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## The WTO Dispute Settlement System\*

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**Summary:** Outline of WTO rules – The WTO dispute settlement system – From GATT diplomacy to WTO law – Compliance and remedies for non-compliance – Retaliation: is it effective? – Compliance and retaliation in practice – The WTO dispute settlement, developing countries and the role of private lawyers – Forum shopping (RTAs) – Conclusion

I am very honoured to be here, and would like first of all to thank President Alcantara for his kind invitation to speak to you about the WTO dispute settlement system. I do not want to focus on Brazil's experience of WTO disputes, but it is nonetheless appropriate to begin by noting that Brazil is one of the most active participants in the system. Including cases that have been settled, Brazil has been a complainant in 21 cases, and a defendant 12 times.<sup>1</sup> Of the cases brought by Brazil, 10 were against the US, 7 against the EU, and, in this region, 1 against Mexico, 1 against Peru and 2 against Argentina. Of the 12 cases brought against Brazil, 3 were brought by the US, 4 by the EU, and, in this region, just one, by Argentina. I did not come here, though, to list statistics. Rather, I would like to outline to you some of the more interesting features of the WTO dispute settlement system, and also describe some of its outstanding problems. And here again it is appropriate that I am here addressing Brazilian lawyers, because Brazil has been

responsible for some of the most recent interesting developments in WTO dispute settlement.

## **Outline of WTO rules**

The basic WTO agreements (GATT, GATS, TRIPS, and others) are designed to prevent WTO Members from restricting trade in goods and services, and to ensure a high standard of intellectual property protection. Under the GATT and GATS, import restrictions on goods and services are negotiated, and in addition there are basic principles of non-discrimination between domestic and foreign products and services, and among foreign products and services. The rules on intellectual property are somewhat different: under TRIPS, intellectual property rights must be granted domestic protection for WTO Member rights holders. There are numerous exceptions to these obligations, especially in the area of services, and WTO Members are permitted to adopt measures for public policy or national security reasons.

## **The WTO dispute settlement system**

These rules are of course important, but what is particularly significant is that they are enforced by one of the world's most effective international dispute mechanisms. The jurisdiction of WTO panels and the Appellate Body is both exclusive (every complaining WTO Member must use the system) and compulsory (every defendant must turn up on the day in court). It is relatively fast, by the standards of large litigation. A panel is supposed to complete its work by 9 months, with a further 3 for an Appellate Body hearing. In reality, these stages are extended somewhat, and there are further stages to verify compliance, these stages having their own appeals, but even so an average case is completed in

around 3-4 years. What is more, the WTO dispute settlement system is backed up by a system of remedies that, at least in many cases, is sufficiently threatening to induce recalcitrant defendants to comply with their WTO obligations.

## **From GATT diplomacy to WTO law**

Before the WTO was established in 1995, there was both a set of trade rules — the GATT, which dealt with trade in goods — and a dispute settlement system involving GATT panels. These panels were also active: between 1952 and 1995 there were 123 panels. This compares to 147 WTO panel reports in the last 15 years. Taken together, this is around twice the total number of cases decided by the Permanent Court of International Justice and the International Court of Justice since 1922.

But while the old GATT system had many virtues and was responsible for solving many trade disputes, from a purely legal perspective it had some basic flaws. In the first place, the system was entirely voluntary. A defendant was able to prevent a panel being established; even if it agreed to this, it could prevent the resulting panel report from being adopted (which meant it had no legal value); and even if it agreed to this, it could prevent the winning party from enforcing the report by means of trade sanctions.

This was not the only problem with the system. Another problem was that the legal analysis of panel reports was often relatively weak by normal standards. Partly, but not wholly, this was due to the fact that the panellists were trade officials without any legal training. For much of the GATT's existence, this was perfectly fine. The panel process was seen as trade negotiations by other means. In fact, there was a strong aversion to legalism, and even to lawyers. There were no official legal officers at all for the first thirty years of

the GATT's, existence. It was only when the US and the EC began to attack each other, and others, with the full force of professional legal argument, that this became untenable. After a series of panel rulings that were widely seen as wrong, it seemed like a good idea to build up the legal expertise of the GATT system. But even this was done gradually. The first GATT legal officer ever was appointed in 1980, and the experimental nature of this appointment was secured by limiting the post to a two year term, and by giving the post to a senior GATT official who was due to retire in two years. But in fact, the experiment was successful, and led 15 years later to a complete shift in the character of dispute settlement.

