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Lancaster University Management School
Working Paper
2005/012

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Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT

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A critical feature of the GATT Uruguay Round negotiations was the establishment of a new and more effective system of dealing with international trade disputes, known as the WTO Dispute Settlement Understanding (DSU). The original GATT dispute settlement system comprised rudimentary remnants of a more thorough framework contained in the defunct Havana Charter of the International Trade Organization (ITO). By the time of the start of the Uruguay Round negotiations in Punta del Este in 1986, the effectiveness and credibility of the GATT dispute settlement system was being very seriously questioned. The primary reason for the increasing lack of confidence in the system was the propensity of GATT contracting countries to ignore the findings of Panels, resulting in a stalemate in a number of high profile trade disputes. Several trade disputes between the EU and the United States discussed were initiated under the GATT dispute settlement system but remained unresolved. These disputes became increasingly acrimonious as a direct consequence of the failure of the GATT system to enforce a satisfactory resolution.

This paper provides an outline of the workings of the GATT and WTO dispute settlement systems underlie several recent trade disputes. The first two sections deal with the GATT system of settling trade disputes. The first details the key elements of the GATT dispute settlement system while the second considers its performance in resolving disputes. Section 3 outlines the origins of the WTO DSU and summarises its principal Articles. The WTO DSU is appraised on the basis of its first nine years of operation in Section 4 followed by a brief discussion of the key issues that have arisen from its operation. The final Section makes some concluding comments on the relative efficacy of the GATT and WTO dispute settlement systems.

1. The GATT Dispute Settlement System

The original 1948 Havana Charter of the proposed ITO contained what has been described as an elaborate system of dispute settlement (Jackson, 1969). The GATT however, was established in the wake of the ITO's failure and contained a more limited array of measures derived from the Havana Charter for the settlement of disputes between its contracting parties. The principal GATT Articles

dealing with dispute settlement are Articles XXII on Consultation and XXIII on Nullification or Impairment. These are summarised below.

GATT Article XXII: Consultation

Article XXII of the GATT is concerned primarily with consultation between contracting parties in the event of disputes over the application of the GATT rules. Paragraph 1 states that:

Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement. (WTO, 1999)

As it stands, the Paragraph is very mild. It does however, establish that GATT contracting parties have an obligation to engage in consultations in the first instance to resolve possible trade conflict. The second and final Paragraph of the Article states that:

The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1. (WTO, 1999)

Paragraph 2 extends the breadth of the obligation of consultation established in Paragraph 1 to all contracting parties. This includes the possibility of mediation by Third Parties or the staff of the GATT Secretariat.

In the case of the failure of consultation and/or mediation between GATT contracting parties to resolve a dispute, the plaintiff may have recourse to the provisions of Article XXIII.

GATT Article XXIII: Nullification or Impairment

Article XXIII stands at the centre of the GATT dispute settlement system. Its paragraphs define the conditions under which violation of the GATT rules permit contracting parties to seek redress and the means of so doing. Paragraph 1 states that:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

- a) the failure of another contracting party to carry out its obligations under this Agreement, or
- b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- c) the existence of any other situation.

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it. (WTO, 1999)

Paragraph XXIII.1 therefore identifies three circumstances under which the GATT rules may be violated. Paragraph 1(b) deals with what are referred to as non-violation nullification or impairment complaints, that is, there has been no specific violation of a GATT provision. This played an important role in dealing with government measures that distorted the outcomes of previous negotiations. Paragraph 1(c) is, effectively, a 'catch-all' provision.

The second paragraph of Article XXIII deals with the means of redress for contracting parties in the case that their benefits under GATT are nullified or impaired. It states that:

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time ... the matter may be referred to the CONTRACTING PARTIES. [They] shall promptly investigate any matter so referred to them and shall make appropriate recommendations ... which they consider to be concerned, or give a ruling on the matter as appropriate ... If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concessions or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Director-General to the Contracting parties of its intention to withdraw from this Agreement. (WTO, 1999)

Jackson (1998a) identifies the key provisions of Article XIII.2 as being that:

- The dispute settlement system can be invoked on the grounds of nullification or impairment of benefits expected under the Agreement and does not depend upon any actual breach of legal obligation.
- The power of the GATT is established, not only to investigate and recommend action but also, to rule on the matter.
- The GATT is empowered to authorise contracting parties to suspend GATT obligations to other contracting parties.

