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# **A Critical Analysis of The World Trade Organization's dispute settlement system is equally available to all member states and creates a fair and level playing field**

**By Zvichanzii V. Mugota<sup>1</sup>**

## **Introduction: Structure of the dispute settlement mechanism**

The dispute settlement mechanisms of the World Trade Organisation (WTO) are set up in terms of Understanding of the Rules and Procedures Governing the Settlement of Disputes (the dispute settlement system hereinafter referred to as DSB).<sup>2</sup> The DSB is not an entirely new creation, it is an organisation that evolved from the GATT diplomacy-conciliatory base system to a more judicially focused organisation.<sup>3</sup> Before the dawn of the DSB, disputes were negotiated through diplomatic channels which could be easily frustrated by one of the parties in view of the absence of legal frameworks to deal this. Each one of the GATT Agreements had its own dispute settlement mechanisms<sup>4</sup> which made dispute resolution complex.

Under the DSB, the respondent state no longer has the right to veto the setting up of a panel to adjudicate over an alleged dispute.<sup>5</sup> It also sets a time frame in which a dispute can be settled<sup>6</sup> and the findings implemented,<sup>7</sup> which is a vast improvement over the time inefficiencies that characterised the GATT era.

The DSB of the WTO has introduced improvements to the nature of dispute resolution and disputes are resolved in three stages, namely:

- i) Consultation stage: a 60 day negotiation period where the parties try to resolve the dispute through diplomatic means. Nearly half the disputes brought before the WTO end at this stage with the defendant yielding a concession or two.<sup>8</sup> Disputes that are not resolved through consultations move to second stage;
- ii) The Panel stage has a panel of three to five members appointed to adjudicate the dispute.<sup>9</sup> The panel is empowered to consider submissions from the main parties to the dispute as well as to admit *amicus curia* from other interested parties and it produces an interim report which the parties consider for adoption. About 13 per cent of the disputes are resolved at this stage.<sup>10</sup> The panel issues a final report which is adopted by the WTO for implementation although, if one of the parties opposes the report, the process will move on to the last stage;

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<sup>1</sup> LLM, LLBS Lecturer, University of Zimbabwe

<sup>2</sup> Annex 2 of the WTO Agreement

<sup>3</sup> Simon Lester & Bryan Mercurio, *World Trade Law Text, Materials and Commentary* (2008) Hart Publishing 155

<sup>4</sup> Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' *Development Policy Review*, (2007), 25 (1): 25-42

<sup>5</sup> DSB Art 6.1

<sup>6</sup> *Ibid* Art. 20

<sup>7</sup> *Ibid* Art. 22

<sup>8</sup> Marc L. Busch, 'The WTO Dispute Settlement Mechanism and Developing Countries' (2004) SIDA Trade Brief available at [www.sida.se/publications](http://www.sida.se/publications) date accessed 13 May 2013 2

<sup>9</sup> DSB Art. 8

<sup>10</sup> Busch (note 8) 3

- iii) The Appellate Body consists of a permanent body of jurists who review the findings of the panel. It is competent to decide issues on treaty interpretation,<sup>11</sup> practice and procedures, and to give *amicus curiae* briefs standards of review among other functions.<sup>12</sup> About 73 per cent of all panel rulings are referred to the Appellate Body<sup>13</sup> whose decisions are then implemented by the parties. The Appellate body is empowered to direct compensation, compliance and retaliation.<sup>14</sup>

The composition of the Appellate Body provides a broad based representation of leading legal and trade experts from all the members of the WTO.<sup>15</sup> The DSB is designed to enable the prompt settlement of disputes and mitigation of expenses and to prevent case backlogs through procedural efficiencies.<sup>16</sup> It has embedded principles to advance the interests of developing countries and can, if requested by the developing country, offer a time extension<sup>17</sup> to enable the developing country to adequately prepare its case.

