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TEN YEARS OF OPERATION OF THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT MECHANISM: OUTCOME FOR LATIN AMERICA AND THE CARIBBEAN

Dispute settlement mechanisms help to create a fairly predictable and accurate environment in which economic agents can pursue their activities in the international arena. The World Trade Organization (WTO) Dispute Settlement Body (DSB) has now been in operation for 10 years and it is fitting, at this point to assess the progress achieved by Latin America and the Caribbean, the region that made most use of this mechanism during the period, and whose countries have made significant gains against protectionism in key export sectors. These successes constitute important precedents which will influence upcoming multilateral negotiations and future trade disputes.

This article reviews the work carried out by the DSB, the role of the leading stakeholders in the system (the United States and the European Union) and progress made by countries of the region in a global context marked by the complexity of trade issues and the legal framework that regulates them.

The findings presented in this article are based on the study "*Una década de funcionamiento del Sistema de Solución de Diferencias de la OMC : avances y desafíos*", LC/L2515-P, *Comercio Internacional Series,* N° 65, March 2006.

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I. INTRODUCTION

While dispute settlement systems are key instruments for promoting the liberalization process – insofar as they ward off attacks by protectionist pressure groups – they also fulfil a key political role. Indeed, recourse to an impartial third body to settle differences helps to avoid politicization of a trade conflict and the interference of other, non-trade, considerations that could make the dispute worse. After 10 years of operation, the World Trade Organization (WTO) dispute settlement system has already processed thousands of pages of legal texts which bind countries to structure their trade practices in accordance with the multilateral principles that converge towards a central goal: making international trade fairer and more equitable.

In presenting the progress achieved by the countries of Latin America and the Caribbean, this article seeks to underscore the role that the region plays in the world trade arena to the extent that the favourable rulings obtained from the Dispute Settlement Body (DSB) set important precedents for greater liberalization in sectors marked by protectionism, such as the agricultural, clothing and services sectors. The article is structured in three parts: the first provides an overall assessment of the operation of the DSB in this decade; the second focuses on the performance of the developing countries and the third examines the specific situation of the countries of the region. The findings relate to the period 1 January 1995-31 December 2005 and each one of the

consultations presented formally to the DSB is counted as a separate dispute, although there may be others that refer to the same issue.

II. OVERALL ASSESSMENT

Developed countries, principally the United States and the European Union, were the main users of the DSB in these first 10 years of operation. However, developing countries make substantial use of the system and this use has increased in recent years. As a complainant, the United States obtained significant results through the DSB on two points of particular interest for its foreign trade policy: the strengthening of regulation enforcement on intellectual property and sanitary and phytosanitary measures. Most of the disputes filed against the United States refer to trade remedies (safeguard, antidumping and countervailing measures) applied by the United States Government to foreign products. As a result, during the decade, the United States amended a significant number of regulations that were considered illegal by the DSB. It is still reluctant to change those that refer to more complex issues, such as: agricultural subsidies (in the case of cotton), antidumping measures (Byrd Amendment, Antidumping Act, steel), safeguard measures (applied to steel), export subsidies (Foreign Sales Corporation – FSC) and intellectual property (omnibus law on allocations).

In the case of the European Union (EU), the second most active member, its main adversary proved to be the United States and the most controversial issues between them were trade remedies. The second adversary is Canada, over the issue of protectionism in the agricultural sector; and India takes third place, because of European barriers to textiles. Approximately 75% of the disputes proposed by the EU against Latin America and the Caribbean are concentrated in the manufacturing sector and 12.5% in the primary sector. Conversely, most of the complaints of the countries in the region against the EU are concentrated in the primary sector (approximately 69.2%), mostly in the agricultural sector, with bananas and sugar taking a prominent place, and the remainder refers to industrial products (approximately 30.8%).

In terms of subject matter, the agreements most frequently cited in consultations presented before the DSB, were the General Agreement on Tariffs and Trade (GATT), the Agreement on Subsidies and Countervailing Measures and the Antidumping Agreement, which demonstrates that trade remedies are usually the issues that generate the most trade conflicts. These are followed by the Agreement on Agriculture and the fifth place is occupied by a series of agreements covering issues such as licenses, safeguards, technical measures, and sanitary and phytosanitary measures.

