

**THE WORLD TRADE ORGANISATION [WTO] DISPUTE SETTLEMENT
MECHANISM: A DEVELOPING COUNTRY PERSPECTIVE**

**Isikeli Mataitoga
A Barrister and Solicitor of the High Court of Fiji**

This paper is an attempt to identify and briefly discuss some of the issues that are faced by developing country members of the World Trade Organisation [WTO] and especially the small island developing countries among them, as regards the settlement of trade disputes. The short paper will be in three parts: (1) a brief background of the trade dispute settlement process under GATT and the WTO; (2) a brief description of a few panel cases under the WTO involving the developing countries either as complainant or as respondents; and (3) an outline of the major problems that have been encountered by developing countries in relation to the operation of the Dispute Settlement Understanding.

PART 1

Background

A brief overview of the Dispute Settlement Body (DSB) of the WTO is needful to set the context of the comments and analysis that will follow. In today's world of globalisation and liberalisation, international trade policy has become a complex phenomenon. One of the key texts that emerged from the Uruguay Round of trade talks is the **"Understanding on Rules and Procedures Governing Settlement of disputes"**¹.

The DSU is an integral part of the Agreement establishing the World Trade Organisation. The WTO is based on the principle of "single undertaking"². The old system of dispute settlement under the Generalised System of Tariff and Trade (GATT) has problems the most severe was the provision for "positive consensus" before any decision by the panel of adjudicators is adopted. This has in the past led to blockage of the settlement procedure by member countries either at the stage of establishing the panel or at the stage of adoption of the panel report.

An example was a case in 1988 where the USA imposed sanctions against imports from Brazil under the Super 301 Trade Act of 1974 on the ground that

¹ In short it is called the "Dispute Settlement Understanding" (DSU)

² Single Undertaking means nothing is agreed until everything is agreed.

Brazil had failed to give patent protection to pharmaceutical products produced by US companies. Brazil challenged the action by the USA as GATT-illegal and requested for a dispute settlement panel in this regard. The US blocked the constitution of the panel by using its influence and dragged the matter for many months while it tried to get a bilateral solution with Brazil.

Another problem under the GATT system was the lack of a time bound process and as a result dispute could be dragged on by the economically stronger parties for many years without any hope of resolution. This marginalised the ability of the small and more vulnerable economies under GATT to consider taking actions because of the cost and the real possibility of no result being obtained within a reasonable period of time.

The problem of forum shopping was also a major weakness of the GATT system of dispute settlement. Members of GATT were not obligated to use its system of dispute settlement when there arose a trade dispute between them. The result was that members would often use domestic tribunal instead of the GATT mechanism when it suited them. This lack of uniformity in dispute settlement eroded the basic philosophy of the multilateral trading system i.e. to check unilateralism

Improvements under the WTO DSU

Perhaps the most important improvement of the DSU procedure over the GATT system of dispute settlement was the adoption of "negative consensus". This means that under the new system the panel reports shall be adopted automatically unless it is rejected by consensus. A similar provision exists for the establishment of the panel. In simple terms, under GATT, consensus was needed at each stage of the dispute settlement process, while at the WTO consensus against each stage of the process is needed.

Under the WTO system the blockage of panel reports is next to impossible and hence the threat of "aggressive unilateralism" is minimum. There is also a timeframe for each and every stage of the legal process. Delaying tactics which were a feature of the GATT system are now virtually impossible under the WTO system. In effect, the principle of "negative consensus" means that a wronged member can expect to receive compensation within a year to eighteen months.

Another important feature is the "single undertaking" nature of the WTO Agreement, i.e. a member can only be a member of an agreement if it is a party to all other agreements. Thus in relation to the GATT system, there is a major change in the functioning of dispute settlement under the WTO. The change is the integration of all dispute procedures established under individual

agreements³ [Goods, Services, TRIPS etc] into a single system operating under the Dispute Settlement Body [DSB].

In contrast to the GATT system, the WTO system of dispute settlement provides parties with automaticity with respect to:

- The establishment of a panel to obtain ruling on the legal status under WTO of the measure applied by the trading partner
- Adoption of panel ruling; and
- Authorisation of counter-measures in the event where an adopted panel ruling is not implemented.