The rules of the WTO dispute settlement *prima facie* give an enabling platform for any member, regardless of its economic status, to take on other members on trade violations.<sup>18</sup> The dispute settlement mechanisms were expected to favour the developing nations as they contained an 'an important guarantee of fair trade for less powerful countries'.<sup>19</sup> This is due to the fact that the dispute settlement mechanism is a judicial system which is based on the rights of members as opposed to the political or economic clout that members might wield,<sup>20</sup> and this rights-based approach has been hailed by critics as seeking to engender 'transparency and predictability'<sup>21</sup>. The majority of WTO members are developing countries and their effective participation is vital for the credible functioning of the WTO as an organisation that champions the trade interests of all members.<sup>22</sup>

However, in practice, the process has been attacked for not offering a level playing field for the effective participation of developing countries. Several factors have been put forward as creating imbalances in the ability of member states to utilize the DSB. This essay will analyse the following factors:

- 1) the role of political and economic power wielded by countries involved in disputes;
- 2) lack of technical and financial capacity to participate effectively in the proceedings at the WTO DSB and;
- 3) the lack of effective enforcement clout.<sup>23</sup>

It is the writer's view that the WTO dispute settlement mechanism is not freely accessible to all members and that it does not ensure an equal and level playing field across the board.

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<sup>11</sup> Turkey – Restrictions on Imports of Textile and Clothing Products (*Turkey – Textiles*)

WT/DS34/AB/R the Appellate Body had to decide on the interpretation of the GATT Agreement

<sup>12</sup> Julio Lacarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench' (2000) *Jn Int Economic Law* 395 398

<sup>13</sup> *Ibid* at note 12.

<sup>14</sup> *Ibid* at note 12.

<sup>15</sup> DSB Art 17.3

<sup>16</sup> Lacarte-Muro & Gappah *Ibid* at note 12, 396

<sup>17</sup> Art. 12.10

<sup>18</sup> Lacarte-Muro & Gappah *Ibid* at note 12, 401

<sup>19</sup> WTO former Director-General, Renato Ruggiero

<sup>20</sup> Lacarte-Muro & Gappah *Ibid* at note 12, 400

<sup>21</sup> *Ibid* at note 12

<sup>22</sup> *Ibid* (note 12) 401

<sup>23</sup> Douglas S. Ierley, 'Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute over Bananas' (2001-2002) 33 *Law & Pol'y Int'l Bus.* 615 616

This discussion will show the political factors that influence the conduct of members at the WTO and how these factors invariably affect the dispute settlement process. The focus will shift to the technical and financial barriers faced by developing countries in trying to access the DSB. Attention will also be paid to the enforcement mechanisms available to implement the rulings of the process. The discussion will conclude by analysing the proposed reforms to the dispute resolution system.

## **BARRIERS TO FAIR AND EQUITABLE ACCESS TO WTO DISPUTE SETTLEMENT MECHANISMS**

### **Behind the consensus veil: the real forces that determine the fairness and equality of the WTO dispute settlement procedures**

The WTO is guided by the principle of sovereign equality; all members have the same rights and duties and can effectively participate in the deliberations of the organisations.<sup>24</sup> All members are free to attend meetings, oppose or propose recommendations and have the right to approve or disapprove a consensus.<sup>25</sup> Supporters of the process have hailed the DSB as offering developing countries practical experience in dispute settlement through participating in the process. They state that is through participation that developing states learn to distinguish between 'what can be won' and what cannot.<sup>26</sup>

Decisions are made through a consensus process;<sup>27</sup> which allows developing countries to veto agreements that are not favourable to them. In the past, developing countries have employed this tradition of consensus to veto proposals such as the EU's proposal on permanent panellists and USA's proposal on transparency,<sup>28</sup> which they did not regard as being in their interests. However, this system is not guaranteed to ensure that the developing countries will always be able to control the direction of the WTO.

