Developing Countries and WTO Dispute Settlement

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Summary

Developing and especially least developed countries face a number of problems in the context of the World Trade Organization (WTO) dispute settlement. They lack resources to adequately participate in the litigation. They lack capacity to enforce a WTO ruling if a developed country refuses to voluntarily comply with such ruling. And as a matter of the realpolitik developing countries may sometimes lose more by going to the WTO, then they may win there. Greater legal assistance, viable remedies and faster and streamlined procedures may represent a solution to some of these problems.

The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread.
Anatole France (1844-1924) [1894].

The pithy observation quoted above provides a basis for understanding why developing countries face different problems with the World Trade Organization (WTO) dispute settlement mechanism (DSM) than developed countries. Logically, richer entities have more ability to deal with lengthy processes with high direct costs and coordination costs than poor entities, but that is not the entire story. Developing countries are also prejudiced by the lack of capacity to enforce WTO ruling and high indirect costs of initiating a WTO dispute.

I. Causes of Imbalance

Lack of Resources

Money alone is not the sole explanation for the current disparity. The two entities with the most total wealth, the European Union (EU) and the United States (US), by virtue of having the largest economies also tend to have the largest number of WTO disputes.

Because both the US and the EU can foresee that each will have a large and continuing number of WTO disputes, each is in a position to hire specialized lawyers in relatively large numbers on an on-going basis. Depending on counting methodology, US has between 20 and 30 such lawyers, and the EU nearly as many (although through more complex bureaucratic arrangements). In addition, both the US and the EU can draw on a large number of other "in-house" WTO specialists. By contrast, St. Lucia, which can reasonably foresee only one case every few years (in the event, *Bananas*) does not even have a mission in Geneva, and could not reasonably hire as permanent staff a large core of WTO specialists.

While this effective discrimination is one of the largest problems for the functioning of the WTO as a whole, it has particular salience in dispute resolution. This is because the short deadlines in the dispute settlement mechanism - which are necessary to maintain confidence in the system, and which, indeed, are being ignored to a point where the system is losing its credibility (WTO [2002a]) - mean that the best work on WTO cases requires a very high degree of dedication to that case. Once the first submission is filed with the panel by the Complainant (which, at least in theory, has had unlimited time to prepare that submission, since the Complainant chooses when to start the case), the rhythm of work is far more intense than in normal court litigation or the predecessor -General Agreement on Tariffs and Trade (GATT)- dispute settlement system. In the author's experience with one of the first WTO disputes, we prepared drafts for one government, sent them off to Geneva around midnight for the government to revise, got back the report in the morning and started working on our replies to the arguments which we *expected* the other government to make in reply to the submission which was filed later that day. This intense pace continues for most of the panel process with a few very short breaks at the end, and then repeats itself during the Appellate Body process.

Very few countries can dedicate staff more-or-less full time to that process. Most must rely on their relatively few WTO experts. The ones in Geneva are already responsible for 4-5 committee meetings a day as well as dealing with the ministries back home on a wide range of issues. Their counterparts back home have to deal with ministers, other politicians, and the usual daily debris of public service. Thus, most WTO governments are forced to rely on outside lawyers who can throw themselves into the project with the same dedication as US or EU inside lawyers. In business terms, this is referred to as a "make or buy" decision - it is rational for the US and EU to have large staffs of inside lawyers, because of the expected large volume of cases, and it is equally logical for other countries to "outsource".