The Evolution and Application of the GATT Dispute Settlement System

The GATT dispute settlement system was founded upon the application of Articles XXII and XXIII, which were never really intended to shoulder such a heavy legal burden. The operation of the system resulted in the gradual evolution of legal procedures, interpretation and precedent that established an increasingly sophisticated body of law over time. The legal evolution of the GATT dispute settlement system is explained in some depth elsewhere (notably, Jackson, 1969, 1998a; Hudec, 1990, 1993, 1998; WTO, 2004).

The dispute settlement system was founded upon the principle of consensus between GATT contracting parties. In its early days, there was no formal provision for the judicial settlement of trade disputes. Instead, the system emphasised diplomatic negotiation and consensus. This required both parties to a trade dispute to accept the outcome of any finding.

A key innovation was the introduction of GATT Panels in 1955. This represented a shift away from negotiated dispute resolution to an approach based more upon arbitration and judicial processes (Jackson, 1998a). Panel Reports were then presented to the GATT Council for ratification. If a consensus accepted a Panel Report, its findings became binding on the parties involved. Countries defending a complaint however, could veto the ratification procedure and thereby avoid being obliged to bring their trade policy into GATT compliance. It was this right to circumvent the ratification of Panel findings that was deemed to be the most significant defect of the GATT dispute settlement system.

The procedures and precedents established in the first thirty years of the GATT dispute settlement system were incorporated into a new Understanding on Dispute Settlement, negotiated as part of the Tokyo Round in 1979 (GATT, 1980). This clarified and codified established GATT practice to date, along with the introduction of minor reforms, including decision-making by committee rather than the Council. These reforms also included the de-linking of the resolution of separate disputes and the imposition of time limits on dispute settlement (Trebilcock and Howse, 1999).

2. The Performance of the GATT Dispute Settlement System

The GATT dispute settlement system evolved as an increasingly rule-oriented judicial system for resolving international trade disputes. Its effectiveness however, was greatly constrained by several weaknesses, in addition to the veto, that led to increasing frustration among GATT member countries with respect to its application. The dispute settlement system survived however, because of the long-term commitment of its Members to maintaining the GATT framework (WTO, 2004). The shortcomings of the GATT dispute settlement system are discussed in an extensive literature (notably, Jackson, 1998a, b; Trebilcock and Howse, 1999; Hoekman and Kostecki, 2001). Its principal shortcomings can be summarised as follows:

- The relevant Articles were brief and did not specify clear objectives and procedures, such that settlement relied upon the creation of ad hoc processes.
- Ambiguity concerning the role of consensus, leading to the ‘blocking’ of adverse decisions.
- Delays and uncertainty in the dispute settlement process, given that there was no right to a panel and no hard time constraints on any aspect of the proceedings.
- Delays in, and partial non-compliance with, panel rulings.

By the 1980s and early 1990s, an increasing number of trade disputes could not be resolved in the face of such ambiguity, uncertainty and delay. This deteriorating state of affairs reflected the rapid growth and increasing importance of world trade – much of which was transacted under the auspices of the GATT – significant changes in the underlying patterns of comparative advantage with the emergence of the newly industrialising economies (NICs) and the intensification of international competition in traded goods and services.

The most comprehensive empirical analysis of the performance of the GATT settlement system is the review undertaken of all GATT disputes between 1948 and 1989 (Hudec *et al.*, 1993). This

study found that, in spite of the shortcomings of the GATT dispute settlement procedures identified above, the system resolved 88 per cent of valid complaints submitted, measured by full or partial compliance. Amid concerns about the GATT system's increasing ineffectiveness after 1980, compliance was still 81 per cent, even though this period covers more than half of the total number of GATT complaints made.

