Guidelines for Dispute Settlement in the WTO

Although the increase in global trade relations, undoubtedly offers prosperity and other benefits, it also brings with it various kinds of domestic and external conflicts. The reality is that countries need to build synergies, reduce trade barriers and constantly seek new markets. Conflicts are now occurring more frequently and becoming more complex, affecting commercial concerns, the environment, food security, and technology. They may also worsen the state of the more vulnerable economies. Therefore, it is essential to have rules that clearly lay out the dynamics of trade, mechanisms in particular, to ensure compliance with the agreement. This is precisely the role of the Dispute Settlement System of the WTO and the other mechanisms that are normally covered by bilateral and regional trade agreements.

For a sector like agriculture and for an organization such as The Inter-American Institute on Cooperation for Agriculture (IIICA), composed mainly of developing countries, it is essential to closely follow unfolding events in international agricultural trade. Hence, it is important that IICA play its part, as an observer member of the Committee on Agriculture and the Committee on Sanitary and Phytosanitary Measures of the WTO, in keeping its members informed.

This note, prepared by the WTO Reference Center of the Program in Agribusiness and Commercialization, attempts to share with readers some aspects of the Dispute Settlement System of the WTO which may be particularly relevant to the developing member countries of IICA.

A. Trade Disputes

1. What is a trade dispute?

A trade dispute may be defined as a disagreement between two or more parties on the terms, interpretation, application, and the context of a trade relationship[1].These disputes may occur between companies, between companies and States or between States, and depending on the issues in question, may become extremely complicated.

However, the methods, tools, and procedures used to arrive at a settlement depend on the actors involved in the conflict. These may include private companies, States, or state owned companies.

Commercial enterprises are key players in the trade and exchange of goods carried out daily. It is thus, within the private sector that trade disputes most often arise: over sales contracts, intellectual property issues, with customs authorities etc.

States also engage in trade transactions as buyers or suppliers or agents of the exchange process— enacting laws and regulations, negotiating international free trade agreements, etc., — none of which escape trade disputes.

[1] Galván, J. (2006). Settlement of disputes and agriculture. *Mechanisms for stabilizing international market access.* San José, Costa Rica: IICA.

2. How can these differences be settled?

In order to settle these disputes, the parties may resort to negotiation, mediation, conciliation and arbitration[2]. They may also benefit from alternative procedures that vary from country to country and are contained in legal instruments such as the New York Convention, the Panama Convention, and the Model Law of the United Nations Commission on International Trade Law (UNCITRAL).

As the main areas of this paper concern the States, presented below are some of the mechanisms that governments may resort to in order to resolve their trade disputes[3]:

a. The Dispute Settlement Mechanism of the WTO whose regulations are detailed in the "Understanding on the Rules and Procedures on Dispute Settlement of the WTO" (UDS). This is a mandatory multilateral mechanism for all members and is the umbrella covering other dispute settlement mechanisms, such as regional agreements, adopted by WTO members. The WTO Dispute Settlement System is the central theme of this paper.

b. Regional Mechanisms. These mechanisms are usually implemented to protect intraregional trade and to expedite trade integration processes. At the same time they facilitate reparation for damages caused by violations. The Central American Integration System (CAIS), the Latin American Integration Association (LAIA), the Southern Common Market (SCM) and the Andean Community (ANC) are examples of regional integration schemes.

c. Mechanisms negotiated in Free Trade Agreements (FTAs). The FTAs are trade pacts that States sign to in order to facilitate the flow of goods and services. They discuss in detail various aspects of trade such as the reduction or elimination of tariffs and trade in services, and may include labor and environmental issues etc. They also include mechanisms for resolving disputes that enable more direct, less expensive and swifter settlement of disagreements, than would be the case if the WTO multilateral mechanism were consulted**.**

3. Trade Disputes in the WTO

In the World Trade Organization, a trade dispute arises when one or more of the members believe that a third party[4] is adopting a policy or a trade measure that violates the provisions adopted in the organization.

