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From Diplomacy to Deadlock: Developing Countries and the Unfinished Legalisation of WTO Dispute Settlement

Abstract

The move from GATT's diplomacy-oriented practice to the WTO's adjudicative system was meant to narrow the gap between weak and strong traders. This article asks whether it has. Drawing on the dispute record to 2000, later scholarship and the recent breakdown of appellate review, it avers that legalisation widened developing countries' access to enforcement but left three asymmetries largely intact: the cost of litigation, the unequal value of retaliation, and the declaratory character of special and differential treatment. Since December 2019, the paralysis of the Appellate Body has added a fourth. The article ends with reforms aimed at the position of developing members, not simply at restoring the status quo ante.

Keywords: WTO; dispute settlement; developing countries; Appellate Body; retaliation; special and differential treatment

Introduction

Trade law lawyers have long disagreed about whether a dispute system should settle disagreements or apply law. One school treats clashes between sovereigns as bargaining problems to be smoothed over. The other holds that impartial rules, applied by someone other than the disputants, protect the weak from the strong.¹ Developing countries have an obvious

¹ Abdul Moneim Osman M Taha, 'GATT/WTO Dispute Settlement System: A Third World Perspective' (PhD thesis, Jawaharlal Nehru University 2001) 3–7 ('Taha'); Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International 1997) 27–31.

stake in the argument. If rules are costly to use, the weak gain little from them, and if diplomacy governs, they bargain from a poor position.²

The Uruguay Round settled the argument on paper. The Dispute Settlement Understanding (DSU) replaced a consensus-bound and partly diplomatic procedure with a single system built on automatic panels, appellate review and fixed deadlines.³ The practical question is whether developing members can use that text at a cost they can bear, against defendants who can retaliate more credibly than they can.

This article argues that legalisation widened developing countries' access to enforcement but left three asymmetries largely integral: the cost of litigating, the unequal value of reprisal, and the declaratory character of special and differential treatment. Since December 2019, a fourth has appeared, because the Appellate Body can no longer hear appeals. Part 2 traces the move from GATT to the WTO. Parts 3 and 4 examine developing-country participation under each regime, and Parts 5 to 7 deal with retaliation, third-party rights and the appellate crisis. Part 8 proposes reforms.

From Diplomacy to Adjudication

GATT 1947 said little about disputes. Articles XXII and XXIII provided for consultation and, failing that, referral to the Contracting Parties, who could recommend action or authorize the suspension of concessions. The Havana Charter contained a fuller chapter, including arbitration and an advisory route to the International Court of Justice, but it never entered into force. Panels grew out of practice in the early 1950s. The 1979 Understanding and the 1989 Improvements mostly codified that practice, adding time limits and a route to arbitration. The Tokyo Round codes complicated matters by creating separate procedures with their own membership, which invited forum shopping.

The central weakness was decision-making. Establishing a panel and adopting its report both required consensus, so a defendant could block either step. Hudec's study of the GATT legal system showed that it worked better than its critics allowed, as a diplomatic practice that most

² 'Developing countries' is used here for what the thesis calls 'LDCs', to avoid confusion with the WTO category of least-developed countries.

³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (adopted 15 April 1994) 1869 UNTS 401; Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 Minnesota Journal of Global Trade 1.

members respected most of the time.⁴ But the party with the most to lose could still stall a ruling, and the party least able to absorb delay paid for it.

The DSU changed the mechanics. Panels are established, and reports adopted, unless all Members decide otherwise.⁵ A standing Appellate Body of seven members reviews panel reports on points of law.⁶ The reasonable period for compliance is subject to a fifteen-month guideline, and a successful complainant may seek authority to suspend concessions if the defendant does not comply.⁷ Consultations remain the first step, and the DSU still states a preference for mutually acceptable solutions.⁸ The system is better described as rule-oriented than rule-based: it keeps room for negotiation but places the final word with adjudicators, not the disputants.⁹

