", in Bernard HOEKMAN, Aaditya MATTOO and Philip ENGLISH, eds., Development, Trade and the WTO: A Handbook (Washington, D.C.: World Bank, 2002).

[39] DSU Article 8.10.

[40] Alavi, A (2007) "African Countries and the WTO's Dispute Settlement Mechanism" (25)1 *Development Law Review* 25-41, at pp. 33.

is about conferring a legal right on them',[41] and so it should be supported. One would tend to agree with Mosoti's reasoning because the mere presence of a panelist from a developing country, who is presumed to have knowledge of special circumstances in which developing countries are, would boost confidence in developing countries involved in such disputes, thereby ensuring the security of the WTO dispute settlement.

Where a Panel examines a complaint against a developing country, it shall afford sufficient time for a developing country to prepare and present its arguments.[42] This provision was applied in the *India-Quantitative Restrictions case,* where upon request; India was given an additional period of 10 days to prepare its first written submission to the Panel.[43] This is an acceptable provision since it gives developing countries ample time to prepare and present their cases. However, this provision should not be used to unnecessarily lengthen DSU time frames.

DSU Article 12.11 requires Panels to state how they have considered any S&DT provision which has been raised by a developing country in a dispute. This provision is welcome since it is meant to enhance transparency on how effective these S&DT provisions have been in a given case and to show how they have actually been applied.[44]

An interesting case on how the panels apply S&DT provisions is the *EC Biotech case*.[45] In this case, Argentina claimed that the moratorium on approvals of biotech products applied by the EC has failed to take into account Argentina's special needs as provided for in Article 10.1 of the SPS Agreement.[46] The issue was on who had the burden of proving that the interests of Argentina were or were not taken into account. Argentina argued that the EC should adduce evidence that it has taken into account Argentina's interests as a developing country. The EC argued the reverse, that is, Argentina should prove that the EC failed to take its interests into account. The panel ruled

---

[41] Mosoti, V (2003), "Africa in the first decade of WTO dispute settlement" (2006) 9 *Journal of International Economic Law* 17; Bahri A and Ali T, "Using Dispute Settlement Partnerships for Capacity Building: Bangladesh's Triumphant Experience at WTO DSU" (2019) 18(1) *Journal of International Trade Law and Policy* 19.
[42] DSU Article 12.10.
[43] See Panel Report, *India-Quantitative Restrictions on Agricultural, Textile and Industrial Products*, DS90, para. 5.10.
[44] See World Trade Organisation (2004) *A Handbook on the WTO Dispute Settlement System*, Cambridge, pp. 112.
[45] European Communities-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WTDS292/R,WT/DS293/R, 29 September 2006.
[46] Panel Report, EC-Biotechs, Para. 7.1605.

that the burden was on Argentina to adduce sufficient evidence to raise a presumption that the EC has failed to take into account its interests. This ruling can be criticized in that it places undue burden on developing countries on issues which are difficult to ascertain. Although the SPS gives such an S&DT in a mandatory form, the panel watered down this S&DT provision at the detriment of developing countries in general and Argentina in particular. Thus, it can be said that the panel failed to uphold S&DT provisions during the dispute settlement process.

4.3 Implementation

Particular attention should be paid to matters which affect the interests of developing countries during the implementation phase.[47] This provision has been observed in many instances.[48] In particular, in the *Indonesia Autos case*, the following comments were made:

> 'Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation,'[49] so it was granted 'an additional period of six months over and above the six month period required for the completion of Indonesia's domestic rule making process.'[50]

The above provision is acceptable both in principle and in logic as it gives developing countries enough time to implement DSB recommendations and rulings. However, what is worrying is that in the event that a developing country is faced with non-compliance by a developed country, there are no S&DT provisions to assist a developing country faced with such non-compliance. Thus there is a need for such provisions in the WTO dispute settlement system.

