WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?

C. CHRISTOPHER PARLIN*

I. Introduction

A substantive agreement is only as good as the enforcement mechanism supporting it. In turn, a credible and effective enforcement mechanism depends not only on its substantive provisions, but also on the resources devoted to it.

This paper explores whether sufficient resources are being devoted by the World Trade Organization (WTO) Secretariat and WTO Members to the dispute settlement system to enable it to function effectively. It argues that, at present, the WTO Secretariat and developed country WTO Members appear to be devoting adequate resources. More resources may become necessary, however, as increasingly complex disputes arise. Developing country Members, on the other hand, are not devoting sufficient resources to dispute settlement, principally because they do not have a sufficient number of WTO experts.

The Secretariat and developed country Members have the capacity to shift resources if needed to satisfy greater dispute settlement demands. Developing country Members, however, have few, if any, resources to transfer. For these Members to utilize the WTO dispute settlement system effectively they must significantly increase the number of people in their government and the private sector who have expertise in the WTO agreements and WTO dispute settlement procedures.

*C. Christopher Parlin is counsel in the international trade practice group at Winthrop, Stimson, Putnam & Roberts. He is also an Adjunct Professor at the Georgetown University School of Law. During the Uruguay Round negotiations of the WTO, Mr. Parlin represented the United States in negotiating the Dispute Settlement Understanding.

Building this resource base is the major challenge facing the WTO. It is a challenge for all Members, not just for the developing countries, because the system cannot remain credible if a majority of its Members are unable to adequately assert or defend their rights or obligations.

II. Background—Overview of the WTO Dispute Mechanism

Measuring from the time of its inception in January 1995 through early 1998, there have been 117 requests for WTO consultations and nine adopted dispute settlement reports. Nineteen disputes remain active. Developed country Members have submitted seventy-nine consultation requests involving fifty-five separate matters. Forty-one of these requests have been directed against other developed country Members, and thirty-eight against developing countries. Developing countries have submitted twenty-seven consultation requests, involving twenty-three separate matters. Eighteen have been directed against developed country Members, and nine against other developing countries. Ten consultation requests, involving four separate matters, have been filed jointly by developed and developing country Members. All have been directed against developed countries.[1]

In addition to the nine adopted reports (all issued by the Appellate Body), one panel report has been appealed, seventeen disputes are before panels, and thirty-eight are in the consultation stage. Twenty disputes have been settled or are inactive. To date, twenty-seven disputes have gone past consultations and into the panel and Appellate Body process.

Breaking down the 117 requests by subject matter, fifty-seven have involved goods, forty-two have involved agricultural products, ten have involved intellectual property, and six have involved services.

III. WTO Secretariat

The resource burden on the Secretariat in dispute settlement proceedings has three components—the Appellate Body, the panelists, and the Secretariat staff. The first two can be disposed of quickly. There is no indication that the permanent seven-member Appellate Body is inadequate to handle the existing or projected caseload. The time limits for appeals appear to most observers to be unreasonably short. However, the cure is not more resources, but rather the provision of more realistic time limits. Similarly, from the resource perspective, there is no indication of an inadequate supply of competent panelists. Some are concerned that there will not be a sufficient supply of panelists knowledgeable about specialized areas, such as sanitary or phytosanitary measures or measures relating to one of the types of intellectual property. However, if growing use is made of

1. The statistics come from *Overview of the State-of-Play of WTO Disputes* (last modified May 8, 1998) <http://www.wto.org/wto/dispute/bulletin.html>. This information is prepared by the WTO Secretariat.

advice from experts and technical expert groups, a shortage of panelists is not likely to develop.[2] Generalists, of whom there is a sufficient pool, will be able to rely on specialists as necessary.

Analyzing the resource burden on the WTO Secretariat is more complex. Traditionally, the Secretariat staffs all panels with personnel from both the substantive division involved (e.g., Rules, Agriculture, or Environment) and the Legal Affairs Division. Acting as a panel staff member is in addition to a staffer's normal duties. During the heart of a proceeding (the twenty to twenty-five weeks from receipt of the first written submissions through issuance of the panel's report to the parties) and particularly in its latter phase when the report is being drafted, considered, and revised by the panel, the staff workload is heavy and demanding. In the past, most of the load has been on the division staffer, but with the advent of the Appellate Body and its exhaustive analysis and critique of the panels' legal reasoning, the workload of the Secretariat lawyers has increased dramatically.

