Introduction

In the wake of the inauguration of the World Trade Organization (WTO), there appeared a body of writing apparently eager to reveal the mysteries of this new organization and to publicize its rules and mandate. Some of this early literature was obviously in advanced stages of preparation, even while the signatures were being appended in Marrakesh, and not surprisingly exuded that hot off the press quality characteristic of pot boilers of one kind or another. A large part of this outpouring was addressed to trade lawyers and busy policy advisers, who it was thought, for reasons not entirely clear, stood to benefit from a retelling of the text of the agreement merely in other words, if not always in plainer language. In that first flush of euphoria marking the advent of the WTO, not much critical comment was forthcoming. For while nobody could fail to be aware that the agreement marked something of a compromise, and that therefore there were bound to be areas for further improvement, a new Round of trade negotiations with an inbuilt agenda was promised, and in any event, a whole new dispute settlement understanding (DSU) was in place to sort out the kinks. Before long, however, the deliberations of the panels and of the Appellate Body (AB) of the dispute settlement mechanism began to reinforce what was common knowledge, that an agreement or a treaty were but words on paper, waiting to be fleshed out and to be invested with meaning in the crucible of actual disputation. Thus, the case reports began to inspire analysis and study, and the jurisprudence of the WTO began to come under focus, albeit from a more or less general standpoint. Though the same could not be said for textual analysis of the concluded agreements, or for the record of their implementation, or indeed for preparations for further negotiations, the emerging jurisprudence was hardly scrutinized from the perspective of the smaller developing countries, and it is the purpose of this paper to help to correct that omission.

The Rule of Law

Interestingly enough, early misgivings about the DSU were located not in the developing countries, but in US opinion, and were particularly associated with a presumed ceding of sovereign authority to judges and to panels associated with countries whose legal traditions were not always viewed in a complimentary fashion. A particularly troubling point concerned standard of review considerations, and the deference with which the findings of domestic agencies, such as US Customs, would be treated. The US eventually won this point in relation to Anti-Dumping cases, with the role of the panel restricted to determining whether domestic
authorities had been unbiased and objective in the establishment of the relevant facts and in their evaluation. Some of this was grounded in plain American isolationism wearing modern clothes, some in internal American politics, and some in recognizably patronizing suggestions of the better wisdom to be found in the judicial system of the United States. Small developing countries, for their part, were thought to have nothing to lose, and even less to fear; the DSU was supposed to make life easier for them, since all, big and small, advanced and struggling, were now bound by the rule of law. Indeed, this idea of the rule of law, as a great leveler, itself undermined any inclination to make a special investigation of the situation of any particular category of countries. And given the majesty of the term, it was not surprising that that tendency was hard to counteract.

Five years down the road, though, and in the wake of the rulings on the EC banana regime, the mood is decidedly less sanguine. Now, an appreciation of the cost and complexity of litigation, and of the sheer commitment of resources and effort that is involved, has brought home the reality behind the magic of the rule of law. Indeed, this idea of the rule of law, as a great leveler, itself undermined any inclination to make a special investigation of the situation of any particular category of countries. And given the majesty of the term, it was not surprising that that tendency was hard to counteract.

The sheer momentum of events, including, in the case of the Caribbean, its wide involvement in a range of trade negotiations, all of which have to be conducted in some fashion or another against the backdrop of WTO compatibility, explains the preoccupation with training, building competence, and garnering resources to participate more fully in the DSU. And yet, the concerns that are emerging point to the possibility that there are deeper issues at stake, that in a word, the overarching architecture of the WTO had taken too much for granted. Admittedly, the record shows that developing countries are taking part in the DSU more and more. The latest statistics produced by the WTO Secretariat (15 January, 2001) indicate that there were 50 matters involving complaints by developing country Members, as compared to 123 from developed countries. Both categories of complaints, however, include cases in which developing countries are themselves the respondents. Thus, their participation is both as subject and object. And while it is possible to tally the cases in which the developing countries have prevailed, it has to be said that that kind of addition is often misleading for the simple reason that not every case has the same significance, either in its reasoning or in its consequences.

