

Dispute Settlement under the GATT/WTO

The Experience of Developing Nations

Any legal system, especially an international system, must have credibility to function properly. Consequently, it must provide an efficient enforcement mechanism; a means through which rights and obligations can be upheld. The strengthened Dispute Settlement Mechanism (DSM) of the World Trade Organisation (WTO), embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which came into force in 1994 has a complete set of formal and informal enforcement tools including mediation, consultation procedures, required reporting, and periodic reviews.

However, what gives the DSM its strength, is the credibility of its formal adjudication of legal claims by an impartial panel. This feature is the result of fifty years of improvements in which developing countries have played a significant role.

This Briefing Paper analyses the experiences of developing countries in the evolution of the dispute settlement procedure.

To Begin With

The fact that some weaker developing countries are not in a position, either economically or politically, unilaterally to address non-compliance by other members, means it is essential for them to have recourse to a system that can do so on their behalf. An effective enforcement mechanism is therefore a major factor enabling the fuller participation of developing countries in the multilateral trading system.

The DSM strengthens the ability of panels to interpret trade rules and increases the adjudicatory nature of the process. With the establishment of an impartial, judicial review of violation complaints, the confidence of developing nations has appeared to increase. The 'rule-based' organisation of the WTO seems to have decreased the risk that economic and political pressures will hamper the system.

Nevertheless, one of the difficulties the GATT (General Agreement on Tariffs and Trade) has always faced is evolving a dispute settlement system that takes into account the various and diverse needs of its members, and provides workable solutions for all. In effect, comprehensive reform in response to the needs of economic development has always been, and remains, a sensitive and difficult area.

Overview of GATT Dispute Settlement History

Early Diplomatic Model

Of the 23 nations that founded GATT in 1947, ten were developing nations. These founding

members, developed and developing alike shared a common goal. Their aim was to create a multilateral agreement, which would improve trade by removing high tariffs and balance-of-payment restrictions. Naturally this shared vision did not eliminate disputes. However, the cohesion made political settlement of these disputes quite manageable.

The enforcement procedure laid out in the original GATT 1947 Agreement was a diplomatic model in which the 23 Contracting Parties assumed the power to rule on violation claims and make recommendations to remedy those found to be valid. Later, Working Parties were established. These were groups of independent experts who were drawn from among the contracting parties to rule on the validity and interpretation of GATT rules.

As the number of cases increased, the GATT introduced 'panels' with clear adjudicatory powers to settle legal disputes. This marked a major improvement for the settlement of disputes; yet, the panel mechanism was informal and remained vulnerable to political and economic might. Consensus based decision making allowed defendant members to hinder the dispute settlement process. Over the years, however, the dispute settlement procedure has been strengthened by restricting the ability of member nations to interfere with the formation and operation of panels.

Attempting to distinguish separate "developing nation's issues" under GATT during the first decade is quite futile. The early involvement by developing nations in the dispute settlement procedure did not present any distinguishing characteristics; indeed 4 out of the initial 8 cases involved developing countries. And the nature of these complaints was identical to

those of the other founding countries: they addressed concerns of balancing tariff concessions rather than attempting to enforce legal obligations. Developing countries were both complainants and defendants.

Thereafter, however, there was a period of inactivity. Developing countries interpreted this relatively small number of legal complaints as a sign that they faced difficulties in enforcing legal claims against developed countries, principally because their dependent economic position made them vulnerable to counter-attack through retaliation in various ways. More significantly, small and developing countries believed they were better off avoiding the dispute settlement process because they could not effectively retaliate if the larger 'loser' refused to comply with the outcome.

It is important to remember that in the early stages, the GATT did not recognise developing countries as a separate group, with different needs and concerns from developed countries. This fundamental premise shaped the nature of GATT dispute settlement throughout the 1950s as GATT membership grew by 14 nations, 6 of which were developing. During the 1970s, however, developing nations expanded their membership in GATT more than three-fold. By 1970, there were 25 developed to 52 developing nations. This brought change to the GATT.

Growing Calls for Reform

By the 1960s the original goals of GATT, to reduce tariffs and remove balance-of-payment restrictions, had been fairly well realised. This provided an opportunity for new members to bring a new agenda to GATT, one that reflected the specific needs of developing nations. This included the call to replace the informal dispute settlement with a stricter enforcement system. There were two major reasons for this.

First, politically, developing nations could not hope to match the strength of developed nations. A 'rule-based' system would make economic and political might less of an advantage in voicing complaints against legal violations. Second, the informal system was designed not to analyse legal complaints but rather to address imbalances in tariff concessions.

