

RESHAPING THE WTO DISPUTE SETTLEMENT SYSTEM: CHALLENGES AND OPPORTUNITIES FOR DEVELOPING COUNTRIES IN THE DOHA ROUND NEGOTIATIONS

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Abstract

The reform of the WTO Dispute Settlement System is an integral part of the Doha Development Agenda launched at the WTO's Fourth Ministerial Conference in 2001. While the World Trade Organization is marking its 20th anniversary, the modernization process tends to reinforce the WTO legitimacy and to bring developing countries into the world economy in a fairer and more efficient way. On January 30th, 2015, the Special Session of the Dispute Settlement Body, chaired by H.E. Ronald S. Soto, issued its latest report providing a state-of-play of the negotiations in this area. In light of the above, this paper brings to light both developing country interests in the current talks and the remaining challenges for their better integration into the Dispute Settlement System.

Keywords: WTO, Developing Countries, Dispute Settlement System, Doha Round

Introduction

It is widely acknowledged that the WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding (hereinafter DSU) is vital for enforcing the rules, and therefore for ensuring that trade flows as smoothly, predictably and freely as possible [E.U. Petersmann, 2012]. The WTO Annual report issued recently points out that: "*The WTO dispute settlement system is lauded as one of the most active and fastest adjudicative systems in the world. It is preferred to the many dispute settlement mechanisms contained in the hundreds of regional trade agreements the world over. It is important to invest in its future*" [WTO, 2014]. The fact is that the dispute settlement activity has been intensifying, confirming the importance that members attach to the settlement of their disputes through

the DSU, and their reliance on these procedures as a central component of the functioning of the multilateral trading system. Two thirds of the Membership have participated in dispute settlement proceedings in one way or another [WTO, WT/DSB/M/350].

In such circumstances, any improvements to these procedures should not alter the progress achieved and, instead, make an important contribution to the functioning of the multilateral trading system as a whole. In this respect, the project of modernization of the DSU is not recent. In 1994, The Marrakesh Ministerial Conference mandated WTO member governments to conduct a review of the Dispute Settlement Understanding within four years of the entry into force of the WTO Agreement (i.e. by 1 January 1999). In 1997, the Dispute Settlement Body (hereinafter DSB) launched the review, and held a series of informal discussions on the basis of proposals and issues that members identified. Many, if not all, members clearly felt that improvements should be made to the understanding. However, the DSB could not reach a consensus on the results of the review.

At the Fourth Ministerial Conference held in 2001 in Doha (Qatar), the WTO members launched a new round of multilateral negotiations called “the Doha Development Round”, with the goals of reducing trade barriers and considering specific needs of developing countries more accurately. Amongst the 21 topics addressed in the Doha Development Agenda, the modernization of the DSU shall not be overlooked, even if agriculture, services and market access for non-agricultural products issues are concentrating most offensive and defensive interests of major WTO players.

The Doha Declaration mandates negotiations on “[...]improvements and clarifications of the Dispute Settlement Understanding, and “based on the work done thus far as well as any additional proposals by members” [par.30]. This Declaration also states that the result of these negotiations will not be part of the single undertaking, meaning that they will not be tied to the overall success or failure of the other negotiations mandated by the Declaration [par.47]. In Hong Kong, Ministers further instructed to “*continue to work towards a rapid conclusion*” of these negotiations. Originally set to conclude by May 2003, they continue without a deadline. Since 2013, the work of the Special Session of the DSB has been based on a “horizontal process” in which interested participants have the opportunity to explore possible solutions together for the following twelve issues under consideration:

- Panel composition
- Third party rights
- Mutually agreed solutions
- Remand referral mechanism
- Strictly confidential information

- Post-retaliation
- Transparency and *amicus curiae* briefs
- Timeframes
- Sequencing
- Developing country interests (including special and differential treatment)
- Flexibility and member control

Although the Chairman of the Special Session highlights that “*the very constructive work conducted recently provides a strong basis for a successful conclusion of the negotiations*”, such a success remains, however, uncertain. Not all issues are at the same level of progress, and the amount of work remaining to achieve convergence still varies significantly from issue to issue. In some areas, the technical work has been essentially completed at that stage, including with the stabilization of draft legal text [TN/DS/25]. In other areas, this comprehensive exercise has allowed a detailed understanding of the proposals and the respective positions of participants, but convergence is still not achieved.