The WTO dispute settlement system is in some ways similar to the GATT system — there are still panels, and the panellists are still overwhelmingly trade officials, although these days often with some legal training. There are also some atavistic elements in the system (on which I will say more in a moment). But the differences from the old system are more striking than the similarities. As I mentioned, jurisdiction is now exclusive and compulsory. The quality of panel reports has improved markedly — although so, unfortunately, has their length: in some cases they run to more than 1000 pages. And there is a new Appellate Body, a permanent judicial body whose seven members are senior figures from academia, government or judiciaries, and who are required to be expert in trade law (and very often are, at least after a short while). The WTO Appellate Body hears appeals on questions of law, while panels operate at first instance, and have an exclusive mandate to make factual findings. In the last 15 years, the Appellate Body has established itself as a significant player on the international judicial stage, and its rulings are of high quality, in many cases at least comparable and sometimes better reasoned than those of the International Court of Justice, or the European Court of Justice. This is not to say that the WTO judicial system is universally loved. There have been accusations of judicial activism, especially from the United States. But its position now appears to be secure.

## **Compliance and remedies for non-compliance**

Against this introductory background, let me now turn to how the WTO dispute settlement system works. This can be seen best in terms of the compliance of losing defendants, and what happens when there is no compliance.

Article 21.1 of the Dispute Settlement Understanding (DSU) states that:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

As a rule, a losing defendant has 15 months to comply (Article 21.4), but this is subject to arbitration, and may be shorter or longer, depending on the measure at issue. If the measure can be reversed by a simple administrative act, 15 months is too long. If it takes new legislation, or even a constitutional amendment, 15 months might be too short. In practice, most defendants found to have violated WTO law comply: probably around 85% (the statistics are hard to assess, in part because of cases of part-compliance or even pretend-compliance).

But what if a WTO Member does not comply? This is where the system of remedies comes in. These are set out in Article 22 of the DSU, and come in two flavours: compensation, and the suspension of concessions. Let me deal with these in turn. Compensation is not described at all in the DSU, except that it must be by 'mutually satisfactory' agreement between the winner and the loser, and that it must be consistent with the WTO agreements. This last

requirement could mean a lot of things, but what that it certainly means is that, to the extent that it involves trade, any compensation granted to a winning party must also be extended to all other WTO Members on a non-discriminatory basis.

And until very recently, compensation was thought always to involve trade. That is to say, a defendant that did not want to comply with a ruling would offer a winning party market access (usually in the form of lower duties) in another sector. But there were precious few examples of this ever happening, in part because of the condition that I mentioned before, that compensation has to be on a non-discriminatory basis. This means that unless there was a product that only the complainant exported to the defendant this was not a very attractive remedy for either side: for the defendant because it would be opening up market access for all exporters, and for the complainant because it would gain market access, but in competition with other exporters. Put it this way: if Brazil won a case against the EU, would it want compensation in the form of lower duties for coffee if this meant also benefiting Colombian coffee exporters?

Because compensation was not described in the DSU, it was always possible that this might include financial compensation. But this possibility was always treated as extremely unlikely in normal trade cases, though one case involving violations of intellectual property protections under the TRIPS agreement was settled in this way. Compensation was always understood to mean enhanced market access in another sector. But then came the dispute in *US – Upland Cotton*, in which Brazil successfully challenged United States subsidies on cotton. The United States refused to comply, but in April this year the United States agreed to compensate Brazil by means of a financial settlement amounting to \$147.3m a year, to go to a 'Fund for Technical Assistance and Capacity Building' to benefit Brazilian cotton farmers — as well as cotton farmers in other developing countries. What this means, somewhat strangely, is that

now the US taxpayers are paying both for the US cotton industry as well as its competitors. This is certainly a strange result. In fact, it gets stranger. Another aspect of the settlement was the redesignation of the Brazilian province of Santa Catarina as a region free of foot-and-mouth disease (FMD), rinderpest, swine vesicular disease (SVD), classical swine fever (CSF) and African swine fever (ASF), notified on Monday and effective on 1 December 2010. Now, in the WTO this sort of decision is supposed to be made on the basis of science, not as part of a settlement of a dispute. We are yet to see what other WTO Members will make of this.

