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LIMITATIONS CHALLENGING BETTER STATE INVOLVEMENT IN THE DSB

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Abstract. In this scientific paper the authors considered the challenges that developing countries experience when participating in the Dispute Settlement Body (DSB) of the World Trade Organization (WTO). Developing countries and the low-income countries are faced with limitations of the DSB and, therefore, this research examines the most substantial aspects of these limitations. The current research article discusses the economic, financial and legal constraints encountered by developing countries and the least developed countries. This research also explains the need to ameliorate the Dispute Settlement Understanding (DSU).

Keywords: WTO, Advisory Centre on WTO Law, dispute settlement body, low-income countries, developing countries, least developed countries, dispute

resolution procedure

i) Deficit of economic and juridical assets

There are a number of remarkable factors that can hinder DLDC participation in the DSB. Initially, the shortage of financial and juridical sources is discussed in this work. It is true that DLDC cannot afford the costly litigation procedures of the DSB. In addition, the lack of legal proficiency of DLDC with WTO law and practice can create obstacles to effectively protecting and securing their interests pursuant to WTO regulations.

The majority of WTO members are DLDC and these countries raise a limited amount of revenue from commerce, and filing a claim in the DSB is problematic for these countries. For instance, one million USD is a minor portion of developed countries' budget, while it constitutes a large amount for DLDC, such as Gambia and Burundi.[1] It is obvious that the WTO operates without considering the fundamental disparity in exports among its members. For example, a claim worth a million USD is viewed the same as a conflict worth one billion USD in DSB practice. Therefore, the WTO structure does not consider the traded volume. Consequently, very small trading communities remain in a less favorable position for utilizing the dispute settlement process as the litigation cost is exceedingly large for several nations. Bringing a case to the DSB is not meaningful for DLDC as first, it is very costly, and second, it is not certain that remedy will be provided. Thus, developing nations are unlikely to be faced with lengthy and pricey litigation, especially when the expected outcome is not clear.

One of the important components that inhibits the participation of developing societies in the WTO DSB is the shortage of economic and juridical reserves. This shortage was noted by the African Group, as the DSB is a "costly and sophisticated" procedure, especially for developing nations. [2] The ambassador of India also pointed out that the DSB is a "serious obstacle" for the developing world.[3] Moreover, DSB procedures demand human and economic capital to pursue a

lengthy lawsuit, from the consultation phase to the appeal phase. A number of developing countries are in need of economic and human resources. Therefore, DLDC face challenges when filing a lawsuit in the WTO. Compared to the developed world, these countries do not possess enough economic reserves and professional legal expertise. Consequently, dispute settlement proceedings are not equal due to an imbalance in sources between developing countries and developed countries.

Due to the lack of professional personnel in DLDC, they have to hire legal experts to defend and secure their interest in dispute resolution procedures. It should be noted that hiring legal professional is very costly. One vivid example is the *Cotton and Sugar Subsidies* case [4] where the cost of the legal professionals was more than 2 million USD. In addition, the length of the dispute settlement is another issue because it can proceed up to three years, as in the *Japan-Photographic Film* case [5], where the cost of the proceedings exceeded 10 million USD. [6] Moreover, it is often impossible to predict and calculate the lawyers' fees, as the case continues to proceedings after consultation to panel or to the AB. Pursuant to the DSU, state representatives are authorized to raise a dispute in a panel or AB [7] which means employing private legal professionals less favourable for DLDC.

According to Article 27.2 of the DSU, DLDC can solicit technical support from the Secretariat of the WTO which helps DLDC deal with the expenditure of litigation and competent legal expertise. Article 27.2 states that the Secretariat provide DLDC with "legal advice and assistance" available at technical collaboration service. [8] However, expert service is provided only after a lawsuit is initiated in the WTO. Assistance provided by the Secretariat should be provided before the dispute settlement procedure begins. Expert assistance may be only for securing the "impartiality of the Secretariat" because experts' responsibility is just to provide guidance and interpret WTO legislation and processes. The DSU states that a legal expert allocated by the Secretariat cannot participate in the case as the defense counsel. In fact, legal experts are needed to represent the impartiality of the

Secretariat. In some cases, the ability of legal experts to assist less developed nations on strategic legal issues is limited by impartiality requirements. [9, p. 120-121] Indeed, Article 27.2 is flawed, especially in terms of the standard litigation process and lack of juridical competence. [10]

In December 1999, the Advisory Centre on WTO Law (hereinafter ACWL) was established by WTO member countries at the WTO Ministerial Meeting in Seattle, Washington.[11] The ACWL is regarded as a new, sovereign "non-governmental" system and universal legal assistance centre for international law. [12] The ACWL functions independently, and the main objective of this organization is to provide legal assistance, help and training on WTO legislation to DLDC representatives. [13] Moreover, this organization aids in the preparation and initiation of trade disputes in the WTO. In addition, the ACWL can provide professional legal services to the parties of a dispute. Indeed, the ACWL can offer broader tactical support and act as a "public defender" for DLDC. The ACWL can provide necessary legal advice in the consultation phase of a case. In addition to the advantages listed above, there is also the downside of the ACWL, which is that its services are not free. Even the membership charges for the ACWL are significantly costly for DLDC. In fact, the membership fee might hinder the DLDC from joining the ACWL.

