

## THE WORLD TRADE ORGANIZATION SYSTEM IN CONTEXT: HELPING DEVELOPMENT THROUGH THE ENFORCEMENT OF NON-DISCRIMINATORY TRADE

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### The WTO dispute settlement system

The popularity and success of the World Trade Organization dispute settlement system has amazed both scholars and practitioners. The WTO Dispute Settlement Understanding (DSU) came into force in 1995, as the evolution of the old GATT dispute resolution system (Hudec 1991). The DSU regulates the claims on infringements made by parties to a number of treaties regulating trade (WTO Agreements). It establishes a classical international jurisdiction, where only states are allowed to be parties, even though a limited participation for private entities, notably NGO's, has been gradually admitted (Bossche 2008). The WTO Dispute Settlement System comprises a range of remedies including consultations (ie negotiation), mediation, litigation and arbitration<sup>1</sup>. A "Panel" and "Appellate Body" are respectively the first degree and the appeal instances for cases brought to adjudication.

Studies on international disputes claim that these are "litigation explosion" times, an age of "appearing trial", and of the emergence of any other process other than the old diplomatic way (Schneider K. 2006). Compared with other international courts, the appeal of the WTO procedure is remarkable. From January 1<sup>st</sup>, 1995, to December 3<sup>rd</sup>, 2013, states have resorted to the WTO dispute settlement system in 471 cases. The International Court of Justice, despite a higher number of state parties, in the same period of time has dealt with about one seventh of the cases, and at current rates, the gap is increasing every year.

From the beginning in 1947, the aim of the GATT/WTO system has been reducing barriers to international trade, on the assumption that increasing international trade would have supported peaceful international relationships (Broude 2004; Konstantinov 2009). The only surviving part of a more general negotiation round aimed at creating a International Trade Organization, the GATT (General Agreement on Tariffs and Trade) has subsequently evolved from a Treaty on the trade of goods with virtually no permanent structure, to an International Organization (the WTO) of 159 members regulating also the circulation of intellectual property, services, capital, and agriculture. Maffettone argues that the WTO, like domestic institutions, has a deep impact, and that states do not really chose to become members, they simply have to (Maffettone 2009, 253). Provided that no international organization can be functionally defined in its entirety, it certainly has core functions or purposes (Qureshi 2009, 184). What is then the real purpose of the WTO? Economists assume that the WTO purpose is liberalizing trade: substantial tariff

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<sup>1</sup> Secretariat, W. T. O. (2004). A Handbook on the WTO Dispute Settlement System. Cambridge, Cambridge University Press.

liberalization and non-discrimination are expressly mentioned in the “Preamble to the Agreement Establishing the WTO” (Horn and Mavroidis 2006, 33). However, since “liberalizing” means “setting free from”, and not simply “remove some of the constraints”, it is the same content of this freedom that is still not clear (Lang 2007, 547). With his analysis of the jurisprudence and texts of the GATT/WTO, Driesen outlines at least three different concepts of free trade (2001, 316): freedom from discrimination, freedom from national regulations (the “laissez-faire” concept) and freedom from international coercion related to non-trade issues<sup>2</sup>. Although these three different concepts of free trade may silently co-exist, they obviously lead in different directions (Lang 2007, 548).

Cass (2005) argues that the WTO regime seems to differ from an ordinary international treaty starting from three peculiarities of the system: 1) WTO law calls for the use of a number of doctrinal techniques which are usually associated with constitutional law; 2) the international trade law community is smaller than the ordinary community of international law practitioners; 3) the level of acceptance of the WTO decisions is much higher than in the “average” international law treaty (Cass 2005, 53).

The transition from the GATT diplomatic procedure to the WTO dispute settlement system has represented a shift toward legalization. This shift has meant a higher degree of certainty and reliability, but also an increase in procedural claims and objections, as well as an increase in the use of legalese jargon. The average length of decisions has gone from 7 pages in the 1948-1956 GATT period, to 201 pages in the 1996-2002 WTO period (Ragosta, Joneja et al. 2003, 743). A good deal of these additional pages are devoted to procedural claims and objections (Pauwelyn 2003, 125). While the GATT routine was in the hands of diplomats, the WTO has seen the rise of international trade lawyers (Conti 2008, 166).