Two additional findings are worthy of particular notice. Firstly, more than half of GATT complaints after 1960 related to agriculture, many of them directly concerned with the EU and the implementation of the Common Agricultural Policy (CAP). The compliance rate in agriculture however, was broadly similar to that of other cases. Secondly, the study also reveals that the United States was responsible for a disproportionate level of non-compliance, particularly post-1980 (Hudec *et al.*, 1993).

In spite of the apparent success of the GATT system demonstrated by the Hudec study, there was a clear decline in its compliance performance after 1980 affecting a significant number of new dispute cases. It is evident that the increasing volume and complexity of trade disputes between a growing number of member countries put undue strain on a system that had not been designed to bear the burden of such economic, legal and political expectations. These weaknesses were evident in three high profile cases of non-compliance in the final years of the GATT system. They involved bananas, beef hormones (both EU non-compliance) and foreign sales corporations (US non-compliance).

Nevertheless, it is important to realise that, given the alternative forms of international dispute settlement available, the GATT system must be recognised as having been a success (Davey, 2000). Further, in spite of its shortcomings, the GATT dispute settlement system served its purpose sufficiently well to form part of the foundations of the WTO Dispute Settlement Understanding (Jackson, 1998a).

3. The WTO Dispute Settlement Understanding

The WTO Dispute Settlement Understanding (DSU) superseded the GATT system from 1 January 1995 and is regarded as being one of the central achievements of the Uruguay Round negotiations.

The WTO DSU and the Uruguay Round Negotiations

Prior to the commencement of the Uruguay Round negotiations, there was a general consensus among the GATT Contracting Parties that the dispute settlement system required reform. This was stated very clearly in the Punta del Este Declaration:

To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations. (GATT, 1986)

This is not to say however, that there was a great degree of consensus concerning how any new dispute settlement system should be constructed. A primary objective of Canada, the EU and Japan, along with many developing countries, was to limit the use of unilateral action by the United States, permitted under its federal law. The principal objectives of the United States however, were the adoption of a rule-oriented approach (automaticity), a clear timetable for dispute resolution and agreement on the potential for cross-retaliation (Stoler, 2003).

The negotiated outcome, the WTO DSU, satisfied most of these desired modifications and improvements to the GATT system. Unilateral action by the United States and other Members is restrained in several ways. Article XVI.4 of the Agreement Establishing the WTO requires that Members' national laws comply with their obligations under the WTO. The DSU also requires that Members abide by its rules and procedures, further ensured by its inclusion in the covered agreements listed in Appendix 1 of the DSU.

The DSU incorporates the US objective of automaticity as a pivotal element of the dispute settlement process (Stoler, 2003). The negative consensus requirement means that the adoption of Panel Reports can no longer be blocked by losing respondents and thus triggers the right of plaintiffs to retaliate. A strict, and therefore predictable, timetable for the dispute settlement process is provided in Article 20. The limited potential for cross-retaliation between sectors, given non-compliance, is dealt with in Article 22.3. The strict legality of carouseling however, is currently the subject of a test case between the EU and the United States. The actual functioning of the WTO dispute settlement system is discussed at length in a recent WTO publication (WTO, 2004).

The Articles of the WTO Dispute Settlement Understanding

The WTO DSU is an integral part of the Uruguay Agreements, running to 27 Articles and four Appendices (WTO, 1999). As such, it provides a significantly more substantial and effective framework for settling international trade disputes than the GATT system that preceded it.

Article 1: Coverage and Application

The coverage of the DSU is identified in Article 1.1 and the Agreements included are listed in Appendix 1 of the DSU. These Agreements include: the WTO Agreement, its component multilateral trade agreements – for goods, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the DSU – together with four plurilateral trade agreements – covering Civil Aircraft, Government Procurement, Dairy and Bovine Meat.

The special or additional application of the DSU rules are covered in Article 1.2, for the particular Agreements listed in Appendix 2. In the case of differences in the rules or procedures of these specific Agreements and the DSU, the former take precedence over the latter.

Article 2: Administration

This Article outlines the functions and procedures of the Dispute Settlement Body (DSB) which administers the DSU.