The first disparity that this issue presents is that for US and the EU virtually all the financial costs of participating in a WTO dispute are fixed costs - they are unrelated to the particular dispute, so that United State Trade Representative (USTR) and the EU can decide to start a case, or decide to defend one rather than settle immediately, without having to ask where will they find the money for lawyers. By contrast, this is one of the first questions for many, if not most, WTO Members confronted with a WTO dispute (even the Advisory Center on WTO Law (ACWL) is not gratis when it comes to litigation). In our experience, hiring outside counsel for a WTO case costs at least US$ 250,000 - and doubles if the US or EU is on the other side of the case (since neither has any cost beyond their inside lawyers' time, so they both tend to throw up a lot of obstacles during litigation). Similarly, a small, poor country, faced with a claim of WTO-inconsistency by the US or EU, asks itself, as one of several questions, where it will get the money to defend itself. Perhaps that is why smaller countries are more likely than the US or EU to settle cases as defendants during the

initial consultations than are the US and EU, and why the US and EU are relatively successful at settling cases as plaintiffs during those consultations. As the representative of Antigua and Barbuda stated, "many small, developing countries had made (…) informal settlements that were beneficial to United States economic interests after being told their laws were in violation of WTO law" (WTO [2003a]).

Developed countries, however, do not always have an advantage in terms of resources. This advantage disappears when the domestic industry of a developing country is strong and active enough in defending its interest before the WTO by hiring an external legal counsel. That makes domestic affected industry a major source of funding the WTO litigation. Among the prominent examples of such funding are Ecuador's complaint in Bananas, Guatemala's defense in Cement, Antigua and Barbuda's representation in Online Gambling as well as the case brought by Brazil against US Cotton Subsidies.

But reliance by the Government on industry's resources carries its own complications. The ability to bring cases in such situation, or defend them well, becomes more a function of local industries' particular interest in a case, rather than a national interest. If the US of the EU were fully dependent on their industries, they probably would have never brought respectively the High Fructose Corn Syrup and Foreign Sales Corporations (FSC) complaints. In the former case the US Government more or less ignored its local industry while the latter case was started without industry pressure - indeed, many European companies with US affiliates receive FSC treatment.

Second, the imbalance in terms of resources can also be corrected through the services of the ACWL. The Advisory Center is an international organization independent of the WTO that provides legal advice and litigation support in the context of the WTO Dispute Settlement. Its services for the developing countries come at a significant discount compared with similar services of private law firms.

Lack of Capacity to Enforce WTO Rulings

Another major constraint for smaller developed countries is the belief that they cannot retaliate against larger developed countries. Under the WTO rules if a Member does not voluntarily comply with a WTO ruling, the burden of enforcement falls on a complainant who has a right to raise its tariffs against the products of a non-complying Member. There are several reasons for the belief that it is impossible for the developing countries to retaliate against large developed countries such as the US and EU.

Economically, smaller countries calculate that if they raise tariffs against the imports from a developed country, it will raise costs in the developing country (and imports tend to be either necessities such as food or medicine or fuel or inputs for local manufacturers). By contrast, a larger economy is less dependent on imports of any particular item and often produces a much wider range of the inputs. Politically, developing countries calculate that any foreseeable retaliation they could impose on the developed country will be a "pinprick" politically to the developed country while WTO-authorized retaliation permits a developed country to impose politically impossible levels of retaliation on a developing country. In addition, developing countries understand the fragility of the world trading system, and recognize that a rules-based system constrains the most powerful country more than it does the smaller countries. In consequence, some developing countries are willing to forego retaliation even if the largest country practices it, in order to maintain a system which is favorable to them overall. Indeed, even the EU has been noticeably more reluctant to

impose WTO-authorized retaliatory measures against the US than vice versa (the EU waited years to push forward its retaliation on the FSC case while the US 'jumped the gun" in Bananas by three weeks).

That said, Ecuador showed in the Bananas case that a small developing country can use WTO retaliation strategically. As J. Reichman ([1995]) pointed out, developing countries can effectively use retaliation, in the form of WTO-authorized derogation of intellectual property rights (rather than raising import tariffs), to gain leverage against developed countries. In Bananas, Ecuador apparently used the threat of such retaliation to help its position in negotiations with the EU and US, and possibly more (there are rumors that the EU agreed to support Ecuador in Club of Paris debt renegotiation (Smith [2003]).