The rule-oriented approach which is inherent in this legalization process has many virtues: reduction of the transaction costs, undistorted competition, depoliticization of the economy, more transparent trade policies (Schneider K. 2006), and a general willingness of powerful countries to accept unfavorable decisions (Ragosta, Joneja et al. 2003, 744-745). Yet, international lawyers posit that the legalization is still really behind, or that it is flawed in many respects. In fact, looking at the decisions of the WTO “judges”, the conciliatory-diplomatic character of international negotiations still emerges, resulting in a language which is contradictory and vague, and exposing the true political nature of the process (Lang 2007, 524).

As Reid and Steele (2009, 14) put it, the WTO is also accused to embody “the darker forces of globalization”, pushing forward a neo-liberal agenda based on homogenization and deregulation, and squashing equality, welfare, environment and participation. A very articulate and comprehensive critique of the WTO system is proposed by Wallach and Sforza (1999). The year Wallach and Sforza published their book is a historical year, in that the WTO system for the first time comes to the fore with the Seattle protests. The protests themselves are triggered by the growing awareness that what is happening in the WTO building in Geneva does have an impact.

Wallach and Sforza condemn the WTO as the apex of the globalization processes: a bunch of WTO unelected bureaucrats, hidden from the public view in Geneva, is giving shape to a new economic model which is substantially in the hand of multinational corporations. The WTO system, by removing trade barriers, is not really pursuing a free market. It is just starting to sponsor a “race to the bottom” for safety and health standards, so to create a global market for corporations to exploit. Wallach and Sforza do not ignore

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<sup>2</sup> US – Shrimp (DS58).

that the WTO law allow states to require higher requirements of protection for their citizens in terms of safety and health standards, through the mechanism of article XX of the GATT treaty. But they contend that article XX has never been successfully used in order to prevent some country from exporting “eco-unfriendly” products, or goods obtained from the exploitation of the environment, and what is happening is in fact that the only exceptions to trade liberalization are in favor of corporations. The exceptions provided in Article XX are too general (“public morals”) or too narrow (“prison labour”), and the WTO Committee on Trade and Environment, a consultation venue set up to discuss “trade and environment” matters, has showed its inability to argue the environment’s case effectively.

According to Wallach and Sforza, the whole WTO process has resulted in widespread unemployment and in the decrease of standards of living. Inequalities have risen between rich and poor countries, as well as between rich and poor people. Developing countries have slowed their growth, and their share of the global trade has shrunk (Wallach and Sforza 1999, 22). New forms of protections of intellectual property have led to the mercification of plant life and indigenous knowledge.

Such negative perceptions of the World Trade Organization are not surprising. The debate on genetically modified products shadows the debate on globalization as such. And the fruits of globalization have not been distributed equally (Reid and Steele 2009, 19). The biggest trade powers have engaged in controversial tactics with developing countries, giving for example limited market access to exports, while dumping their products in their fragile economies: this is the case reported by Oxfam<sup>3</sup> in relation to agricultural products exported by Lebanon and Jordan in the EU. Countries respecting human rights at home, can put human rights in danger by distorting trade with third countries (Konstantinov 2009, 324).

In his analysis on the cases brought to the WTO dispute settlement system, Conti recognizes the “hegemony of the economically powerful in the WTO proceedings”, of those countries, that is, “who have the greatest latitude for rational behavior, while legitimating the dispute settlement mechanism as a formally fair and open forum for settling disputes for all” (Conti 2008, 177). The Organization acts as a strategic device to maintain and exacerbate the advantages of a group of industrial states over their less powerful and developing counterparts (Wilkinson 2011, 44), sharing the same hegemonic origins with the International Monetary Fund (Chorev & Babb, 2009). WTO law is not good at conjugating trade and non trade interests, and this is especially true for environmental issues (Weiss 2006, 189).