So why did the US fight all the way to the end, only to agree to pay this large amount of financial compensation? This was not out of the goodness of its heart, but rather because it was faced with retaliation of an annual value of more than \$800m, much more than the \$147.3m it now has to pay in cash. Let me explain a little how this came about.

Under Article 22.2 of the DSU, when faced with non-compliance by a losing WTO Member, the successful complainant may ask the WTO Dispute Settlement Body (DSB) for authorization to suspend WTO obligations (ie 'retaliation'). The Dispute Settlement Body is technically a political body comprised of Ambassador-level diplomats, which administers certain aspects of the WTO dispute settlement system. In this case, however, the DSB has no choice: under Article 22.6 it must grant the request unless, by consensus, it rejects the request. This would of course mean that the winning party would at the same time have to make a request for countermeasures and vote to reject this request: a patent absurdity. Why this possibility even exists can only be explained by reference to the old GATT system of consensus used for all decisions, including this type of decision: under the WTO, the idea of consensus was kept, but now decisions are taken automatically unless blocked by consensus.

## **Retaliation: is it effective?**

Now I would like to say more about the system of retaliation in the WTO, and I want to do this by addressing this question: is the system effective in inducing the violating party to comply with its obligations? Recall, if you will, the statement in Article 21.1 of the DSU that:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

Is this just wishful thinking? I propose to address this question by comparing enforcement of WTO dispute settlement system with the enforcement of general international law, as set out in the Articles on State Responsibility adopted by the International Law Commission in 2001, and noted and recommended to Governments by the Sixth Committee of the United Nations General Assembly. Article 30 of these Articles (Cessation and non-repetition) states as follows:

The State responsible for the internationally wrongful act is under an obligation:(a) to cease that act, if it is continuing;(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

This is similar to the DSU's requirement of compliance. One point that is not mentioned however in this provision is the timing of



cessation. One might think that it should be immediate, and that is sometimes possible, but of course this depends upon the nature of the violation. Some measures might take longer to cease: think, for example, of an illegal occupation of a country. In the case of the WTO, the measures usually at issue range from administrative practices all the way through to rules contained in constitutions or international treaties. Respecting this typology and variety of measures that need to be undone, Article 21.3 of the DSU gives a defendant WTO Member a 'reasonable period of time' to bring its measure into compliance with WTO law. The default is 15 months, but it can be shorter or longer. In other words, the DSU is precise where the Articles on State Responsibility are not. But one would no doubt arrive at the same result under those rules.

But there is more to it than this. Article 31 (Reparation) of the Articles on State Responsibility goes on to say that:

The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Under Article 34 to 36, reparation is to be effected by restitution, failing which by compensation. This set of obligations is entirely missing in the WTO system. It is established practice that past injury (dated from the end of the 'reasonable period of compliance') must be borne by the injured party without compensation of any type.

Instead, the WTO dispute settlement system goes straight to authorized countermeasures. These are designed to induce a recalcitrant violator to comply with its obligations. In many ways these are similar to the countermeasures described the Articles on

State Responsibility. I would like to illustrate the system of WTO countermeasures by reference to these provisions.

A first similarity concerns the purpose of countermeasures. Article 49(1) of the Articles on State Responsibility states that:

An injured State may *only* take countermeasures against a State which is responsible for an internationally wrongful act *in order to induce that State to comply with its obligations* under part two.

Likewise, WTO arbitrators, including the arbitrators in *US – Upland Cotton*, have specifically said that authorized retaliation in the WTO is intended to induce compliance.

There are also other similarities as well. One is that under both regimes countermeasures are supposed to be *temporary*. Article 49(3) of the Articles on State Responsibility states that countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. Likewise, Article 22.8 of the DSU states that:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed.

A second is that they must be *proportionate* to the injury caused.

This is stated in Article 51 of the Articles on State Responsibility; for its part, Article 22.8 of the DSU states that '[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.'

Now, one might ask whether this is actually consistent with the purpose of countermeasures, or DSU retaliation, which is to induce compliance. The basic problem is that some proportionate countermeasures will be too weak to induce compliance. In fact, under the Article on State Responsibility, if there is a choice between proportionate and effective countermeasures, this choice is resolved in favour of the proportionate countermeasures. (One might ask whether a measure that can have no prospect of inducing a recalcitrant country to comply with its obligations even qualifies as a measure to induce compliance under Article 49(1) of the Articles on State Responsibility, but it is probably better simply to say that the Articles apply a very light standard of review to the question of effectiveness.)