III. THE PERFORMANCE OF DEVELOPING COUNTRIES

Developing countries are participating more and more actively in the DSB in comparison with the old GATT system and are achieving more favourable results in the claims put forward since the establishment of WTO. The developing countries of the Cairns Group are those that effectively make use of the DSB. Brazil and India are the most active developing countries. However, it is important to point out that the developing countries continue to be wary about filing action against trade partners with which they share some trade agreement, or with those that provide them with some kind of assistance or aid (such as the preferential treatment granted by the European Community to its former African and Caribbean colonies through the Lome Convention and the Cotonou Agreement). On the other hand, they position themselves strategically at the moment of initiating action, concentrating on those in which they have the capacity to retaliate.

Whether the developing countries decide to participate in the DSB depends mainly on the following factors: a) the volume of exports at stake (countries with exports that show a low value added and limited diversification are less likely to lodge a complaint); b) the existence of legal experts; c) the capacity to use retaliation against the adversary; and d) international political relations between them (an evaluation is made of the diplomatic relations between them, the existence of free trade agreements or of any other trade integration process and the future implications of seeking legal redress in a matter of rivalry).

The most conflictual sectors for the developing countries are agriculture, fisheries, footwear, textiles, clothing, steel and the automobile industry. The trade instruments that affect these sectors of interest for developing countries are mainly agricultural subsidies, sanitary and phytosanitary measures and trade remedies

(safeguards, antidumping, countervailing duties). For their part, action is constantly being brought against developing countries in cases of intellectual property (concerning pharmaceutical products, for example).

With respect to the result of the disputes that have arisen, most of the concessions or successes obtained by the complaining countries have occurred at the consultation phase. Seventy-five per cent of cases do not even reach the phase of mediation by a panel. However, the developing countries are in a less favourable position for reaching agreement at the consultation phase owing to their lack of human, institutional and technical skills, which is the major challenge to be overcome. The structural factors that have an adverse effect on developing countries' participation in the DSB are the political costs (the decision to submit a case to the DSB requires a prior government strategy that takes into account the political implications of this measure) and the economic costs (which result in the abovementioned lack of human, institutional and technical skills).

Developed countries obtain liberalization of the sector in question by the responding country in 74% of cases, whereas the developing countries are successful in only 50% of cases. Moreover, the vast majority of developing countries (71%) which achieve this liberalization consist of a small group made up of Argentina, Brazil, Chile and Mexico and in Asia, by India, the Republic of Korea, Singapore and Thailand.

IV. THE RESULTS FOR LATIN AMERICA AND THE CARIBBEAN

Latin America and the Caribbean is the group of countries that is most active in the DSB, being the complainant in 21% of all disputes and the respondent in 20% of them (see Table 1). Participation among the countries of the region varies significantly: the most active ones are the larger economies which account for a higher share of world trade, namely, Brazil (35 cases), Mexico (28), Argentina (25) and Chile (20). However, it is interesting to note that countries with smaller economies and a lower GDP participate in a considerable number of cases: for example Central American countries such as Guatemala (8), Honduras (6) and Costa Rica (4). Even though participation has been uneven, the result has been homogenous. In other words, regardless of the size and level of development of the countries in the region, countries ranging from the smaller economies, such as Antigua and Barbuda, to the larger economies, such as Brazil, have achieved significant results against the trade barriers of developed countries. In addition, smaller countries have associated with larger countries, as in the cases of bananas, sugar and cotton, in which the Latin American and Caribbean countries advocated the elimination of protectionist trade policies against products that are key exports of the region.

Table 1

LATIN AMERICAN AND CARIBBEAN PARTICIPATION IN THE

DISPUTE SETTLEMENT BODY (DSB)

	Cases as a complaining country		Cases as a responding country	
	Nº	% [a]	Nº	% [a]
Latin America and the Caribbean	71	21.0	68	20.0
South America	59	17.6	60	18.0
Central America	11	3.3	6	1.8

Caribbean	1	0.3	2	0.6

Source: Prepared by the author on the basis of information from WTO.

[a] Percentage of participation in the DSB, taking into account the 335 cases lodged between 1995 and 2005.

