

Developing Countries and Dispute Settlement: Having One's Day in Court

Roderick Abbott

In light of statistical data on the WTO's dispute settlement process, the main obstacles to developing country participation may lie in other factors than the nature of the system itself.

It is often claimed that the Dispute Settlement Understanding (DSU) works more in favour of the richer WTO Members, which have vastly greater resources to pursue trade problems, as well as armies of staff lawyers. For developing countries, recourse to dispute settlement is perceived to be difficult, costly and time-consuming.

On the other hand, one of the principal objectives of the DSU was to create a system in which every Member could bring forward a complaint, have it fully investigated, obtain a ruling on the compatibility of the measure or practice with WTO rules, and – more generally – ‘have its day in court’. The guiding principle of ‘equality before the law’ was designed to lead to fairer opportunities than a system where power politics could, and did, influence the results.

So, in this rather positive atmosphere, how have developing countries been able to exploit their right to a day in court?

We start with the data on dispute cases, as provided by the WTO Secretariat at the end of 2005.¹ One should note the following:

- Developing countries are nowhere defined in WTO, i.e. ‘you claim to be one, you are one’.
- For this study, I place three OECD members that have been fairly active in disputes outside the developing country category (Korea, Mexico and Turkey).
- Taking account of that, raw WTO data suggest that 234 disputes were launched by developed countries, and 101 – or 30 percent of all cases – by developing country Members.
- When counted in terms of individual complainants, developing Members have made 13 complaints, some jointly with others.
- No fewer than 68 of these were initiated by just five Members: in order – Brazil, India, Thailand, Chile and Argentina. Each of these started at least nine disputes.
- Another eight Members account for a further 33 cases, which means that this group of 13 Members together is behind almost 90 percent of all cases.²
- A contrario, the vast majority of developing Members (90-100 in all) have been relatively absent and inactive, except perhaps where they requested to be third parties in consultations or, more rarely, during panel proceedings.

What Constitutes Participation?

There is a question regarding what exactly participation in the dispute settlement system means. Does it mean initiating a case? Or does it include being a respondent in a case started by another Member? Does it include being a third party either at the bilateral consultation stage or later during a panel or Appellate Body hearing?

My view is that we should measure participation both at the initial consultation stage – bearing in mind that many such cases have a short life – and at the panel/appeal stage where resource implications could be a serious deterrent. The data for participation at these later stages can be used to confirm or question the results obtained at the initial stage. I also incline to the view that disputes *initiated* by a developing country Member are a more relevant measure of their ability to participate effectively in the system than disputes where they are respondents. But the level of overall activity, offensive as well as defensive, needs to be considered.

That said, the fact that five Members account for just under 60 percent of dispute activity, and that with another eight Members this ratio reaches 90 percent, is a disturbing finding. It underlines the ‘absence from the game’ of large numbers of developing countries, and makes

us aware that least-developed WTO Members have hardly been touched by the dispute settlement system at all. Only Bangladesh has been active, with one single complaint, and no African Member (apart from South Africa and Egypt) has either made a complaint or been cited for alleged violation by others.

As we know, developing countries are far from being a homogeneous group. Therefore, one should perhaps not expect an analysis of participation that offers valid conclusions for all countries in the group. It begins to look as if we can be reasonably satisfied that a small number of more advanced developing Members have no substantial difficulty with the system, while a further group has established a record, albeit at a fairly low level of activity. For others, the data is silent.

Constraints That May Hold Back Greater Participation

In academic literature, there is much discussion and analysis of two main types of constraint that have been thought to hold back participation of developing countries in the system. These are ‘capacity constraints’ and ‘power constraints’, terms which have been summarised by Gregory Shaffer as follows:

“Although developing countries vary significantly in terms of trading profiles, they generally face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including for the hiring of outside counsel; and (iii) fear of political and economic pressure. We can roughly categorise these as constraints of law, money and politics.”³

Before entering into any discussion of such constraints it will be useful to look at the role and the record of the Advisory Centre

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on WTO Law (ACWL), which was set up to address some of these developing country Member problems and has – to a large extent – eliminated many of them over the last four years or more.

Recent ACWL reports⁴ show that the Centre has given assistance in about 20 percent of all dispute settlement cases begun since mid-2001, mostly to developing country Members as complainants, less often as respondents or as third parties. The only developing countries active in the dispute settlement process that have not joined the ACWL are Argentina, Chile, Brazil, Mexico and South Korea, all of which had extensive experience in the dispute settlement system and in using the resources available through private law firms even before the establishment of the ACWL. India, which has used the Centre's services in some cases, may now be able to manage future disputes on its own.