Now, what about under the DSU? In fact, we see the same problem, but there is an added twist, which is that Article 22.3 contains language about the 'effectiveness' of retaliatory measures. This appears in a special context, which I should explain. The default rule, set out in this provision, is that the obligations suspended have to be in the same agreement as the one that was violated. In other words, there is a system of reciprocity: if a WTO Member illegally blocks imports of your goods, you can block imports of its goods; if it is services, then also services, and if there is a failure to protect your nationals' intellectual property rights, you get to block these. But there is an exception: in some cases, the winning party is able also to suspend obligations in other WTO agreements. This is called 'cross-retaliation', and what it means in practice is that intellectual property rights, or services, can be suspended in retaliation for illegally blocked exports of goods.

Cross-retaliation is permitted when two conditions are satisfied: that normal retaliation is not 'practicable' or 'effective'. Not being 'practicable' means that relevant obligations do not exist, and so cannot be suspended; but not being 'effective' is more complicated.

The question of 'effectiveness', in the sense of inducing compliance, has come up on a number of occasions involving small developing countries and economic superpowers, where the developing country complainants seek permission to cross-retaliate. After it won the *Gambling* case against the US, Antigua stated that 'ceasing all trade whatsoever with the United States (approximately US\$180 million annually, or less than 0.02 per cent of all exports from the United States) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.' Ecuador was in the same position, after it won the *Bananas* case against the EU. Ecuador imported less than 0.1 per cent of total EU, leading the Arbitrator in that case to query whether the objective of inducing compliance 'may ever be achieved where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party.'

The situation seemed, superficially, similar in *US – Upland Cotton*. Brazil argued that it should be permitted to suspend obligations in services and intellectual property because simply imposing restrictions on imports of US goods would be 'ineffective'. There were various reasons for this. One, which is most relevant here, was the relatively low importance of the Brazilian market for the United States. Brazil claimed that:

[t]he significantly unbalanced nature of the trade relations between Brazil and the United States, and the considerable economic differences between the two countries, render the

suspension of concessions and other obligations under trade in goods alone neither practicable nor effective as a response to the United States' failure to comply with its obligations. (para 5.124)

Furthermore,

Brazil also considers that countermeasures restricted solely to trade in goods may not have sufficient political influence to press for the United States' withdrawal of the billions in US dollars annually paid subsidies or to remove their adverse effects. Therefore, such countermeasures are not "effective" for the purpose of encouraging compliance. (para 5.126)

But this time Arbitrator rejected this as irrelevant. It said:

Brazil's insistence that its countermeasures must have "sufficient political influence" from the perspective of the United States to press for the withdrawal of the subsidies and the removal of their adverse effects is misplaced. "Effectiveness" relates to the ability of a Member to have recourse to the authorized remedy, such that it can serve to induce compliance. However, the preference of a Member for a particular type of countermeasure, because it would constitute a more powerful form of persuasion in a political sense, is not a relevant consideration for an arbitrator in these proceedings. (para 5.198)

This represents a shift from the general theme in the Antigua and Ecuador arbitrations. It is perhaps a shame for the position of developing countries in the dispute settlement system. On the other hand, this position does have the virtue of being consistent with general international law on the law of countermeasures. But whether that means that it is a good result is a different story altogether. Perhaps the problem is with the general rule.

There was however another aspect of the 'effectiveness' of the suspension of the GATT which was more favourable to Brazil, and which bears on developing countries more generally. This was the argument that suspending obligations on imports of goods would harm Brazil. The reason for this was that, according to Brazil, 95% of these products are capital goods, intermediate goods, or other inputs essential to the Brazilian economy. It said that:

[t]he costs involved in switching suppliers are normally prohibitive for capital goods and intermediate goods. In addition to prices, decisions on the purchase of capital or intermediate goods are conditioned by several factors that severely constrain the ability of producers to switch suppliers. These factors include: (i) long-term contracts cannot be terminated easily or without heavy pecuniary penalties; (ii) capital goods in particular are tailor-made... and are ordered many months or even years in advance; (iii) in most industries, inputs must have the exact technical specifications that match the requirements of the machinery in place ...; (iv) intellectual property protection and intra-company trade determine purchase decisions and curb the ability of producers to change suppliers. (para 5.126)