In reality, the developing nations desired imbalances in concessions, which was to their advantage. They felt that their particular situation and their need to develop should allow them to enjoy the benefits of trade liberalisation before incurring costs. It was thus in their interest to formally receive concessions whilst ensuring that developed nations kept their own obligations.

As the increase in the membership level of developing nations in the 1960s brought a higher demand for improving the level of compliance of developed nation's GATT obligations, the focus became stricter enforcement of the obligations concerning export of developing countries' products. In most cases, these were primary products. In theory, GATT rules applied to non-tariff measures even if a tariff concession had not been made.

However, for some sectors, especially agriculture, rules permitted inconsistencies with basic GATT policy. This frustrated developing nations, and correcting the discrep-

ancy with firmer obligations and improved compliance became one of their primary goals. This legal pursuit to ensure that developed nations kept their obligations was exemplified in a complaint by Uruguay in 1961 against 15 developed countries, which were accused of violating the terms of the GATT.

It listed well over 500 trade restrictions that affected Uruguayan exports. High on the list of targets was the European Community's (EC) Common Agriculture Policy (CAP), especially the variable levies. Although Uruguay never actively prosecuted the case, it was seen as a symbolic attempt to draw attention to the fact that developing countries' trade positions were steadily growing weaker. When the complaint failed, many developing countries drew the conclusion that the dispute settlement system was not designed to tackle the problems they faced in the world trading system, or to protect their interests.

Other GATT members like the EC thought the system was open to abuse by those who relied on overly-legalistic arguments in situations where negotiations were the more appropriate remedy. However, if the dispute settlement process was partly a negotiation process, it meant that the deciding factors would be economic and political might. In that scenario smaller and less-developed countries would always be at a disadvantage.

Nevertheless at that time, both the EC and the US adopted non-legalistic policies in the dispute settlement procedure, and any formal legal claims were viewed as unfriendly acts of aggression. This incapacitated the dispute settlement procedure from 1963 until 1969 and as a result closed this avenue for developing nations effectively to pursue their interests under GATT.

Attempts at Reform

During this period of legal inactivity, little progress was made in the area of agriculture on the political front. The EC refused to compromise in its defence of the CAP throughout the Kennedy Round. However, progress was made in giving developing nations the legal means of ensuring a better level of compliance. The Brazilian and Uruguayan delegations proposed an amendment to GATT Article XXIII to improve the dispute settlement process for developing countries. The proposal contained, *inter alia*, the following elements:

- more technical assistance for developing countries in the dispute settlement procedures;
- fixed deadlines for different stages of the procedures;
- involvement of the Director-General in the consultation process; and
- a series of proposals to strengthen the remedies available to developing countries including, compensation and collective action against GATT violators.

Although the most important features of the Brazil-Uruguay proposals were rejected, the initiative led to the adoption of a decision providing special procedures for developing nations under Article XXIII. The 1966 Decision introduced a procedure exclusively designed for disputes between developing and developed countries.

The procedures started with bilateral consultations, involved the Director-General as a mediator/conciliator, included the appointment of a panel, and ended with possible sanctions in the event of non-compliance with a panel's recommendations. Strict timelines were significant additions to the procedures. But the issues of compensation and automatic suspension of developing countries' obligations were not addressed in the Decision.

It is difficult to determine to what extent the 1966 Decision benefited developing nations. The impact of the special procedure, in terms of assisting developing countries to initiate legal complaints or aiding them during the dispute settlement process, is unclear. It was not used for over ten years after it was established. Then in 1977, Chile invoked the procedure in a claim against the EC concerning export refunds on malted barley. The case ended abruptly when Chile withdrew the complaint.

The special procedure was invoked again by India in 1980 in a complaint against Japan concerning measures on leather imports. This case ended with a three-year agreement, which promised increased quota access to India, however, Indian exports actually decreased during those three years. In 1986, Mexico invoked the 1966 Decision procedures against the US Superfund tax; however, it was persuaded to participate in an identical complaint by the EU and Canada under the general dispute settlement procedure.

Perhaps the limited use of the procedures under the Decision can be explained by the fact that developing countries were never really interested in piecemeal concessions under the dispute settlement system. Special concessions could weaken the strength and credibility of a legal system. Instead, developing nations sought legal reforms to the dispute settlement system as a whole.

A dispute settlement system with a more formal legal structure and predictable outcomes would guarantee stricter enforcement of developed nations' obligations and also protect any exceptions from GATT obligations extended to developing nations in the agreements. However, the 1966 Decision probably indirectly contributed to the goal of a stronger system by serving as a model for incorporating automatic processing and timelines into the general dispute settlement procedures during the Tokyo Round.