The establishment of a third party quasi-judicial procedure (the Appellate Body) to resolve disputes has the potential to make decisions that may alter the direction of the WTO to the possible detriment of developing countries through a negation of their veto powers.<sup>29</sup> This is because the Appellate Body does not have a developmental focus; it is concerned with a positivist approach to the rules of the WTO.<sup>30</sup> Though the concessionary method of decision making in the WTO is commendable, sceptics are concerned with the nature of the consensus. They argue that it is necessary to have 'quality of consensus-making' to enable the making of just and fair outcomes.<sup>31</sup>

The WTO dispute settlement mechanism is a result of negotiations in the international trade arena which is influenced by both political and economic forces that dictate the tone of international relations.<sup>32</sup> Powerful trading nations have used the forum presented by GATT to champion their own interests.

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<sup>24</sup> Ilan Kapoor, 'Deliberative democracy and the WTO' (2004) 11:3 *Review of International Political Economy* 522 528

<sup>25</sup> *Ibid* (note 24)

<sup>26</sup> *Ibid* (note 23) 622

<sup>27</sup> Marrakesh Agreement Establishing the WTO Article IX

<sup>28</sup> James Smith, 'Inequality in international trade? Developing countries and institutional change in WTO dispute settlement' (2004) 11:3 *Review of International Political Economy* 542

<sup>29</sup> *Ibid* (note 28) 543

<sup>30</sup> James Smith *Ibid* (note 28)

<sup>31</sup> Kapoor (note 24) 528

<sup>32</sup> *Ibid* (note 23) 616

Towards the conclusion of the Uruguay Round, the USA coerced weaker nations into agreeing to all the intellectual property clauses, investment and services in the TRIPS Agreement by threatening to withdraw from the Round and to impose trade restrictions on all the countries that did not agree to its proposal.<sup>33</sup> The US further teamed up with the European Union to secure its demands by successfully pushing for a 'single undertaking' of the whole GATT/WTO system.<sup>34</sup>

In order for developing countries to comply with the requirements of the TRIPS and TRIMS Agreements, they had to amend and realign their laws with the foreign western laws.<sup>35</sup> This automatically put the developing countries on the back foot as they had to learn the intricate details of these laws so as to effectively implement them. When it comes to TRIPS related dispute, the developing and developed countries do not have the same knowledge or relevant expertise to equally resolve such disputes.<sup>36</sup> This illustrates that there is no real consensus as some of the developing countries are coerced into accepting the positions of other countries.<sup>37</sup>

The coercion translates into the subterranean field of dispute settlement procedures, making it difficult for developing countries to institute proceedings against stronger nations.<sup>38</sup> It also makes it difficult for weaker countries to vote against a position taken by a stronger nation concerning the adoption of panel reports during the dispute settlement stages. The political power that influences the working of the WTO also helps to tilt the dispute resolution field in favour of the developed countries.

In addition, many developed countries are able to offer concessions in the consultation phases of the process which is a bargaining tool that developing countries do not have at their disposal. Some of the outcomes of the dispute may not be based on fairness but on the promises made in the consultations. Though the consultations are on a 'without prejudice basis', political arm twisting cannot be ruled out.<sup>39</sup> This further illustrates how the system of dispute settlement in the WTO is not immune to political and economic manipulation which can distort the notions of equality and fairness that are embodied in the DSB legal framework.

### **Lack of financial and technical capacity**

The dispute settlement process is open to all members but members are required to meet their own legal costs<sup>40</sup> that are a huge challenge for developing countries.<sup>41</sup> Bringing a case before the WTO is very expensive. According to Bown and Hoekman, top lawyers who offer specialist legal counsel in trade litigation can charge from USD 89,950 for a relatively simple case to USD 247,100 for a more complex case.<sup>42</sup> These legal fees do not include the costs of data collection, or the hire of other experts which usually cost anything between USD 100 000-200 000.<sup>43</sup> When the logistical overheads, such as accommodation, are factored in, the