The ACWL provide services after the case proceedings have commenced, according to the DSU. Aid given prior to the initiation of a case may be more effective. Moreover, the ACWL has a limited number of personnel and a couple of lawyers with outstanding intelligence and competence. Undoubtedly, the ACWL cannot manage all disputes at hand. Interestingly, when two DLDC refer their dispute to the ACWL, it cannot assist both of them. In a case about *export subsidies on sugar*, [14] the ACWL denied granting aid to one of the parties of the dispute. Indeed, Australia employed its legal experts, Brazil had to use private law firms and Thailand was assisted by the ACWL. These shortfalls of the ACWL prevent the majority of DLDC from becoming a member. The ACWL was established to

officially represent and guide DLDC to secure their legitimate rights. In fact, the ACWL does not resolve all limitations faced by developing world countries, and the cost of litigation in the WTO is still very expensive. The ACWL and Article 27.2 of the DSU addressed the scarcity of economic and legal sources of DLDC in the dispute resolution process. Nonetheless, problems related to the exorbitant cost of litigation and lack of juridical expertise of DLDC remain unsolved.

ii) **Retaliation**

Due to their economic and political weakness, DLDC are unable to enforce DSB rulings against powerful countries. This is a major problem and issue of great concern for DLDC. In the *US-Upland Cotton [15]* case, the concern of DLDC became crystal clear. Brazil enables US compliance and US rejection to abide with DSB decisions. Thus, Brazil opted for official DSB permission for countermeasures under Article 22.2 of the DSU. [16] The insufficient performance of retaliation should not considerably influence DLDC determinations to operate in the WTO. Ensuring enforcement by retaliation rules through termination of trade privileges or obligations consequently leads to the assumption that dispute resolution system of WTO “approximately pointless” and have no authority against developed powers. Among the notable limitations of DLDC participation in DSB is the structural inflexibility of redress handed over to low-income countries to enforce a positive judgment.

Within the scope of the DSU review negotiations, the DLDC group emphasized the limited involvement of developing countries in the WTO dispute resolution structure. Mainly, DSU deficiencies and organizational toughness of the remedies accessible to poor states were highlighted. In addition, the African Group highlighted that the essential crux is the biased enforcement mechanism of rulings and recommendations and retaliation. Thus, there have been a number of proposals [17] to reform all forms of retaliation rules. [18] The contemporary system of DSU enforcement might cause powerful countries to lengthen the dispute resolution

process. For instance, the case related to textile safeguard measures among the US, Pakistan and Costa Rica lasted approximately 3 years. [19]

The DSU should be reformed so that it is effective for both developing and developed countries. [20] This analysis proved that the dispute adjustment structure of the WTO is not workable for developing nations, especially first world countries, and it wastes funds and valuable time. Moreover, the termination of trade concessions is more beneficial for advanced nations than DLDC as a method of verifying compliance. If retaliation is the only way to ensure compliance, then it would result in an inferior level of compliance by DLDC.

As assessed in this section, the developing world is limited when low-income countries have to pay financial and administrative damages to advanced state members and maintain pressure to force compliance. Moreover, retaliation can be pernicious for DLDC rather than advanced nations targeted by it. DLDC have few resources to dispute settlement schemes; therefore, they cannot successfully implement WTO rulings. In summary, the shortfalls of retaliation are already recognized by members of the WTO as a constraint to DLDC participation in the DSB.

iii) Length of the DSB Process and Compensation

The DSB of the WTO is established to settle disputes between WTO member states regarding their rights and infringements under WTO rules. [21, p. 102-158] All member states of the WTO are included in the DSB. A party that wants to make a claim against other member states should first initiate a request for consultation. In fact, the consultation stage should last at least 6 days. If during the consultation phase, the parties' disputes are not effectively solved, the parties can ask the panel to settle their conflict. After making a request to the panel, the adjudicative procedure will start. There are two levels of adjudicative processes in the DSB. The first phase is "adjudicative", where three panelists constituted by the DSB. The panel considers all facts and regulating norms, and then makes a decision within six

months [22], or in complicated disputes, this period can be extended by the panel. [23] The panel circulates its decision to the parties of the case, and they can comment or make recommendations on it. [24] The final decision of the panel is put forward to the DSB, and if there is no general agreement of the parties against the decision or any of the parties plans to appeal, the decision is confirmed by reverse consensus. The second phase of the DSB adjudicative procedure is the appeal. Either one or both parties can appeal their dispute to the AB. The appeal stage duration is a maximum of sixty days, or in particular, exceptional cases can be extended up to ninety days. In short, the length of the litigation period on average is 15 months, commencing from the formation of the panel until the date when the DSB adopts a panel report. [25]

Nevertheless, in practice, in many cases, it takes more than fifteen months to settle a dispute. For instance, the *Airbus and Boeing subsidy* [26] case lasted approximately five years. In this case, the United States of America (US) and the European Communities (EC) filed a grievance concerning national subsidies for air vehicle manufacture. The request for the establishment of the panel was made in January 2006 by the EC and in May 2005 by the US. Consequently, the initial ruling of the panel was released on 30 June 2010. The duration of the Airbus and Boeing case exceeded the limit set in the DSU.