In any event, all participants agree that a number of developing countries members face particular constraints in accessing dispute settlement procedures and defending their interests effectively through recourse to such procedures. An in-depth analysis of the WTO members involved in disputes, as complainant or respondent, from 1995 to 2013 shows that only 65 of them were concerned, with a large majority of developed and emerging countries [WTO, 2014]. As a way of illustration, Egypt is the only Arab country to be concerned by the WTO dispute settlement system and, what is more, four times as a respondent, while there are 13 WTO Arab members. Thus, one third of the Membership has not participated in dispute settlement proceedings in one way or another. When they intervene as complainant or respondent members, many developing countries must still overcome major obstacles, including high litigation costs, a lack of expertise to handle the complexity of international trade disputes, as well as the difficulty of implementing adjudicators’ recommendations and rulings. There are special and differential treatment provisions in the DSU, but hardly effective on the ground. Developing countries are seeking to give teeth to these provisions enabling them greater participation in a dispute settlement.

As negotiations are moving towards a decisive phase, but also because developing country interests are needed to be an integral part of any outcome in these negotiations, this contribution endeavors to provide an overall assessment of their challenges in the improvement and clarification of the DSU. Not all the issues of negotiation mentioned earlier are of equal importance for developing countries. The latter’s priorities are thus grouped around broad themes tracing key phases of the litigation process. While

Section I stresses on the access of these countries to the WTO dispute settlement system, the second Section provides a state of progress accomplished for ensuring the effective compliance with DSB's recommendations and rulings, and increasing the effectiveness of sanctions imposed by developing countries. These arguments will be followed by a brief conclusion.

Section i: Greater Access of Developing Countries to the Dispute Settlement System

Besides a more active participation of developing countries, there is an emerging consensus amongst the participants as to the nature of difficulties faced by developing countries to be engaged effectively in WTO dispute settlement proceedings. It is agreed that levelling the playing field should be a key objective in this respect. For this purpose, the ongoing negotiations have identified two possible avenues for developing country interests: mitigating the costs of litigation complemented by a more efficient technical assistance in the dispute settlement procedure (A), and facilitating access of non-parties, including enhancing third party rights in the panel and appellate stages (B).

A- Mitigating the Costs of Litigation and Increasing Expertise

The ongoing negotiations have highlighted limited litigation capacity of most developing countries, making more efficient technical assistance indispensable. These countries incur both financial and technical burdens in the implementation of the DSU.

Indeed, participants have widely acknowledged that the infrequent use of the dispute settlement system by small developing countries and least-developed countries is, first, the result of their lack of expertise and knowledge of WTO rules, and that this situation is exacerbated by the increasing complexity of international trade disputes. Bringing an action before a WTO panel is a long process that requires the preparation of legal and business data which cannot be provided by other members or the WTO Secretariat. A State member must find various sources of relevant information by using legal experts and economists who can provide consultations and econometric studies supported by substantial documentation. Developing countries have, however, a severe lack of experts in these areas. The situation of Arab countries may constitute a striking illustration: is it necessary to recall that, notwithstanding the provisions of article 17(3) of the DSU by which the Appellate Body shall be broadly representative of WTO members, only two Arab experts have integrated this entity since 1995!

At the same time, it is impossible not to question the effectiveness of the “progressive learning strategy” and the “reference centers” which constitute the two vertebral columns of the trade-related technical assistance program for developing countries. Managed by the WTO Secretariat, and more particularly by the Institute for Training and Technical Cooperation (hereinafter ITTC), this program focuses on e-learning courses, academic programs and workshops organized at both national and regional level. The immediate objective of these activities is to enable participants to understand the fundamental principles of the WTO in relation to the matters dealt with. For specific questions in connection with the Doha Round, the goal is to give participants the factual and analytical information required to participate meaningfully in the negotiations [WTO, 2014].