The DSB is required to consider what further action it may take in addition to surveillance and status reports, if this matter has been raised by a developing country.[51] The DSB is also

[47] DSU Article 21.2.
[48] See Award of the Arbitrator, *Chile-Taxes on Alcoholic Beverages-Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WTDS110/14, 23 May 2000, DSR 2000: V, 2589, 44. See also Award of the Arbitrator, *Argentina-Measures Affecting the Export of Bovine Hides and Import of Finished Leather-Arbitration under Article 21.3(c) of the DSU*, WT/DS155/10, 31 August 2001.
[49] Award of the Arbitrator, *Indonesia-Certain Measures Affecting the Automobile Industry-Arbitration under Article 21.3 (c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998: IX, 4029, 24.
[50] Supra note 10, 24.
[51] DSU Article 12.11.

required to consider both the trade coverage of the challenged measure and its impact on the developing Member concerned.[52]

4.4 Accelerated Procedures

Instead of using the ordinary DSU procedures, a developing country may use accelerated procedures of the Decision of 5 April 1966.[53] The time-frame of the Decision were only applied once under the GATT 1947,[54] but has not yet been applied in the WTO. According to Roessler (2005) there are two main reasons why this provision has not been used in the WTO dispute settlement system. First, developing countries want to face developed countries as equals in the legal proceedings and are therefore hesitant to invoke procedural privileges that their opponents do not enjoy.[55] Secondly, it is claimed that developing countries fear that the application of procedural provisions biased in their favour may detract the legitimacy of the results of the procedures and hence reduce the normative force of the rulings they are seeking.[56] It can be said that the above reasoning is not convincing in that it is developing countries who asked for these provisions in the first place and they were adopted by all Members, thus there would be no compromise on the quality of rulings since these procedures now are part of the WTO dispute settlement process. Thus there is a need to investigate the real reasons why such procedures are not used by developing countries. Otherwise developing countries and LDCs should be encouraged to use this procedure.

4.5 Legal Aid

DSU Article 27.2 requires that the WTO Secretariat should make available a qualified legal expert from the WTO technical services to any developing country which is involved in a dispute, if it so requests. This provision is welcome since it affords technical assistance to developing countries and can cushion them from lack of expertise.

---

[52] DSU Article 21.8.
[53] BISD 14S/14.
[54] See panel Report, EEC (Member States) - Bananas I.
[55] Roessler (2005) *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System* Geneva: Advisory Centre on WTO Law.
[56] Roessler Ibid.

Developing countries and LDCs may also get legal representation from the Advisory Centre on WTO Law (Advisory Centre) if they are Members thereof.[57] This Centre provides legal services in two main ways. First, it renders assistance in WTO dispute settlement proceedings.[58] Secondly, it provides legal advice to these developing countries and LDCs on matters of WTO Law.[59] This Centre also provides internships and training for officers from developing countries and LDCs.[60] It also has an agreement with some private legal firms which can give legal advice or legal representation to developing countries and LDCs in cases in where the Centre may have a conflict of interest.[61] It is the Centre which pays the fees to private law firms. Thus it can be said that some developing countries have legal assistance through the Advisory Centre on WTO Law. However, the Centre is a small one with only limited number of staff and resources so it cannot cater for all the needs of developing countries and LDCs.[62] Thus there is a need to find more ways by which developing countries and LDCs can have access to legal advice and legal representation.

4.6 LDCs

All the above provisions which confer S&DT provisions on developing countries are also applicable to LDCs. In addition, there are some provisions which are meant for LDCs only and these are considered below.

The special situation of LDCs should be considered at all stages of the dispute settlement process.[63] Members are encouraged to exercise restraint in bringing cases against an LDC and in asking for compensation or seeking authorization to suspend obligations against an LDC which would have lost a case.[64] These provisions are too general and vague and are difficult to enforce in practice. The DSU also provides for mediation and conciliation before a panel is established.[65] This is done in order to try to settle the matter before litigation. This is positive in that it tries to

[57] The Advisory Centre on WTO Law is an independent intergovernmental organizations which was established by an international agreement, the 'Agreement Establishing the Advisory Centre on WTO Law' signed by 29 Members of the WTO in Seattle on 1 December 1999.
[58] This assistance is from the consultation stage up to the implementation stage of the dispute. They appear on behalf of these Members before the Panels and the Appellate Body.
[59] See WTO Secretariat (2004) 115.
[60] See http://www.acwl.ch/e/training/training_e.aspx accessed on 24 January 2024.
[61] Ibid.
[62] See http://www.acwl.ch/e/dispute/dispute_e.aspx accessed on 25 January 2024.
[63] DSU Article 24.1.
[64] DSU Article 24.1.
[65] DSU Article 24.2.

reach a mutually acceptable solution which will not only build the relationship of the parties in a dispute but will also be cheap and easy to use.

