

WTO DISPUTE SETTLEMENT

MANAGING THE AGENDA AFTER SEATTLE

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Note: The views expressed are those of the author and cannot be taken to represent the official views of DFAT

SUMMARY

1. The WTO dispute settlement system cannot drive WTO reform, nor set the agenda for a negotiating round. Panels and the Appellate Body are expressly precluded from creating new treaty rights and obligations through dispute settlement proceedings.¹ Appellate Review on issues of law is a powerful disincentive to "judicial adventurism."
2. However, the dispute settlement system can be used as an impetus to reform, either by exposing deficiencies or inequities in the rules, or by seeking clarification of existing rules which have been ambiguously drafted - or which are being creatively flouted.

Lessons from the GATT

1. The GATT dispute settlement system was used to give impetus to the Uruguay Round negotiating agenda, particularly in the agriculture sector. Landmark disputes included:
 - the Chile/EC apples disputes
 - the US/EC oilseeds case,
 - the US/EC citrus/pasta disputes,
 - the US/Japan processed agricultural products case
 - challenges by the US, Australia and New Zealand to the beef quota regimes of Japan and Korea
 - the Australia/US sugar dispute
 - the challenges by South American banana producers to the EC quota regime

The outstanding issues

2. Although the Uruguay Round Agreements factored in the outcomes of these disputes, there is still some unfinished business. The EC bananas regime remains one of the most contentious issues on the WTO dispute settlement agenda. Australia and USA have challenged Korea's beef import regime. The United States has not significantly liberalised its sugar import regime. WTO rules on processed agricultural goods remain contentious.
3. Some of the WTO rules are undergoing review or change in application as part of the built-in agenda :
 - The five year transitional periods for "local content "available to developing countries under the Subsidies and Countervailing Measures Agreement (SCM) and the Agreement on Trade-Related Investment Measures (TRIMS) are due to expire²
 - WTO members did not extend the provisional application of certain provisions of the SCM Agreement, relating to presumptions of "serious prejudice", cover for designated "non-actionable" subsidies and provisions for authorized remedies³
 - Re-integration of textiles into the multilateral system, including full integration by 2002 of products accounting for less than 18% of 1990 imports and integration of all remaining products by January 2005⁴

¹ Article 3 Of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, or "DSU")

² Articles 27.3 and Article 3.1(b) of the SCM; Article 5.2 of TRIMS

³ Articles 31, 6, 8 and 9 of SCM Agreement

⁴ Article 2 of the WTO Agreement on Textiles and Clothing (ATC)

- expiry of the "peace clause of the Agriculture Agreement in 2003⁵
- expiry of certain transitional periods for developing countries under the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁶
- sectoral liberalisation of services trade⁷
- review of the Dispute Settlement Understanding (DSU), including issues connected to authorization of rights of retaliation⁸

4. Close surveillance will be needed of implementation of the liberalisation provisions of the built-in agenda, including, as appropriate, through the leverage

New challenges:

5. There are new challenges confronting the WTO, some of which might be tested through dispute settlement machinery. These include:
- the erosion of the MFN principle arising from the proliferation of regional trade agreements (RTA's) and the extent to which they conform to WTO provisions on free trade areas and customs unions⁹
 - trade restrictions based on consumer concerns, including in the area of genetically modified foods
 - implementation of obligations by newly acceding WTO members.

The role of developing countries:

6. The WTO dispute settlement system is strong evidence that the WTO rules are not merely for the benefit of the major developed countries. Developing countries have been far more active in prosecuting their rights under the WTO dispute settlement system than under the GATT system. They have successfully challenged measures of the major developed members. In addition to the Latin American countries, India, Pakistan, ASEAN members and Korea have mounted successful challenges to the measures of the EC and the US. Some of them have also been on the losing side in successful challenges by the major trading countries.
7. The launch of a new round and efforts to achieve WTO reforms (including improved transparency) cannot be achieved without the support of developing country members. The climate for developing country support could be adversely affected if they were to be targeted through the dispute settlement processes upon the expiry of transitional periods for special and differential treatment.
8. The support of developing countries (which make up the majority of WTO membership) is also critical to achieving consensus on "civil society" proposals, including in the dispute settlement arena.