Despite the heavy workload for staff involved in the more complex disputes, there is no indication that the substantive divisions of the Secretariat have lacked the necessary level of expertise, been unable to fully service panels, or had to reduce other aspects of their work in order to staff dispute panels. In large part this is because, despite the unprecedented number of panel requests in the first three years of the WTO, the number of disputes going to panels (twenty-seven) has not been excessive. Even when one accounts for massive cases like *EC Bananas, EC Hormones, Japan Film* and *U.S. Shrimp*, there is not yet evidence of systemic overload or lack of expertise.

This could all change quickly, of course. There have been seven new requests for consultations since mid-December 1997, and requests for panels could be made in many of the thirty-eight ongoing consultations. Further, as transition periods end in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS), one can expect a growing number of cases to test the parameters of the obligations under these agreements as well. Since they are new agreements, little, if any, relevant precedent exists. A great deal of thought and effort will be required to decide these cases. Additionally, once China becomes a WTO Member, it is

2. Article 13.2 of the WTO's Dispute Settlement Understanding empowers panels to consult experts "on certain aspects of the matter [in dispute]" and to request an advisory report from an expert review group "[w]ith respect to a factual issue concerning a scientific or other technical matter." Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1226, 1234 (1994) [hereinafter DSU]. In addition, expert groups are specifically provided for in the Agreement on the Application of Sanitary and Phytosanitary Measures (article 11.2), the Agreement on Subsidies and Countervailing Measures (article 4.5), the Agreement on the Implementation of Article VII of the General Agreement [Customs Valuation] (article 19 and annex II), and the Agreement on Technical Barriers to Trade (article 14.2 and annex 2).

likely that many disputes will be brought challenging whether they are fulfilling their WTO obligations.[3]

For the Legal Affairs Division, the present situation is more problematic, and the prognosis even more so. The Appellate Body continues to critique the reasoning of panel reports very closely. This close critique will drive the Legal Division to spend even more time than they do now attempting to make the panels' legal reasoning airtight. This increased effort is a lot to ask from a staff of eight lawyers. If the number of disputes increases, it may well be too much.

If dispute settlement staffing becomes inadequate, it could be cured by redeployment of resources. While lean by the standards of other international organizations, the WTO has underutilized staff in some areas. The underutilization could be ascertained in a thorough management audit, and resources could be shifted to the Legal Division and the substantive divisions that are burdened by a large number of disputes. Even if this could not be done, or more resources were needed than could be redeployed, the WTO Members could remedy any problem by budgeting more money to hire new staff for the overwhelmed divisions. The only constraint is the will of WTO Members to increase their contributions to fund the new positions.

Unfortunately, at present the United States, Germany, and a few other Members continue to reject any growth in the WTO budget.[4] Continued inability to add new staff and the concomitant departure of overworked, disgruntled, and experienced staff could seriously harm the Secretariat's ability to provide sufficient qualified staff for all disputes. One can only hope that the United States and Germany will not let this come to pass because the result of lower-quality decisions would be a less credible dispute settlement system and a less effective WTO. Such an outcome would not be in any Member's interest.

IV. Developed Countries

Developed countries remain the primary users of the WTO dispute settlement system, filing seventy-nine of the 117 consultation requests and being respondents in sixty-nine. The United States and European Community (EC) have filed the lion's share of the complaints (sixty-five), and they, plus Japan, have been respondents in fifty-seven disputes.

The pace of complaints by developed countries indicates that they, and particu-

3. One additional possibility is increased filing of "political disputes" (such as the EC's now-suspended challenge to Helms-Burton, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS 38). If this occurs, resources will not be the problem, though, for the issue will be whether the WTO will cease to be regarded by one or more key Members as an organization that they should continue to support.

4. In his comment on this paper, Andrew L. Stoler sets out a chilling compendium of problems caused by the frozen WTO budget. Mr. Stoler notes that the United States is not likely to agree to an increase because of the State Department's policy of zero nominal growth. It would be foolish indeed if the United States harmed the WTO dispute settlement process (of which it continues to be the major beneficiary) because of its pique regarding the spending practices of *other* international organizations.

larly the world's three major economies, intend to continue their historic reliance on the General Agreement on Tariffs and Trade (GATT)/WTO dispute settlement mechanism. Indeed, with the jump in TRIPS-related complaints since late 1997, it would appear that the United States and the EC have decided to begin testing the parameters of this "new" agreement. This testing, and the likelihood of more GATS cases as the transition provisions of the services annexes end, presages an increased WTO caseload in 1998. Moreover, because of the size of their economies, developed countries (in particular the Big Three) will continue to be drawn into many disputes as respondents.