Developing Countries under GATT

Developing countries were marginal users of GATT adjudication. Between 1947 and 1995 they raised forty-two complaints, about a fifth of the disputes that reached panels, and forty of those were aimed at developed members. The United States (21 cases) and the European Community (20) were the leading defendants. Brazil was the most active developing complainant with eight cases, followed by Chile with six and Argentina with four.¹⁰ Almost half of their cases concerned quantitative restrictions, and the few that challenged anti-dumping or countervailing duties produced little. Only a handful date from the 1970s; twenty were filed in the 1980s.¹¹

The causes were structural, not a shortage of grievances. Many developing countries were still colonies when GATT was drafted, and in the 1970s some newly independent states preferred South-South cooperation to a contest with former colonial powers inside a free-trade framework.¹² Those who did litigate found that the 1966 Decision on Article XXIII, which offered developing complainants the Director-General's good offices, was virtually never applied by panels, apparently because its language was hortatory and nothing set out how it

⁴ Robert E Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers 1993).

⁵ DSU arts 6.1, 16.4, 17.14, 22.6.

⁶ DSU art 17.1, 17.6.

⁷ DSU arts 21.3(c), 22.2.

⁸ DSU art 3.7.

⁹ Taha 13–14.

¹⁰ Taha 200–01.

¹¹ Taha 200.

¹² Taha 201.

should operate.¹³ Cases often ran beyond two years, a long time for an economy living off one or two export commodities, and a procedure that began with consultations in capitals and in Geneva demanded expertise that small administrations lacked.¹⁴

Developing Countries under the WTO

Participation rose sharply. In the WTO's first five years, developing members brought more complaints than in fifty years of GATT.¹⁵ By January 2000, India, Thailand and Mexico had filed five each. Thirteen developing members had been respondents in forty-five cases, twenty of them brought by the United States and ten by the European Communities, with India, Korea and Brazil the most frequent targets.¹⁶

Several early rulings mattered to developing members. The first appeal the Appellate Body decided, *US - Gasoline*, was brought by Venezuela and Brazil.¹⁷ In *Shrimp*, India, Malaysia, Pakistan and Thailand challenged a US import ban imposed to protect sea turtles; the Appellate Body accepted that such a measure could fall within the environmental exceptions but found it had been applied in an arbitrarily discriminatory manner.¹⁸ India won on transitional safeguards in *US - Shirts and Blouses* and lost, as respondent, on the TRIPS 'mailbox' obligations.¹⁹

Yet the same decade showed how fragile that participation was. The DSU contains some special and differential provisions, but panels have applied them rarely, if at all, and one of obvious practical use is Article 27.2, which requires the Secretariat to supply a qualified legal expert to a developing member on request.²⁰ The Appellate Body's ruling in *EC - Bananas III* that governments may use private counsel before panels is defensible, but it raises costs for any party that must hire foreign lawyers.²¹ The Advisory Centre on WTO Law, created by treaty in 1999 and operating since 2001, has narrowed this gap for members that join. Still, Bown and

¹³ GATT, Decision of 5 April 1966 on Procedures under Article XXIII, BISD 14S/18; Taha 201.

¹⁴ Taha 201.

¹⁵ Taha 202.

¹⁶ Taha 121–23. The figures are compiled from WTO records to January 2000.

¹⁷ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996.

¹⁸ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998.

¹⁹ Appellate Body Report, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997; Appellate Body Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted 16 January 1998.

²⁰ DSU arts 3.12, 4.10, 12.10–12.11, 21.2, 21.7–21.8, 24 and 27.2; Taha 120–21, 203–04.

²¹ Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997; Taha 121.