The WTO has been accused of subtracting from the states’ sovereignty without the citizen’s consent from a completely different standpoint. According to international trade law scholars, WTO judges embraced an activist attitude, and they are often reading WTO law in an evolutionary manner (Ragosta, Joneja et al. 2003, 705). While the WTO was likened to a “court with no bailiff” (Petersmann 2002), the Dispute Settlement Agreement lacks those basic jurisdictional limitations such as lack of clear standing, mootness, or ripeness doctrine, that restrain judicial activism (Ragosta, Joneja et al. 2003, 730-731).

In this article I have looked at the dispute settlement process of the World Trade Organization with the “trade and” discourse, taking into consideration the different social projects opposed to the liberal trade project and the critiques to the latter. In the author’s view, commercial freedom is as good as any other kind of freedom, if properly restrained and never intended as a dogma. From this moderate perspec-

<sup>3</sup> Oxfam, “Signing Away the Future How Trade and Investment Agreements between Rich and Poor Countries Undermine Development” 3-8, available at <http://www.oxfam.org/sites/www.oxfam.org/files/Signing%20Away%20the%20Future.pdf> (last visited 17 Dec. 2013).

tive, it will be considered whether the WTO dispute settlement system can be an instrument of commercial emancipation for developing and underdeveloped countries through the principle of non-discrimination.

What we advocate is an empowering interpretation of the dispute settlement system, which is still under-utilized by the least developed countries. In this view, commercial emancipation of a country from the big trade powers (EU, Us, Canada and Japan) and from its own governing elites, who often have a clear interest in the commercial underdevelopment of their fellow citizens, might be the key-value for WTO judges in the interpretation of the still largely uncharted WTO law.

### Disputing and settling in the WTO

The clear success of this state-to-state dispute system in attracting disputants warrants a closer look at the dynamics of the dispute. Plaintiffs in the WTO have an average success rate of 4 to 1 (Reinhardt 2001; Holmes, Rollo et al. 2003, 21). Implementation rates of the Panel and Appellate Body decisions is about 83%, which can be considered a remarkable result for an international jurisdiction (Davey 2005, 19-20). Defendant states are 55 times more likely to retaliate and file a claim against the plaintiff within a short time (Guzman and Simmons 2005, 570).

Despite being called by Hudec “a punch that will not hit anyone” (1987, 219), Panel and Appellate Body decisions are nonetheless quite effective. A “shadow-of-WTO-law” effect has been recognized (Busch and Reinhardt 2000, 160): after a Panel is appointed to hear a case, the level of liberalization of the disputed measures increases of 10%. When the ruling is in favor of the defendant, liberalization in the relevant sector is 4 times more likely (Busch and Reinhardt 2002, 474). At the same time, while Panel and Appellate Body have no authority to establish a precedent, they have “acquired the persuasive authority to clarify members’ rights” (Conti 2008, 149). Over the years, there has been a significant increase of WTO panel members with a legal background (Fontoura Costa 2011, 15).

On the problematic side, the non-retroactivity of the decisions is a strong incentive to non-compliance (Biggs 2007, 128). Industrialized countries tend to delay abusively the implementation of adverse rulings, and the WTO is unable to impose sanctions other than the right to retaliate commercially for the winning party. Developing countries seem more willing to implement unfavorable rulings (Davey 2005, 22).

The result is a number of unresolved disputes, engulfed with procedural counterclaims (Pauwelyn 2003, 127)<sup>4</sup>. Since WTO judges are not allowed to award costs, or to impose a bond or financial security for the amount of the damage, it is unlikely that developing countries may retaliate commercially against a stronger country, and in fact they rarely ask to do so (Biggs 2007, 126), even if there is no evidence that poor countries are reluctant to file against rich countries for fear of the political consequences (Guzman and Simmons 2005, 571).

Democratic countries are more involved in the WTO dispute settlement system, either as plaintiffs or as defendants. It has been hypothesized that democratic government receive from the inside more pressures for protection, and are thus forced to defy international trade law (Horn and Mavroidis 2006, 20).