⁵ Articles 13 and 1(f) of the Agreement on Agriculture

⁶ Article 65 TRIPS Agreement

⁷ General Agreement of Trade in Services (GATS)

⁸ Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes

⁹ Article XXIV of GATT 1994 and WTO Understanding on the Interpretation of Article XXIV of GATT 1994

OUTSTANDING ISSUES AND THE BUILT-IN AGENDA

Agriculture

9. The Agreement on Agriculture set in train the re-integration of agriculture in the multilateral trade system. The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) established disciplines on Members in the use of trade and trade-related measures for the protection of human, animal and plant life and health.
10. The agricultural regimes of WTO members have been challenged in a diverse number of disputes, including:
- the EC's banana import regime¹⁰
 - Canada's dairy assistance measures¹¹,
 - India's quantitative import restrictions,¹²
 - EC measures on poultry¹³,
 - EC measures on butter¹⁴,
 - Philippines measures on pork and poultry¹⁵,
 - Hungarian agricultural export subsidies¹⁶,
 - EC import duties on grains¹⁷ and rice¹⁸,
 - Korea's shelf life provisions¹⁹
 - Korea's safeguard measures on dairy products²⁰
 - Korea's measures on beef²¹
 - United States safeguard measures on lamb meat²²
 - Belgium's customs administration for rice²³
11. In many cases, the disputes were settled without proceeding to formal legal adjudication. In general, access improvements were secured as an outcome of recourse to dispute settlement, although implementation in the bananas case remains outstanding. Some of the disputes have involved complex factual and legal issues. They have also involved considerable resources over extended periods of time, although joint complaints have been helpful in minimising the drain on resources needed to prosecute a dispute at the panel stage. Australia has worked closely with other exporters in the initiation and prosecution of disputes such as India's quantitative import restrictions, Hungary's agricultural export subsidies, Korea beef and US lamb safeguards. Australian officials also rely heavily on the private sector for developing the basis for complaints, including expert resources and funding of consultancy studies. Australia has strengthened

¹⁰ WT/Ds27

¹¹ WT/DS103 and WT/Ds113

¹² WT/DS90

¹³ WT/DS69

¹⁴ WT/DS72

¹⁵ WT/DS102,

¹⁶ WT/DS35

¹⁷ WT/DS9 and WT/DS13

¹⁸ WT/DS17

¹⁹ WT/DS5

²⁰ Wt/DS98/

²¹ WT/DS169

²² WT/DS177 and WT/DS178

²³ WT/DS210/

WTO legal resources and established a domestic mechanism for the management of disputes.²⁴

12. In legal terms, the findings in the bananas case have implications for tariff quota allocation and administration. In view of the large number of tariff quotas applying in the agricultural sector, there may be value in examining whether application of the bananas jurisprudence to other tariff quotas would contribute to access improvements. The Canadian dairy case may also be useful in regard to of agricultural export subsidies.
13. Significant issues that are yet to be tested include the relationship between the subsidy provisions of the Agriculture Agreement and the SCM, in particular processed agricultural products²⁵, as well as the extent of coverage of the "peace clause", including in relation to "green box" measures²⁶.
14. Three of the SPS disputes to date - EC hormones²⁷, Australia salmon²⁸ and Japan varietal testing²⁹ proceeded to formal legal adjudication. Australia has fully implemented, Japan is in the process of implementing and the EC case remains outstanding (Canada and the US were granted authorization to retaliate against imports from the EC pending implementation). Thailand has recently initiated a complaint against Egypt, connected to an import prohibition on canned tuna incorporating soybean oil containing genetically modified organisms (GMO's). The three completed disputes have served to clarify obligations on countries maintaining measures in excess of an international standard.
15. If the legal findings in these cases were applied to all of the SPS measures maintained by WTO members, it is doubtful that any WTO member would be in strict compliance with WTO obligations. The SPS Agreement has proved to be useful leverage in securing quarantine-related access improvements. However, if WTO members were to engage in a series of "tit for tat" legal challenges, the dispute settlement system could break down and there could be a civil society backlash. In the event of progress being stalled at the bilateral level, Members could give consideration to alternatives to panel processes, such as the dispute mediation arrangements under the International Office of Epizootics (one of the WTO-recognised standards organisations) or, conceivably, under the good offices³⁰ or arbitration process³¹ of the DSU.

Textiles

16. Implementation of ATC commitments will require close surveillance. The WTO dispute settlement system may provide useful leverage to ensure that there is no backsliding on commitments.

