TRADE LAW BRIEF
Making Trade Law Simple

Developing Countries and the Dispute Settlement Mechanism of the WTO

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With the failure of the World Trade Organisation (WTO) Members to agree on the modalities on agriculture and Non Agricultural Market Access (NAMA) negotiations in 2008, the Doha Development Agenda (DDA) is in a limbo for now. There is a possibility of revival of negotiations, with the WTO General Council at the end of December 2008 endorsing plans to start negotiations in all areas of negotiations early next year. Given the present recessionary trends in the world economy and the forecast of a decline in growth of world trade, a focus by some members on protecting domestic producers against imports cannot be ruled out.

Are developing countries prepared to use WTO rules to ensure incursion into their market access rights? Are they well versed in using the WTO Dispute Settlement Mechanism (DSM)? This Trade Law Brief takes a general overview of the situation on the ground based on experiences of developing countries in the first 11 years of existence of the WTO, with a focus on how far they have succeeded in employing DSM to resolve disputes.

Participation of Developing Countries in the DSM

Since the inception of the WTO on January 1, 1995 up to April 2007, 363 complaints were brought to the DSM[1]. Out of which, 137 (38 percent of all complaints) resulted in Panel establishment, while 102 (28 percent) Appellate Body (AB) and Panel Reports had been adopted by the DSB in this period. Besides, there had been 58 mutually agreed solutions and there were 25 active panels. Compared with a total of 101 cases in the entire life of General Agreement on Tariffs and Trade (GATT), the WTO DSM has been much more active.

Keeping aside the 6 complaints, which were initiated by a combined group of developed and developing countries, 197 (59 percent of the total complaints) were initiated by developed countries, 121 (61 percent) of which were against another developed country, while 132 (39 percent) complaints were initiated by developing countries, 69 (52 percent) of which were against a developed country. So far, only one complaint was initiated by a least developed country (LDC). Of the total complaints in each of the 11 years from 1995 to 2005, complaints initiated by developing countries constituted 36, 65, 28, 47, 21, 53, 76, 77, 84, 67 and 59 percent respectively.

This trend may be perceived to indicate that developing countries have become the major users of the DSM, albeit only 29 developing countries have ever brought a complaint, 14 of them only once, 10 more than twice (indicating 'regular' use) and 5 more than 10 times (indicating 'frequent use'). Thus, use of the DSM is not widespread amongst developing countries. If we take the top 3 users, amongst developed countries most usage has been by US (81 complaints), EC (70) and Canada (26), while amongst developing countries they are Brazil (22), India (16) and Mexico (15). Therefore, developing countries' frequency of use is also not anywhere near the frequency of use by developed countries.

In all, 65 developing countries have participated in the DSM in any capacity: 35 as participants and 30 as third participants only. Participation of developing countries in DSM has increased in due course: they initiated 41 cases in the five year period up to 1999, but 89 cases in the six years from 2000 to 2005. Statistics also indicate that perhaps a plateau has been reached in the use of DSM by developing countries. Since January 1, 2000, only 6 developing countries have initiated a first dispute, and of them 2 (China and Chinese Taipei) are new Members. So, of the 29 developed country users, 23 were users in the first 5 years itself. Thus, it can be argued that the DSM is not becoming any more inclusive. Following reasons could be cited for developing countries not having used the DSM optimally for their benefit:

- many developing countries have not had a reason to use the system;

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- passage of time has not taught them that use of the system can benefit them;
- they do not have the capacity or the wherewithal to use the system; or
- they have chosen not to use the system because of the possible consequences of its use such as adverse effect on bilateral relations or international aid etc.

Let us now take the case of developing countries that do use the system, and determine whether they behave any differently than developed countries. First, statistics show that while 72 percent of the cases initiated by developed countries result in appeals, while only 24 percent of the cases initiated by developing countries are appealed. Second, developing countries are more likely to settle a case midstream than a developed country[2]. This may indicate that developing countries are more likely to settle disputes than the developed countries. Conversely, developing countries are more likely to accept panel rulings and less likely to escalate disputes. This could be due to the political reasons or because of limited resources. In short, developing countries are more likely to use the DSM as a negotiating forum while developed countries are more likely to use it as a judicial forum.

Compliance with a DSB decision by developing countries is much better than the developed countries (see Box 1). This is particularly true where the complainant was a developed country. Compliance with rulings and recommendations of the DSB can be taken as an example of WTO Members having faith in the system, and adds to the credibility, security and predictability of the multilateral trading system. It appears that developing countries generally tend to have such faith.

Special provisions for developing countries in the DSM

Developing countries have a perception that the special and differential treatment (S&DT) provisions of the DSU have not benefited them much. Article 12.10 allows time extensions to them, and only one case of an extension by 10 days for submitting a written submission (India in the QRs case) is recorded. Article 12.11 requires an explicit indication of the form in which account was taken of the S&DT of developing countries. Of the 5 cases in which it was invoked (Mexico-Taxes on Soft Drinks, US-Byrd, US-Safeguards, Brazil-Aircraft and India-QRs), it was actually interpreted and applied only in the India-QRs case, as the subject matter itself (Article XVIII, GATT) was an S&DT provision.