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<sup>33</sup> Richard Steinberg, 'In the Shadow of Law or Power? Consensus-based bargaining in the GATT/WTO' [2002] 56 (2) *International Organisation* 339

<sup>34</sup> Kapoor (note 24) 530

<sup>35</sup> *Ibid* at 535

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

<sup>38</sup> *Ibid*

<sup>39</sup> Kapoor (note 24) 537

<sup>40</sup> Chad P. Bown & Bernard M. Hoekman, 'WTO Dispute Settlement And The Missing Developing Country Cases: Engaging The Private Sector' (2005) 8(4) *J Intl Econ L* 8(4) 861 870

<sup>41</sup> Chad P. Bown 'Participation in WTO Dispute Settlement: Complaints, Interested Parties and Free Riders' (005) Vol 19 No 2 *Wld.Bank Econ.Rev.* 294

<sup>42</sup> Bown & Hoekman (note 40) 870

<sup>43</sup> *Ibid*

'litigation only' bill can be about \$500,000.<sup>44</sup> When the costs of lobbying and public engagement are added on, the amount needed to sustain just one leg of litigation is very substantial.

Based on past disputes, WTO disputes are seldom settled in one round<sup>45</sup> and cases usually go to the Appellate Body for a final ruling.<sup>46</sup> The developed countries have the financial wherewithal to absorb these costs which constitute an obstacle for poorer countries. In this way, using the WTO procedures for dispute settlement is not equally accessible to all parties.

Another challenge for developing countries to effectively participate in the dispute making proceedings of the WTO is due to their limited legal capacity to participate or keep abreast with the process.<sup>47</sup> Trade disputes are highly technical and complex and require legal and technical expertise to proceed with a case.<sup>48</sup> Parties have to act as both players and referees to spot violations of trade agreements and bring them for resolution. Some developing countries are unable to adequately identify the issues so as to effectively address them. In contrast, the developed countries have armies of professional trade experts, from both the public and private sectors who work together to ensure effective investigation of the cases. They also work hard to drum up political interest which is very handy in eventual compliance or non-compliance with the case outcomes.<sup>49</sup>

The subsidised legal assistance offered by the WTO Advisory Services in Geneva is not fully adequate for a state to effectively lodge a complaint against a more powerful member state.<sup>50</sup> This is because the assistance offered by the Advisory Services and other NGOs can be biased to favour the special interests of the NGOs. The work produced by NGOs has been criticised for being of a lower standard as it is usually produced by interns working in these organisations. This is in stark contrast to the work that forms the basis of the arguments of the developed countries which is produced by high-level legal experts hired by the governments with the support of the large corporations.<sup>51</sup>

In addition, assisting services are only provided once a dispute has been formally lodged,<sup>52</sup> which means that there is a capacity gap in the proper preparation of the case.<sup>53</sup> The Appellate Body is also cognisant of the fact that the governments of developing countries may not have similar trade expertise within their ranks and file to effectively represent their interests, which is why the Appellate Body in the *European Communities-Bananas* case made a decisive ruling to allow private legal counsel to represent a state party.<sup>54</sup>

However, the decision to allow law private counsel to represent member states highlights the fact that the procedure of the DSB is 'so complicated that one needs training to use it.'<sup>55</sup> The prohibitive costs of litigation disputes coupled with the lack of technical expertise make it difficult for poorer countries to access the DSB on the same terms as richer, more industrialised countries.