The sector that elicited the most interest in the region was the industrial sector, followed by the agricultural sector, and lastly, intellectual property and services. In regard to the relationship of the countries of the region with the main players in the DSB, namely, the United States and the European Union, most disputes proved to have been settled through litigation. This suggests that the fact that many Latin American and Caribbean countries are unable to retaliate makes it difficult to reach agreement at an early stage and/or that the issues they usually challenge relate to complex trade policies that suffer tremendous internal pressure in the developed countries.

In terms of the interregional relationship, 30 of the 335 disputes initiated in the DSB (between 1995 and 2005), were trade disputes between countries of Latin America and the Caribbean themselves. Chile initiated the most consultations with other members of the region (6 cases filed), followed by the group made up of Argentina, Brazil and Mexico (3 cases each). Chile was the country that had the largest number of trade measures challenged in the DSB by other countries in the region (6 cases in which it was the responding country). However, it should be borne in mind that there is more than one dispute challenging the same measure. Mexico was the defendant in the second largest number of cases (5). The most serious dispute in the region occurred between Argentina and Chile, countries that filed the most complaints challenging their respective trade policies, especially those that implied putting safeguards in place that adversely affected their respective agricultural and agro-industrial exports. The application of antidumping and safeguard measures were the most conflictual issues between countries in the region and the products that caused the disputes range from agricultural products to industrialized goods.

Latin America and the Caribbean: achievements against protectionism

With respect to the disputes that involve two leading DSB players (the United States and the European Union), the countries of the region, with few exceptions, were unable to reach satisfactory agreement at the pre-litigation stage. Of the proposals against the European Communities, an agreement at the pre-litigation stage was obtained in only one case (Chile and Peru reached an agreement on the French Government's restriction on the marketing of the *pectinidae* genus of molluscs in its market). In the remaining disputes with the European Communities, it was necessary to move on to litigation with intervention from the Panel and even from the Appellate Body. Table 2 shows the favourable results of the countries in the region against European protectionism. [1]

Table 2

CONCESSIONS OBTAINED BY LATIN AMERICA AND THE CARIBBEAN AGAINST

EUROPEAN PROTECTIONISM

Successful country	**Amended measure/policy (case)**
Ecuador, Guatemala, Honduras, Mexico and Panama	- Community policy applied to bananas, which is still at the phase of discussion of the tariffs to be applied by the EC (DS27)
Brazil	- Import treatment of certain poultry products (DS69)
Brazil	- Export subsidies granted by the EC to the sugar sector (DS266)
Peru	- Restriction on the use by Peruvian products of the "sardines" trade denomination in violation of the Technical Barriers to

	Trade (TBT) Agreement. (DS231)
Chile and Peru	- French regulations establishing the official names and trade denomination of *pectinidae* genus of molluscs (DS12)
Chile	- Safeguards applied by the ECs to Chilean salmon, which were eliminated at the consultation phase (DS326)

Source: Prepared by author, on the basis of WTO information.

Meanwhile, in some cases initiated by Latin American countries against the CE the procedures were simply paralyzed by the parties' inactivity, suggesting that they had lost interest in the complaint or that some amendment was made in conflictual legislation by means of an agreement that was not notified to the WTO.[2] A country of the region failed to obtain a favourable verdict in only one complaint against the EC (the case presented by Brazil challenging antidumping measures applied to piping -DS219).

Regarding the United States, there are several cases which are at a standstill without the WTO[3] having been notified of a result. The countries of the region were only able to reach a mutually convenient solution at the initial phase of the dispute presented by Brazil in reference to the special tax levied by Florida on orange products, where, after the establishment of a panel, the parties reached an agreement (DS250). Table 3 summarizes the favourable rulings against United States protectionism which led to concessions (trade liberalization) and those still pending, in other words, those where concession has not yet been achieved.