Article 3: General Provisions

Article 3.1 explicitly recognises the foundations of the DSU in GATT Articles XXII and XXIII. The remaining eleven paragraphs cover the various objectives of the DSU. These include its role in providing security and stability to the multilateral trading system (Article 3.2), the prompt settlement of disputes (Article 3.3) and the use of the DSU (Article 3.7).

Article 4: Consultations

The 11 Paragraphs of this Article cover the function of, and timetable, for Consultations between Members in dispute. A request for consultations is required as a pre-condition for a request for the establishment of a dispute panel (Article 4.3). Special attention is to be given to the particular problems and interests of developing country Members (Article 4.10).

Article 5: Good Offices, Conciliation and Mediation.

This Article is concerned with the provision by the WTO of good offices, conciliation and mediation procedures to resolve trade disputes between Members.

Articles 6, 7 and 8: Establishment, Terms of Reference and Composition of Panels

A Panel can be established at the latest at the first meeting of the DSB after the one at which the request first appears as an agenda item (Article 6.1). Panels are to examine the facts of a dispute and make recommendations or rulings to the DSB with regard to the covered agreements (Article 7.1). In so doing, Panels will address the relevant provisions in the covered agreements cited by the parties to a dispute (Article 7.2).

Article 9: Procedures for Multiple Complainants

This includes the establishment of a single Panel whenever feasible (Article 9.1) and the publication of separate reports when requested (Article 9.2).

Article 10: Third Parties

The interests of such parties are to be fully taken into account (Article 10.1), they have the right to be heard and make written submissions that are circulated to all parties (Article 10.2) and are provided with the submissions of all parties to a dispute (Article 10.3). Third parties may also have recourse to the DSU in the event of the nullification or impairment of their benefits under any covered agreement (Article 10.4).

Articles 11, 12, 13 and 14: Panel Functions, Procedures, Rights to Seek Information and Confidentiality

The function of a WTO Panel is to assist the DSB by making an objective assessment of the facts of a case and the applicability and conformity with the relevant covered agreements (Article 11). Panel procedures are laid down in Appendix 3 of the DSU (Article 12.1), including a proposed timetable for

Panel work (Appendix 3.12). Further, WTO Panels are empowered to seek information and technical advice from any appropriate individual or body (Article 13.1). Evidence may also be requested from an Expert Review Group (Article 13.2), according to the procedures outlined in Appendix 4. All Panel deliberations are confidential (Article 14.1) and non-attributable (Article 14.3).

Articles 15 and 16: Interim Review and Adoption of Panel Reports

A Panel will issue an interim Report, including the description of the case, the comments of the parties and its decision (Article 15.2) according to the timetable in Article 12.8 (Article 15.3). A party to a dispute has 60 days to lodge an appeal against the findings of a Panel Report (Article 16.4).

Article 17: Appellate Review Procedures and the Adoption of Appellate Body Reports

Only parties to a dispute and not third parties can appeal against a Panel Report (Article 17.4). Appeal proceedings should not exceed 60 days from the date of formal notification of appeal (Article 17.5). An Appellate Body Report will be adopted by the DSB and by the parties to a dispute unconditionally by consensus (Article 17.14).

Article 18: Communication with the Panel or Appellate Body

There can be no *ex parte* communication with a Panel (Article 18.1) except by means of confidential written submissions available to the parties to a dispute (Article 18.2).

Article 19: Panel and Appellate Body Recommendations

In the event of a Panel or Appellate Body concluding that a measure is inconsistent with a covered agreement, the Member will be recommended to bring the measure into conformity. Further, the Panel or Appellate Body may suggest ways of so doing (Article 19.1).

Article 20: The Time Frame for DSB Decisions

The time between the establishment of a Panel and its submission to the DSB should not exceed nine months in the absence of an appeal and 12 months in the case of there being an appeal.