While the training tools have been continuously improved since the creation of the WTO, their added value for a large number of developing countries remains however limited. Several delegations consider that the priority should be given to increased capacity building and trade-related technical assistance or to look into possible ways of increasing the attractiveness of the Advisory Centre on WTO Law (hereinafter ACWL) for members with limited capacities, as means of addressing the capacity constraints identified [Ronald S. Soto, 2015]. It is also suggested that generally focusing on solutions that would not be tied directly to litigation of specific cases would help to move forward. Some proponents stress that the dramatic situation of most developing countries requires more than a few weeks of training or seminars on specific issues on WTO dispute settlement mechanism [Ronald S. Soto, 2015]. Rather, it requires more regular training and monitoring mechanisms for local officials selected on skills and stability criteria, as well as more intense awareness policies for businesses, parliamentarians and decision-makers in these countries. Given that negotiations regarding trade-related capacity building constitute an autonomous theme of talks during the Doha Round, but also because of the lack of consensus between proponents and other participants, the current proposals “*could be explored further*” [Ronald S. Soto, 2015].

Apart from the lack of expertise, the participants also stress that WTO dispute settlement has become too expensive for developing countries, adding that some of the costs needed to be shared [Ronald S. Soto, 2015]. As a result, a number of proposals emerged as to a direct support in the form of a Dispute Settlement Fund (hereinafter DSB Fund) and litigation costs. For this purpose, a draft legal text, under Article 28 of the DSU, has even clarified some important aspects of the expected functioning of both mechanisms. The DSB Fund would be available to developing country complainants and respondents, irrespective of the other disputing party’s

development status. A proposed “Annex X” to the DSU would address its detailed operation.

From a practical standpoint, the DSB Fund would be part of the regular WTO budget, with the possibility of receiving voluntary contributions. The proponents suggest that such a fund “[...] *would reimburse a developing country's dispute settlement costs for no more than 2 disputes per year, only as regards legal fees and costs, and up to a specific ceiling for each dispute settlement stage*” [Ronald S. Soto, 2015]. The DSB Fund’s operation would be overseen by the Budget and Finance Committee, and reviewed annually by the General Council.

Unsurprisingly, some participants posed a number of questions about specific aspects of the proposal’s implementation, including on budgetary implications and the operation of the mechanisms. The necessity of segregation between WTO members is also highlighted. Not all developing country members, nor even all developed country members, are in the same situation in respect of relative expertise or resources to deal with WTO litigation [Ronald S. Soto, 2015].

Another topic of concern has been the relationship between these proposed mechanisms and the functions of the ACWL. While the latter’s contribution to providing quality independent legal advice to beneficiary members is largely recognized, many delegations expressed concerns with the proposal, either for technical reasons or because of its perceived negative impact on the ACWL [JOB/TNC/39]. In particular, several participants emphasize that the ACWL has been useful in providing assistance in dispute settlement and dispute avoidance, and it should not be undermined. The reflection should start on whether to strengthen the existing mechanism of the ACWL, instead of creating a parallel system. Special emphasis shall be placed, for instance, on making its funding more stable. Several members still consider that, institutionally, the ACWL is a more adequate forum. Unlike the WTO, the ACWL could differentiate between developing countries in need of dispute settlement assistance and developing countries with major litigation capacity. Furthermore, the DSB Fund would not involve any costs to beneficiaries, so these members would have no incentive to use the ACWL. If the proposal was accepted, donor governments would start making a choice between the DSB Fund and the ACWL. Ultimately, the question would be whether it was reasonable to contribute to the ACWL as well.

In response, the proponents of developing country interests stress that their proposal does not aim to weaken the ACWL but to strengthen it. With time, this institution would be used more frequently and its work would increase as a result of the DSB Fund. From a financial efficiency rationale, a solution to the problems of developing countries in accessing WTO dispute

settlement should be devised at the WTO, in the DSU. It is useful to recall that the ACWL is outside the WTO and, consequently, not multilateral as it does not involve all WTO members.

In respect of the reimbursement of beneficiaries, it is noteworthy that in a dispute involving multiple developing country parties, the latter would all benefit from the DSB Fund. In contrast, there is no consensus for the proposal allowing the refund of litigation costs also in disputes between developing countries. Developing countries have strongly rejected that idea, and the proposal tries to limit the instances in which litigation costs could be reimbursed [JOB/TNC/39].

Last but not least, several participants also express concerns about the calculation of litigation costs and the reimbursement terms. In particular, it is asked whether the “[...] *DSB Fund would cover costs other than those related to dispute settlement, or whether the Budget and Finance Committee would oversee the operation of the Fund only in general or would also verify individual bills submitted for reimbursement*”. In this respect, this raises the question whether the Secretariat would have “[...] *any discretion to refuse reimbursing a frivolous or exaggerated bill under paragraph 7 of the proposed Annex X, and whether any recourse would be available against another Member's reimbursement requests*” [Ronald S. Soto, 2015].