Article 21.2 requires that particular attention be paid to the matters affecting developing countries in surveillance and monitoring of compliance. 10 of the 13 invocations of this provision related to arbitration proceedings regarding reasonable period of time, and no specific additional time was added by the arbitrator in any case on this account. Article 24.1 requires that particular consideration be given to the special situation of LDCs. It was invoked by Benin and Chad, but was not accepted by the Panel, as they were third parties.

Thus, S&DT provisions in the DSU are virtually dead letter. Of course, the developed countries and some experts state that DSU should not have any S&DT provisions, which should be limited to substantive agreements under the WTO. They argue that while special consideration could be negotiated in favour of developing countries in terms of rights and obligations

Box 1: Status of Compliance in Complaints By Developing Countries

Of a total of 363 complaints[3] initiated in the WTO DSM up to 23 April 2007, 137 (38 percent) were initiated by developing countries. Of these 137 complaints[4], 80 (58 percent) were against developed country measures and 57 (42 percent) against developing country measures. Of these 137 complaints, in 44[5] (32 percent) cases panel/AB reports have been adopted by the DSB. And 32 (73 percent) of these adoptions have been in complaints against developed country measures and 12 (27 percent) in complaints against developing country measures.

It is not easy to determine whether there has been full and satisfactory compliance in each completed dispute in the WTO. Lack of compliance comes to the knowledge of the WTO Members other than the disputants only where they seek a compliance panel, and further to adoption of the compliance of the compliance panel/AB reports by the DSB, the complaining party seeks authorisation to retaliate. Thus, the only sure shot way of determining that there has been no compliance is to identify whether there has been arbitration under Article 22 of the DSU or under Article 7.9 of the Subsidies and Countervailing Measures (SCM) Agreement.

In the history of the WTO DSM, only 16 cases were subject to compliance and remedy regime under 22.6 (and none under Article 7.9 of the SCM Agreement). These include 2 Bananas cases (by US and Ecuador against the EC), 2 Hormones cases (by Canada and the US against the EC), 2 in the Aircraft cases (cross cases between Brazil and Canada), 8 Byrd cases against the US (there were 11 complainants[6], 3[7] did not seek authorisation to retaliate; of the 8[8] that sought and obtained retaliation rights, 5[9] were developing countries). Thus, as on date, retaliation rights have been obtained by developing countries in 7 cases, and actually used only in 1 case.

Box 2: India's Participation in the DSM

India has participated in the DSM 17 times as complainant, 19 times as respondent, and more than 25 times as a third party. Of the cases as complainant, India won 7, did not pursue another 6 perhaps because the matter got settled or the market access involved was minimal, obtained mutually agreed solutions in two cases, lost one case and one case is ongoing. As defendant, out of 19 India won one case, lost 5 cases, got mutually agreed solutions in 6 cases and one case is suspended, while the rest are in limbo. India is one of the largest users of the DSM, and has certainly benefited from its security and predictability.

India has also been a major user of the Advisory Centre on WTO Law (ACWL), a law firm set up with the help of WTO for the benefit of developing countries. Apart from India, Thailand, Ecuador, Paraguay, Colombia, Honduras, Dominican Republic and Indonesia have also frequently used the ACWL. ACWL provides free legal advice, and acts as the lawyer for the developing countries at a concessional fee.

In recent cases, India has started using Indian law firms for its representation in the panels and the Appellate Body. This was the case in the last two disputes, one by the US against India on additional duties on wines and spirits (DS 360) and the other by India against the US on customs bond directives of the US administration in respect of anti-dumping duties on shrimp imports (DS 345).

in the WTO, once there is a dispute, the law and procedures should apply equally to all Members.

Suggestions for Improvements in DSM

Developing countries perceive the DSM as an onerous and costly proposition to settle trade disputes[10]. If we go by the proposals made in the ongoing DSU review by developing countries, access to the DSM is an issue with them. They have asked, for example, for: (a) limit on the cases against developing countries each year (China says not more than 2 per year); (b) need to reimburse the costs of litigation to developing countries, at least in case of a 'win' (proposal from like-minded group of countries); (c) increased reasonable period of time to developing countries; and (d) automatic cross retaliation in any sector by developing countries, etc.

As regards the last mentioned proposal in DSU reforms, it may be mentioned that developing countries are not normally able to retaliate, even if they obtain an authorisation from the DSB. Ecuador, for instance, obtained a right to retaliate in the EC-Bananas case, but never exercised that right. Brazil obtained such a right in the Canada-Aircraft case with the same result (though there was a cross case in this matter, where Canada also did not retaliate). Similarly, India, South Korea, Chile and Brazil did not retaliate in the US-Byrd case after having obtained the authorisation (only Mexico retaliated).