<sup>4</sup> EC – Bananas III (DS 27), EC - Hormones (DS 26, DS 48); Canada – Aircraft (DS 70); Brazil - Aircraft (DS 47).

Oddly enough, democratic countries are also less likely to comply with the rulings (Busch and Reinhardt 2002, 473).

Some further options besides adjudication are provided for in the article 5 of the Dispute Settlement Understanding: good offices, conciliation and mediation can be used as an alternative or as a complement to litigation before the Panel or Appellate Body. Article 25 of the DSU also provides for “expeditious arbitration within the WTO”. However, mediation and arbitration have been used each only once in the WTO framework<sup>5</sup> (Pauwelyn 2003, 137-138). When lodging a complaint at the WTO, state parties have to go through a consultation phase in order to find a negotiated settlement. Although consultations sometimes are done hurriedly in two-three hours (Bernauer and Sattler 2006), this is enough to prevent more than half of the cases to reach the next level of the adjudication before the Panel or the Appellate Body (Schneider K. 2006).

Due to its speed and affordability, mediation should have the qualities to be a viable option also in the WTO system (Horn and Mavroidis 2006, 13; Nestic 2006). What are the obstacles to its success? First of all, according to the DSU, the mediator is *ex-officio* the WTO Director, or the appointed deputy. Parties cannot choose their own mediator, which is incongruent with the spirit of mediation. Developing countries in particular, fear that a pro-free trade bias permeates the WTO, even though a group of them and the least developed country group have submitted a proposal to provide for mandatory mediation (Conti 2008, 165).

Secondly, the Panel and Appellate Body can render a decision in just a few months, which is not necessarily longer than any international negotiation on trade issues. Panel and Appellate body help establishing a standardized body of law, something that cannot be done with alternative means of dispute resolution. Countries prefer in some instances to let a judge resolve the issue, instead of negotiating it, especially when a domestic public opinion exerts pressure (Holmes, Rollo et al. 2003, 21).

## Development and the WTO

Horn and Mavroidis (2006) report the frequent accusation that the WTO dispute settlement system is biased to the disadvantage of poorer and smaller countries. Should this be true, we would be looking at a serious flaw in the international trade system. Having identified a steep learning curve associated with litigation in the WTO, Conti asserts that members who rarely participate are at disadvantage when they need to identify a good case to argue (2008, 169).

Developing countries may encounter three main obstacles to participation in WTO proceedings: lack of legal expertise, lack of financial resources to hire legal counsel, and fear of political retaliation from industrialized countries (Mitchell 2009, 81). Empirical research however has pointed out not only that there is no real evidence of a bias against developing countries (Bown and Hoekman 2005), but also that the absence of cases from developing countries is not always a bad sign, since the weakest actors may be using the dispute settlement system in indirect ways, as demonstrated in a case study on four West African cotton-producing countries (Elsig & Stucki 2012). On the other hand, developing countries are dramatically increasing their use of the dispute settlement system (Shaffer, Ratton Sanchez et al. 2008,

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<sup>5</sup> EC – Tuna.

485; Mitchell 2009). If we consider the volume of imports and exports per country, developing countries participate on average twice as often as all the other countries (Romano 2002, 390). Central American countries have started cases against each others, Brazil and India have challenged respectively the European Union and the United States (Davey 2005, 14). Behind Brazil's success story is the "rise of pluralist interaction between the private sector, civil society, and the government on trade matters" (Bown and Hoekman 2005). In more than one case, developing countries formed a team to file a complaint against one of the big powers (Bown and Hoekman 2008, 177-178). From 2000 through 2004, when developed countries sensibly slowed the pace in the dispute settlement system, developing countries initiated around 60% of the consultation requests – more than doubling their relative share of initiations (Bown and Hoekman 2008, 179).

The dismal aspect is that "least" developed countries (LDC's) are almost completely disengaged from the WTO dispute settlement system (Wallach and Sforza 1999). Only Bangladesh ever initiated a proceeding in 2004 against India<sup>6</sup>, while none of the LDC countries has ever been complained against in the 18 years through December 2013.