Article 21: Surveillance of Implementation of Recommendations and Rulings

This Article is concerned with the response of Members in bringing their trade policy into compliance with the WTO rules. Members have 30 days after the adoption of a Report to inform the DSB of their intentions regarding the implementation of Panel or Appellate Body recommendations (Article 21.3). This is to be 'within a reasonable time', according to the conditions laid out in Paragraphs 3(a), (b) and (c). In the event of disagreement concerning Members' compliance with a Panel's recommendations and rulings, recourse may be made to the dispute settlement procedures and leading to a Panel Report within 90 days (Article 21.5). Under Article 21.6, the DSB keeps the implementation of adopted recommendations and rulings under surveillance.

Article 22: Compensation and the Suspension of Concessions

These are temporary measures to be implemented if recommendations and rulings are not acted upon within the reasonable time period given in accord with Article 21.3. Implementation however, is preferred to compensation or the suspension of concessions (Article 22.1). A Member failing to bring an inconsistent measure into compliance (within a reasonable time frame) is liable to provide compensation or face the suspension of its WTO concessions (Article 22.2). The appropriate conditions under which compensation or the suspension of concessions may take place are detailed in Article 22.3. Any suspension of concessions should be equivalent to the level of nullification or impairment (Article 22.4), subject to authorisation by the DSB (Article 22.5) and be temporary (Article 22.8).

Article 23: Strengthening the Multilateral System

Members are required to use the DSU in the case of dispute and have recourse to and abide by its rules and procedures (Article 23.1).

Article 24: Special Procedures Involving Least-Developed Country Members

Particular consideration is to be given to the special situation of least-developed country Members (Article 24.1). They are also entitled to request consultation assistance from the Director-General or Chair of the DSB (Article 24.2).

Article 25: Arbitration

Arbitration provides an alternative means of dispute settlement within the WTO (Article 25.1) subject to mutual agreement (Article 25.2), the inclusion of third parties (Article 25.3) and the application of Articles 21 and 23 of the DSU to arbitration awards (Article 25.4).

Article 26: Non-Violation Complaints

This Article deals with non-violation complaints that are covered by Paragraph 1(b) of GATT 1994 Article XXIII (see Section 2.1). This relates to the nullification or impairment of benefit under an Agreement resulting from any measure, whether or not it conflicts with that Agreement (Article 26.1). This includes the justification for such a complaint, mutually satisfactory adjustment of such a measure, non-binding arbitration and compensation [Paragraphs 1(a), (b), (c) and (d)]. Limits are set on the role of a Panel with respect to Article XXIII.1(c); the existence of any other situation (Article 26.2).

Article 27: Responsibilities of the Secretariat

The responsibilities of the WTO Secretariat are to assist Panels with legal, historical and procedural matters as well as to provide secretarial and technical support (Article 27.1). They are also to provide legal advice to developing country Members (Article 27.2) and special training courses in the dispute settlement procedures and practices (Article 27.3).

The Achievements of the WTO DSU

The creation of the DSU was an integral element of the WTO Uruguay Round Agreements. The DSU incorporates the rules and precedents established under the initially consensus-based GATT system into a formal rules-based judicial procedure. While the new DSU is founded upon GATT Articles XXII and XXIII, its length, scope and sophistication represents a significant improvement over the previous GATT disputes system. Eric White, the EU's chief legal advisor on trade matters, goes further:

The WTO Dispute Settlement system is a remarkable achievement. The WTO has succeeded in creating a frequently used compulsory dispute settlement system producing binding results that can be enforced. Nowhere else in international law are all these characteristics combined. (White, 2003)

Although the WTO DSU represents a significant advance in dispute settlement, it has not been a universal panacea for resolving all international trade disputes. Its broader scope however, means that there is significantly greater potential for conflict between the WTO Agreements and the regulatory systems and policy objectives of WTO Member states.

The principal achievements of the WTO DSU are summarised by Jackson as being (1998b):

- It established a unified dispute settlement system covering all of the WTO Agreements.
- It enshrines the precedent of plaintiff governments to initiate a panel process and prevents defendants from blocking the process.
- It established a new appellate procedure, including a negative consensus requirement for the acceptance of an appellate ruling.