On the other hand, the proponents attempt to introduce checks and balances. In particular, there would be a ceiling on the reimbursable amount at each stage, and reimbursements would be made only upon the presentation of bills for work already done. At the same time, the proponents recognize the relevance of further reflection “[...] *on the idea of a challenge against Members' reimbursement requests*” [Ronald S. Soto, 2015].

To conclude, the proponents of the establishment of a DSB Fund point out that awarding litigation costs might be “*complex but not impossible*”, recalling that there are currently at least 56 jurisdictions that awarded litigation costs [Ronald S. Soto, 2015].

B- Third Party Rights

With regard to third party rights, heated debates focus on the Chairman's text of July 2008 and the more recent draft legal text proposed by the Friends of third parties, both in the G40 and in smaller groups meeting. The purpose is to reduce some of the confusion that may arise from the coexistence of these two texts. Remaining differences are also identified in the consolidated text.

Negotiators point out that an opportunity to participate as a third party in various proceedings may enhance access and also contribute to capacity building [JOB/DS/6]. Such a purpose would be reflected by the improvement of third party rights in participating in consultations between

members and adjudicators proceedings. Some proponents go further and propose an extension of third party's intervention in both compliance and arbitration proceedings.

Phase of consultations

Given that under DSU's provisions third parties are excluded from the phase of consultations, developing countries are unable to defend their interests at an early stage of the dispute. Convergence therefore emerges around the need to integrate third parties during the consultations. Under the proposed approach, "*Members having expressed substantial trade interest in consultations would be automatically joined in such consultations, unless the Member to which the request is addressed notifies the applicant Member and the DSB within 7 days of receiving the request that it considers the claim not to be well-founded*" [Ronald S. Soto, 2015]. In the proposed text, a member to which such a request is addressed should favorably consider representations made by applicant members with respect to the reasons for their request. Without prejudging the types of considerations that could form the basis for a "*substantial trade interest*" in being joined in consultations, such a solution would provide an appropriate balance between the interests of disputing parties and interested members.

At the same time, discussions still focus on further possible drafting improvements, especially the importance to clarify the sequence of events from the request to be joined, to its consideration by the responding member and the notification of the decision. Questions have also been raised as to whether transparency about both acceptances and refusals may be profitable, otherwise the notification would be useful only in cases where the request is denied. As a reminder, the respondent is required, under the current practice, to notify acceptances, but not rejections, of requests to be joined in consultations, and then the Secretariat circulates a document listing members whose requests to join have been accepted. In light of this practice, some proponents enquire whether delegations would be ready to explore mechanisms other than notifications by the responding Member in order to achieve greater transparency, for instance through the circulation of a DSB document listing the members that have and have not been joined in the consultations. In any event, participants share the understanding that an absence of timely refusal entails the automatic participation of the requesting member [JOB/TNC/39].

Adjudicators' proceedings

Alongside with the phase of consultations, discussions also relate to the improvement of third party rights during the panel and appellate body proceedings.

For this purpose, participants agree that DSU's provisions in this field are formulated in general terms and are relatively inadequate to maintain a balance between the necessity of not overloading the work of parties and, at the same time, facilitating third-party participation.

Pursuant to article 10 DSU: “ [...] *Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”)* shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report. [...] *Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel*”.

These rights are furthered by the Appendix 3 on Working Procedures in the following terms:

“All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session. [...] The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements”.

With respect to third party rights in panel proceedings, the proponents have therefore proposed a reshaping of article 10 of the DSU that may address two main issues:

Providing a time period to notify the interest in participating as third party

With respect to the timeframe for expression of third party interest, support is expressed for codifying the practice of the 10 days from the date of panel establishment to express third party interest. However, concerns are raised with respect to the proposed processing of notifications made beyond this 10-day period, the possible additional burden for parties, as well as on the composition of the panel, if the notification was received from a member who had a national serving on the panel. It is also asked on what basis the panel would decide whether to accept such “late” requests [Ronald S. Soto, 2015].

Granting additional third-party rights, including the possibility for third party to participate in each substantive meeting only upon agreement of the parties

While many participants express their support for strengthening third party rights at this level and codifying rights that have been granted in

practice, the same members also underline that such access would not be detrimental to involved parties [JOB/DS/6].