The arbitrator dealt with this by saying that:

there may be situations in which, for example, the complaining party is heavily dependent on imports from the other party, to such an extent that it may cause more harm to itself than it would to the other party, if it were to suspend concessions or other obligations in relation to these imports. In such a situation, where the complaining party would cause itself disproportionate harm, such that it would in fact be unable to use the authorization, there would be a basis for concluding that such suspension would not be “effective”. (para 5.79)

To the extent that the arbitrator recognized that the harm to a party proposing to impose sanctions, this is a welcome ruling. On the other hand, it is not clear why the arbitrator should all of a sudden be interested in the actual effect of the sanctions on the target country, which is a consideration otherwise rejected. Nor, building on this, is it clear what the significance is of the *relative* harm caused to the target and the author of the retaliation. Surely the *only* significant question is the harm caused to the author of the retaliation. One could, for example, imagine that two countries of similar size and development are equally harmed by proposed retaliation. Why should it be ‘effective’ for the one party to impose retaliation in this case, but not in the case of a target country which is less harmed? But at least there is some hope here for the situation of developing countries.

Now, this is all an argument in favour of cross-retaliation. But it is important to recognize that cross-retaliation is not a cure for the basic problem, because developing countries also depend on services — at least of some types — and intellectual property. No country wants to expel foreign banks and telecommunications companies in retaliation for a block on goods. These measures are therefore not effective, in the sense that the winning party will be

unwilling to take them.

What about intellectual property? At least superficially, this appears to be less of a problem, because the suspension of obligations under TRIPS simply means that royalties do not need to be paid for the use of foreign owned intellectual property. In other words, all of the factors that make compliance with TRIPS unpopular for developing countries make the suspension of TRIPS obligations as a form of cross-retaliation attractive to them. But here, too, there are practical problems. Not paying royalties sends a bad message to foreign investors.

Another difficulty is that not respecting intellectual property rights may also violate other international obligations, such as those contained in bilateral investment treaties, though of course this is not a problem in Brazil, which has not concluded any such treaties. But there is also the possibility of a violation of WIPO obligations. There was an interesting debate on this within WIPO a couple of years ago. A WIPO official expressed the view that a suspension of TRIPS obligations as a result of WTO cross-retaliation could violate WIPO obligations with respect to copyright. He was promptly contradicted by the WIPO spokesperson, who said that he was speaking in his private capacity. A leading US professor of law, specializing in TRIPS, Professor Fred Abbott, also disagreed with this statement, saying that WTO Members have agreed by implication suspended their WIPO obligations. This may be the case, but it is not certain how an international tribunal would deal with this, let alone the WTO. And it does not deal with the situation of later agreements, such as bilateral investment treaties.

## **Compliance and retaliation in practice**

Let me now say a few words about compliance and retaliation in practice. First, there is a very good compliance record of WTO



Members. Out of the roughly 130 cases in which violations have been found, retaliation has been authorized in only 19 cases. This means that that compliance with an adverse finding, without the threat of retaliation, runs at around 85% of cases in which violations have been found. And when one takes into account settlement at the door of the courthouse — as in *US – Upland Cotton* — one can fairly much fill the remaining 15% gap with complainants who receive satisfactory compensation. By any standards, in practice the WTO dispute settlement system is a remarkable success.

Second, when there has not been compliance, there has only rarely been retaliation: notable examples include cases between the US and the EU. But of the various developing countries which have obtained authorization to cross-retaliate against developed countries by suspending obligations on services and intellectual property — Ecuador, following the bananas dispute with the EU, Antigua, following the *Gambling* dispute with the US, and now Brazil, following the *Cotton* dispute with the US — none has actually gone so far as to implement this authorized retaliation. Other solutions have been found.