Such absence can be certainly explained with the tiny share that LDCs represent in the world trade volume (Holmes, Rollo et al. 2003, 21). Having excluded that LDCs are in full compliance of their WTO obligations, the small size of their internal markets and the lack of competent private sector that helps and stimulates government representatives in Geneva (Bown and Hoekman 2005, 118), coupled with the high cost and complexity of WTO litigation (Biggs 2007), and a certain fear on the part of high income countries to be seen as the oppressors of the poors (Bown and Hoekman 2008, 179) are the most likely explanations. Even the establishment of the Advisory Center on WTO Law (ACWL) in 2001, offering subsidized legal opinion on WTO matters to developing and least developed countries, has failed in boosting the LDCs participation.

More than 50% of WTO members have never participated in the dispute settlement, and the absence of poor countries is a proof that the benefits of participating in the institution is not fully understood (Bown and Hoekman 2008, 199-200). A growing awareness that development needs to be accompanied with trade expansion. Although the former Director-General of the WTO, Pascal Lamy, asserted that the WTO is not a "development institution" because it is not an aid agency (Qureshi 2009, 178), the round of inter-governmental negotiations in charge of drafting the future WTO regime (Doha Round), which in December 2013 reached an agreement after 12 years, has been intended as a "development round" (Palm 2004, 338).

### **The opening of the WTO dispute settlement proceedings**

The secrecy and closure of the WTO proceeding has been pointed out as one of the many flaws of the dispute settlement system. Excluding citizens and civic participation from the process has caused a great damage to the reputation of the WTO. The first open hearing of a Panel in 2005, and of the Appellate Body in 2008, were part of a strategy to endear a strongly negative public opinion (Ehring 2008, 1023). More than 200 people assisted to the first public hearing in WTO history, even if for later hearings attendance

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<sup>6</sup> DS306.

dropped to around 60 people, many of which were delegates from other WTO members, and not members from the general public. The conduct of the open hearings did not differ from the ordinary hearing. Even if both parties agreed to opening, some states contended the legality of such a procedure. During the first cases, it was the developing countries group the most vocal opponent of the open hearing. But in the end the success of the initiative was clear and no country has ever objected again.

During the first Appellate Body proceeding which was opened to the public, the judges gave a flexible interpretation of article 17 of the Dispute Settlement Understanding, setting aside the strong opposition of Brazil, China, India and Mexico (Ehring 2008, 1029). It is somewhat peculiar that the opposition to opening the proceedings came from the group of those countries known *par excellence* as the “emerging countries”.

I had the privilege to assist in Geneva to the first entirely open hearing of the Appellate Body, held on the 16<sup>th</sup> and 17<sup>th</sup> of October 2008<sup>7</sup>, and then subsequently to a partially open hearing of the Panel, held on the 4<sup>th</sup> and 5<sup>th</sup> November 2008<sup>8</sup>. During all these open hearings, public attendance never reached 60, and quickly declined to 20-15 after the first three hours. The first dispute, in particular, was one of the oft-cited and historic Bananas disputes, opposing Ecuador and a number of third world countries plus the United States on the side of the banana exporters, to the European Community and to the ACP countries (Africa, Caribbean and Pacific) on the other side, defending the preferential regime of importation for bananas reserved by the former to the latter.

The external appearance of the hearings is more typical of the international organization assembly than of the court of justice. Members of the panel or appellate body do not wear gowns. Parties representatives sit at long tables that are perpendicular to the bench, often facing the other delegations, and they need to stretch or twist in their seat to have face contact with the judges. The terms ‘judge’ and ‘court’ are avoided altogether in the WTO lexicon. Panels and Appellate Body decisions need in fact not to be repelled unanimously by the Dispute Settlement Body (which represents all the member states) before taking effect. This means in practice that all panels and appellate body decisions have taken effect under the WTO, but the limited enforcement powers reserved to these “judges”, and some diplomatic peculiarities of the process, prevented the DSU drafters from using a judicial terminology.