In other words, one seeks the WTO when a trade measure implemented or promoted by a State (or by a private agent representing a State[5]) contravenes the WTO rules and harms or threatens to harm the economy of one or more of its members.

Members have agreed that if that dispute cannot be settled through dialogue and bilateral negotiation, then the Dispute Settlement Mechanism of the Organization will be sought. The current Dispute Settlement System is based on the 1947 GATT[6].

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[2] The parties agree to submit their dispute for resolution before an arbitration tribunal and abide by the decision of this (award) as a final response (incumbent) and mandatory. International Trade Center, 2005. *Arbitration and alternative dispute resolutions. How to solve international trade disputes. The case of Costa Rica*. San José, Costa Rica: IICA. p.140.

[3] Galván, J. (2006). Settlement of disputes and agriculture. *Mechanisms for stabilizing international market access*. San José, Costa Rica: IICA.

[4] Refers to a third member of the WTO. This may be the government or public or private entities.

[5] For example, a bank, a commercial agency, among others.

[6] Official Term for original General Agreement on Tariffs and Trade (prior to 1994), before the formation of the WTO.

a. Who is involved in the settlement of disputes in the WTO?

Only central governments. For purposes of Public International Law, the State or the Central Government (customs territory in WTO terms) represents all its citizens in the international community, and also represents their commercial interests at the WTO through Trade Ministers, Ministers of Foreign Affairs and embassies or trade missions.

b. What do disputes cover?

A trade discrepancy[7] may result from a general or specific action that affects one or several sectors of the economy or one or more countries, or the production or exchange of a product or service. Countries can claim that a trade measure is affecting a combination of factors, and they can invoke the breach of one or more agreements of the WTO. For example, Guatemala requested consultations with Peru concerning Peru's imposition of "additional duty" affecting imports of certain agricultural products, such as rice, sugar, corn, milk and several dairy products. Guatemala argues that the measure is inconsistent with a number of agreed provisions of the WTO[8].

B. Advantages of the WTO Dispute Settlement System

1. Advantages for all WTO Members

When a State agrees to become a part of a supranational entity, for example, the United Nations (UN), or the World Trade Organization (WTO), it surrenders a part of its sovereignty to the organization and trusts that the organization will act on its behalf in areas where it has little influence and bargaining power. The same can be said of the Dispute Settlement System of the WTO.

In effect, this system offers the multilateral trading system and WTO members advantages such as[9]:

a. Security and Predictability

The WTO understands international trade and the flow of goods and services between member countries. However, this exchange is basically in the hands of private operators, so that security and predictability embedded in the laws, rules and regulations governing their activities are absolutely essential.

States must adhere to the WTO rules, regulations, laws, and other measures taken or subscribed to for the regulation of domestic and international trade. On becoming a part of the WTO, countries automatically accept that all the WTO rules **are mandatory**, including those governing the dispute settlement mechanism**.**

One of the many reasons for the increase in the number of members in the Organization-it has 159 members with an expected increase in 2014- is precisely this guaranteed compliance. The Dispute Settlement Body (DSB) is the entity responsible for implementing the UDS and overseeing procedures for settling disputes.

[7] To view examples of disputes go to: http://wto.org/spanish/tratop_s/dispu_s/dispu_s.htm
[8] For details on the case go to : http://wto.org/spanish/tratop_s/dispu_s/cases_s/ds457_s.htm
[9] WTO, 2014. *Training Module on Dispute Settlement*. Available at: http://www.wto.org/spanish/tratop_s/dispu_s/disp_settlement_cbt_s/signin_s.htm

The primary objectives of the Dispute Settlement System of the WTO include:

i. Actively seeking mutually acceptable resolutions. The primary objective of the Dispute Settlement Mechanism is to resolve disputes, preferably by mutual agreement, and in accordance with the provisions of the organization**.**

ii. Facilitating judicial processes via a panel and the Appellate Body in cases where a mutually acceptable resolution has not been arrived at. Even so, countries are always encouraged to arrive at a bilateral settlement through dialogue and negotiation.