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<sup>44</sup> *Ibid*

<sup>45</sup> Robert E. Hudec, 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' (2002) *World Bank Report* 81 88

<sup>46</sup> The EC- Bananas and Dolphin-Tuna cases

<sup>47</sup> Smith (note 28) 547

<sup>48</sup> Amin Alavi (note 4) 32

<sup>49</sup> Bown & Hoekman (note 40)

<sup>50</sup> Bown (note 41) 246

<sup>51</sup> Bown & Hoekman (note 40)

<sup>52</sup> Amin Alavi (note 4) 33

<sup>53</sup> *Ibid*

<sup>54</sup> European Communities- Regime for the Importation Sale and Distribution of Bananas WT/DS27/AB/R

<sup>55</sup> Lerley (note 23) 624

## **The most favoured nation principle as a disincentive for the participation in dispute settlement**

The operation of the most favoured nation (MFN)<sup>56</sup> under the general rules of the WTO can act as a disincentive for the participation of all interested parties to a dispute. In the *United States - Safe guard on Circular Welded Pipes case*, Korea litigated but other parties did not join the proceedings as interested parties. Instead, they waited to have the issue determined so that they could enjoy the benefit without having to meet any litigation costs. When a member is complying with the ruling of the dispute settlement body and grants extra concessions to the complainant in the dispute, it has to offer the same treatment to the other members of the WTO due to the operation of the MFN principle.<sup>57</sup> This means that the party that has met all the costs of litigation would have done so in vain as all the other members will benefit as free riders.<sup>58</sup>

The inherent unfairness of this is illustrated by the granting of compensation. If a ruling orders the granting of compensation, the MFN principle will apply and all interested parties will reap the benefits of the ruling. However, if trade concessions are to be suspended, the suspension is only applicable to the actual parties to the dispute.<sup>59</sup> This makes the system unfair against complainants as they have no tangible benefits that accrue to them as a result of instituting the dispute.

### **Participation as interested third parties**

The WTO Mechanisms allow parties to participate in the DSB either as complainants or as interested third parties.<sup>60</sup> It is difficult for a developing country to institute proceedings as it is expensive in monetary terms and demanding with regard to legal and technical requirements. However, if developing countries participate as interested third parties this lowers the cost of dispute resolution and they also obtain vital first-hand experience in the settlement of disputes by the WTO.<sup>61</sup> The interested party route is available but has seldom been utilised by the developing countries. If this route is used more often, the dispute mechanisms of the WTO will be reasonably equally accessible to members.

### **How effective are the DSB enforcement mechanisms?**

Countries that have had disputes previously, such as Mexico and Ecuador, complain about the lack of enforcement remedies against violators of WTO commitments.<sup>62</sup> The greatest weakness of the dispute settlement mechanism of WTO is that it fails to have an enforcing system; instead it leaves the enforcement of the agreement to the complainant.

This renders dispute resolution out of the reach of the weaker developing nations as they often lack the 'retaliatory might to threaten' sanctions on the party violating the agreement. The lack of economic backlash on the part of the offending nation removes the impetus for fulfilment of WTO Agreements.<sup>63</sup> Also, due to the relatively small size of the overall size of the domestic market, the developing countries cannot control international prices of most commodities<sup>64</sup> and therefore have no clout to ensure compliance with recommendations in

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<sup>56</sup> WTO Agreement Art.1

<sup>57</sup> Lester & Mercurio (note 3) 165

<sup>58</sup> *Ibid* at note 3.

<sup>59</sup> Arwel Davies, 'Reviewing Dispute Settlement at the World Trade Organisation: a Time to Reconsider the Role/s of Compensation?' (2006) 5 (1) *World Trade Review* 31

<sup>60</sup> Bown (note 40)

<sup>61</sup> Lacarte-Muro & Gappah (note 12) 397

<sup>62</sup> Bown (note 41)

<sup>63</sup> Bown (note 41) 301

<sup>64</sup> *Ibid* 293

their favour. Further, countries are hesitant to drag major trading partners to the DSB due to special political or economic relationships. These special relationships can include receiving development assistance from a major donor country or being members of the same free trade agreements.<sup>65</sup> If a country relies on aid from another country, it is less likely to institute proceedings against its donor country or, if the countries belong to a free trade agreement, the agreement might have its own dispute settling mechanisms outside the scope of the DSB.<sup>66</sup>

The lack of effective mechanisms due to differences in economic resources can be best illustrated by the *EC-Bananas* case. In this case, Ecuador was empowered to enforce retaliatory measures to force compliance with a ruling in its favour. Ecuador sought cross retaliation<sup>67</sup> under different agreements as it did not have sufficient economic might to force compliance against the EU powerhouse.<sup>68</sup> It considered the grounds for the use of cross retaliation in other areas such as TRIPS.