Emerging consensus appears between participants around the proposal devoting the right to take part in the second substantive meeting, which would include the right to make an oral statement and the right to respond to the questions arising in and from the meeting. Additional rights beyond those identified would be subject to the agreement of the parties. This would bring clarity and predictability in the extent of third party rights, and would also bring consistency in this respect. The proposal aims at achieving a balance in the treatment of third parties in different cases.

However, some participants consider that “[...] *a better balance was reflected in an earlier proposal that envisaged third parties being allowed to participate actively at the first substantive meeting but only to be present at the second meeting, with flexibility for the panel to grant additional rights on a case-by-case basis*” [Ronald S. Soto, 2015]. Some concerns are also expressed about the encumbrance resulting from the proposed enhanced rights for the parties, in particular in relation to the second substantive meeting. It is also observed that the separate proposal on transparency would address the issues of attendance at substantive meetings and access to written submissions.

In sum, discussions must still continue in order to bridge “*formal and substantive differences on these issues*” [Ronald S. Soto, 2015].

With respect to third party rights in appellate proceedings, paragraph 4 of article 17 DSU provides that: “*Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body*”.

In view of such a restrictive approach, large support is expressed for allowing flexibility to join the proceedings at the appellate stage. In this respect, proponents indicate readiness to consider logistical and practical terms and conditions to address other delegations' concerns over potential burdens in the implementation phase. They do not propose new text in this respect, but support the proposal in the Chairman's text of July 2008.

It is suggested that new participation at the appellate stage implies that third parties may bring new legal points, submissions and arguments that parties will have to address. This would undermine the parties' ability to defend their interests and focus on the resolution of their dispute. This concern might be addressed by imposing limits on issues that new third participants may raise, or applying an additional threshold for participation [JOB/TNC/39]. Proponents have observed that third parties, regardless of their number, do not have the prerogative to define the issues examined on

appeal. The most that third parties can do is add new arguments, support existing ones or provide more perspectives on already discussed issues.

Given the Appellate Body's role in providing legal interpretations of the covered agreements, a number of participants stress the importance of the opportunity for all WTO members to participate in proceedings especially at this stage. This proposal may be of great importance for developing countries facing resource constraints that were unable to participate at the panel stage.

Further discussions are clearly required regarding the content of a legal text, including the manner in which the interest to join should be expressed, the deadline for expression of interest, and the description of the rights of third participants. A suggestion was made to insert general language in the text to clarify that the participation of third parties should not have an adverse impact on the ability of parties to argue their case, while leaving it to the Appellate Body to organize the details of how to achieve this through its working procedures [JOB/TNC/39].

In brief, the Chairman of negotiations calls for the search of “*common ground*” on the issues discussed.

Third party rights in compliance proceedings

With regard to third party rights in compliance proceedings, it should be recalled that paragraph 5 of article 21 DSU provides that “[...] *Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it[...].*”

The proponents explain that they do not want to change the meaning of this provision and that the intention is only to propose clearer language. They recall that under the existing DSU wording and also under the sequencing suggested, there is no obligation to request consultations prior to requesting a panel under article 21(5) DSU, but it is possible. If consultations are requested in the context of compliance proceedings, it would be merely useful to clarify that third party interest may be expressed in the same conditions as under original proceedings, provided that the consultations are open [JOB/TNC/39].

Based on the wording of article 21(5) DSU, all delegations agree that consultations are optional and therefore remain possible. Further discussions are, however, required to propose a reformulation of article 21(5) that apprehend more adequately the intention of all participants [JOB/TNC/39].

Consensus building will also be the priority of negotiators when considering the draft text of article 22, paragraphs 6 and 7 DSU relating to

arbitration proceedings in case of objection to the level of suspension of concessions proposed. It should be recalled that third party participation in article 22(6) proceedings is not currently addressed in the DSU and falls within the arbitrator's discretion. Highlighting the added value of allowing third parties to participate, the Friends of third parties propose to clarify article 22(6) proceedings [JOB/TNC/39]. It is discussed whether these proceedings involve issues that are primarily of a bilateral nature and therefore not ensuring access to other members, or whether legal or other issues of wider systemic interest are also at issue. There continue to be different standpoints in this respect. Some participants consider that these proceedings entail primarily factual issues relating to the calculation of the impact of the measures on the complaining party. Others consider that the application of the principles of articles 22(4) and 22(3) by the arbitrator necessarily involves legal aspects (including an interpretation of the meaning of nullification or impairment) and other issues of general interest, such as the choice of methodologies available for the calculation of nullification or impairment.