Seen from the observer’s perspective, the process does not seem secretive or inaccessible, but rather tedious. Despite the diplomatic setting, the argumentations of the parties are strictly legalistic, although general statements on international trade policies are proffered from time to time. In both the observed cases, the dispute concerned the implementation of previous WTO decisions (art. 21.5 of the DSU), and WTO law technicalities abounded. The two only notable exceptions were the political standings of the ACP countries in the Bananas dispute, advocating for an interpretation of WTO law respectful of the economic development of poor countries, and the exchange between the European Communities and the United States representatives in the dispute on Zeroing, with the EC accusing the US of “not taking its WTO obligations seriously”, and “not giving back the money” to the subject affected by the violations of the treaty.

<sup>7</sup> EC - Bananas III (DS 27).

<sup>8</sup> US - Zeroing (DS 322).

## Conclusion

Human rights principles are seeping into the WTO system, notwithstanding the fact that there is no human rights provision in the WTO Agreements. Scholars from developing countries have voiced their concerns that human rights considerations might be used by the Quad (EC, US, Japan and Canada) to mask protectionism and distort trade (Bhagwati & Hudec 1996). In this respect, the WTO bears numerous similarities with the original European Communities. But paradoxically, it was the developing countries that strongly objected to public participation and openness in the dispute settlement proceedings, fearing that the public scrutiny could slow down the liberalizations and the advance of their emerging economic power.

Despite claims that the gap between rich and poor in trading terms is widening, the data show that in the period 2000-2007, merchandise exports of least-developed countries increased by 19% on an annual basis (12% in the world), while imports increased by 15% (11% in the world)<sup>9</sup>. As for the concerns regarding the inability of the WTO to prevent a race to the bottom in environmental and safety standards, the Panel and Appellate Body case-law seem to disprove them: in the “Asbestos” and “Shrimp” decisions<sup>10</sup>, the WTO judges confirmed bans on imported foreign products established on the basis of environmental or health concerns. In the “Gasoline” decision, a ban was considered unlawful since the requirements imposed on foreign products were more stringent than those imposed for domestic products<sup>11</sup>.

In some cases, NGOs advocating the consumers interests cooperated with the system and embraced the philosophy of the WTO: in the “Sardines” case, Peru prevailed on the European Communities and obtained a lift of the restrictions on canned fish imports, on the ground that it was motivated by a substantially protectionist intent<sup>12</sup>. The largest European consumer group was prompted to intervene as a third party when Peru’s claim was posted on the WTO Advisory Center website. NGOs are mostly sceptic of the WTO, and just a few of them is willing to assist disadvantaged countries to engage in the system (Biggs 2007, 124). But emerging countries NGOs have a distinctive approach: while they criticize their governments at the national level, they tend to support the commercial interests of their states and conform with their positions at the international level (Shaffer 2001, 74).

Exploitation and inequalities in international trade do happen, but this is probably not the result of the process promoted by the WTO, which has become completely open. National constituencies are rather protectionist and mercantilist, especially when they have to protect an internal market in sectors such as agriculture, steel or textiles (Shaffer 2001, 11). Trade restrictions often favour the economical and political elites of least developed countries, not the poor and the destitute, while, conversely, the current WTO dispute settlement system is not pro-market as such: “the overriding telos of the WTO is development through non discriminatory trade” (Cass 2005, 244). As to the question as to whether the WTO will be effective in promoting commercial redistribution, the jury is still out.

<sup>9</sup> WTO Trade Statistics 2013, available at [http://www.wto.org/english/res\\_e/statis\\_e/its2013\\_e/its13\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2013_e/its13_world_trade_dev_e.pdf).

<sup>10</sup> EC – Asbestos (DS 135); US – Shrimp (DS 58): it was NGO’s and other parties were admitted to file amicus briefs

<sup>11</sup> US – Gasoline (DS 2).

<sup>12</sup> EC – Sardines (DS 231).

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