It was held that for a member to use these provisions, it must prove that the measures available under the same agreement are not practical or effective. This is a factual requirement and not just speculative.<sup>69</sup> Cross retaliation had been advocated by the developing countries as a way of enforcing the findings of the WTO. The Appellate body did not effectively discuss the long held view of developing countries that some retaliation measures would harm the countries more than affect the developing countries. In the case of Ecuador, if it put higher tariffs on consumer goods, it would lead to more harm being done to its economy. The Appellate Body's insistence that the government of Ecuador apply restrictions first in trade in goods (similar agreement issues) proved that some of the GATT enforcement remedies are impractical.<sup>70</sup>

The carousel approach to retaliation was first employed in this case. The USA imposed retaliation tariffs on new products from the European Union every six months and the tariffs were as high 100%.<sup>71</sup> It must be noted that the carousel approach is only practical for larger industrialised countries which have a vast array of goods on which to apply the different tariffs. Developing countries have no effective methods of enforcing the awards if they should win a dispute against a more industrialised country.<sup>72</sup> A developing country does not have sufficient economic might to compel the offending industrialised country to abide by the ruling.<sup>73</sup> However the same remedy of retaliation in the hands of a more developed country can inflict serious damage on a developing country.<sup>74</sup> This simply shows that the WTO dispute resolution mechanism is heavily skewed in favour of the developed countries<sup>75</sup>

*The Tuna-Dolphin* case illustrates that the interpretation of the rules of the GATT can be used to protect the interests of developing countries ahead of the concerns of the more developed countries. In this case, the Panel had to adjudicate on the permissibility of trade restrictions based on Article XX of GATT. First, the USA was caught out as it discriminated

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<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid* 302

<sup>67</sup> Article 22.3 of the WTO

<sup>68</sup> Hudec (note 45) 88

<sup>69</sup> Arbitration Decision European Communities-Regime for the Importation and Distribution of Bananas, Recourse to Arbitration by the European Communities WT/DS37/ARB/ECU para 70-72

<sup>70</sup> Hudec (note 45) 89

<sup>71</sup> EU Bananas case

<sup>72</sup> Hudec (note 45) 89

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid* 81

<sup>75</sup> *Ibid*

against Mexican tuna; this was a violation of the national treatment.<sup>76</sup> The Panel further ruled that the ban was not justifiable under Article XX (b)<sup>77</sup> as the ban on Mexican tuna was not deemed necessary for the protection of animal life. It further ruled that Article XX (g)<sup>78</sup> was only applicable as a measure to protect domestic resources and could not have extra territorial application.<sup>79</sup> This case was a leading case in setting the hurdles for the proper adjudication of disputes of an environmental nature<sup>80</sup> and also shows that the operation of the WTO DSB seeks to promote equality among states.

## PROPOSED REFORMS

In order to make the DSB a more level playing field, proposals have been made which range from seeking to improve the workings of the DSB at panel stages to assessing the costs of participation for developing countries.<sup>81</sup>

### The reforms to the operations of the DSB

There is need for the panel to provide a range of measures that can be used by the winning party to enforce the recommendations of the panel report.<sup>82</sup> This will provide leeway to the party to enforce these recommendations without necessarily having to change their domestic legislation.<sup>83</sup> Another way to ensure a much fairer dispute settlement is through the utilisation of the arbitration provided for in terms of Article 25 of the DSB.<sup>84</sup> Arbitration is cheaper and much faster than the DSB dispute resolution mechanism<sup>85</sup>. The negative impact of using international arbitration is that arbitral awards might be inconsistent with the WTO jurisprudence which has been developed through the DSB rulings.<sup>86</sup>