Section II- Effective Compliance With Adjudicators' Reports

Alongside with mitigating costs of litigation and enhancing third party rights in dispute settlement procedures, the Chairman's text of July 2008 and the draft legal text presented by proponents of developing country interests have identified effective compliance as area of concern to them. There is common view on both the relative effectiveness of various remedies in favoring prompt compliance and the necessity to adjust the remedies available in order to induce effective compliance, including facilitated retaliation or compensation mechanisms for developing countries. Improved remedies may also strengthen effective access, if they increase the chances of achieving a resolution of the matter for the complainants. On the ground, the current discussions are exploring possible venues to level the playing field in various ways, including taking into account the impact of the measures on the economy of the developing country complainant, and support from other members or administrative sanctions.

Amongst delegations, it is undisputed that overall compliance levels have been high. The resort to retaliations measures is rare in practice. However, an in-depth compliance procedure's review reveals that the position of developing country members remains fragile, even if these latters have prevailed. This fact is recognized by several members expressing concern that compliance was not always easily achieved, and that some may face particular challenges in this respect, in part because available remedies are not effective enough. For some members who are not frequent users of

the system, compliance concerns may thus represent a major proportion of their experience.

To meet these challenges, negotiators dealing with developing countries interests make a distinction as to whether a developing country is prevailing in the DSB (B) or, instead, such a member is sanctioned under DSU provisions (A).

A- Defeated developing country

In the instance where a developing country is condemned, emphasis is given to a reasonable period of time for implementation (RPT hereinafter). Contrary to the proponents' proposals which cover RPTs determined under subparagraphs (a), (b) and (c) of Article 21.3, the Chairman's text is limited to RPTs determined by arbitration. The primary goal is to enjoin the arbitrator for taking into account the particular problems and interests of developing country members in determining the "shortest period of time" within the implementing member's domestic legal system.

For memory, the arbitrator(s) is granted a period of 15 months from the date of adoption of the DSB report to determine the RPT pursuant to the current text of Article 21.3(c) of the DSU, although the RPT may be shorter or longer "*depending upon the particular circumstances*". Through successive arbitral awards under this provision, it has been also established that the RPT should be the shortest period possible within the legal system of the implementing member.

As per paragraph 2 of article 21 DSU, "*Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement*". Pursuant to this provision, some arbitrators under Article 21.3(c) have taken into account the situation of the developing country member to determine the time within which it can implement the recommendations and rulings. Practically, the average length of the RPT to date has been 9 months and 5 days when agreed by the parties pursuant to Article 21.3(b), and 11 months and 16 days when it has been determined pursuant to Article 21.3(c) arbitration.

While some participants agree that developing country members may face significant constraints in the implementation process and expressed support for improving the current DSU provisions, other negotiators are seeking a number of clarifications as to how extensive the scope of the provision was intended to be [Ronald S. Soto, 2015]. In particular, it is asked what exactly the terms "*interests*" and "*problems*" of developing country members are intended to cover and how they differ from each other. Several questions raised about the scope of these terms, including whether they might cover considerations relating to the interests of a domestic industry

affected by the rulings, or considerations not directly relating to the measures at issue and the implementation process, such as the general economic situation of the implementing member. It is suggested that some considerations, such as political sensitivities in the implementing member, may not be relevant to the determination.

In response, it is argued that these terms are already part of the DSU, adding that article 21(2) refers specifically to “*matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement*” [Ronald S. Soto, 2015], thus limiting the scope of the provision. In this context, the proponents emphasize that they are not seeking to modify the existing benchmark for the establishment of an RPT, but to guard against interpretations that would preclude such considerations from being given due attention.

In sum, the proponents confirm that the intention is to reflect in the DSU text the existing practice, rather than modify it. Despite substantial progress, the Chairman highlights that “[...] *further discussion seemed necessary on the nature of the problems or interests to which consideration is to be given and the scope of coverage of the proposed text*” [Ronald S. Soto, 2015].