From this section, it can be concluded that although some of S&DT provisions are helpful, most of them are mere hortatory and unenforceable. In addition, these S&DT provisions only start to be applicable when the consultation process begins, they do not take into account the constraints of developing countries in the pre-consultation stage. These countries have difficulties with expertise to identify whether or not there are any infringements on their WTO rights and also on financial resources to carryout some scientific tests which may need to be undertaken, for example, in food standards cases where there is a need for scientific tests.[66] Thus there is a need for reforming S&DT provisions in the DSU. The next section will discuss the proposals which were submitted by both developing countries and LDCs in the on going DSU negotiations.[67]

5. Proposals relating to SDT provisions in the DSU in the ongoing DSU Review.

The starting point for a discussion on the ongoing DSU review is Paragraph 30 of the Doha Ministerial Declaration, 2001 which provides as follows:

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

In addition, Paragraph 44 of the same Declaration provides as follows concerning SDT provisions:

> '44. We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In

[66]See Agreement on Sanitary and Phytosanitary Measures (SPS).
[67] Kumar Ingnam, 'Making WTO Dispute Settlement System Useful for LDCs' (2018) 6 *Kathmandu Sch L* Rev 117.

> this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.'

Paragraph 30 of the Declaration sets out that the mandate of the DSU negotiations is to make improvements and clarifications on the DSU. Paragraph 44 mandates the negotiators to review all SDT provisions with a view to strengthening them and making them more precise, effective and operation. Thus it can be said that Members committed themselves to improvement of all SDT provisions, including those in the DSU. It is interesting to note that developing countries and LDCs are actively participating in these negotiations and they have tabled many proposals. The next subsections give the main proposals by developing countries and LDCs for strengthening SDT provisions and evaluate whether such proposals are of any practical significance.[68]

5.1 Proposals by the African Group

The main proposal by the African Group provides that the DSU should 'provide for assistance in the form of a pool of experts and lawyers in the preparation of conduct of cases, the payment of fees and expenses entailed, and compilation by the WTO Secretariat of all applicable law including past decisions to be fully available to and usable by both parties and the panels/Appellate Body in each individual case.'[69] Alavi (2007) observed that this proposal adds nothing to the existing SDT provisions except on the proposal on payment of expert fees.[70] Be that as it may, this proposal is acceptable especially on the availability of fees. However, the way in which the African proposals are drafted is problematic in that it is very broad, general and not specific and many issues are bunched together. There is a need for improvement by African countries in the drafting of their proposals so that they may be understood easily by other parties.

[68] Valerie Hughes, 'Food for Thought: The Bali Package and WTO Dispute Settlement Post-Bali' (2014) 9 Asian J WTO & Int'l Health L & Pol'y 335.
[69] TN/DS/W/15.
[70] See Alavi, A (2007) "African Countries and the WTO's Dispute Settlement Mechanism" (25)1 *Development Law Review* 25-41, at pp. 29.

There is also another proposal which seeks for the establishment of a Fund on Dispute Settlement that can be used by developing countries.[71] This permanent fund is meant to allow developing countries and LDCs to engage in the dispute settlement process against developed countries on a more equal footing. There is also a proposal which is aimed at making existing non-binding SDT provisions legal binding by changing 'should' to 'shall' in the provisions concerning assistance and thereby presumably making them mandatory and operational as required by the Doha mandate.[72]

The African Group proposed to amend DSU Article 8.10 which deals with the composition of panels. The proposal is that it should be automatic for at least one panelist to be from a developing country in cases involving a developing country.[73] They added that another panelist from a developing country should be added if a developing country involved in a dispute so requests.[74] The African Group also proposed to increase the number of African members of the Appellate Body.[75]

The African Group also proposed collective retaliation against a developed country.[76] The logic behind this proposal is that a WTO inconsistent measure which affects the economy of the complainant is likely also to have an impact on other countries. This proposal also shows that African countries are aware that they lack the power to retaliate hence their proposal for collective retaliation.