²⁴ Disputes Investigation and Enforcement Mechanism (DIEM), text available on DFAT's website: www.dfat.gov.au

²⁵ Article 11 of the Agreement on Agriculture

²⁶ Article 13 and Annex 2 of the Agreement on Agriculture

²⁷ WT/DS26

²⁸ WT/DS18

²⁹ WT/DS76

³⁰ Article 5 of the DSU

³¹ Article 25 of the DSU

17. There have been a number of WTO disputes involving textile products. Most of the complaints have been initiated by developing countries - notably India - and have delivered benefits. The disputes include:

- Turkey's restrictions on textiles arising from a regional trade agreement with the EC³²
- Argentina's tax measures on textiles and apparel³³
- India's quantitative restrictions on textiles³⁴
- United States restrictions on woven wool shirts and blouses³⁵
- United States restrictions on imports of cotton and man-made fibre underwear³⁶
- United States safeguard measures on combed cotton yarn³⁷

Expiry of transitional periods for developing countries

18. The expiry of the transitional period for local content and some other arrangements is a matter of vigorous debate in WTO forums. Developed countries may seek to enforce the expiry dates through recourse to WTO dispute settlement. However, a proliferation of legal processes might not be conducive to the climate for a new round.

Dispute Settlement Machinery

19. There is a general consensus that the system is functioning well and in an equitable manner. The level of activity of developing countries as complainants is far higher than in the GATT system and has a greater geographical spread.

20. In terms of equity between members, it is clear that rights of retaliation, while available to all members, are generally not feasible for all except the major economies. Against this, retaliation rights have been exercised on only three occasions: by the US and Canada against the EC in the beef hormones case and by the US against the EC in the bananas case. There are concerns about the "chilling" effect of publication of draft retaliation lists and at "carousel" retaliation (varying the product coverage during the retaliation period). There are also concerns that retaliation could indirectly disrupt the supply patterns of third countries eg Australian supplies of raw wool to EC manufacturers. A panel established at the request of the EC is currently examining some of these issues. From a wider perspective, it is legitimate to expect that WTO members will act in good faith and consider compensation options before proceeding to retaliation.

21. Another equity consideration relates to the reasonable period of time for implementing WTO findings. A WTO arbitrator accorded the EC 15 months to implement in the beef hormones case, but only accorded Australia 8 months in the salmon case. This was based on reasoning that longer periods of time should be accorded for legislative implementation compared to administrative processes. Such an approach ignores the requirements of administrative law, including principles of natural justice in common law systems. More recent arbitration

³² WT/DS34

³³ WT/DS56

³⁴ WT/DS90

³⁵ WT/Ds33

³⁶ Wt/DS24

³⁷ WT/DS192

awards indicate that less weighting could be accorded to distinctions between legislative and administrative decision-making.

22. It is also incumbent on WTO members to act in good faith and to be "reasonable" about the reasonable period of time, in acknowledgment of the need to manage the domestic agenda in a way that supports the credibility of the WTO in the domestic constituency. Examples of "reasonableness" include the Latin American banana producers in the EC bananas dispute, the United States in the Howe Leather dispute with Australia and the EC in the highly sensitive dispute with the US in the Foreign Sales Corporation case.
23. In regard to the "civil society" agenda, there have been calls for greater transparency in dispute settlement processes, including more rapid de-restriction of panel and Appellate Body reports and public access to meetings. Any such moves in this regard are dependent on consensus, including equity considerations that documents should not be made publicly available until translated into the three WTO official languages (English, French and Spanish). Ironically, recent practice of attaching the full submissions of parties to dispute reports has served to overload the translators and thus to delay public circulation. In regard to the issue of public access to meetings, there are concerns that such access could be abused by turning the meetings into forums for public protest. There is no consensus in this regard.
24. Overall, transparency concerns may be more apparent than real. Oral proceedings before a panel involve no more than a week in total in processes of six months or more. Public access to Geneva hearings is likely to be feasible for only very few privileged members of "civil society", as is webcasting of proceedings. It is in the hands of national governments to deliver transparency to their domestic constituencies. Australian stakeholders are closely consulted throughout the course of disputes and are given access to submissions initiated by Australia. In disputes involving measures of State governments, it is practice to invite State government representatives to join the delegation.
25. It is now established that panels and the Appellate Body have discretionary powers to accept *amicus* briefs. Procedural rules may be needed to guarantee due process for the parties to the dispute, including the timing of such submissions and identification of the membership and source of funding of any organization making an *amicus* submission.