In the case of the Caribbean, the early attention was not to matters of substance in argument, but to procedure. The first grouse was about the Chairman selected for the AB. 'You could not want a bigger statement of bias than that,' commented the Prime Minister...
of St. Lucia (Anthony 1997). There were misgivings about the scope of participation afforded to third parties, about the precise coverage of enhanced third party rights, and on the issue of representation by private lawyers. Caribbean opinion also adopted two procedural grounds raised by the EC in the Bananas appeal, namely, the sufficiency of the request for the establishment of a panel, and the legal interest of the US in participating. The first ground turned on whether sufficient details had been provided, and the AB concluded that the applicable standard had been met. What was necessary was not details in the arguments or in the written submissions, but in the claims in the request for a panel: these must be specific enough in order to allow the defending and possible third parties to appreciate the legal basis of the complaint. Even this standard, however, poses problems for resource poor countries, and entails prior investigation and intelligence that may be difficult to achieve. With respect to the second ground, the AB concluded that no provision of the DSU required a claimant to have a legal interest. This was in answer to the EC argument that "the United States has no actual or potential trade interest justifying its claim, since its banana production is minimal, it has never exported bananas, and this situation is unlikely to change due to climatic and economic conditions." That was not the point, the AB said; rather, what was more to the issue was the intention of Article 3.7 of the DSU, which states that before bringing a case, "a Member shall exercise its judgment as to whether action under these provisions would be fruitful." It is therefore for the member to decide. A potential export interest by the US could not be excluded; the internal market for bananas in the US could be affected by the EC banana regime, and given the increasing interdependence of the global economy, all Members have a stake in enforcing WTO rules ‘since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.’ This last argument sounds like the international application of the principles of domestic public interest litigation, and it is not surprising then that the AB had to rebut the possibility that its reasoning might open the door to the busybody or the merely litigious claimant. It chose to do this by suggesting that the sheer cost of an action under the DSU should ensure that cases are not brought by Members with no immediate trade interest (para 7.51).

This is not real world reasoning. At the least, it amounts to an attempt to resolve problems of standing by cost implications. Not only is this unfair to poorer countries, it makes a mockery of the assertion that all Members of the WTO have a common interest in ensuring that the rules are respected and correctly implemented. As one commentator has noted: "A legal system which relies totally or predominantly on the participant’s capacity to pay for the legal costs involved introduces inequities and distortions and may result in situations where the dispute settlement mechanism is seen primarily as a locus of adjudication of interests of large and/or wealthy companies and countries" (Michalopoulos 1999). Another way of reading this is to say that all have an interest, but only some will have the resources to act on their interest. From one point of view, this may simply be regarded as an object lesson from the sphere of international litigation in the ramifications of an uncomfortable domestic fact – that there may be one law for the rich and another for the poor. In any case, the original Banana panel, in their role as Arbitrators, understood that cost implications are not an adequate filter. As they put it, "an initial decision on whether or not to raise a
complaint is necessarily the result of a subjective and strategic consideration from the individual perspective of a Member" (WT/DS27/ARB 9 Apr 99 para 6.9). This sounds more like diplomacy than law, reveals the scope for using complaints to gain leverage and exert pressure, and indeed shows how, under the cloak of the DSU, the politics of power and wealth is very much alive.

The idea that under the DSU diplomacy and power had given way to law was a major selling point for developing countries. It was based in part on the relative automaticity in decision-making at the stages of the dispute settlement process, including the establishment of a panel, the adoption of panel and AB reports, and the surveillance of implementation of rulings including authorization for retaliatory measures. It was also based on the overturning of the consensus rule that had worked to prevent the adoption of GATT reports; now, blocking required the concurrence of all Members, including the successful party to a dispute. Furthermore, the establishment of the AB to hear appeals on points of law from panel reports, with authority to 'uphold, modify or reverse the legal findings and conclusions of the panel' was sold as a device to ensure predictability and consistency. To further anchor this point, provision was made for a Member whose position had prevailed at the panel stage to appeal the legal reasoning and interpretations developed by the panel, opening the possibility for a Member to participate both as an appellant and an appellee in the same proceeding! Consider, then, the situation of a developing country that could barely afford to bring a case to protect substantive interests, let alone for the purpose of clarifying an interpretation. Consider, too, how the latter procedure could result in some countries being blind-sided by the development of new interpretations, whose coverage and applicability might not be immediately obvious. This may be regarded as law with a vengeance, especially since reasoning drawn from any area of the covered agreements is deemed relevant to any other area.