As the major users and major targets of the dispute settlement system, one would expect the developed countries (in particular the Big Three) to devote sufficient resources to the process. Of course, there can be lags in the assignment of new resources. For example, during 1997 the Office of the United States Trade Representative (USTR) was overburdened with WTO dispute-related work. However, USTR was recently granted authority by Congress to add seven attorneys to its staff in order to properly handle the dispute settlement workload. This increase in staff illustrates that resource levels can lag behind needs, and more importantly, it illustrates the ability of a developed country to satisfy new resource needs relatively quickly. The resources (trained personnel who are knowledgeable about the substantive WTO agreements and international dispute settlement procedures) are readily available. The only constraints are bureaucratic and political—whether there is the will to reallocate resources to dispute settlement-related positions or to seek additional budgetary authority.

With regard to developed countries (at least the Big Three), the question of whether adequate resources are being devoted to WTO dispute settlement is virtually self-fulfilling. As the major drivers of the WTO, the developed countries will have the major voice in deciding how active the dispute settlement process will be, and accordingly will allocate resources (possibly with some lag time) to meet their chosen level of activity.

V. Developing Countries

With the replacement of the GATT's diplomatic model of dispute settlement (in which consensus was required at every stage of a dispute) with the WTO's judicial model (in which no step can be blocked), developing-country Members have, for the first time, begun to use the dispute settlement process regularly. The numbers clearly evidence the change. Twenty-three different developing countries have been involved in disputes (either as complainant or respondent), eleven of them for the first time.[5] To date, developing countries have filed thirty-

5. The eleven newcomers are Costa Rica, Guatemala, Honduras, Indonesia, Malaysia, Pakistan, Peru, Philippines, Poland, Singapore, and Sri Lanka. One could (should) add to this listing the twelve African and Caribbean ACP countries that were actively engaged as third parties in the *EC Bananas* dispute.

seven WTO consultation requests; twenty-eight of them have been against developed countries. At the same time, developing countries have been respondents in more disputes than ever before—in thirty-eight disputes commenced by developed countries and nine by other developing countries.[6]

It still takes political will to commence a dispute, because the power of developed countries to dissuade developing countries from requesting WTO consultations remains great. Once the political courage to start is mustered, however, all WTO Members have equal weight (in theory at least) in the virtually automatic dispute resolution process. The developing countries can no longer be stymied or bullied by developed-country opponents if they have the necessary experts to utilize the WTO process effectively.

The scope of activity by developing countries as complainants shows a great interest in the system and a desire to ensure satisfaction of their rights. Yet, evidence (admittedly anecdotal and drawn largely from the experience of developing countries as respondents) suggests that they are not devoting sufficient resources to make the system work effectively for them. They are not devoting sufficient resources because those resources do not exist.

Unlike developed countries, for which resource constraints are temporary and caused by bureaucratic or political difficulties, the resource constraints of developing countries are physical and long-term in nature. With the possible exception of Brazil (the most active developing country in WTO disputes), developing countries simply do not have sufficient personnel who are knowledgeable about the substantive WTO agreements and the WTO dispute settlement process. In many cases, there is literally no one who can be reassigned to a dispute settlement-related function because no one in the government has the necessary background. Dedication, intelligence, and hard work abound and can compensate for lack of expertise in many respects. However, in disputes with trained experts from developed countries, the lack of experience frequently cannot be overcome; thus, the "fight" is not fair.

In the long term this problem can be rectified by training. Developing countries can decide (as many seem to have done based on the background of the students in my WTO class at Georgetown) to develop a broader corps of WTO experts. Needless to say, such training takes time. It also takes money, and for many developing countries there simply is little money that can be reallocated.[7] This

6. Nine of these disputes have involved new obligations (i.e., obligations created as a result of the Uruguay Round) under the Agreements on Agriculture, Sanitary and Phytosanitary Measures, Textiles and Clothing, and Trade-Related Aspects of Intellectual Property Rights. However, twenty-nine have involved obligations existing before the Uruguay Round. This would seem to indicate that the developed countries intend to hold the developing countries to a higher standard of compliance with all WTO obligations than was the case before the conclusion of the Uruguay Round.