NEW CHALLENGES

Regional Trade Agreements

26. Possibly the greatest challenge facing the WTO system is the erosion of the application of the MFN principle, arising from a proliferation of regional trade agreements (RTA's). Valuable work has been undertaken in the WTO Committee on Regional Trade Agreements (CRTA), but progress has slowed in this Committee. Some RTA's involve extensive transitional periods and contain a number of sectoral exclusions, which may be incompatible with WTO disciplines on free trade areas and customs unions. There is concern that some of them might lead directly or indirectly to trade restrictions against those not in the RTA "club"

27. India has taken the lead in challenging new textile restrictions imposed by Turkey, which Turkey claimed were necessary to align its import regime with that of the EC. While the findings of that dispute may not be capable of general application to all RTA's, there is a wealth of documentation on individual RTA's - publicly available due to WTO transparency requirements - which might be usefully examined from a systemic perspective.

Consumer concerns

28. The SPS Agreement accords sovereignty to member governments to determine their appropriate level of protection for human, animal and plant life and health. For example, Australia's highly conservative approach to quarantine risk has recently been upheld by a WTO panel examining Australia's quarantine measures on salmon. These involve 11 measures in excess of the international standard.
29. The right to a precautionary approach is built in to the SPS provisions and has been upheld in WTO legal proceedings. This includes a right to provisional measures where there is insufficient science available to undertake a risk assessment.
30. In the beef hormones dispute, no claims were made that there was insufficient science to undertake a risk analysis. Rather, the issue appeared to relate to consumer perceptions that were not founded in science, nor relevant to the precautionary principle (which is reflected in the SPS Agreement). Similar concerns are emerging in relation to genetically modified organisms.
31. In accordance with SPS provisions, the level of risk to life and health that a society is prepared to tolerate should be factored into a country's appropriate level of protection. However, a WTO member should also be consistent in the application of its appropriate level of protection in different situations. For instance, food safety would not appear to be central to any decision to tolerate potentially fatal levels of *e coli* in a domestic product, but at the same time to impose a total prohibition on a comparable imported product which may pose far less risk to life and health.
32. There is understandable concern that consumer concerns may be manipulated by protectionist elements within a community. On the other hand, the credibility of the WTO may be at issue if it is perceived that the WTO rules are applied in a way that does not reflect consumer concerns. There is also a view that concerns may be related to lack of confidence in national regulatory authorities to guarantee - or enforce - food safety, such as the "mad cow: problem and illegal use of dioxins in Europe. This appears to be more marked in the EC than say in North America or Australia and New Zealand. Consumer confidence in Europe may be improved with the establishment of an EC wide food authority.
33. In the GMO context, the SPS Agreement may not have application to concerns that consumers should be fully informed or to concerns to maintain "GMO free" crops. These are matters that would appear to be more relevant to the WTO Agreement on Technical Barriers to Trade or to the conservation provisions of the

GATT 1994.³⁸ Healthy domestic debate between those wanting access to the best genetic materials and others wanting to preserve the genetic purity of crops may lead to better outcomes than internationally adjudicated outcomes.

Implementation of obligations by newly acceding members

34. Countries acceding to the WTO are expected to have in place regulatory regimes that are not in conflict with WTO obligations and which have the capacity to deliver the observance of rights to other WTO members.
35. Absorption of China into the multilateral trading system is a major challenge for the WTO. There may be particular challenges associated with the role of China's provinces (most of them having populations far greater than Australia) in trade regulation and administration.
36. WTO rules require that signatory governments assume full responsibility for the trade and trade-related actions of their regional governments.³⁹ In some cases, signatory governments have positive obligations to seek observance of WTO rules on the part of regional governments.⁴⁰
37. The trade and trade related actions of regional governments are actionable under the WTO dispute settlement system (as they were under the GATT system) Article 23.9 of the DSU provides:
 - *The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB [Dispute Settlement Body] has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance"*
38. If a panel/Appellate Body were to find that "reasonable measures" had in fact been taken, the inconsistent measure could conceivably remain in place. While compensation and retaliation rights would accrue to the complainant party, such measures may not deliver benefits to the affected commercial exporters. In theory, whole provinces could be excluded from the application of WTO legal provisions. In practice, it is hard to envisage that WTO members would be prepared to accept such developments.

³⁸ Article XX of the GATT 1994

³⁹ See Article XXIV:12 of GATT 1994 and Articles 13 to 15 of the Understanding on the Interpretation of Article XXIV of GATT 1994

⁴⁰ See for example Article 13 of the SPS agreement.

CONCLUSIONS

39. The WTO dispute settlement system has proved to be effective leverage in securing observance of WTO obligations. It has proved to be effective for developing countries as well as developed countries.
40. Some five years into its operation, the basic structure of the system has proved to be sound, although there is a need to clarify some procedural ambiguities.
41. Recourse to the dispute settlement system in respect of major systemic policy issues could provide some impetus to negotiations for a new round.