Hoekman's study of the 'missing' developing-country cases finds that the poorest members seldom appear even as interested third parties, because the extended litigation process is expensive relative to the trade at stake.²² Busch and Reinhardt likewise stress legal capacity as central to developing-country outcomes.²³

Retaliation and the Limits of Legal Entitlement

Enforcement is where the asymmetry is sharpest. The DSU's countermeasure regime is a *lex specialis*: a Member cannot answer another's WTO breach with the customary law of countermeasures, only with suspension of concessions authorised by the Dispute Settlement Body.²⁴ The complainant must look first to the same sector, then to other sectors under the same agreement, and only then to other agreements, and the level must be equivalent to the nullification or impairment suffered.²⁵ Authorisation follows almost automatically once requested, since only consensus can refuse it, but the level is open to arbitration, and arbitrators have tended to trim.²⁶ In *Hormones*, the United States sought authority for US\$202 million and Canada for C\$75 million; arbitrators allowed US\$116.8 million and C\$11.3 million a year. In *Bananas III*, a US request for US\$520 million became US\$191.4 million.²⁷ The remedy is also prospective. It answers harm suffered after the compliance period expires, not before.²⁸

For a large complainant, these limits are tolerable. For a small one, retaliation means withdrawing market access from a more powerful partner, and the cost may fall on its own consumers. Brazil's experience in *Upland Cotton*, where it obtained authority to retaliate across agreements, including under the GATS, shows the instrument can work when the complainant carries enough market weight; the parties eventually reached a framework settlement.²⁹ The

²² Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8 *Journal of International Economic Law* 861; Agreement Establishing the Advisory Centre on WTO Law (Seattle, 30 November 1999).

²³ Marc L Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' (2003) 37 *Journal of World Trade* 719.

²⁴ Junianto James Losari and Michael Ewing-Chow, 'A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law' (2015) 16 *Journal of World Investment & Trade* 274, 280–81; Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules Are Rules – Toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335.

²⁵ DSU art 22.3–22.4; Losari and Ewing-Chow (n 27) 281, 284.

²⁶ DSU arts 22.6–22.7; Taha 113–14.

²⁷ Decisions of the Arbitrators, EC – Hormones (US) and EC – Hormones (Canada) (Article 22.6 – EC), WT/DS26/ARB and WT/DS48/ARB, 12 July 1999; Decision of the Arbitrators, EC – Bananas III (US) (Article 22.6 – EC), WT/DS27/ARB, 9 April 1999; Taha 101, 114–15.

²⁸ Losari and Ewing-Chow (n 27) 284.

²⁹ Recourse to Article 22.6 Arbitration, United States – Subsidies on Upland Cotton, WT/DS267/ARB/2 (31 August 2009), discussed in Losari and Ewing-Chow (n 27) 281.

value of the remedy depends on the retaliator's economic size more than on its legal entitlement, a point Diego-Fernández makes from the standpoint of developing members.³⁰

One proposal in earlier work on this subject would bar developed members, for ten years, from retaliating across agreements against a developing-country defendant.³¹ The idea responds to real inequality, but it protects defendants rather than helping complainants, and it would also shelter non-compliance. It is best kept as a fall-back. The main effort belongs on the complainant's side, as Part 8 suggests.

Third Parties as a Low-Cost Route

Participation need not mean litigating. Developing members have often joined disputes as third parties under DSU Article 10, which lets them protect systemic and commercial interests at much lower cost. Albashar and Maniruzzaman observe that third-party rights have been extended beyond the bare text in a few disputes (*EC - Bananas III*, *EC - Tariff Preferences*, *EC - Export Subsidies on Sugar* and *EC - Hormones*) and refused in others, such as the *US - 1916 Act* and *Australia - Salmon* disputes, and that the rights remain unclear and limited.³² Proposals by members, including Costa Rica, would give third parties access to all submissions and let them intervene on appeal even if they skipped the panel stage. Developing members are likelier to have an interest in an outcome than the resources to be a principal party, so clarification would cost little and help them disproportionately.

Appeals into the Void

For developing members, the Appellate Body was the system's most visible gain. Three of its first seven members came from developing countries (Egypt, Uruguay and the Philippines), and it gave every member, whatever its weight, one body to correct legal error.³³ It lost its quorum in December 2019, after the United States had blocked appointments from 2017, and has not heard an appeal since.³⁴ A losing party can now appeal 'into the void', leaving the panel

³⁰ Mateo Diego-Fernández, 'Compensation and Retaliation: A Developing Country's Perspective' in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (CUP 2007).