### **The WTO dispute settlement, developing countries and the role of private lawyers**

Let me now say a few words about the WTO dispute settlement system and developing countries. In terms of overall use of the system, the statistics are impressive. WTO Secretariat data for the first ten years of dispute settlement activity shows that 127 of the 335 consultations requests made during that period were from developing countries, 40 of the 96 panel proceedings completed involved developing-country complainants, and 33 of the 56 appearances before the Appellate Body in 2007 were from developing countries. But this activity is highly concentrated among a few developing countries, including Brazil: in order, in the first 10

years of the DSU, the top five of the system, by complaints brought, were the US (81), the EU (70), Canada (26), Brazil (22) and India (16). Soon one will be able to add China.

So the record for developing countries is somewhat mixed, and indicates clearly that in this, as in other areas, developing countries are certainly not all in the same situation. There is however one way in which developing countries have benefitted from a common approach. Until recently, trade law was not well understood in most of the world. It was barely taught in any universities anywhere, including in my native Australia. Where it was better understood was in government ministries, but here there was also a large difference between different countries.

It was therefore of some significance when, in 1997, only two years after the establishment of the WTO, the Appellate Body decided in the *EC – Bananas* case to permit private lawyers to represent countries in dispute settlement proceedings. The United States had argued against this, and when one considers that the country that wanted to use private lawyers in the case was St Lucia, one can see why — as a question of litigation tactics, if not perhaps as a question of systematic importance. Fortunately for St Lucia, the Appellate Body decided otherwise, although with the caveat that private lawyers representing WTO Members are formally speaking part of their delegations. Since then, law firms — primarily United States firms with branches in Geneva — have acted for developing countries, including some of the very large countries. This also happens from time to time for developed countries, but less commonly, and for the large players — the US and the EU — it never happens. These players always rely on their own lawyers. And, it is fair to say, a number of the larger developing countries are beginning to do this as well, although gradually, and sometimes on a case-by-case basis. It also sometimes happens that developing countries represent themselves when they appear as third parties in a dispute (where they are not bound by the ruling) but hire outside

counsel when they are actual parties to the dispute.

There are various arguments in favour and against the use of private lawyers. One obvious downside is that private lawyers are expensive. One study on this issue calculated that, in private lawyers fees, even the simplest case costs at least \$500,000 and there are reports of cases costing up to \$10m. Indeed, costs have increased in recent years. Partly this has been because countries have begun to take the system more seriously, recognizing its binding nature, partly because the stages and duration of litigation have multiplied. Let me use *US – Upland Cotton* as an example. Brazil requested a panel on 6 February 2003; the report of which was circulated on 8 September 2004 — so from request to circulation of final report was 17 months. Then there was an appeal, and the Appellate Body report was adopted on 21 March 2005: now a shade over 2 years. The compliance period for all subsidies was six months later, on 21 September 2005. But this was not the end of the story. For its part, claiming compliance, the US stopped any payments under the old program, and introduced new legislation in January 2006. But Brazil considered this insufficient, and commenced implementation proceedings under Article 21.5 of the DSU. There was a new panel request on 18 August 2006, leading to the adoption of a final Appellate Body report on 20 June 2008. And even this was not the end of the story: on 25 August 2008 there commenced an arbitration as to the amount of retaliation, and the possibility of cross-retaliating, and this decision (which I have mainly be quoting from) was circulated on 31 August 2009. An agreement on compensation between the US and Brazil was then took place in April 2010, and this was notified to the WTO in August 2010. And the latest stage, as I mentioned, is the redesignation of Santa Catarina as a pest-free zone on Monday. All in all, from February 2003 to an agreed solution in April 2010 is 7 years. So, to refer back to my original point, this is why the costs of litigation can be immense. They are also, relevantly, not recoverable.

There are also some other reasons why cases are expensive. One is that they are beginning to involve increasingly technical matters. It is not just arguing over the appropriate level of customs duties, or an internal discriminatory tax: cases now often involve complicated questions involving scientific exports, under the SPS Agreement on food safety, as well as economic experts in complicated subsidies cases.

