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

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

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

VI. Conclusion

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

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

KEY PROCEDURAL ISSUES: RESOURCES

Comments

DR. RICHARD L. BERNAL*, DEBRA P. STEGER**,
AND ANDREW L. STOLER***

DR. RICHARD L. BERNAL: As the process of globalization continues unabated and trade agreements increase in coverage, countries will for the first time create a genuinely global economy. Ironically, as liberalization proceeds and the markets both national and global become freer of restrictions and barriers the need for regulation and regulatory mechanisms also increase. Additionally, as national barriers to trade in services and financial flows are dismantled, the repercussion of inadequate regulations has become a serious issue requiring immediate attention. As liberalization exposes national economies to greater competition, these markets will need to be brought under increased global discipline, in which all countries participate in a multilateral, rule-based regime. The World Trade Organization (WTO) dispute resolution mechanism is a first attempt to provide such a multilateral forum for the resolution of international economic disputes.

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I. Prospective Use and Available Resources

The use of the WTO DSM is likely to increase substantially in the next few years (a) as countries become more familiar with the process, (b) as the transition periods end, and (c) as the full requirements of the TRIPs and services agreement come into operation.

As the case load of the WTO dispute settlement mechanism grows exponentially, the available resources will become increasingly inadequate. The issue of the availability of resources and the adequacy of resources has to be examined in relation to the WTO institutional machinery, the developed countries, and the developing countries.

II. Different Constituencies

There are two very different constituencies among the membership of the WTO, namely the developed countries and the developing countries. The developed countries were responsible for 79 of the 117 cases to date while developing countries were responsible for 38 cases. Developing countries were, however, involved in 65 of the cases. The developed countries have the human and financial resources to service these cases through the various stages of the dispute resolution process, but developing countries are either unable or have severely limited capacities to participate meaningfully.

First, the WTO Secretariat for dispute settlement proceedings involve the Appellate Body, the panelists, and the staff of the Secretariat. To date the permanent seven-Member Appellate Body has not experienced any difficulty in handling the caseload and there seems to be no shortage of qualified panelists. But given that the Secretariat provides staff for all panels there will be a problem, as there will be a sharp escalation in disputes referred to the WTO. In fact, the increased caseload has already had an enormous impact on the WTO Secretariat especially the available resources.

The issue of available resources has to be examined in relation to the WTO institutional machinery, the developed and developing countries, the Legal Division, and the Appellate Body Secretariat. The overload has already resulted in delays in the translation of panel reports, and the current budget and staff of the Legal Division and the Secretariat of the Appellate Body are already proving inadequate to meet the demands of the process. At present there are only two persons in the Secretariat available to provide technical assistance to developing countries, neither of whom are available to these countries on a full-time basis. Therefore both human and financial resources will have to be increased and this has to be done as quickly as possible.

Second, developed countries appear to have a more than adequate supply of trade lawyers familiar with the WTO agreements, both in the private sector and the government. Developing countries do not have adequate capacity in either the public or private sector.

III. Increasing Resources

Recognition of the considerable costs involved in the preparation and presentation of cases led the United Nations Secretary General, on the recommendation of non-aligned states, to announce on November 1, 1989, the creation of a Trust Fund to assist states in the settlement of disputes through the International Court of Justice (ICJ). The purpose of this fund is to provide financial assistance for developing countries for, inter alia: the preparation of memorials, counter-memorials, and replies; fees for agents, counsel, advocates, experts, or witnesses; research fees; costs related to oral proceedings (e.g. interpretation); expenses of producing technical materials; and costs relating to the execution of an ICJ judgment. This was in recognition of the fact that "costs can be a factor in deciding whether a dispute should be referred to the International Court of Justice" and that as such "the availability of funds would advance the peaceful settlement of disputes."

Similarly, justice requires that there be a recognition of the prohibitive costs associated with effective participation in any dispute settlement procedures and the impact that participation or failure to participate will have on the ability of developing countries to defend their vital economic interests. In recognizing this fact, the WTO, if it is to be an effective arbiter of the rights of countries in a liberalized global economy, must also provide meaningful access to the process. Such access may be facilitated through the provision of a pool of funds for developing countries not only aimed at enabling participation in a particular dispute, but also to develop the necessary expertise in these countries, which in time will obviate the necessity for such a fund.

In addition, the Secretariat may provide on-site training and exposure of developing country participants in the dispute settlement process through such mechanisms as attaching developing country delegates to a panel process from its inception to completion, thereby providing an overview of the entire dispute settlement procedure.

* * * *

DEBRA P. STEGER: I have been given the delightful, although unusual, task of presenting both my views and those of Andy Stoler, which he has ably outlined in his written comments (see p. 877). As I agree with everything that he has written, my task is that much easier. I must also, at the outset, offer a disclaimer that the views that I express are my own, as Director of the Appellate Body Secretariat, and not those of the Appellate Body or the Appellate Body Members themselves.

As a general theme, it is true that "the system is in danger of collapse at current resource levels and that both the Secretariat and developed country Members must increase the resources they devote to dispute settlement in the very near future."¹

1. C. Christopher Parlin, *Key Procedural Issues: Resources*, 32 INT'L LAW ____ (1998).