A new and positive feature of the WTO dispute settlement system is the introduction of appellate review of panel decisions. This has enhanced the enforceability of all commitments and ensures greater confidence in the quality of legal finding. It does introduce a much needed degree of precedent setting in terms of developing specialised jurisprudence in an area of international law that is still shrouded in a lot of mist.

PART 2

Panel Cases under the WTO System and the Developing Countries

In this part of the paper a brief examination of three WTO panel cases involving developing country members is undertaken. The objective of the examination is to raise issues that developing countries are still facing and are problematic in their quest for fairness and equity in the settlement of trade dispute in the WTO. After each panel case issues that its raises are identified for your consideration and discussion.

(a) Brazil - Measures Affecting Desiccated Coconut, complaint by the Philippines (WT/DS22).

In March 1996, a panel was established at the request of the Philippines to consider whether Brazil's imposition of countervailing duties on desiccated coconut from the Philippines was consistent with the WTO rules. The Philippines claimed that the duties were inconsistent with Brazil's obligations under Article VI of GATT 1994 because, inter alia, Brazil had not established the basic prerequisites for imposing such duties and in particular had not correctly calculated the degree of subsidization. Brazil objected to this claim on the ground that the Tokyo Round Agreement on Subsidies and Countervailing Measures (Subsidies Code) was the only legal framework applicable to the dispute. In

³ Also covers Plurilateral Agreements under WTO Agreement {annex 4}

Brazil's view, the WTO agreements did not apply to countervailing duty investigations initiated prior to the date of entry into force of the WTO Agreement (i.e. 1 January 1995).

In its October 1996 report, the panel noted that the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides that it applies to countervailing duty investigations initiated after 1 January 1995. The investigation at issue was initiated prior to 1995. The panel concluded that Article VI of GATT 1994 could not be applied independently of the SCM agreement to a countervailing duty investigation initiated prior to 1995. As a result of this finding on the question of applicable law, the panel did not consider the merits of the Philippines' claims. The Philippines appealed this finding. In February 1997, the Appellate Body issued its report upholding the panel's conclusions. The reports of the Appellate Body and of the panel, as upheld by the Appellate Body, were adopted by the DSB in March 1997.

This case, although it reached the appellate stage, did not resolve the dispute at issue because both the panel and the Appellate Body avoided a ruling on the merits of the case for technical reasons. This illustrates the increased emphasis on legal positivism and judicial restraint under the WTO regime, as opposed to pragmatic solutions which were prevalent under GATT 1947. The lesson from the unsuccessful result for the complainant is that under the WTO dispute settlement mechanism, what appears to be a strong case could be lost because of certain legal technicalities. However, the implication of this particular case for the WTO dispute settlement mechanism is rather limited because the case involved special circumstances during the transition period from GATT 1947 to GATT 1994. Now that the co-existence of the old and new regimes is over, it is unlikely that this particular issue will arise again in the future.

(b) United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, complaint by India (WT/DS33).

This dispute concerns a transitional safeguard measure that were imposed by the United States on imports of textile products. In its report circulated in January 1997, the panel found that the measure was in violation of the WTO Agreement on Textile and Clothing [ATC].

In reaching its conclusion, the panel adopted a rather restrictive approach regarding its scope of examination. For instance, in assessing the conformity of the US measure with Article 6.2 of the ATC, the panel restricted its review to an examination of a statement issued by the US investigating authority when the United States requested consultations under the ATC with India in April 1995. Following its finding of violation, the panel did not go on to consider India's request that it find that the importing country has to choose at the beginning of

the process whether it will claim the existence of "serious damage" or "actual threat of serious damage" to the domestic industry because, in India's view, they were two separate concepts, not interchangeable with each other. Nor did the panel consider India's claim that the United States consulted with India only on the basis of "serious damage" and referred the matter to the Textiles Monitoring Body (TMB) on that basis, not on the basis of "actual threat". The panel also declined to consider India's claim that the United States had improperly backdated the effective date of the restraint.

India obviously was not satisfied with this narrow finding by the panel. Although the United States had lifted the measure against imports from India in December 1996, even before the issuance of the final report of the panel, India filed a notice of appeal in February 1997. The grounds for appeal included issues regarding (i) which party bears the burden of proof concerning the legality of trade restrictive measures; (ii) what role the TMB should play in the dispute settlement process in the textiles sector; and (iii) whether a panel is required to make findings on all legal claims made by the complaining party.