Troubles with the System

Quantitative Restrictions on 'Sensitive' Products

After the Tokyo Round of GATT negotiations, dispute settlement increased in importance and participation by developing nations rose during the late 1970s and 1980s. But during this time, developing countries had suffered from the imposition of a growing network of quantitative restrictions. These restrictions were placed on 'sensitive' or 'disruptive' exports from developing countries. Many were in the form of voluntary export restraints (VERs) where the threat of quantitative restrictions on imports would induce developing countries to agree to limit exports at the source.

The effect of this was that the tariff liberalisation won by developing countries during the 1970s was being eroded in certain important industries, notably textiles and electronics. Since the restrictions operated to curtail products where developing country producers had the greatest competitive advantage, developing countries were thus unable to fully realise the gains they had won.

Significantly, these quantitative restrictions operated outside normal GATT rules, which meant that no remedy was available to them through the dispute settlement system. Between 1967 and 1971, efforts were made to create a 'self-starting' panel procedure which would evaluate the impact of quantitative restrictions on the trade of developing countries. However, the language of the proposed text conveyed no legally binding obligation on contracting parties to use the procedure. Developed countries resisted the creation of these panels, claiming that bilateral negotiations were preferable in such cases.

Agriculture

The revised dispute settlement procedure of the Tokyo Round was so highly regarded that contracting parties, especially the US, began to utilise it to pursue the concessions which could not be procured during the Round. For developing nations, as well as others, this meant attempting to open up agricultural trade. In the decade following the Tokyo Round, nearly half of the cases under GATT involved agricultural trade measures.

Of those complaints, 44 per cent were lodged against the EC and its members. During the Tokyo Round, the EC had again refused to consider any modifications that had implications for its CAP. As a result, the elaborate CAP was targeted through the dispute settlement process; thus, during this time disputes concerning CAP placed the most pressure on the dispute settlement system.

The panels were still searching for conduits to compromise rather than producing legal analysis of disputes. It seemed that panels were more eager to avoid a confrontation with the EC concerning CAP than in making legally sound decisions. This resulted in some very poor results from complaints filed by developing nations concerning agriculture.

To the extent, therefore, that developing countries could protect their interests by opening up developed country markets, agriculture remained out of the reach of the dispute settlement system. The fundamental problem was that most of the key restrictions that distorted agricultural trade were either outside the rules altogether or not effectively regulated by them. Not surprisingly then, agriculture was one of the major issues for reform in the Uruguay Round negotiations.

Structural Changes Brought by the WTO

The statistics on cases brought since January 1995 indicate that the DSU has increased the confidence of developing countries in GATT dispute settlement. As of November 1999, of 142 distinct matters pending in the dispute settlement process, 32 originate from developing

country members; in 4 of them, developed and developing countries have united to bring complaints.

Almost a fifth of the 183 consultation requests were commenced by developing countries, and developing countries are challenging each other as well as developed countries. Out of the 36 complaints from developing countries, 11 are against other developing members. Developed countries have initiated 41 complaints against developing countries.

Procedural Issues

The significant procedural changes in the DSU offer potential benefits to developing and least-developed countries. The most important is the right to a panel; one will be established when requested unless there is a consensus against it. This reverse consensus formula and the built-in timelines virtually guarantee speedy panel formation.

Developing countries' particular interests and problems are to be taken into consideration, from consultation to ruling, and least-developed countries merit special procedures. These Special and Differential provisions for developing and least-developed members are rather declaratory in nature and it may be difficult to assess how practical they have been to developing countries.

Indeed it is clear that developing countries using the dispute settlement system to date have hardly invoked the special and differential provisions in the DSU. Research may be needed to determine to what extent this problem is systemic, in order that it may be addressed effectively in future reviews of the DSU.

The DSM is much less vulnerable to the delay that undermined the authority and legal integrity of the GATT process. Assurance that a panel will be formed expeditiously when requested and promptly deliver its decision inspires confidence in the whole dispute settlement system. With this, developing countries can enter consultations with more confidence that there will be resolution to their complaints.

Undermining the legal authority of a ruling by blocking adoption of a panel report has also been curbed by the DSU. Panel reports must be adopted within 60 days of the ruling unless there is a consensus against it, or a party to the dispute appeals it. Formal appeal has been instituted through the establishment of an Appellate Body, further judicialising the WTO process.