B- Prevailing Developing Country

In parallel with RPT’s issue, intensive debates also relate as to how it is possible of enhancing effective compliance in favor of the complaining developing country member. This heading includes, to a large extent, the following proposals:

A clarification of compliance proceedings in a post-retaliation context

At a conceptual level, convergence emerges on a large sequence of steps to deal with post-retaliation situations: once the responding member shall assert and substantiate its claim of compliance (without prejudice to the exact form or legal status of this announcement), the complainant may challenge the respondents' assertion of compliance. If there is no disagreement on the achievement of that compliance, the retaliation authorization will be ended. In contrast, in case of disagreement, compliance proceedings should take place to determine whether compliance has been achieved. In the cases where compliance proceedings take place, the existing retaliation authorization remains effective until their conclusion. Where compliance proceedings have taken place, if it is determined in these proceedings that compliance has been achieved, the authorization will be terminated. When it is established that compliance has not been completed, the level of retaliation authorized may be modified to mirror the current level of nullification or impairment.

However, the observed consensus should not neglect that further discussions are useful with regard to the exact procedural stages to achieve this sequence [Ronald S. Soto, 2015]. Three open and unresolved issues still remain, namely:

- The contents and legal status of the initial notification/statement to be made by the respondent to assert compliance;
- The process for initiation of compliance proceedings (i.e. initiated by the complainant or triggered by the respondent's declaration of compliance); and
- The allocation of burden of proof in these proceedings.

The possibility of retaliation by a group of members on behalf of a prevailing developing country complainant (group retaliation)

In respect of retaliation on behalf of another member, the insertion of a new language has been suggested into article 22(6) of the DSU as subparagraph (b), which would follow the current language of that provision, to be renumbered as paragraph (a) . The proposed subparagraph (b) reads:

“Where a developing country Member has been authorized to suspend concessions or other obligations under Article 22.6 (a), and it considers that it is not practicable or effective to utilize that authority, the DSB shall, upon request by such Member, authorize other Member(s) to suspend concessions or other obligations on behalf of the requesting Member unless the DSB decides by consensus to reject the request. The authorization established in this Article shall be the same as the initial authorization granted under Article 22.6 (a).”

Participants agree the underlying rationale of such a proposal and recognize the difficulties that some members may face in retaliating effectively against larger economies. In this respect, the terms of “*collective retaliation*” have been removed because the retaliation on behalf of the developing country complainant would not be allowed to all members. Rather, the complainant would approach some other members and explain that it faces difficulties in using the authorized retaliation. Should certain members be willing to do so in its stead, the transfer of the original authorization would then be adjudicated by the DSB [Ronald S. Soto, 2015].

While there appears to be broad recognition of the difficulties faced by small developing country members in retaliating effectively, a number of questions relating to the proposed solution are needed to be addressed in order to move forward. As a way of illustration, the proposal’s systemic and practical implications would require more clarification. In light of the bilateral nature of existing remedies under the DSU, multilateral retaliation “*on behalf*” of others would be hard to achieve.

Facilitated cross-retaliation for developing countries

In order to facilitate an assessment of equivalence, article 22(3) of the DSU has codified an accurate sequence for retaliation measures, starting with the same sector and then moving to other sectors and then other agreements. The wording of that provision is, however, not feasible for developing countries because the process of justification is too burdensome. Under the current discussions, the proponents of developing countries and effective compliance consider that the procedure for cross-retaliation under Article 22(3) of the DSU is too cumbersome and developing countries should not have to demonstrate that retaliation in a sector or under a covered agreement is not practicable or effective. Such a proposal is primarily intended to address certain evidentiary issues: it would maintain the need for the complainant to provide an explanation of why it was not practicable or effective to retaliate in the same sector or agreement, but it would do away with the subsequent exchange of arguments on that evidence.

For this purpose, the adoption of the following text as Article 22.3*bis* of the DSU is suggested in order to facilitate cross-retaliation by developing country members:

“Notwithstanding the provisions contained in Paragraph 3, if the complaining party is a developing country, such Member shall have the right to seek authorization to suspend concessions or other obligations in any sector(s) under any covered agreement(s).”

In light of this wording, facilitated cross-retaliation would be available for developing country complainants irrespective of the respondent's status. It is noteworthy that this proposal would not introduce a new right: article 22(3) of the DSU already provided for cross-retaliation. The added value of article 22(3*bis*) would be to make article 22(3) readily accessible for developing countries.