A typical case of difficulties in retaliating is the EC-Ecuador Bananas case. Ecuador could not retaliate, as retaliation would have been very cumbersome, even though it was allowed to cross retaliate in the copyright sector, as the monitoring of 'level' of retaliation would have been difficult. The way the US-Gambling case plays out would add further experience on the exercise of the right to retaliate by a small developing country against a major trading partner.

Lacunae in DSM

Although there have been a number of suggestions for clarifications or improvements in the DSM in the ongoing DSU review, two sets of proposals stand out as real lacunae in the existing DSU. These suggestions address lacunae that need to be plugged to make the DSM function well as a system, and are not related to better use of the system by developing countries alone. Of course, developing countries would benefit as much from these improvements as the developed countries.

The first is the so-called 'sequencing' issue. Article 21.5 provides for setting up a compliance panel in case of a disagreement between the parties as regards compliance by the responding party, but does not specify the time when action to set up the compliance panel will be triggered. Article 22.2, on the other hand, provides that if no satisfactory compensation has been agreed to between the parties within 20 days after the expiry of the reasonable period of time (RPT) given to the responding party to comply, the complaining party may request authorisation to retaliate. Thus situations may arise where a compliance panel has not been sought within 20 days of expiry of the RPT (or has been sought after the 20 days) while the complaining party is obliged to request authorisation to retaliate in order to preserve its right to retaliate.

In short, the sequencing between the establishment of a compliance panel to adjudicate upon the disagreement

between the parties and the kicking in of the right to retaliate is absent in the rules. Various proposals, chiefly from EC/Japan, Korea and a group of six countries (Argentina, Brazil, Canada, India, New Zealand and Norway) are being discussed. In practice, the lacuna is being overcome by the two parties entering into an agreement on the sequencing of these two steps[11]. However, the potential of this lacuna creating a problem in dispute settlement remains until this practice (or a negotiated variation of it) is incorporated into the DSU by amendment.

The second lacuna is the lack of remand procedures in the DSM. The Panel establishes the facts as well as makes legal findings, while the AB considers only issues of law and legal interpretation. Thus, if there is a change in the legal interpretation at the AB stage that requires fresh facts to be established in order to make a finding necessary to resolve a dispute, AB cannot establish those facts or remand the case to the panel, unlike in most domestic jurisdictions. The panels (duly endorsed by the AB, it would appear from jurisprudence) as well as the AB frequently use judicial economy, resulting in absence of any findings on many claims, which exacerbates this problem. Proposals from the group of 6 countries referred to in the context of sequencing proposals, as well as South Korea have made proposals in this regard in the ongoing negotiations.

Conclusion

Developing countries have been participating in DSM since the inception of the WTO. For various reasons, they are less active than the developed countries. It will be worthwhile to explore the reasons for this further, including why newer developing countries are not entering the fray in recent times.

In the current global situation of a financial meltdown that does not seem to be going away and a Doha Round that does not seem to be getting closer to conclusion, disputes between WTO members can rise. Reports of tariff and non-tariff measures taken in recent months by many governments with protectionist intent are emerging in the media. Developing countries may be as affected by them as others. Use of the DSM in cases where the measures are incompatible with WTO rules is a legitimate action. But developing countries need to have both the understanding and the wherewithal to use the system to their advantage.

Endnotes

1 Some data is now available for 13 more disputes initiated in the WTO in the succeeding one year, but the analysis in this paper is based on this earlier figure.

2 Brown, C. P. and Hoekman, B. M. "WTO Dispute Settlement and Missing Developing Country Cases: Engaging the Private Sector" in *Journal of International Economic Law*, 2005, pp. 861-890

3 Each DS number is counted as a complaint

4 In the case of multiple complainants, whether the other complainants are developed or developing countries, so long as a developing country is a co-complainant, the complaint is counted in the total as one.

5 Multiple complaints by developing countries under the same DS number are counted as one. For example, while there were 4 complainants in the *US – Shrimp* case, it has been counted as one. Similarly, of the 5 complainants in the *EC – Bananas* case, four are developing countries but the complaint has been counted as one. If the total number of developing countries involved in a dispute against developed countries is to be considered, then this number will go up to 55, as there are 3 cases in which there are multiple developing country complainants acting under the same DS number (*US – Byrd, EC – Bananas* and *US – Shrimp*). Conversely, if there are different developing country complainants initiating a dispute on the same subject matter against the same developed country, and therefore under different DS numbers, they are counted separately. For example, in the *EC – Sugar* case, 2 of the 3 complainants were developing countries, acting under separate DS numbers, so they are counted as 2 disputes even though a common panel/AB report was circulated.

6 Australia, Brazil, Canada, Chile, the EC, India, Indonesia, Japan, Korea, Mexico and Thailand

7 Australia, Indonesia, Thailand

8 Only Canada, the EC, Japan and Mexico actually retaliated

9 Brazil, Chile, India, Korea, Mexico

10 Shaffer, G. Mosoti, V. et al. « Towards a Development-Supportive Dispute Settlement System in the WTO », ICTSD, Geneva, 2003.

11 For example, see the sequencing agreement between Argentina and the US in the OCTG case in WT/DS268/14 dated 5 January 2006

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