The above suggestion may work in favour of developing and countries in that where a developing country could not have retaliated; collective retaliation seems to create enough pressure to induce compliance by the respondent of whatever stature. The main setback of this proposal is that it perpetuates retaliation, which itself is trade restrictive. Bronkers and Broek

[71]Text for the African Group Proposals on Dispute Settlement Understanding Negotiations Communication from Kenya, TN/DS/W/42 (24 January 2003).
[72] LDC Group Proposal TN/DS/W/17. For a commentary see Alavi A (2007) "African Countries and the WTO's Dispute Settlement Mechanism" (25)1 *Development Law Review* 25-41, at pp. .30.
[73]Text for the African Group Proposals on Dispute Settlement Understanding Negotiations Communication from Kenya, TN/DS/W/42 (24 January 2003).
[74]Ibid.
[75]Ibid.
[76]Ibid.

(2005) argue that this proposal is legally unrealistic because the nature of obligations in the WTO is inherently reciprocal, and it can not be assumed that a Member has a legal interest in the performance of the WTO obligation *perse*, independent of individual benefits.[77] Ehlermann (2004) points out that the implementation of DSB recommendations is expected to be achieved through the interactions of the parties in the course of dispute resolution.[78] Thus if collective retaliation is implemented this may complicate the implementation process and fundamentally alter the structure of the WTO dispute resolution system. As a result, it can be argued that collective retaliation should not be implemented in the WTO dispute settlement system.

5.2 Joint Proposal by India, Cuba, Malaysia and Sri Lanka and others

These countries proposed that developing countries and LDCs should be reimbursed if they successfully litigate or defend a legal action against a developing country.[79] This proposal recognises the lack of financial resources; knowledge and scientific expertise which is needed to investigate and handle during some cases in the WTO dispute settlement. Thus it can be said that this proposal should be seriously considered during the ongoing DSU reform negotiations.

5.3 LDCs Group Proposal

LDCs Group, represented by Zambia, proposed monetary compensation as opposed to retaliatory measures in the case of a developed country failing to bring its laws and regulations in conformity with DSB recommendations and rulings.[80] The merits of financial compensation has been considered in the previous section, and it can be recommended that financial compensation should be included in the DSU in order to make remedies available to developing countries and LDCs who lack retaliatory power. The LDC Group also proposed retrospective damages and that the quantification of such damages should commence from the date the Member in breach adopted

---

[77] Bronckers, M and Broek, N (2005) "Financial compensation in the WTO: Improving the remedies of the WTO dispute settlement system" 8 *Journal of International Economic Law* 101 at pp. 127.

[78] Ehlermann, E. (2004), "Reflections on the process of clarification and improvement of the DSU", in Ortino, F. and Petersmann, E.-U. (Eds), Studies in Transitional Economic Law, Vol. 13,The WTO Dispute Settlement System 1995-2003, Kluwer Law International, The Hague., pp. 112.

[79] See Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19 (9 October 2002), p. 2. See, also, Frances Williams, WTO Minnows Cry Foul on Mediation, Financial Times, 24 October 2002, p. 6.

[80] See Negotiations on the Dispute Settlement Understanding (submitted by Zambia on behalf of the LDC Group), TN/DS/W/17 (9 October 2002), 2.

the offending measure.[81] This is a very serious proposal which warrants consideration in the ongoing DSU negotiations.[82]

6. Recommendations

From the above discussion it is apparent that developing countries and LDCs still face many challenges when participating in the WTO dispute settlement process. The main concerns which resonate almost through all proposals are lack of financial resources, lack of expertise and lack of power to retaliate. Thus, these issues need to be addressed in the ongoing DSU negotiations. Below are some of the proposals which may improve system
and mitigate these problems.