The key message here is that the ACWL has provided a service that its members clearly appreciate. Appendix 1 to the Report on Operations 2005 shows that among the main users of ACWL services over the four years were Thailand, Guatemala, Pakistan and the Philippines. These WTO Members have been relatively active in the disputes field, but seem nevertheless to feel that their experience of the procedures is not yet sufficient to go it alone. However, this may represent no more than some kind of extra insurance policy since it is certainly not the case that all developing country complaints have resulted from, or involved ACWL assistance.

While the availability of ACWL assistance has largely addressed many of the capacity constraints, there is one area where a developing WTO Member might still be at a disadvantage. This is in the pre-litigation, pre-consultation stage where the first steps have to be taken to identify the existence of a trade barrier or of a measure that is perceived to be affecting exports in an adverse fashion. Such identification clearly has to precede any help with legal evaluation of whether a violation of WTO rules can be shown to exist, as well as what chances there may be to initiate a WTO dispute with a prospect of success.

However, where this is a difficulty in fact, it has more to do with the state of governance and the capacity to monitor trade trends in the exporting country than it has to do with any defect in the DSU. One determinant factor present in the more successful developing country users of the system (such as Brazil) is the degree of knowledge about trade rules and rights under the WTO in the industry of the country concerned, and how far it is motivated to exert pressure on the government for the resolution of trade problems.

Other Factors That Affect Participation

There is no obvious answer to the question 'why have developing Members not made more complaints?', nor is it easy to guess at the underlying reasons. For a start, there is no law that states that developing and developed countries should have parity in the dispute settlement area. All depends on the perceived importance of the problem, the motivation and the circumstances.

I have heard it said that many developing country Members have relatively few products to export, and in many cases their access to major markets is duty-free. Schemes such as Generalised Systems of Preferences and the US African Growth and Opportunity Act offer real advantages, and it may be more important to maintain these than to make a formal complaint in the WTO. Or, if there are difficulties, these may well be due to specific measures in the technical barriers/sanitary and phytosanitary areas, which are less easy to challenge, thus making the motivation to do so less strong. Further, the major barrier faced by exports to other developing Members may be a high unbound duty rate, or one below a ceiling binding. Such cases offer no scope for reasonable challenge.

Is lack of resources, human or financial, one of the problems? The contribution of the ACWL has already been noted, and the signs are rather to the contrary. Assistance from outside lawyers in the preparation of cases, and in drawing up legal arguments, has become the norm

and the cost of this does not appear to have caused any major problem. Indeed, the Antigua/Barbuda dispute on offshore gambling, the prolonged banana saga and shrimp export cases amply demonstrate that financial resources can be made available.

Is there any other factor within the DSU system that works against participation by developing country Members? A large number of them have not been directly involved in disputes, and it is impossible to say whether bias in the system is responsible. When deciding whether to devote resources to a WTO challenge, there is always a tradeoff between the importance of a barrier or of policies affecting a Member's exports and the cost (in terms of both financial and human resources) of conducting a case. In many poorer countries, administrative problems rather than the WTO system are likely to be the determinant factors.

In conclusion, the jury is still out on the question examined in this article. There is good news and some less good news. The situation continues to evolve, and with added experience and over time, a future study may find that the record has further improved.

Roderick Abbott is a Visiting Fellow in International Relations at the LSE in London. He was, until last year, a Deputy Director-General at the WTO and previously held a similar position with DG Trade at the European Commission in Brussels. This article draws on a longer working paper to be published shortly by ECIPE, a trade policy think tank recently established in Brussels.

ENDNOTES

¹ See the overview in WT/DS/OV/25 of 12 December 2005.

² The eight Members are Guatemala, Honduras (six complaints each); Colombia, Costa Rica and the Philippines (four each); Ecuador, Indonesia and Pakistan (three each). There are some doubts about the value of the data for this group due to duplication in several of these cases. However, such duplication occurs throughout the WTO database, and is an unavoidable fact of life.

³ Gregory Shaffer, article in the *World Trade Review*, July 2006, at page 177.

⁴ See the Management Board's progress report *The ACWL After Four Years* of October 2005, and the Executive Director's *Report on Operations 2005* of January 2006.