Furthermore, the overall message from the judicialised process is that full conformity with WTO rules is the preferred option. While compensation or suspension of concessions may be used, they are merely temporary, until an inconsistent measure is brought into conformity with the WTO rules. This contrasts with the former procedure under the GATT system, which stressed political compromises to correct imbalances in tariff concessions rather than structural corrections to violations.

Substantive Issues

All these new features seek to provide assurance that the DSM will work with an element of automaticity and

equality. Since its inception, it has been fairly tested by developing countries. In a number of these cases, the developing country complainant has won its case against a major developed country.

One of the first cases was that brought by Brazil and Venezuela against the United States, where both the panel and the Appellate Body found that the US regulation was inconsistent with GATT Article III.4. Similar results have been produced in cases between Costa Rica and the US, India and the US, and in the recent *Shrimp/Turtle* case between a group of Asian countries and the US.

The *Reformulated Gasoline* case acted as the litmus test for proving whether the new dispute settlement system could detect and address protectionist measures. It communicated the message that a more level "playing field" had been created in which developing countries' interests had a better chance of being protected, even against some of the major players in world trade.

But developing countries are also testing the system as against each other, where their interests clash. In other areas, even where developing countries do not directly challenge each other, the conflicts between their interests may be just as sharp. One of the most significant tests of the DSU occurred in the *Bananas* dispute between the EU on the one hand, and the US and several Latin American countries on the other.

An added complication came in the form of several Caribbean and African banana producing countries with vested interest in the maintenance of the current EU banana system. The dispute pitted the interests of two distinct groups of developing countries against each other, by attacking the fundamental trade and developmental co-operation arrangement of the Lomé Convention under which the EU extends assistance to 70 developing and least-developed countries in the Caribbean, Africa and the Pacific. The complaint by the US and Latin American countries was upheld by the panel and Appellate Body.

Compliance and Enforcement

Even under the new rules, winning a case, especially against a major trading nation, may not necessarily guarantee that compliance with the ruling will ensue. The DSU does not expressly rule out compensation as a remedy for violation. The language of Article 22 is sufficiently ambiguous for countries to argue that they have the option of providing compensation, rather than bringing their measures into conformity with WTO rules. Until there is full compensation, the matter stays before the DSB.

If a more flexible interpretation can be placed upon Article 22, a more dominant trade member could conceivably persuade a weaker member to accept compensation instead of amendment of the measure in violation. In the *Bananas* case, monetary compensation was specifically refused by the Latin American complainants, and the issue of compliance with the panel and Appellate Body's ruling has been a continuing source of friction between the EU and the US.

One of the most important issues relating to the effective use of the dispute settlement system by developing countries is the issue of retaliation in case of non-

compliance with a ruling by the panel or Appellate Body. In practical terms, this option is not available to most developing countries. Many developing countries from both a financial and political standpoint would find it extremely difficult to suspend concessions against a developed country trading partner, since they may not have sufficient concessions to suspend.

Indeed, they continue to depend on developed countries for improvement in their terms of trade and continued integration into the multilateral trading system. It has been suggested that Article 22 could be amended to provide, either for joint retaliation by all WTO members against the defendant, or a ruling by the panel that the offending measure must be removed.

Legal Assistance and Technical Cooperation

The real challenge now facing the WTO is the further integration of developing countries into the multilateral trading system. Far more resources must be made available by the international community to ensure that this is done, so that South African ex-President Mandela's vision of a WTO where developing countries are real and active participants becomes a reality.

But, despite the theoretical level playing field created by WTO procedures, in practice, a country's ability to pursue and defend its trading interests lie in its capacity to make full use of the dispute settlement process. From their steady use of the new integrated dispute settlement system, it appears that developing countries now have increased confidence in the process.

Article 27.2 offers developing countries secretariat legal advice and assistance. The Technical Co-operation and Training Division (TCTD) has two full time legal officers and two consultants who provide legal advice. Occasionally, other consultants are hired to provide advice in a specific dispute. This has contributed to the promotion of equity in the dispute settlement system.

Nevertheless, there are concerns that the Secretariat staff (who are supposed to be impartial) cannot give the kind of specific advice that a paid lawyer would. Therefore, in addition to the Secretariat legal advice, developing countries will still need to have effective access to technical assistance and to legal experts of their own choice.

In his speech at the GATT 50th Anniversary and WTO Ministerial, in recognition of the positive effects that trade can have on countries' development (so long as trade serves the interests of sustainable development), the UK Prime Minister Tony Blair offered funding for technical assistance to developing and least-developed countries. The *Bananas* dispute clearly demonstrated that such assistance to develop human and technical resources is urgently needed.