The role of precedent in WTO Panel Reports however, is non-binding and Member countries may agree to depart from a Panel Decision through 'interpretive rulings' or negotiate derogations from their obligations via a waiver (Jackson, 1998b).

4. The Performance of the WTO DSU

As of 31 December 2003, some 304 trade disputes have been referred to the WTO DSU in the nine years since its inception. Although this figure includes pending cases, almost all of these disputes have been resolved in accord with WTO disciplines, whether directly, through ultimate compliance with Panel and Appellate Body Decisions, or indirectly, through mediation and good offices. The number of completed trade dispute cases subject to the WTO DSU is now sufficient for the derivation

of broad inferences concerning its operation as well as more detailed analysis based upon statistical techniques.

The Extent of Bias in the Use of the WTO DSU

The founding principles of the GATT and WTO multilateral framework are non-discrimination, reciprocity and transparency. Nevertheless, the WTO DSU is argued to be biased in favour of the leading industrialised countries, notably the EU and the United States, at the expense of developing countries.

The EU and the United States in particular are regarded as having created and employing the DSU to achieve their own objectives. This arises from their greater economic and political leverage in international trade matters, the greater resources at their disposal to fight complex and costly cases and their greater propensity for selective but substantial retaliatory action. If this is the case, the DSU will only be used by those Members with the retaliatory capacity to threaten respondents failing to comply with Panel Decisions (see Hoekman and Mavroidis, 2000; Bown, 2003; Holmes *et al.*, 2003).

An important counter-argument to this view of inherent bias is that the DSU is a more effective dispute settlement mechanism for all WTO Members than the GATT system. This is primarily because the GATT system of consensus was vulnerable to political pressure while the WTO DSU utilises a quasi-judicial system.

The likelihood of Members making use of the WTO DSU is analysed both theoretically and empirically using a set of resolved disputes (Bütler and Hauser, 2000). Several empirical studies analyse the extent of bias in the DSU by investigating the frequency with which countries and blocs are plaintiffs and respondents in WTO cases. Of the 235 cases brought to the WTO DSU between 1995 and 2001, some 66 per cent were initiated by industrialised countries and 34 per cent by developing countries. The former were sole or co-respondents in 56.6 per cent of cases and the latter in 46.4 per cent (Park and Panizzon, 2002). The least-developed countries however, were not involved in any cases at all. On the basis of cases since 2000, there is a discernible trend in complaints by developing countries against industrialised countries (Park and Umbricht, 2001; Leitner and Lester,

2003). The United States alone was the respondent in 18 cases and the EU in six out of a total of 41 WTO cases in 2002.

A number of other studies however, attempt to normalise the absolute numbers of cases so as to take account of the value of trade and likely existence of barriers to trade. Studies by Horn *et al.* (1999) and Busch and Reinhardt (2002) suggest that any bias is much less than it might appear. The EU and the United States were the most frequent litigants at the WTO between 1995 and 2002, with disputes between them accounting for 40 per cent of all complaints. The EU and the United States also appear together in many cases as third parties or co-plaintiffs. This raises the additional issue of coalition formation between Members (Busch and Reinhardt, 2002).

Holmes *et al.* (2003) find, using regression analysis, that trade share is a major explanatory factor for involvement in WTO trade disputes and conclude that there is little evidence of bias. Bown analyses participation in formal WTO trade disputes between 1995 and 2001. While WTO Members all have equal access to the DSU, weaker ones – that is, those with smaller trade shares – do not make use of it, in spite of their trade being affected, because of the pattern of incentives in the system (Bown, 2003). For this reason, there is a strong belief that the DSU system is underused by developing countries (Holmes *et al.*, 2003). The lack of any involvement by the least-developed countries ought therefore to be a cause for some concern.

The Types of Dispute Cases Considered by the WTO

The pattern of the distribution of WTO cases by product type and relevant WTO Agreement is investigated in several studies, although few attempt to explain these patterns (Horn *et al.*, 1999; Park and Umbricht, 2001; Park and Panizzon, 2002; Leitner and Lester, 2003).