Outcome

Even after the Bananas case, in the Handbook produced for popular dissemination by the Inter-American Institute for Cooperation in Agriculture (IICA) we are told: "It is rather unfortunate that the WTO has received a lot of bad press in the region as a result of the banana dispute. A rule-based system remains the best guarantee for securing and maintaining small country interests in trade" (IICA 1999). As a theoretical proposition, there can be no quarrel with this conclusion. But we have passed the stage of theory. Rule-based or not, the DSU explicitly reserves and encourages Members to arrive at mutually agreed solutions to points at issue. The process of consultation and trade-off continues after the announcement of panel and AB rulings. Just to take some examples: in WT/DS56 on Textiles and Footwear, Argentina and the US reached an agreement on implementation of measures to comply with relevant rulings; in WT/DS69 on Poultry Products, the EC and Brazil reached a mutual agreement on time for implementation; in WT/DS90/1 on Agricultural, Textile and Industrial products, India and the US agreed on the reasonable period of time for implementation. In WT/DS76/1, on a complaint by the US against Japan on Measures Affecting Agricultural Products, Japan noted that it expected to reach a mutually satisfactory solution with the US regarding a new quarantine methodology. What transpires in consultation is not open to scrutiny, but it would be strange if the balance of power
among the parties involved were not a decisive factor. Indeed, the following extract from the testimony of Ambassador Charlene Barshefsky, the US Trade Representative, before the US Senate Committee on Finance, reveals the possible dynamics at work:

... US trade policy will support and advance the rule of law internationally by ensuring the enforcement of trade agreements and US rights in the trading system. Much of our enforcement work takes place at the World Trade Organization. We have filed more complaints in the WTO ... than any other member, and our record of success is strong.... In almost all cases, the losing parties have acted rapidly to address the problems. We will insist that this remain the case in all our disputes, including those with the European Union on beef hormones and bananas, and with Canada on magazines.... We have and will continue to aggressively pursue our rights, whether through the consultation process or ultimately through the WTO dispute settlement regime. (Barshefsky 1999)

The Trade Representative went on to claim that 'the US has complied fully with all panel rulings it has lost...' This however obscures the fact that compliance remains elective. A Member may chose to maintain an offending measure or decide not to rectify the relevant omission, but instead provide compensatory benefits; or it may chose not to provide compensation and suffer instead likely retaliation (Bello: 1996). It is clear then that the DSU permits 'the modification of' obligations, or even outright violation of them, in cases where benefits are great and the aggrieved nations can be made more or less whole through substituted concessions' (Jackson & Sykes 1997). How a country chooses to respond to findings inimical to its case is not a matter of law, or respect for legal norms, but a question of affordability. This is paralleled in modern contract law by the idea of 'efficient breach', where the calculation of joint benefits exceeding joint costs convinces the errant party not to amend his ways. From this perspective, it is a matter of concern that the WTO "not become an instrument of the few that would make the rule of law in international trade a masquerade for the perpetuation of mercantilist injustice" (Ramphal 1998).

In the case of developing countries, affordability is also a consideration even where they might prevail before the DSB. In many respects, retaliation against a developed country would be difficult to countenance, especially since the successful country would have to retaliate by itself and not undertake this as a joint endeavor. The time frame for compliance, prior to possible retaliation, is also a source of difficulty. This is not fixed by the panel, but left to the parties to sort out by mutual agreement, or failing that, by arbitration. The more protracted this process, the more the scope for undue pressure to be exerted on the developing country. As a consequence, claims won in the DSB might prove to be hollow victories.

The handmaiden of the rule of law, especially if strict interpretation of the covered agreements is pursued, is an emphasis on legality as opposed to outcome. In a sense, the adverse consequences suffered by a small developing country, for example, is to be treated as collateral damage in pursuit of a greater good, that of aggregate welfare, or for a principled purpose, that of ensuring adherence to undertakings. There is no room here for the domestic equivalent of the sentencing process, or for the social and other
consequences of a panel's rulings to be considered. And the consequences can be very far-reaching. For example, it was clear that the EC was stung by the Bananas rulings, and that its subsequent negotiating positions were colored by that experience, so much so that in the deliberations which eventually produced the Cotonou Partnership Agreement, it chose to hide behind the very broad skirt of WTO compatibility. Here, then, was a case of a sectoral sub-set (bananas) affecting not only other sub-sets (rice, sugar) but also the sector (agriculture) as a whole, and beyond that sector, having an impact on the entire range of the negotiations. To take another example: the DSU rules provide for cross-retaliation as between different sectors and different agreements. Thus, for a perceived lapse in the area of services or intellectual property there may be retaliation in the trade in goods. This is likely to weigh more heavily on developing countries, since cross-retaliation is permitted only where action in the implicated sector is ineffective (Das 1998).