High Indirect Costs of Bringing a WTO Dispute

Insufficient litigation resources and lack of leverage to enforce a WTO ruling are not the only reasons of why developing countries are less active in the context of the WTO dispute settlement. They, for example, do not explain why Egypt dropped out of the US-led coalition against the EU de facto genetically modified organisms (GMO) ban. In that case Egypt would not have been the main complainant and could largely free ride on the US arguments. Also the US retaliation alone would probably be sufficient to induce the compliance by the EU in the event of a victory at the WTO. Egypt nevertheless abstained from taking part in the complaint (and even though this dropping out may have meant no Egypt-US FTA (Inside US Trade [2003a, 2003b and 2003c]) and the main reason seems to be that the cost-benefit analysis of initiating a dispute was not in favor of Egypt's participation in the dispute. Egypt would have brought a WTO complaint if benefits from pursuing it would have outweighed any losses in current or potential trade flows to the EU or development aid from the EU that Egypt could have suffered as a result of its decision to go to the WTO.

The key to understanding this analysis is that the initiation of a WTO dispute is considered to be a hostile act towards defendants. Members complained against normally "deplore", "deeply regret" or express "great dissatisfaction and concern" in connection with requests for the establishment of a panel. They also normally respond to the initiation of a WTO case by either filing a counter-complaint or undertaking other unfriendly steps. Examples of such behavior are the EU filing a complaint against Australian quarantine regime as a tit-for-tat move following a complaint by Australia against EC protection of geographical indications (BNA [2003a]) or Korea initiating a dispute against EU shipbuilding subsidies following the EC challenge to Korean shipbuilding subsidies (BNA [2003b]).

While this approach to dispute settlement is not at all unique to trade relations between developed and developing countries, developed countries possess greater persuasive force as a function of their degree of economic development when dealing with developing countries. The result is that developing countries would think twice before bringing a WTO complaint against a developed country. For example, even though according to the President of the Mozambican Cotton Association "the quality of life of millions of Mozambicans is being dramatically eroded by the low price of cotton" (Ribas [2004]), Mozambique does not participate in the WTO dispute against US Cotton Subsidies. One of the reasons may be that it is anxious to preserve untouched Generalized System of Preferences (GSP) benefits in trade with the US including such sensitive matters as sugar quotas, as well as other forms of development aid whose existence depends on the US goodwill alone. The same is possibly true with respect to the fact that four major victims of US cotton subsidies - Benin, Burkina

Faso, Mali and Chad - are not complainants in the challenge to those subsidies (although Benin and Chad take part as third parties). This may be due to the fact that the unnecessary hostility of these countries towards the US may significantly diminish their chances of success in the parallel to the WTO litigation Doha Round agricultural negotiations where those countries seek "financial compensation to offset they are losing" as a result of the US cotton subsidies (WTO [2003b]).

By the same token, if a WTO inconsistent trade restriction against developing country imports is so great that spoiling relations with a developed country is a worthwhile exercise, then a WTO case will be brought. In Export Subsidies on Sugar Thailand reportedly was not scared off launching a complaint against the EU although the latter had warned that this might result into the reduction of Thai tuna imports under a GSP quota (BNA [2003c]).

II. What is to be Done?

Greg Shaffer notes that developing countries are less likely than developed countries to be complainants under WTO than GATT, and more likely to be defendants. He notes a number of proposals, including monetary damages and attorneys' fees for developing countries, less costly procedures, and greater legal assistance (Shaffer [2003]). These proposals, if adopted, may correct some of the imbalances described above.

Greater Legal Assistance and Attorney's Fees

Legal aid to developing countries may be provided in two forms - by providing developing countries with legal advice for free or at discounted rates or by giving an opportunity to successful developing country complainants (or defendants) to recover legal expenses from the losing side. The first scenario was implemented by the establishment of the Advisory Center on the WTO Law functioning as an independent international organization. The first years of the existence of the Center (whose services although discounted are not free) represent a remarkable success in terms of assistance to developing countries. There is every reason therefore to further support and expand activities of this organization, including by pushing the US and EU to become Members of the ACWL. Additionally since least-developed countries cannot afford even sharply discounted rates of the Advisory Center, one might think about the creation regional ACWL, in particular African ACWL, which would be free for its Members when it comes to both, the WTO Dispute Settlement and the support in the rounds of multilateral trade negotiations.