In April 1997, the Appellate Body issued its report upholding the legal findings and conclusions of the panel on all issues. As to the burden of proof, the Appellate Body agreed with the panel that it was up to India to present evidence and argument sufficient to establish a presumption that the measure was inconsistent with the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption. Regarding the role of the TMB, the Appellate Body concluded that the statement in the panel report on what information the TMB may take into account was purely a descriptive comment and not "a legal finding or conclusion" which the Appellate Body "may uphold, modify or reverse". On the issue of "judicial economy", the Appellate Body concluded that the panel's finding that it only needed to address those legal claims that it considered necessary for the resolution of the dispute was consistent with the DSU as well as the practice under GATT 1947 and the WTO Agreement.

In May 1997, the DSB adopted the reports of the panel and the Appellate Body. There was no implementation issue because the restraint was no longer in place at the time of the adoption.

India's motive in bringing this case was probably systemic, rather than economic. That is why India pursued the case even after the revocation of the measure by the United States. In response, the Appellate Body came up with clear-cut rulings on the burden of proof and judicial economy, which may not have necessarily satisfied India, but nevertheless greatly influenced later practice in the WTO. The Appellate Body Report on Shirts and Blouses became an important precedent regarding these two issues, often cited by later panels and the Appellate Body

itself. With respect to the role of the TMB and other issues, the answer was even less satisfactory from the Indian point of view. The panel made a statement, with which India disagreed, albeit in the form of *obiter dictum*. The Appellate Body simply avoided the question. A lesson to be learned from this case is that one cannot expect too much of rule-making from the WTO dispute settlement system. As adjudicatory organs, both the panels and the Appellate Body would generally exercise a judicial restraint and limit their rulings to issues which are absolutely necessary for bringing the dispute to a positive conclusion. Given the importance attached by the Appellate Body to the treaty interpretation rules enshrined in the Vienna Convention, while it is possible to seek certain clarifications of existing rules by panels or the Appellate Body, they will never be able to substitute the role of negotiators in resolving systemic issues.

(c) European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27).

This case is sometimes referred to as Bananas III because previously there were two failed challenges by certain banana exporting countries against the EC bananas regime under GATT 1947. The complainants alleged that the EC's regime for importation, sale and distribution of bananas was inconsistent with GATT Articles I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the Agreement on Trade-Related Investment Measures (TRIMs Agreement) and the General Agreement on Trade in Services (GATS). A panel was established in May 1996. In its May 1997 report, the panel found that the EC's banana import regime, and the licensing procedures for the importation of bananas in this regime, were inconsistent with the EC obligations under GATT 1994 and the GATS. The panel further found that the Lomé waiver granted to the EC, waived only the inconsistency with GATT Article XIII (regarding allocation of quotas), but not inconsistencies arising from the licensing system. In June 1997, the EC appealed from these findings. The Appellate Body mostly upheld the panel's findings, but reversed the panel's findings that the inconsistency with GATT Article XIII was waived by the Lomé waiver, and that certain aspects of the licensing regime violated GATT Article X and the Import Licensing Agreement.

The Appellate Report and the panel report as modified by the Appellate Body were adopted by the DSB in September 1997.

In November 1997, the complainants requested that the "reasonable period of time" for implementation of the recommendations and rulings by the DSB be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. The Arbitrator found the reasonable period of time to be from 25 September 1997 to 1 January 1999. Amendment to the EC bananas regulation was announced in

July 1998 in purported compliance with the recommendations. The complainants did not agree that the amended regulation implemented the DSB recommendations, and in September 1998 indicated that they might take recourse to Article 21.5 of the DSU, requesting the referral to the original panel regarding the consistency with the WTO rules "of measures taken to comply with the recommendations".

Procedural wrangling between the complainants and the respondents, however, kept the complainants from getting the panel established by the DSB. Moreover, while Ecuador pursued the reconvening of the original panel under Article 21.5 of the DSU, the United States went ahead and invoked its domestic procedures to implement its threat of retaliation against the EC exports to the US, as stipulated under Article 22.6 of the DSU. The United States announced a preliminary list of EC exports which it was considering for a 100 per cent tariff in retaliation for the EC's presumed non-compliance with the Appellate Body findings. The list was finalized on 18 December 1998 and the US was set to impose retaliatory tariffs on EC exports worth US\$520 million from March 2 1999 if the EC failed to change its regime for the importation of bananas. (Under Article 22.6 of the DSU, the DSB is bound to accord permission for retaliation to the complainant upon request, as such request can be denied only by consensus of all members including the complainant.)