7. During my time as United States Trade Representative (USTR) Legal Advisor to the GATT, the most poignant statement I heard was made by the Ambassador of Tanzania, who said "in a country like mine where so many people are starving, it is very hard to think about spending money for the GATT."

shortfall in developing countries' ability to fund adequate WTO training can only be overcome by assistance from the WTO and from individual developed countries. The WTO Training Division conducts regular courses for low and mid-level officials of developing-countries' governments. My understanding is that the courses are well attended and considered to be very useful. However, the 100 or so people trained every year are but a small fraction of what would be necessary for all developing countries to have the necessary corps of experts.

Some of the remaining need is satisfied by individual developed countries—Canada, the Nordics, and Switzerland, in particular, have been quite generous in this area. However, clearly a great deal more could be done to provide practical training opportunities. One would hope that the United States and other developed countries would better and more widely recognize that a healthy, credible WTO requires strong support from developing countries and that they will provide it only if they feel that their interests are effectively represented.

While there is no substitute for a sufficient corps of WTO experts within each developing country, there are two palliatives—legal assistance and advice from the WTO Secretariat and the assistance of attorneys in private practice that are WTO experts. Unfortunately, the first has not yet shown itself to be of major value. Article 27.2 of the WTO's Dispute Settlement Understanding recognizes the need of developing countries for "additional legal advice and assistance in respect of dispute settlement" and directs the Secretariat to "make available a qualified legal expert from the WTO technical cooperation services."[8] The Secretariat has had difficulty in keeping this post filled. Frequently it has had to contract out to former staffers of the Legal Division. In addition, developing countries report that, while in most instances the "expert" was sincere and sought to provide useful advice, he did not provide the wide-ranging, in-depth assistance that the countries felt they needed. In short, he was not "their lawyer." Rather, he merely provided technical assistance on a narrow range of issues, frequently doing no more than critiquing possible arguments or defenses and providing basic advice about the course of WTO dispute proceedings. Is it fair to expect more? No. The "expert"was never intended to be the WTO equivalent of a public defender—an advocate assigned by the WTO. Rather, he was intended to provide just the sort of narrow-range technical advice that most have been providing.

The problem, then, is not the quality of services provided by the WTO expert, but the range of service he is capable of providing. This situation has left developing countries desiring the potential of representation equal in experience and in quality to that provided by in-house experts from developed countries with only one option—hire knowledgeable outside counsel. For many years, developing countries have used outside counsel to assist in researching legal arguments and drafting written submissions to dispute panels. Until recently, however, few

8. DSU *supra* note 2, at 1243.

pressed to have counsel appear at and participate in panel hearings. Reportedly, a few surreptitiously included outside counsel on their delegations. But, in many more instances, they acquiesced in the refusal of their developed-country opponent (virtually always the United States) to agree to their request. It appears that no developing country challenged this state of affairs until the organization of African, Caribbean, and Pacific states (ACP)—former colonies of EC Member States—did so as third parties in the *EC Bananas* dispute.

For the purposes of this paper, the point of primary importance is the ACP countries' belief that they needed the assistance of outside counsel in order to effectively present their views to the panel and the Appellate Body and to protect their interests during these proceedings. One can question the motives of the United States in objecting, but that is for another day and another paper.

In granting counsel the right to appear before the Appellate Body (counsel had been excluded by the panel from its proceedings), the Appellate Body said: "[W]e also note that representation by counsel of a government's own choice may well be a matter of particular significance—especially for developing-country Members—to enable them to participate fully in dispute settlement proceedings."[9] This is a ringing affirmation of the developing countries' belief. Until such time as they are able to build a corps of in-house WTO expertise, the only way that they will be able to use the dispute system effectively, whether as complainants or respondents, is to exercise their sovereign right to be assisted by knowledgeable outside counsel. It is no substitute for sufficient, in-house expertise, but at least it helps level the playing field.

VI. Conclusion

An effective WTO dispute settlement system is in the best interest of all WTO Members. They should work collectively to ensure that the Secretariat and all Members have the resources necessary to make the system function properly.

9. *European Communities—Regime for the Importation, Sale and Distribution of Bananas—AB-1997-3*, WT/DS27/AB/R (Sept. 9, 1997) (visited June 21, 1998) <http://www.wto.org/wto/online/ddf.htm>.