The system also facilitates:

- The right to make a claim and mount a defence
- The defence and enforcement of the rights and obligations of WTO members. .
- The examination of substantial elements of claims, in compliance with policies, procedures, detailed steps and deadlines.
- The timely settlement of the dispute (by implementing procedures and standards within the period of time stated by the UDS agreement).
- The issuance of a fair resolution (the parties in dispute may not be a part of panels or the Appellate Body) which is implemented promptly.
- The removal by the defendant of all measures that are incompatible with the rules of the WTO (the WTO does **not** offer payment in kind for damages).
- Enforcement of trade sanctions (compensations and countermeasures) on the defaulting member of a resolution.
- Appealing the panel's report. The dispute settlement system has an Appellate Body to which members who are dissatisfied with a decision may resort.
- Formal monitoring of the implementation of a resolution, once the panel's report has been accepted**.**

b. Claims on Subsidies and Domestic support

WTO members have agreed to remove subsidies and grants for **non** agricultural products. However, they may apply subsidies to agricultural products under certain conditions and limits. Unlike bilateral and regional trade agreements, in the WTO, countries negotiate commitments to reduce agricultural subsidies. The Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture have made this the standard approach. Thus countries can resort to the Dispute Settlement System, in cases where a violation by one or more members of the WTO in this matter is noted.

c. Negative consensus: without the right to veto

Currently, a decision taken through the dispute settlement system is considered adopted unless there is consensus against the decision. This special process of decision making is usually called "negative consensus." That is, if the defendant or any other member wishes to impede the adoption of a given report, it will have to convince all the other members of the WTO (including the opposing party) so that they can support their objection. This process has never actually ever been used in the WTO, which means that resolutions are practically adopted automatically.

d. Coherence and credibility of the dispute settlement system

Added to the compulsory nature of compliance with the regulations, two elements help to give greater coherence and predictability to the dispute resolution system:

Exclusive jurisdiction: In the dispute resolution systems of the GATT of 1947 and of the Codes of the Tokyo Round (1973)[10], rarely were resolutions adopted, since the claimants were allowed to select the agreement and the mechanism for dispute settlement that were more in keeping with their interests or to propose several controversies on a given issue to benefit from different arrangements. Accordingly, different or opposing resolutions arose for the same conflict, which affected the credibility and effectiveness of the system.
On the other hand, the WTO dispute settlement system has a single mechanism for resolving disputes[11]. Furthermore, application of the resolutions issued by the special groups or by the Appellate Body is subject to monitoring, which strengthens the system and gives it credibility and trustworthiness.

Prohibition on adoption of unilateral measures: The member countries of the WTO have entrusted a portion of their sovereignty to the Organization, and have agreed to resort to its dispute settlement system to resolve any trade conflicts. This means that countries are discouraged from taking unilateral measures as a reprisal, since this could lead to greater conflict, which are likely to affect their population (usually, excessive or disproportionate) and could develop into political and economic conflicts that negatively affect the population of the countries in dispute as well as the international community.

2. Importance of the WTO dispute settlement system for developing countries

The dispute settlement system in the WTO offers many advantages to its members; but at the same time, it has been the subject of various criticisms, particularly with regard to appeals, some concepts and interpretations and the jurisprudence that has been generated since its implementation[12].

a. Regulations take center stage

"*The strongest is not always the winner"*
In the WTO, each country determines its own state of development. Nevertheless, this state is irrelevant when it becomes a matter of adhering to rules: all are binding.

Theory shows that, in the absence of a binding dispute resolution system, the "strongest" (or the "richest") usually win, because they would have more means or more influence in order to defend their interests or impose their conditions. Nevertheless, the dispute settlement system of the WTO treats all countries alike: decisions are taken based on regulations and not according to the size of one's economy. It should be mentioned that on more than one

[10] A code is a set of legal rules that regulate a particular issue. It defines the specific fines, penalties and responsibilities for the issue and applies them only to the signatories. In the case of the Tokyo Round, a legal text was decided for each one of the issues negotiated (i.e. Antidumping Code, Civil Aeronautic Code, Dispute Resolution Code, Differentiated Treaty and Most Favoured Nation Code; etc) and applied to different groups of countries. In the WTO, all the agreements (with two exceptions) are multilateral in nature, i.e., they apply to all members equally. For further information on the Tokyo texts, go to: http://www.wto.org/spanish/docs_s/legal_s/prewto_legal_s.htm

[11] For example, if a difference arises with respect to a regional trade agreement (between two or more countries) the parties can only resort to the specific agreement or to the WTO dispute settlement system.