The second scenario securing greater legal assistance through the reimbursement of legal expenses is complimentary to the provision of affordable legal services. First, it would allow successful developing countries to get back their expenses, including those spent on the services of the ACWL. Second, it would also allow to developing countries to hire outside legal counsel in situations where for the reasons of confidentiality or expertise they prefer to do so. This is especially important in situations where a WTO case is a sequel to a WTO-inconsistent national trade remedies investigation. In that case a private law firm which represented the developing country producers in the respective national investigation would have a significant expertise in the issue and more importantly would be able to provide continuity between a national jurisdiction (where the real remedies are) and the WTO in terms of implementation of the WTO ruling in the jurisdiction concerned.

Having said, the reimbursement of attorney's cost for the developing countries cannot be accepted without reservations. First, the experience of jurisdictions using the

"costs follow the event" rule (such as England) shows that not capping reimbursable expenses by some sort of reasonability standard frequently leads to an abuse as there is no incentive for a meritorious complainant or defendant to oversee the efficiency of its lawyers. Second, if reimbursable costs are to be reasonable a special costs arbitrator is needed in order to avoid a lengthy litigation on costs.

Monetary Damages

The lack of retaliation capacity with respect to a non-complying developed Member may be corrected by replacing the remedy of retaliation with other remedies such as compulsory compensation. In this context the compensation may take the form of either a tariff reduction according to the choice of a developing country plaintiff (as proposed by Joost Pauwelyn) or by providing monetary compensation for the damage caused by a WTO-inconsistent trade restriction. Both remedies are familiar to the WTO Membership. The option of compensation (although in a different form) is reflected in Article 22 of the WTO Dispute Settlement Understanding, but has not been frequently used, probably due to its non-mandatory nature and the obligation to provide such compensation on an MFN basis. Monetary damages have been offered in practice (in US-Broadcast Music) and are being mentioned among the proposals in the ongoing DSU review (WTO [2001]). It is important to mention that the remedy of compensation in either form by promising a real relief to a complaining developing country significantly modifies the cost-benefit analysis of initiating a WTO dispute in a way that secures greater participation of developing countries in the WTO dispute settlement.

Less Costly Procedures

Less costly procedures in the WTO dispute settlement are necessary if the previously described proposals on reimbursement of attorney's fees and/or monetary compensation are not adopted. Otherwise, there already will be an incentive in place to achieve a settlement. Among procedures that can be adopted are obligatory use of mediation and introduction of a small claims track with simplified procedures and a single panelist (Hoekman [1999]). One could also think of penalizing defendants for complicating the litigation by putting forward unmeritorious requests for preliminary rulings (such Article 6.2 DSU allegations). The penalty may consist of deducting days of delay caused thereby from the reasonable period of time for compliance, or, if a proposal on reimbursement of attorney's fees is adopted, of awarding additional costs as a penalty.

Furthermore, an important step in reducing the financial burden on the parties to the dispute can be made if the currently established deadlines are enforced which necessitates the expansion of the WTO Secretariat's human and technical capacity.

III. Conclusion

Marrakesh Agreement establishing the WTO recognizes in the preamble that positive efforts are necessary to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development. In the same vain positive efforts are needed in order to guarantee that the developing countries are adequately represented when it comes to defending their interests in the WTO. Full-fledged participation of developing countries in the WTO dispute settlement system requires change of the current rules so as to provide developing countries with resources and incentives needed for successful representation of their interests before the WTO Panels and Appellate Body. Greater legal assistance, viable remedies and faster and streamlined procedures are key to providing that indeed "right perseveres over might" (Lacarte-Muro [2000]).

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