Table 3

CONCESSIONS OBTAINED BY LATIN AMERICA AND THE CARIBBEAN AGAINST

UNITED STATES PROTECTIONISM

Successful country	**Amended Measure/policy (case)**
Brazil and Venezuela	- United States regulations on gasoline (DS2, DS4)
Costa Rica	- Success in the case against United States restrictions on textile imports (DS24)
Mexico	- Antidumping investigation on the import of fresh or refrigerated tomatoes (DS49) [a]
Brazil	- Safeguard measures on steel products (D259)
United States trade measures with implementation pending [b]	
Argentina	- Antidumping measures imposed on tubular articles for oil fields (DS268)
Brazil, Chile, Mexico (others)	- Subsidies provided for in the Byrd Amendment (DS234)
Brazil	- Subsidies for American cotton (DS267)
Brazil	- Definitive safeguards applied to steel products (DS259)
Antigua and Barbuda	- Measures applied by United States authorities that affect the service of games of chance and electronic betting (DS285)

Source: Prepared by author on the basis of WTO information.

a Official communication from the United States Trade Department suggests that the matter has been resolved.

b Refers to cases that have been settled although the ruling has not yet been implemented.

Although the concessions achieved by Latin American and Caribbean countries have been mostly obtained at the litigation stage, the result is that this region has been exerting significant pressure to obtain

liberalization of key sectors for the poorest countries, such as that of cotton, bananas and of sugar, taking into account recent favourable rulings in these sectors obtained by members of the region. In short, bringing a dispute before the DSB, enables countries with totally different social and economic realities to initiate a dialogue under its "sponsorship"; other approaches, including diplomacy, might not be able to exert the same binding force on the countries involved in the dispute. In this context, it is worthwhile to quote the case of gambling and betting,[4] which brought together countries that are poles apart in terms of their economic realities: Antigua and Barbuda (per capita GDP of US$ 9,160) and the United States (per capita GDP of US$ 37,610 in 2003). [5]

Furthermore, once a complaint has been initiated in the legal dispute settlement system, the possibility of its being solved in accordance with pre-defined procedural principles and rules is greater, thereby reducing flexibility in terms of the use of political pressure; this is positive for developing and least developed countries, whose economic resources and political strategies for negotiation are usually more limited. Another favourable consideration is that a consultation with the DSB can attract the attention of other countries that could have an interest in the conflict, which would not occur if the dispute were closed at a bilateral or regional level. Consequently, other countries add their voice as "third parties", which helps to strengthen the claimant's case in political terms (a group of countries is in a better position than a single country to pressure the responding country by diplomatic means) and legal terms (other legal arguments may be added that could eventually influence the decision, as all of them should be evaluated by the panel and by the Appellate Body). [6]

V. CONCLUSION

The Dispute Settlement Body entails two essential elements for the smooth operation of trade relations at a global level: legal security in regard to how the disputes are settled and foreseeability of expectations in terms of anticipated results. The DSB represents an alternative for developing countries when bilateral negotiations fail to solve a trade dispute and taking into account the modest progress made in the last rounds of multilateral negotiations. Motivated by the recent unsuccessful debates of the last rounds of negotiations (Cancun and Hong Kong Ministerial Conferences), developing countries, in particular those of the region, have been using the DSB as a second channel to exert pressure against trade protectionism. This shows that this dispute settlement system has been playing an essential role in creating a favourable environment for the parties to enter into negotiations and achieve a solution that is satisfactory for both of them or, when this does not occur, at least offer the "executive title" (favourable ruling) which is used as an instrument to push for the interests of the developing countries to be taken into account in multilateral negotiations; it also serves as a legal precedent, which ultimately encourages more countries to file complaints against similar restrictive measures that have an adverse effect on their exports.

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[1] In these cases, the favourable outcome to the complaint does not mean that the conflictual regulations have already been effectively amended.

[2] This is the case, for example, of the disputes initiated by Brazil, challenging the European trade policy of granting special treatment to the Andean Group and of the Central American Common Market, which has a negative impact on soluble coffee imports from Brazil (WT/DS154, WT/DS209). It is also the case of the consultation proposed by Argentina against European restrictions on the wine trade (WT/DS263)

[3] WT/DS49, WT/DS78, WT/DS97, WT/DS111, WT/DS218, WT/DS224, WT/DS239, WT/DS325.

[4] WT/DS285

[5] According to information from the UNICEF database, available at: http://www.unicef.org/spanish/infobycountry/index.html

[6] Dispute Settlement Understanding, Article 10.2.