Advisory Centre

In response to the perceived need by developing countries to pursue their interests through dispute settlement, around a dozen WTO member countries have launched

an Advisory Centre on WTO Law. The Centre will act as a central resource centre for developing countries and economies in transition, although membership of the Centre is open to all WTO members. Assistance will be provided for preparation of legal arguments in disputes and later, representation at WTO panel and Appellate Body proceedings.

The Centre will be independent of the WTO, so the WTO Secretariat can still maintain its neutrality. The range of legal advice and technical assistance covered by the Centre includes, preliminary analysis of complaints to determine if violations have occurred, support for governments during proceedings including preparation of evidence and submissions, holding seminars on WTO law, and internships for government officials responsible for WTO legal issues.

The Netherlands is the main financial backer of the initiative, providing the centre with \$2.25 million in initial support, followed by Denmark, Norway, Sweden and the United Kingdom, which have given \$1 million apiece. Financial or in kind contributions from other countries in this initiative would provide welcome support to those less well resourced but no less important WTO members, ensuring that they can pursue their trade interests while developing their own in house trade law expertise.

Internships

The changes in the structure and procedures of the dispute settlement system brought about by the WTO offer countries a more equitable forum in which their grievances may be heard and settled. However, the inequality in the capacity of differing groups of countries to mount challenges or defend cases brought against them, still makes the dispute settlement system less than a level "playing field".

Many developing nations without the in-house legal or other technical expertise may seek to engage outside counsel. Some may be better able to afford such assistance than others. But the importance of engagement in the dispute settlement process cannot be over-emphasised, nor should it be under-estimated.

This is a forum where increasingly, legal interpretation of GATT rules is consistently being produced. Thus, the dispute settlement process has become a policy-making process. Unless a country is able actively to engage in this process, it is unable to influence the shape of policy which may affect it in the medium to long term.

The EU has made two proposals, which may contribute to facilitating better access by developing countries to the dispute settlement system. First, they propose the creation of a new unit for Technical Co-operation and Training. This would be staffed by one permanent and four consultancy posts, and would supplement the current TCTD of two full time legal officers and two part-time external consultants.

However, the new unit would be independent of the TCTD and report directly to the WTO Director General. The unit would be financed by a separate trust fund to which all WTO members could contribute freely.

The other proposal is for the establishment of internships for developing country lawyers. Each developing country lawyer would train in the EU Mission in Geneva or individual member states' missions, where appropriate, for a year. 10 to 16 internships would be available on an annual basis. The intention would be for such lawyers to return to their capitals or be posted in their countries' mission in Geneva.

This idea seems to be based on the current Dutch sponsored 'Programme for Trainees' currently being run in the WTO Secretariat where developing country trade personnel are undertaking internships in various WTO departments.

Conclusions

In sum, this paper shows that the goal of developing countries in the evolution of the dispute settlement is no different from that of the developed nations: a better level of compliance with obligations. It highlights the specific challenges developing countries have faced, in particular sectors, and with particular GATT rules. It also examines the confidence played by developing countries in the new dispute settlement procedures provided in the DSU. And, it highlights recent developments and initiatives to provide developing countries with better access to the dispute settlement system.

This analysis of the experiences of developing nations throughout the evolution of the dispute settlement procedure demonstrates the particular challenges developing nations have faced under the GATT procedure and then under the WTO DSM. Since the large increase in their GATT membership in the 1960s, developing nations have

supported a strong dispute settlement procedure to ensure a better level of compliance by all nations.

Their participation in the dispute settlement process has gradually changed from fairly insurmountable difficulties in bringing claims and enforcing rulings (through lack of economic and political influence) to a situation where confidence in the renovated system is apparent through increased use and reliance on a structure of legal and procedural disciplines ensuring a degree of certainty.

Still there remains much to be done. Perhaps the greatest challenge now facing the WTO is the further integration of developing countries into the multilateral trading system. With the erosion of tariffs and the greater use of non-tariff barriers to trade—product standards, investment requirements, environmental and social standards, and competition policies—there will be a need to ensure that countries' interests can be pursued and protected.

US experience demonstrates how vital the dispute settlement system is for opening up markets and warding off protectionist measures. Developing countries will need to be prepared to face the coming challenges, from an institutional and substantive standpoint. Several of them are already well placed to improve their ability to meet these challenges directly.

For many others, there remains the possibility that they may become further marginalised. To avoid this, the WTO may need to work closely with other agencies in the international community to provide the necessary support to those who cannot by themselves acquire specialist legal or other technical services. Useful initiatives and proposals in this regard are already underway. All WTO members should lend their support to such endeavours.

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