It is not unknown, in many legal contexts, for the successful litigant to have cause to pause before proceeding to claim his just desserts. Travel along that road involves a calculation informed by considerations of vulnerability, and a concomitant appreciation of available degrees of freedom. Unequal participants in a rule-based system are not rendered equal by adherence to common rules, but by the common effect of those rules. There is a case, then, for instruments of compensatory equality to allow the juxtaposition of the fact of inequality with the fiction of equality. In some respects, this is covered by the idea of Special and Differential Treatment, but this is viewed under a temporal penumbra, with the implication that in the fullness of time, such arrangements can be discarded. This attitude also threatens to infect the treatment of preliminary phrases and preambles which enjoin the developed countries to take into account the special situation of developing countries, to exercise due restraint, and to provide assistance to developing countries. How exactly to give flesh to these sentiments is not clear. No developed country can easily chose to assist developing countries to prepare cases where its own Trade Ministry might be implicated, or where the activities of its businessmen are at the root of the complaint.

Nor would it be fair to expect this assistance in the task of turning legal concepts and language to one’s own advantage. WTO jurisprudence is marked by strict interpretation. This was clearly stated in WT/DS50/AB/R where the AB explained that the “legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself.” In WT/DS33/AB/R, the AB wrote that there was nothing in the DSU that was “meant to encourage either panels or the appellate Body to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.” What we have here is the principle of judicial economy, but also, a particular kind of legal fetishism capable of producing an inflexible approach. The essence of jurisprudence is how precedents are distinguished to accommodate development and new meaning, how ideas once scoffed at or barely accommodated move closer to center stage. For developing countries, the task is therefore to ground an insertion into the relevant processes, so that ideas and approaches meaningful to their context are forced into the debate, and like debt forgiveness at the end of the millennium, become notions whose time has come.
Such an outcome is more likely to assist developing countries in achieving the goal of fairness, as in fair trade as opposed to free trade. All the same, there has been no sustained exploration of the idea of fairness. Ironically, its groundings might be associated with US antitrust and hence domestic law (Gifford 1995). The sporting analogy that is sometimes used, as in ‘a level playing field’ is not entirely successful. This is not a sport, and in any case the evenness of the field is hardly germane if one has no control over the shifting of the goalposts. We still need to examine what is fair about fairness.

Conclusion

Developing countries have a particularly hard time ahead in the negotiating agenda on the reform of international trade. In a sense they are committed to fight against the tide of free trade and the principles enshrined therein: most favored nation status, which means that the most favorable terms given to any party must be extended to all, and the rule on national treatment, which means that the concessions extended to locally produced goods and services must be extended to foreign counterparts. The apprehension that the undiluted application of these principles is a road to disaster has strengthened the search for exceptions; the danger is that that can put developing countries on the defensive, as can be gleaned from the very name of the exceptions: Special and Differential Treatment, Preference, Waivers. Thus, they may find themselves in the position of always having to make the case, or worse, of seeming eccentric, even perverse, especially in the light of the view that the application of free trade principles will increase aggregate welfare.

How the jurisprudence of the WTO will develop as the issues become more and more technical, for example in the calculation of dumping margins, or injury, or in SPS cases, over the appropriate scientific evidence, is anybody’s guess. It is possible that the philosophical moorings of the DSU, such as they are, will become increasingly attenuated. Another possibility is that the decisions might lead incrementally to a new architecture. For this to happen, developing countries will have to increase their presence and the power of their arguments. To oil this process, the negotiators have in a sense to start backwards, to confront the interlocking intangibility that characterizes the contemporary challenges, and to secure a grounding for instruments of compensatory equity by which those challenges can be at the least accommodated and at the best surmounted.
Selected References


European Communities. 1999. Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB (9 April).


