Who Owns the Crown, the Wearer or the Bearer?

By:

Timothy Masiko

October 13, 2023

Introduction

As this symposium and a plethora of literature have no doubt illustrated over the last few years, the World Trade Organisation's (WTO's) famed Dispute Settlement Body (DSB) is at a critical stage of its development. Some have referred to this stage as a crossroads – and with good reason – but I think it is more of a magic roundabout. Whichever way we look at it, there is so much at stake no matter which direction the DSB takes by the end of this crisis. One lesser discussed factor is the all-important question of participation, representation and diversity in the dispute resolution process.

With the DSB variously referred to as the 'jewel in the crown' of the WTO or even as the crown itself – whether of jewels or of thorns – an important question seems to be, who should the DSB serve? While in monarchies the crown is a symbol of authority and power, it is often debated whether the crown belongs to the monarch or the people who vest said authority in the monarch.

This is not meant to incite a debate on the constitutional ownership of royal regalia, but the analogy might be instructive for the present debate. This post aims to pose some specific questions about participation, representation and diversity in the dispute resolution process from the perspective of lower- and middle-income countries (LMICs).

Some preliminary questions need to be asked and if possible, answered. What is meant by ‘participation’, ‘representation’, and ‘diversity’? Participation might be the easiest to describe or identify, as it relates to the use of the dispute settlement mechanism by WTO Members, whether as complainant, respondent, or as a third party. In the context of dispute settlement and especially this symposium, representation would refer to the availability of legal representation and advice to WTO Members that have historically low participation in the dispute settlement process. Finally, diversity questions the composition of adjudicators, at both the panel and appellate stages, and studies whether the composition of the DSB organs is representative of WTO Membership. This post will focus on participation and representation, as diversity is eruditely covered by Priscilla Vitoh’s post.

Participation

LDCs and developing countries accounted for only a quarter (24.5%) of disputes brought before the DSB in the WTO’s first ten years. By 2020, out of 623 disputes, one (0.2%) was initiated by an LDC, and 141 (22.6%) by non-BRIC (Brazil, Russia, India and China) developing countries. The statistics are similar when considering LMIC participation as respondents, with no LDC (0%) and 125 (20.1%) non-BRIC developing countries having been respondents in WTO disputes. By comparison, the four BRIC Members were complainants in 87 disputes and respondents in 100 disputes. In addition, only eight LDCs joined proceedings as a third party a total of 22 times, while 56 non-BRIC developing country Members were third parties 686 times. By comparison, 14 industrialised countries other than the EU and the US were third parties 835 times, while the EU and the US were third parties 267 times.

Admittedly, these statistics may correlate with participation in trade (expressed, for example, as shares of WTO trade), but it is worth noting that LDCs and non-BRIC developing countries make up 115 (70.1%) of the WTO’s

164 Members. There have been multiple attempts to explain these participation statistics, so I will not repeat those here. Three main questions remain:

1. How do we build technical and legal capacity in LDCs and developing countries to enable a higher level of participation in the WTO dispute settlement system?
2. Are there, or should there be, ways to incentivise participation in the system? and
3. What are the implications of absence from the system?

The third of these questions is by far the most important, as we cannot begin to answer the first two unless we know what the implications of low participation are. Has absence from the dispute settlement system resulted in any injustice or material damage to the economies of those Members that have little or no participation? If the answer is in the affirmative, there is certainly cause for concern, and if not, then we might not need to fix what is not broken. A more recent consideration might be the availability of alternative means of dispute resolution available to LDCs and developing countries in some contexts, such as the AfCFTA's Dispute Settlement Mechanism when it becomes operational. This, of course, would be subject to the WTO DSB's exclusive jurisdiction over disputes arising from covered agreements.

Should we encourage participation in the dispute settlement system? Only as necessary, in my opinion. If the need to use system has not arisen – a highly contestable proposition – then there is no need for alarm. But if the need has in fact arisen and gone without remedy, then the barriers to participation would need to be removed, whether by Members ensuring they have the legal and technical capacity to use the system that is available to them, or by strengthening institutions such as the Advisory Centre on WTO Law (ACWL) to make participation by the underrepresented Members easier. Ongoing insufficiencies at the ACWL, including limited staffing and the absence of non-legal technical inputs required for a WTO dispute significantly curtail its effectiveness. To its credit, the provision of free legal advice and discounted legal representation for LDCs might help increase LMIC engagement with the dispute settlement process.

These efforts can then feed into building the technical and legal capacity of LDCs and developing countries, through some potentially accessible interventions. The primary goal should be on increasing familiarity with WTO law and WTO dispute settlement with a particular focus on the LMIC context. Institutions such as trapca, TRALAC, Trademark Africa, SEATINI and others have a pivotal role in this process, as they have the capacity to support, train and advise technocrats in developing countries on WTO law and dispute settlement.

Representation

With the low participation attributed in part to the paucity of technical and legal capacity, representation is, arguably, inadequate. When Members do not have the capacity to request for consultations – whatever the cause may be – representation in the dispute settlement process is likely to be deemed a secondary concern. I think it is more circular than first impressions may lead us to conclude, since legal and technical capacity are inextricably linked to participation and the necessary representation. For example, an LDC with a limited presence in Geneva may have an ambassador and a few staff members representing its interests across all of the Geneva institutions (up to 24, depending on membership) and will therefore be less likely to have the capacity to engage with WTO dispute settlement compared to larger and more powerful WTO Members, like the US, which has the well-funded, staffed and equipped USTR to focus on trade matters.

The ACWL has an important role to play, including free legal advice and heavily discounted representation for LDCs, but with support provided in 77 disputes, more Members need to take advantage of the facility. Further enquiry is necessary to establish whether this is due to limited capacity at the institution or whether Members are simply not taking advantage of its services. With ongoing dialogues on WTO reform, a possible consideration might be the establishment of an institutional mechanism of support for LDCs and developing country Members within the DSB or dispute settlement process in order to increase the participation of these groups. Where appropriate, experiences from other international dispute settlement systems can be studied and the best ones adapted to the WTO context.

As the WTO reform agenda grows in the run up to MC13, it is imperative for developing countries to strengthen their negotiating position. One such

welcome initiative is Kenya’s call for African governments to cede negotiating authority to the African Union (AU) on trade, security and other matters. This would necessitate more coordinated action at regional and even continental level but should yield a unified and representative position that advances the interests of the developing countries.

View online: Who Owns the Crown, the Wearer or the Bearer?

Provided by Afronomicslaw