Compensation is currently used as a response to non-compliance; and it has been proposed that compensation should be employed both as a recommendation and as a noncompliance remedy.<sup>87</sup> The party that would be permitted to seek compensation should also be empowered to choose which concessions and under what are agreements it wishes to have implemented in its favour. This will effectively address the concerns raised by Ecuador in the EC-Bananas case on the feasibility of substitution of concessions.<sup>88</sup>

Other reforms that have been proposed concern the application of retrospective damages. However, the granting of retrospective damages would undermine the protectionist measures that a country can adopt prior to a WTO ruling.<sup>89</sup> The retrospective damages will

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<sup>76</sup> GATT Art II

<sup>77</sup> *Ibid* Art. XX (b) necessary to protect human, animal or plant life or health;

<sup>78</sup> *Ibid* Art.XX (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

<sup>79</sup> United States-Restrictions on Imports of Tuna GAIT B.I.S.D

<sup>80</sup> Bruce Neuling, 'The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate' (1999-2000) 22 *Loy. L.A. Int'l & Comp. L. Rev.* 1

<sup>81</sup> Marc L. Busch and Eric Reinhardt, 'The Evolution of GATT/WTO Dispute Settlement' (2003) available at [http://www9.georgetown.edu/faculty/mlb66/tpr2003\\_busch\\_reinhardt.pdf](http://www9.georgetown.edu/faculty/mlb66/tpr2003_busch_reinhardt.pdf) last accessed 13 May 2013

<sup>82</sup> *Ibid*

<sup>83</sup> *Ibid*

<sup>84</sup> Article 25.1 states that "[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."

<sup>85</sup> *Ibid* (note 23)

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

<sup>88</sup> *Ibid*

<sup>89</sup> Busch & Reinhardt (note 81)

be assessed at three stages; "(a) the date of imposition of the measure; (b) the date of the request for consultations; or (c) the date of establishment of the Panel."<sup>90</sup>

### **Reforms to improve the participation of developing countries**

Proposals have been put forward to allow for collective retaliation as a method available to developing countries to enable the remedy to be more effective<sup>91</sup> and mandatory conciliation and mediation<sup>92</sup> have been proposed to make access to the DSB less costly.<sup>93</sup> However, mandatory conciliation and mediation will be a step back as it is a way of reviving the dispute resolution mechanisms of GATT.

In order to ensure greater compliance with the WTO rules, it has been proposed that only countries that have fully implemented previous rulings against them should be allowed to institute proceedings at the WTO. Whilst this is a noble idea, it will not level the playing field in dispute resolution; instead it will make it much harder for weaker parties to resist decisions against them with which they do not agree.<sup>94</sup> This forced compliance will be done to ensure that they are not excluded from enjoying the benefits associated with the rest of the WTO.

From the analysis of the litigation process, the inhibitive costs associated with the process have been identified as usurious on developing countries. Trebilcock and Howse have recommended that if a developed country loses a dispute instituted by a developing country, the developed country should be ordered to pay the costs of the other party.<sup>95</sup>

### **CONCLUSION**

It can be concluded that on paper the dispute resolution mechanisms of the WTO are fair and equally accessible to all. However, in practice, the situation is restricted by lack of expertise to conduct effective trade litigation; prohibitive costs; and the lack of effective enforcement procedures. However, the DSB must be commended for being a platform that seeks to engender principles of fairness and equality of nations regardless of their political and economic status.

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<sup>90</sup> Busch & Reinhardt (note 81)

<sup>91</sup> Busch & Reinhardt (note 81)

<sup>92</sup> DSU Art. 5

<sup>93</sup> Busch & Reinhardt (note 81) 3

<sup>94</sup> Lerley (note 23) 627-628

<sup>95</sup> Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 3 Edition, (2005) Routledge Taylor & Francis Group 145

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