Nonetheless, serious doubts are still express as to a possible added value of such a reform given that if a developing country complainant has a small volume of trade, it can easily demonstrate that retaliation in the same sector is not practicable or effective. In that regard, some large developing countries would have no problems retaliating under article 22(3). A majority of developing countries do not have, however, a sufficiently diversified economy to effectively retaliate in the same sector. Questions have also raised as to how the proposal would address asymmetry between a large developing country complainant and a small developed country respondent. In response, it is explained that large developing country members would not be excluded from the proposal, but they would not need it to effectively retaliate and are not the main target of the proposal. In view of the great difference between developing country members trade profiles, some participants have suggested that if the intention is to address the specific

difficulties faced by certain developing countries, article 22(3bis) should be limited to that group of members. At the same time, it is widely recognized that any reclassification of member would be politically sensitive [Ronald S. Soto, 2015].

The calculation of the level of nullification or impairment for developing country complainants

Under article 21(8) of the DSU, the DSB is required to take into account the impact of the measures at issue on the economy of the developing country complainant. To enhance the effectiveness of article 21(8) of the DSU, the proponents suggest an amendment of article 22(4) of the DSU to take into account the economic impact of the inconsistent measure on the developing country complainant. The provision would read as follows:

“The level of the suspension of concessions or other obligations, authorized by the DSB shall be equivalent to the level of the nullification or impairment. If the case is one brought by a developing country Member, the level of nullification and impairment shall also include an estimate of the impact of the inconsistent measure on the economy of such Member.”

The proposal’s rationale has received large support from participants arguing that article 21(8) of the DSU has to be made effective in practice. At the same time, there is considerable skepticism on how it could be implemented in its current form.

Conclusion

The above discussion suggests, at least, three main observations:

Firstly, a large consensus emerges amongst the participants on the fact that improvements and clarifications to the DSU can meaningfully promote both the integration of the developing countries in the world trading system and the strengthening of the entire multilateral trading system. Developing country interests are thus perceived as of major importance for the completion of multilateral negotiations in this field. In this respect, it is undisputed that measurable progress has been made towards draft legal text in a number of areas. Current discussions are occurring in a constructive spirit, and based on a combination of meetings of variable geometry depending on the issue being discussed. On the ground, key points of convergence are identified, even if the level of convergence on various issues still varies significantly.

Secondly, while expressing sympathy for developing country concerns, some participants continue to express reservations with the current proposals, including on a conceptual level. These members acknowledge the need to support developing countries but this must be done fairly and

neutrally. If the broad objective is to ensure that the WTO dispute settlement system is user-friendly and accessible to all members, it would be more useful, they argue, not to present issues in negotiations in terms exclusively of developing country versus developed country distinctions. Discussions would be more fruitful if proposals were viewed more horizontally, and were not limited to exclusively benefit developing countries. They recall that small economy developed country members consider that they face similar asymmetries, and may also wish to benefit from concepts embodied in these proposals. In sum, any proposal in this field should be generalized rather than presented as special and differential treatment, exclusively in favor of a category of members.

Last but not least, if the proposed reforms constitute a step forward towards a better efficiency and legitimacy of the Dispute Settlement System, other avenues would deserve further assessment. The drawbacks of developing country member economies and their lack of diversification require, in parallel, a special emphasis on promoting opportunities of monetary compensation as a possibly more effective means of achieving satisfaction for affected sectors than retaliation. In this respect, it is striking to note that participants do not find many cases where retaliation was partially helping compliance or rebalancing concessions. In the same sense, making mediation mandatory in disputes involving developing or least-developed countries and, more generally, enhancing DSU consultation and mediation processes may have merit. A differentiation amongst developing country members is also inevitable. A distinction between emerging countries and other developing countries would permit to focus more efficiently on the needs and specifics of truly vulnerable members.

References:

- PETERSMANN (E.U.), *The International Economic Law at the 21st Century*, 2012, 574 p.
- SOTO (Ronald S), Report by the Chairman, Special Session of the Dispute Settlement Body, 30 January 2015, TN/DS/26.
- SOTO (Ronald S), Chairman's report to the Trade Negotiations Committee, 25 June 2014, JOB/TNC/39.
- SOTO (Ronald S), Chairman's summary of the informal open-ended meeting of 21 November 2013, JOB/DS/17.
- SOTO (Ronald S), Report by the Chairman, Special Session of the Dispute Settlement Body, 21 April 2011, TN/DS/25.
- WTO, Director-General, 26 September 2014, WT/DSB/M/350.
- WTO, Annual report 2014.