Holmes *et al.* (2003) focus on two principal types of disputes – domestic regulation and trade defence – that accounted for 44 and 31 per cent respectively of all trade disputes between 1995 and 2002. While cases of the former have declined significantly, the latter have risen substantially – particularly anti-dumping, countervailing duties and safeguard actions. The initial popularity of domestic regulation cases may therefore reflect a desire to complete existing but previously unresolved GATT cases (Holmes *et al.*, 2003), notably on beef hormones and bananas. The evidence also suggests that trade defence cases are increasingly being brought by newly industrialising countries (NICs) and developing countries against the United States and other NICs and developing countries.

The Extent of Bias in the Outcome of WTO Cases

The leverage and resources of the industrialised countries may mean that, even if there is no bias in the use of the WTO DSU, they are more likely to win their trade dispute cases. This issue is complicated by the fact that many disputes do not result in formal complaints and not all complaints result in panel reports (Holmes *et al.*, 2003).

Some 88 per cent of WTO cases between 1995 and 2002 were found to be successful on the basis of the plaintiff winning on at least one issue in a complaint (Holmes *et al.*, 2003). To the extent that this success rate can be compared with that of the GATT system, it suggests that the WTO DSU has, to date, been more effective in resolving trade disputes. Further, Holmes *et al.* find little evidence of bias in the outcome of cases compared with the number of complaints made by particular Members.

Of substantially greater interest in this context however, is the finding concerning mutually agreed settlements, that is, the resolution or dropping of complaints prior to the production of a panel report. While industrialised countries are the plaintiffs in 60 per cent of cases, they are the plaintiffs in 81 per cent of such settled cases (Holmes *et al.*, 2003). This suggests that Members with greater economic and political leverage are more likely to impose a negotiated settlement while weaker Members must rely upon the judicial process of the DSU.

5. Issues Arising from the Operation of the WTO DSU

Several issues have arisen concerning the operation and application of the DSU since its inception.

The Function and Composition of WTO Panels

Concern has been expressed in some quarters about both the function and composition of WTO Panels, particularly the reliance of the DSU procedures on part-time non-professional panellists. There are a number of reasons for these concerns. The very success of the WTO DSU, in terms of generating complaints, has meant the rapid growth of both the volume and complexity of dispute cases. As a direct result, doubts have arisen about the competence of these part-time panellists, given the rules-

based legal foundations of the dispute settlement procedures and the heavy workload. As a consequence, the EU has proposed that the WTO should create a permanent or standing body of qualified and experienced panellists. The benefits and costs of such an innovation are discussed elsewhere (see Davey, 2000, 2003; Cottier, 2003).

Automaticity

There is a concern, arising partly as a consequence of the misgivings about panellists, that DSU panels and the Appellate Body are exceeding the scope of their remit. That is, that they are interpreting some of the WTO Agreements in such a manner that it may add to or diminish the rights of Member countries without their consent (Stoler, 2003).

The Transparency of the Panel and Appellate Systems

A further concern relating partly to automaticity and the functions of WTO Panels and the Appellate Body is that Panel procedures lack transparency, so exposing the WTO system to accusations of secrecy (Davey, 2000). Evidence and written submissions to Panels generally remain confidential until the publication of Panel Reports. Greater transparency is therefore unlikely to have an adverse impact upon the system although it is opposed by many developing countries.

The Implementation of Panel Recommendations and Sequencing

There has been some debate about the primacy of Articles 21.5 and 22.6 of the DSU, highlighted by the WTO banana case (Salas and Jackson, 2000; Stoler, 2003). The former provides for referral back to a panel where there is disagreement about a Member's compliance with a panel ruling. At the same time, the latter provides for automatic retaliation in such a case and the DSU provides no indication of which Article takes precedence. Logic suggests that the suspension of concessions should not be made until a decision is made on the consistency of a revised measure (Davey, 2000).