[12] González, A. (2006). *La solución de controversias en los acuerdos regionales de América Latina con países desarrollados*. (Conflict resolution in the regional agreement between Latin America and developing countries. p. 19-23. Santiago, Chile: ECLAC.

occasion developing countries have faced off against large economies and have managed to win their petition for withdrawal of commercial measures that affected their interests[13].

b. Special and differentiated treatment: support for small economies

Over the last decade, member countries classified as developing countries have increased their participation in the dispute settlement system, either as claimants, as defendants or as third parties. For an organization in which two thirds of its members are developing countries or least developed countries, this situation is instructive.

These countries, however, face several obstacles when using the system[14]. For example, the resolution of a controversy can take an official up to two years, which means that the affected country cannot export during that time and must wait until the measure in dispute is raised (between two and five years). The economic damages can be enormous.

With this situation in mind, the WTO confers special rights on the developing and less developed member countries.

b.1. Special and differentiated treatment

All provisions relating to special and differentiated treatment are an integral part of the WTO agreements[15]. Indeed, the UDS recognizes the special situation of developing countries and of least developed member countries, and has placed additional or favorable procedures and legal assistance at their disposal, or has even granted extensions to the usual deadlines.[16]

b.2. Technical assistance

In addition to making the good offices of the Director-General available to developing countries and least developed countries, the UDS has established specific regulations so that the Secretariat of the WTO provides to these countries, upon request, additional technical assistance and legal advice. Thus, the impartiality of the Secretariat is guaranteed.
The Secretariat also organizes special courses on procedures and practices for dispute settlement so that the Member Countries can update their knowledge in this regard.

[13] WTO, 2014. Three of the cases in Latin America and the Caribbean illustrate this argument: *a) Dispute DS2*. Defendant: The United States. Claimant: Bolivarian Republic of Venezuela. Subject: Guidelines for reformulated and conventional gasoline. Details at: http:/wto.org/spanish/tratop_s/dispu_s/cases_s/ds2_s.htm; *b) Dispute DS24.* Defendant: Restrictions on Imports of Cotton and Man-Made Fibre Underwear. http:/wto.org/spanish/trato p_s/dispu_s/cases_s/ds24_s. &htm; *c) Dispute DS27*. Defendant: European Communities. Claimants: Ecuador; Guatemala; Honduras; Mexico; the United States. Subject: Regimen for the importation, sale, and distribution of bananas. Details at: http:/wto.org/spanish/tratop_s/dispu_s/cases_s/ds27_s.htm

[14] The greatest difficulties for developing and least developed countries in the process of dispute resolution lie in the availability of personnel (with respect to the quantity and complexity of the work of the WTO), investment in terms of time and money, and the economic damage resulting from the trade measure imposed by the other member.

[15] "Special and differentiated treatment" is a technical term that is used in the Agreement on the WTO to refer to the rules that take into account the situation of developing and least developed countries and which are only applied to members that are so described.

[16] WTO, 2014. Training Module on the Dispute Settlement System. Available at: http://www.wto.org/spanish/tratop_s/dispu_s/disp_settlement_cbt_s/signin_s.htm

C. Participation of IICA member countries in the WTO dispute settlement system

All member countries of IICA, with the exception of the Bahamas, are members of the WTO; hence, the importance of IICA's participation as an Observer in the Committee on Sanitary and Phytosanitary Measures (since 2002) and in the Committee on Agriculture of the WTO (since 2010).