It is recommended that a permanent fund should be set up to help defray the costs of litigating disputes. This would remove the financial burden which is faced by developing countries and LDCs in the dispute settlement process. In addition, developing countries and LDCs should be reimbursed if they successfully litigate or defend a legal action against a developing country. These recommendations are meant to cater for lack of financial resources by developing countries and LDCs.

Concerning expertise, the Advisory Centre on WTO Law is doing its best but still there is a need to build capacity in developing countries and LDCs. This capacity building would enable these countries to have a good trade policy infrastructure which would ensure that information is gathered, analysed and transferred to the government, which then decides whether to pursue a

[81] Negotiations on the Dispute Settlement Understanding (submitted by Zambia on behalf of the LDC Group), TN/DS/W/17 (9 October 2002), 3.

[82] This is commendable in that it will give the offending country an incentive to comply early with the rulings and recommendations of the DSB since the longer they take to comply the more they are to pay. This then removes all the present incentives for delay in the dispute settlement process especially on the implementation and enforcement. Some authors have argued that retrospective damages are contrary to the fundamental notion of constitutional and democratic governance. For, instance, there are significant constraints on the ability of the governments to recall subsidies already provided legally and in good faith to private companies. See Mavroidis, P. (2004), "Proposals for reform of Article 22 of the DSU: reconsidering the 'sequencing' issue and suspension of concessions", in Ortino, F. and Petersmann, E.-U. (Eds), *Studies in Transitional Economic Law*, Vol. 13, The WTO Dispute Settlement System 1995-2003, Kluwer Law International, The Hague.2004) 405; Paola Conconi & Carlo Perroni, 'Special and Differential Treatment of Developing Countries in the WTO' (2015) 14 *World Trade Rev* 6; Ronald Cullen Kerr Welsh, 'Special and Differential Treatment: A New Factory Explaining LDC Engagement with the WTO Dispute Settlement System?' (2018) 2018 Int'l Rev L 310.

case or not.[83] The point here is that SDT provisions should not begin only at the consultation procedure but should also be extended to the pre-consultation stage if these countries are to fully benefit.

On the implementation phase, monetary compensation should be embraced in the WTO. Repatriation by governments of injury for which they are held liable is acceptable under public international law.[84] This remedy was proposed in the GATT for the first time in 1966.[85] As noted above, this proposal was tabled by the LDC Group has several advantages.[86] First, it is not trade restrictive. Secondly, it helps redress injury. Thirdly, it may work better to induce compliance. Fourthly, it does not lead to disproportionate burden on innocent bystanders. Fifthly, it can be a disincentive to foot-dragging in the implementation and enforcement process. Sixthly, it is in line with general public international law and finally, it can add an element of fairness. Thus it is recommended that this remedy be used by developing countries and LDCs when they are faced with non-compliance by developed countries.[87]

It is also recommended that the existing non-binding SDT provisions should be made legally binding by changing 'should' to 'shall' in the provisions concerning assistance and thereby presumably making them mandatory and operational as required by the Doha mandate. In addition, there is also a need to make available less costly procedures for developing countries and LDCs. These procedures include mediation and conciliation.

5. Conclusion

It is important that developing countries and LDCs should have faith in the WTO dispute settlement system if security and predictability of the multilateral of the trading system is to be

[83] See also Shaffer, G (2003) *Defending Interests: Public-Private Partnerships in WTO Litigation.*Washington, DC: The Brookings Institution Press., 1.
[84] See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd session (September 2001), Supplement No. A/56/10),Chp.IV.E.1 available at http://www.un.org/law/ilc/convents.htm accessed on 23 January 2024.
[85] See Report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM, TD/F/4, (4 March, 1966).
[86] See Bronckers, M and Broek, N (2005) "Financial compensation in the WTO: Improving the remedies of the WTO dispute settlement system" 8 *Journal of International Economic Law* 101.
[87] For the setbacks of this remedy see Bronckers, M (2005) 119. However, it seems its advantages far outweigh its disadvantages so it should be implemented in the WTO dispute settlement system as an SDT provision.

maintained. Developing countries and LDCs must feel that the system will not only give them the opportunity to have rulings in their favour, but also that the system gives them the means to enforce the rulings. Hence the call for strengthening SDT provisions in the DSU and making them more precise, effective and operational.