The Participation of Developing Countries in the DSU

The Articles of the DSU pay special attention to the needs of developing countries. Their participation in the WTO DSU has grown during the years of its operation. Increasingly, they are appearing as plaintiffs as well as respondents, notably Brazil, India and Korea. Developing countries, and least-developed ones in particular however, are constrained by the financial and intellectual resources required to fight DSU cases, whether as plaintiffs or respondents.

The complete lack of participation of the least-developed countries in the DSU to date gives some cause for concern. It can be argued that this merely reflects the small number of least-developed Members of the WTO and their small share of global trade. As the most vulnerable to retaliatory action however, positive evidence is required to demonstrate that the least-developed countries are not failing to make appropriate use of the DSU.

The WTO, National Sovereignty and the Democratic Deficit

The WTO DSU process raises important constitutional problems in terms of increasing friction between levels of national and international governance. The DSU is therefore attempting to reconcile sophisticated systemic governance questions raised by the competing demands of Member countries' international obligations and national governments' internal democratic mandates. This requires reconciling competing domestic interests – relating to national sovereignty, subsidiarity, environmental issues and consumer food health and safety issues – with international trade policies (Jackson, 2000).

Popular disquiet with the operation of the WTO, among other international agreements, is by no means confined to the anti-globalisation movement. This has given rise to a growing feeling in many Member countries, both developed and developing, that the WTO is 'usurping' the democratic process by enforcing externally imposed rules on sovereign states. UN Secretary General Kofi Annan has responded:

Globalization should not be made a scapegoat for domestic policy failures ... the WTO must not be distracted from its own vital task ... [of] ... extending the benefits of free trade fully to the developing world. (Annan, 1999)

In some ways, this situation reverses an aspect of the strategic trade policy literature, whereby governments have recourse to international agreements so as to side-step domestic constituencies opposed to liberalisation. Countries therefore commit themselves to external agreements in order to optimise the achievement of their domestic political goals.

More important in the context of the current discussion is the democratic deficit, whereby at least part of a country's electorate remains to be convinced of the benefits of such international agreements. While most policy-makers and economists might argue that any alternative is likely to be sub-optimal, both nationally and internationally, this is not necessarily apparent to domestic electorates. The negotiated WTO rules were designed specifically to preserve the sovereignty of the nation state by imposing constraints on the exercising of its power (Jackson, 2000).

In the face of substantial domestic opposition to the transfer of national sovereignty to agreements such as the WTO however, governments may be faced with a crisis of credibility. At its mildest, this might lead to the adoption of a policy of non-compliance while possible outright rejection of the WTO could mean a reversion to unilateralism with its attendant problems.

6. Conclusions

This paper is concerned with the evolution of the systems of dispute settlement at the GATT and WTO. As an adjunct to the Havana Charter, Articles XXII and XXIII of the GATT were never intended to provide a robust and enduring legal framework for the resolution of trade disputes. Although the GATT system developed a quasi-rules-based dispute settlement procedure, its effectiveness in key cases was critically undermined by its consensus requirement for respondents.

The WTO DSU was negotiated as part of the Uruguay Round to create a new rules-based procedure for dispute settlement. Its structure and scope addressed the principal shortcomings of the GATT system as well as embodying the diverse objectives of many Member states. In the years since its inception, the DSU has demonstrated a sharper cutting edge in enforcing the international trade rules and greater effectiveness in resolving trade disputes between WTO Members. As it currently stands, the DSU therefore represents a significant improvement upon the previous GATT dispute settlement systems.

The WTO DSU has, nevertheless, faced a number of criticisms, most of which concern the pattern and structure of incentives for its use. Initial studies of the performance of the new dispute settlement system suggest that it is subject to institutional bias that favours leading trading nations over most developing countries.

The effectiveness of the DSU has been greatly enhanced by the negative consensus rule but this also means however, that the WTO system can impose external policies on Member countries without a democratic mandate. It is this lack of democratic accountability on the part of the WTO that is, in

part, responsible for its current crisis of credibility. Some form of middle way is needed to strike a better balance between the demands of national sovereignty and the effective resolution of international trade disputes. The unchallenged dominance of either is to the detriment of the other and will undermine the credibility of both the WTO and the DSU.

Acknowledgements

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