Canada and the United States participate in their capacity as developed countries, Haiti as a least developed country and the other countries (31 countries in total) as developing countries. Given this configuration, as well as the weight that agricultural trade has in these economies, whether through imports, or through exports (or both), all the member countries of IICA should be aware of the functioning of the WTO and, in particular, of the provisions that apply to developing countries and to least developed countries.

Between January 1995 and December 2013, the countries of Latin America and the Caribbean accessed the WTO dispute settlement system on 35 occasions as claimants and on 20 occasions as defendants, in order to resolve agricultural issues. Furthermore, they have used the system as third parties on 485 occasions; agricultural issues were not necessarily resolved on these occasions. The Caribbean Region has participated primarily in its capacity as third party, except for Trinidad and Tobago, which has, on two occasions, been a defendant.

Between January 1995 and May 2014, the United States and Canada were the countries of the hemisphere that had presented the most cases of commercial, agricultural, and non-agricultural disputes. This situation is explained by the volume of goods and services that these countries trade, the connections and trading partners they have, and the diversity and quantity of the sectors in which they participate. Canada has accessed the dispute settlement system on 33 occasions as a claimant, on 17 occasions as a defendant and on 95 as a third party. In 107 cases, the United States has accessed the system as a claimant, in 121 cases as defendant and in 104 as a third party.

In the next bulletin, we will examine the status of some agriculture-related cases that are currently in dispute within the dispute resolution system of the WTO. We can examine the performance of the member countries of IICA in this type of dispute and learn more about the most sensitive products of the region.

Conclusions

The context of globalization that characterizes the world economy today forces the countries to organize their trade relations, both at the domestic and international levels; hence, they reach bilateral, regional, or multilateral trade agreements (like that of the WTO), in order to agree upon rules that offer them protection, safety, predictability, and transparency. The mechanism that guarantees fulfillment of what is agreed to within the Organization is the WTO dispute resolution system.

The dispute settlement system offers numerous advantages to its members. It is a system that seeks impartial and prompt resolution to a conflict, that treats its members with equity and coherence, and, perhaps what is most relevant, it takes a country's developmental situation into account and allows members to question internal assistance and grants for agriculture, something that is not possible in either regional or bilateral mechanisms.

Certainly they are many the benefits that may be derived from the system; but there are also outstanding tasks relating to measures for reward of damages, suspension of obligations, imbalances between countries, etc.

The special and differentiated treatment received by developing countries and least developed countries that are members of the WTO does not solve their problems; but indeed, it represents important support within the framework of their trade interactions. This scenario is much more favorable than the absence of any regulation, especially when the most delicate sectors of the economy, such as agriculture, are at stake.

Of the member countries of IICA, the United States and Canada are the countries that have used the WTO Dispute Settlement System the most frequently. They are followed by the Latin American and Caribbean countries, but to a significantly lesser degree, which shows that the small economies still face economic, political and technical challenges that prevent more dynamic participation in the system and restrict the benefits that they could obtain.

In the midst of a constantly-changing international environment, where international trade forums and trade agreements are essential to maintaining order and access in trade relations, the technical cooperation that IICA provides to its member countries with respect to their participation in the WTO, especially in matters affecting agriculture and sanitary and phytosanitary measures, are indispensable for both organizations.

Hence it is important that IICA continue to participate as an Observer member of the Committee on Agriculture and the Committee on Sanitary and Phytosanitary Measures of the WTO. It is also important to strengthen the partnership between the two organizations and for them to succeed in developing their technical capabilities, so that the member countries can take better advantage of the benefits of the WTO system and the technical support that IICA can provide.

If you wish to obtain more information, kindly contact Adriana Campos Azofeifa, Specialist in Policies and Trade Negotiations at IICA and Coordinator of the WTO Reference Center at IICA, by writing to adriana.campos@iica.int or telephone no. (506) 2216-0170. Contact can also be made with Nadia Monge Hernández, Technical Assistant of the WTO Reference Center at IICA, at e-mail centroreferencia.omc@iica.int, telephone (506) 2216-0358.