³¹ Taha 206.

³² Faisal A S A Albashar and A F M Maniruzzaman, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives' (2010) 11 *Journal of World Investment & Trade* 311, 312–14.

³³ Taha 93 n 25.

³⁴ Giorgio Sacerdoti, 'The WTO in 2019: Systemic Developments, Disputes and Review of the Appellate Body's Reports' (2019) *Italian Yearbook of International Law*, <https://ssrn.com/abstract=3578938>.

report unadopted and the dispute unresolved; by the end of 2023, more than twenty appeals had been filed this way.³⁵

Some members, including the European Union and China, built a workaround in the Multi-Party Interim Appeal Arbitration Arrangement. The European Commission reported that its participants, together accounting for around 60 per cent of world trade, reaffirmed it at the Fourteenth Ministerial Conference in Yaoundé in March 2026.³⁶ That conference, however, closed without a reform work plan or a final declaration, and many developing members' call to restore two-tier review went unanswered.³⁷

The consequences are uneven. A large exporter inside the arrangement can secure a binding appeal; a small one outside it cannot, and its panel victory can be neutralised by a defendant's appeal into the void. Developing members have themselves worried that the Appellate Body might drift into territory reserved for the political membership, and the United States has justified its blockade with a similar charge of overreach.³⁸ The sensible lesson is that restoring appellate review should be paired with a narrower remit and a remand mechanism, not treated as a return to 1995.

Reform Priorities

Capacity before doctrine- The DSU promises equal access that developing members cannot yet exercise. Legal assistance under Article 27.2 should be expanded; a dedicated fund could support poorer litigants, and developing members could pool expertise through a joint legal service and regular exchanges of experience.³⁹ Shaffer's work suggests such pooling works best when it draws in domestic exporters, who know where barriers actually bite.⁴⁰

Make special and differential treatment operational- panels should record how they considered the relevant provisions in each case involving a developing member, and a simple screening step would show whether they did so.⁴¹ Transitional periods under TRIPS, TRIMs

³⁵ Library of Parliament (Canada), 'Settling Disputes at the World Trade Organization: Alternatives to Appealing "Into the Void"' (HillNotes, 29 January 2024).

³⁶ European Commission, 'Outcome of the 14th WTO Ministerial Conference' (30 March 2026).

³⁷ Bruegel, 'A Plan to Revitalise the World Trade Organization' (policy brief, 2026) s 4.5; Shimukunku Manchishi, 'WTO Reform Agenda Takes a Dive at MC14' (African Climate Wire, 1 April 2026).

³⁸ Taha 202, 205; Congressional Research Service, The World Trade Organization's (WTO's) Appellate Body: Key Disputes and Controversies (R46852, 2021).

³⁹ Taha 205-06 (recommendations 2, 6 and 11).

⁴⁰ Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5 World Trade Review 177.

⁴¹ Taha 205-06 (recommendation 8).

and GATS should be extended, paired with market access and technology transfer commitments.

Be cautious with cost-shifting - A proposal that developed complainants pay costs when their case fails has intuitive appeal,⁴² but it may deter legitimate claims and does nothing for complainants who cannot afford to start. Funding the weaker side is the better route.

Restore review, with limits- Appellate review should return with a narrower remit and a remand power where factual findings are incomplete. Meanwhile, the interim arrangement should be open to developing members, with legal assistance extended to appeals under it.

Conclusion

Legalisation did something real for developing countries. They litigate more, they can win cases that GATT's consensus rule would have buried, and they gained a permanent appellate body on which they sat. But a right is worth only what its holder can afford to claim and enforce. Cost, retaliation capacity, and underused special and differential provisions still divide strong and weak, and the loss of appellate review has widened the divide. Restoring the old two-tier system without closing these gaps would repeat the original mistake of treating a legal entitlement as a practical capability.

⁴² Taha 205 (recommendation 3).