Another interesting development occurred on 15 December, 1998, when the EC itself asked for the establishment of a panel to find that its implementation measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged" under the DSU.

The DSB, at a special meeting held on 12 January 1999, agreed to two separate requests from Ecuador and the EC to refer, under Article 21.5, to the original panel in the dispute over the EC's implementation of DSB recommendations concerning its bananas importation regime. Ecuador requested the panel to verify whether the DSB recommendations have been effectively implemented by the EC as it believed that the new EC measures continued to violate provisions of various WTO Agreements. Colombia, Costa Rica, Côte d'Ivoire, Dominican Republic, Dominica, Jamaica, Mauritius, Nicaragua, St. Lucia, and Saint Vincent and the Grenadines indicated their interest in participating as third parties, whereas Mexico reserved the right to request its own Article 21.5 procedure. The EC requested the panel to look into the regulations it had adopted to implement the DSB recommendations regarding its bananas importation regime. The EC also said that it wanted to induce a challenge to its implementing measures and hoped that with the establishment of the two panels, a proper examination under Article 21.5 would be carried out. The US, Panama, Guatemala and Honduras objected to the EC request while St. Lucia supported it. India also expressed its opinion that a member should not be denied the opportunity to seek a ruling on

the legality of its own measures and showed concern about a winning party in a dispute going to the retaliation phase automatically to the detriment of the losing party.

About a week later, the US, Guatemala, Honduras, Mexico and Panama, in a letter dated 20 January 1999, asked for consultations with the EC under Article 4 of the DSU to find a solution regarding the EC's amended bananas importing regime. This move for consultations was expected to come into play after the WTO authorization for the US sanctions, that was expected to be granted by the DSB in its meeting scheduled on 25 January 1999. Japan, on the other hand, was urging a compromise. The compromise proposal by Japan, which was supported by some developing countries also, aimed at the suspension of the consideration of the US request for authorization of sanctions until the reconvened panel (on the request of the EC and Ecuador) has given its final ruling. This, Japan hoped, would preserve the right of the US to retaliate while putting off the automatic authorization until the time the reconvened panel pronounced itself on the EC's amended bananas regime.

The DSB meeting, scheduled for 25 January, was postponed repeatedly. For the first time in the history of the WTO, there was objection to the adoption of the agenda for the DSB meeting. Two small Caribbean banana-growing island countries, St. Lucia and Dominica, objected to the inclusion in the agenda of the US request for authorization to retaliate against the EC. This unprecedented move led to angry outbursts from the US and protracted negotiations between the EC and the US diplomats in Geneva. The Director General of the WTO acted as a facilitator for the negotiations which led to a compromise that allowed the DSB to finally meet and conduct its business. Among the elements of this compromise are:

- an agreement between the two parties to proceed immediately to consultations under Article 4 of the DSU to find a mutually agreed solution to the problem of the EC's amended bananas import regime;
- the original panel, already reconvened to deal with the two requests under Article 21.5 of the DSU, has also been given the task of arbitrating, under Article 22.6 of the DSU, on the extent of the US retaliation against the EC exports to the US by 1 March.
- the systemic issues concerning the relationship of Article 21.5 and 22.6 of the DSU need to be resolved expeditiously and the General Council as well as the DSB should address this as a priority issue.

This procedural wrangling regarding implementation of the DSB recommendations in the bananas case is due to an ambiguity in the DSU which has been exploited by the two major trading powers. While Article 21.5 provides for the reconvening of the original panel to determine the conformity of the

measures adopted by the losing party with the DSB recommendations, Article 22.6 allows the complainant to seek authorization for retaliation which can not be denied by the DSB. Moreover, this authorization must be sought within a period of 30 days after the adoption of measures by the losing party. There is no link or order established in the DSU in respect of these two provisions. At a more fundamental level, the DSU is not very clear as to when, how and by whom the conformity of measures adopted by the losing party with the DSB recommendations is to be decided.