One of the problems faced by DLDC is the lengthy duration of the dispute resolution process of the WTO. Several developing states expressed their views about the considerably protracted period of dispute settlement that lacks to present prompt solution to a dispute. [27] Even though Article 3.3 of the DSU provides that the dispute resolution procedure should be expeditious and efficacious, it should be noted that these proceedings take a very long time. The overall dispute settlement period takes fifteen months starting from request for consultation until the decision of the AB. Moreover, a ten-month reasonable period was also included for the implementation of the ruling and recommendations. [28] It takes an extra two years to attain satisfaction due to the use of inconsistent measures.

DLDC maintain their economies at the expense of annual revenues, and the protracted litigation against trade barriers that lasts for several years leads these countries to a dead end. On this account, the prolonged dispute resolution procedure undermines the prospect of DLDC participation in DSU. The lengthy litigation process dampens interest in this system and, over time, leads to rare use of this mechanism.

It should be noted that there are some circumstances that lengthen the DSU process. One of the reasons to extend the time is referred to the legal and political complexities within the cases; for instance, the parties can terminate the proceedings and attempt to negotiate. Another reason for lengthening the period can be language issues. Draw attention to some cases where the parties are Spanish speaking countries and the respondent persistently decided to include English speaking experts in the case. As a result, additional time was allocated for the translation of the documents. Consequently, the majority of DLDC try to refrain from the DSU due to the lengthy period and shortage of resources.

a) **Compensation**

Compensation is one of the intriguing aspects that encourages DLDC to utilize DSBs. Additionally, it is regarded as an essential factor for upholding DSU as an effective instrument for all member states of WTO. Certainly, DSU provides ruling that might introduce compensation for the succeeding party where the failing party does not fulfil the decision of DSB. Compensation is viewed as a redress for DLDC to ensure that other parties enforce DSU determination. Nonetheless, pursuant to Article 3.7 of DSU compensation is regarded as a temporary procedure to be provided when “prompt withdrawal of the measure is not possible”. It is discovered that without compensation, DSU determination is less significant.

Consultation is the first course of action of DSU. The claimant state may request consultations to amicably resolve conflict between parties. In case the consultation phase is unsuccessful, the claiming party can apply for the creation of

a panel. In the panel stage, submissions of either party will be assessed. DSU Article 22.1 maintains that "compensation and suspension of concession or obligations" are transitory procedures applicable when the failing party does not comply with the recommendations and ruling within a specific reasonable time. Noticeably, in Article 22, there is no clear instruction on how to implement and enforce recommendations under compensation and termination of privileges or other obligations. This factor obscures the application for compensation. In fact, developing world countries face troubles applying for compensation according to DSU.

Another important factor that prevents developing countries from claiming compensation is that the concept of the most favoured nation (hereinafter MFN) norm must be respected by all member states. Compensation is officially permitted by DSB and not enforced until DSB issues suggestions and rulings. Undeniably, defendants can withdraw arrangements within a period of 60 days. The defendant may also suggest restitution by means of compensation. In the dispute settlement system, there is no reimburse for any damage generated by illicit trade practices. Compensation is implied as a tariff reduction, not as financial payment. WTO provisions and MFN treatment should be respected while considering compensation. Under MFN, if there is special advantageous treatment for one member, then this certain beneficial treatment must be applicable to all member states of WTO.

Thus, if claiming party after going through all the procedural stages of DSU reaches successful results, then all members of WTO can benefit from this positive ruling. This practice is considered unfair because when one party goes through all the lengthy procedural steps and achieves a result, then it has to share it with all members. Therefore, MFN produces another obstacle employing compensation in practice. Accordingly, claimants might seek a wider scale of market access while considering compensation, so this party can obtain special advantage from it, especially when claimants have to share it with all members. As a result, compensation is not so much inviting for the parties of a dispute. [29]

The fundamental goal of compensation is stimulating WTO Member states to comply with WTO rulings. Two of the substantial restraints inhibiting the participation of DLDC in dispute resolution procedures are the duration of DSB proceedings and compensation. Moreover, there is a lack of satisfaction with the suggested compensation. There are grounds for barely employing the redress of compensation: initially, the voluntary characteristic of the compensation requires that both parties consent to the decision. The next reasons are that the compensation should be covered in the agreement and the compensation does not necessarily represent an adequate reparation for losses.

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