So these costs are, in principle, a significant deterrent for many countries to bringing a case. But much has been done to address it by the establishment in 2001 of the Advisory Centre on WTO Law (ACWL), which is an independent inter-governmental organization with the mandate to provide developing countries with support in WTO dispute settlement proceedings, as well as legal advice and training on WTO law. The ACWL provides its legal services to developing countries for free or at heavily subsidized rates. These services are financed largely by an endowment fund of developed country and developing country contributions: there is an entry fee, which gets you free legal advice, and there is a subsidized rate for dispute settlement proceedings. The ACWL can be seen as an 'international legal aid' centre in international law. It also provides training activities for Geneva-based delegates of developing countries and LDCs. (It also has a fund of CHF 600,000 for technical expertise in dispute settlement.) It all sounds rather useful, but Brazil is not a member. There may be various reasons for this, and it is not for me to speculate about this, but suffice to say that for whatever its reasons for not joining, Brazil is not alone. Only a few of the larger developing countries are members, namely India, Thailand, Turkey and the Philippines being unusual examples.

### **Forum shopping (RTAs)**

I would like to finish by putting the WTO dispute settlement system

in some type of context. In many cases, the WTO is not the only relevant forum. Where there is a regional trade agreement, there is frequently also a dispute settlement mechanism set up under that agreement. It is not difficult to see that this can raise choice of forum problems. Sometimes there is an attempt to forestall such problems: some regional trade agreements have exclusive jurisdiction clauses (as with the European Court of Justice), some have 'fork in the road' provisions, where the party has to elect one forum and then this becomes exclusive (as with the Protocol of Olivos in Mercosur). But even when these clauses exist, this does not necessarily mean that another tribunal — such as WTO tribunals — would pay any attention to them.

There has not yet been a case which confronted these questions head on, although *Mexico – Soft Drinks* came close, and we are about to see something further, perhaps in *US – Tuna III*, both of these involving NAFTA and the WTO. But Brazil was a defendant in a case which tangentially raised similar issues. This was the case of *Brazil – Retreaded Tyres*, an EU challenge to a Brazilian prohibition on the importation of retreaded — as opposed to new — tyres. The reason for this was that retreaded tyres wear out more quickly, and when they end up dumped in landfills, they provide a breeding ground for mosquitoes, leading to greater risks of dengue fever and malaria. This was not itself the problem: the problem was that while Brazil applied the ban to the EU, it did not apply the ban to Uruguay, and the reason that Brazil did this was because, following an earlier challenge to the measure by Uruguay under the Mercosur, Brazil had been ordered by a Mercosur tribunal not to apply the ban to Uruguay. The WTO panel and the WTO Appellate Body did not care: Mercosur, and the decision of the Mercosur tribunal, were no defence.

One might think that the Appellate Body is simply ignoring the Mercosur tribunal in a heavy-handed manner. But this is actually not the case. From the WTO perspective, the import ban was justified

as a measure necessary to protect human health under Article XX(b) GATT. But such measures are only permitted if they do not constitute arbitrary or unjustifiable discrimination between WTO Members. The import ban certainly discriminated against the EU in favour of Uruguay. The question was whether that was arbitrary or unjustifiable. The panel had said that it was not, because the Mercosur tribunal decision was rational. The Appellate Body agreed with this, but also said that rational decisions can still be 'arbitrary or unjustifiable'. (I would prefer to say they can be unjustifiable but not arbitrary, but one gets the same result). The test, for the Appellate Body, was whether the discrimination could be justified on the grounds of human health. The answer, of course, was no: the discrimination had nothing to do with health. In fact, the Appellate Body pointed out that Brazil — for some unknown reason — had failed to even try to defend its measure on health grounds in Mercosur, which it could have done. The strong implication was that Brazil had not run a very good defence.

There is more to it, of course. Regional trade agreements are protected in the WTO system by Article XXIV GATT, which applies (according to the Appellate Body) as a defence for any measure 'necessary' to the formation of a regional trade agreement. There is a lot to be said about this, including whether the test is correct, and how it would apply to rulings of tribunals set up under regional trade agreements. Some of this was actually argued in *Brazil – Retreaded Tyres*, but in the end the Appellate Body was not asked to make a decision on this, and so the answer remains uncertain. It is likely to arise again, perhaps even in the *US – Tuna III* case currently pending before a panel, which involves choice of forum issues under NAFTA. In sum, this is an issue to keep an eye on.

## **Conclusion**

This brings me to my conclusion. I hope I have covered the sort of

issues you were hoping to hear from me, and I thank you, and President Alcantara, very much indeed for listening to me, and I look forward to any further questions you might have.

LB 17 November 2010

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\* The Brazilian State Lawyers Association – ENAU XI.

<sup>1</sup> These figures aggregate some identical disputes with separate case numbers.

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