The saga of "Bananas III", without prejudice to its final outcome, has raised some important questions for the consideration of developing countries. These are:

- i. Is there a need to define clearly which WTO members have the right to bring up disputes before the DSB? It is a fact that the US is not a major exporter of bananas. Admittedly, the US is defending the rights of its multinational corporations engaged in the production of bananas in Latin American countries and their export to the EC. But allowing the US to bring this case also opens the door for disputes in the future that are filed not in the defence of a country's own exports, but in order to open markets for the exports of its multinational corporations, no matter where these exports have been produced.
- ii. Who has the right to decide whether the measures adopted by the losing party are in conformity with the DSB recommendations? If this is the right of the complainant, as the US seems to imply, this may lead to retaliation against developing countries even when they claim to have complied with the DSB recommendations.
- iii. Is retaliation really an option for developing countries? All the co-complainants in the bananas dispute are developing countries. But no matter how frustrated they feel with the EC implementation of the DSB recommendations, not one of them has opted for retaliation like the US. The fact is that hardly any developing country can afford to seek, or effectively employ, retaliation against a major developed country. Retaliation is an instrument in the multilateral trading system that is more likely to be used against them than by them.

In its December 1997 report, the Appellate Body upheld, with certain modifications regarding the reasoning, the panel's finding on Articles 70.8(a) and 70.9, but ruled that Article 63 was not within the panel's terms of reference. The Appellate Report and the panel report, as modified by the Appellate Report, were adopted by the DSB in January 1998. At the DSB meeting in April 1998, the

United States and India announced that they had agreed on an implementation period of 15 months.

PART 3

Some Problems encountered by Developing countries in the DSU

The experience of developing countries with the implementation of the DSU so far indicates some problems. In this presentation I will only refer to two, and they are:

- the cost of recourse to the dispute settlement;
- the implementation of decisions regarding cases brought by developing countries against developed countries and the related issue of compensation

a) Cost of Access to the dispute settlement process

The present dispute settlement process is very costly as considerable human and financial resources are required to prepare and follow the case through the consultation to the appeal stage spanning a lengthy period of close to three years. Due to the lack of local expertise needed to handle this complex and lengthy legal process, developing countries have had to engage professional legal and other experts from the developed countries to argue their case.

Developing countries, therefore, weigh the costs and benefits of launching the process very carefully even when they are convinced that their rights have been impaired or another WTO member has not discharged its obligations. For the smaller developing countries like Fiji there is a political cost that has to be considered when the other party to the dispute is a large developed country with significant bilateral aid portfolio. These considerations often upset the balance of rights and obligations in the system and result in an unfair and inequitable process.

b) Issues of Implementation of decision and compensation⁴

The expected benefit a developing country may get with a favourable decision under the DSU is limited to the withdrawal of the offending trade measure in question. Should the developed country offender fail to do so, the developing country is entitled to retaliate. This in principle is an improvement over

⁴ For detail review see: Hudec, "Enforcing International Trade Law: The Evolution of the modern GATT System", (Butterworth, London 1993)

the GATT system but victory can be hollow when the trade imbalance in most cases between parties in to a dispute favours the offending party.

The above difficulty raises additional problems for the developing country. Without an expeditious withdrawal of the offending trade measure irreparable damage will be inflicted on the developing country as regards its export trade. The lack of compensatory provision in cases of delayed implementation of panel decision is particular damaging to small developing countries who already have a small range of export products and markets to compete in.

Concluding remarks

A major feature of the WTO is its 'rule-based' dispute settlement mechanism. The earlier system under GATT was based on a negotiatory model and thus, non-binding. On the other hand, the WTO dispute settlement mechanism is based on adjudicatory model and thus more timely, automatic and binding.

Though there has been a shift from politics towards legality, the system is far from ideal. Recent cases reveals stress on the system and these problems highlighted above need to be directly addressed in the context of the current round of ministerial negotiations. The special and differential treatment provisions in the WTO agreements and in the Understanding on Rules and Procedure Governing Settlement of Disutes [DSU] are merely declaratory. Consequently it has been impossible to use it to re-balance the functioning of the system to be fair and equitable to all members.

Capacity development in the area of international trade law, international economic and public international law must now be a priority area for all developing country members of the WTO, if they are to have a fighting chance of protecting their rights under the multilateral trading system.

I thank you.

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