NOTE

PHILIPPINE PARTICIPATION IN WTO DISPUTE SETTLEMENT

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There is an adequate international legal framework that works to address our legitimate grievances. All we have to do is properly access it and prove our case. We must do everything allowable and possible within the bounds of international law and the accepted civilized norms of behavior among nations to protect our rights.

- Leonardo Q. Montemayor
Former Secretary of the Philippine Department of Agriculture
On the WTO Dispute Settlement System
Government Press Release, 29 November 2002

There is even a silly proposition to take the case to the World Trade Organization, where the case will surely gather cobwebs.

- Michael E. Abrazaldo
Filipino citizen from San Andres Bukid, Manila
On the Philippine Case Against Australian Fruit and Vegetable Import Ban
Letter Published in the Philippine Daily Inquirer, 6 July 2002

Those who want results do not file cases with the WTO.

- Edgardo Angara
Philippine Senator
Interview Published in the Philippine Daily Inquirer, 30 October 2002

INTRODUCTION

Since the World Trade Organization (WTO) in 1994 as an original member, the Philippines has been party to eleven (11) of the three hundred and four (304) disputes brought before the organization's Dispute Settlement Body (DSB). The Philippines participated as complainant in four cases and as defendant in four more cases, and intervened as a third party in three cases. Philippine complaints were raised against one developing country (Brazil) and two developed countries (United States and Australia). All complaints concerned import restrictions on Philippine agricultural products. On the other hand, complaints against the Philippines were raised by one developing country (Korea) and one developed country (the United States). One complaint (by the United States) involved import restrictions imposed by the Philippines on pork and poultry. The two other complaints concerned the country's measures affecting industrial imports. The first dispute for which the Philippines reserved its third-party rights was between two developing countries (Hong Kong vs. Turkey) concerning restrictions on manufactured imports. The second dispute was between four developing countries and the United States concerning measures affecting agricultural imports. The final dispute between two developed countries (Australia vs. the European Community) was also over measures affecting agricultural imports.

TABLE 1: WTO DISPUTES INVOLVING THE PHILIPPINES

Cases as Complainant	**Respondent**	
DS22: Brazil – Measures Affecting Desiccated Coconut	Brazil	Panel/AB Report Issued
DS61: United States – Import Prohibition of Certain Shrimp and Shrimp Products	United States	Consultation Stage
DS270: Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables	Australia	In Panel
DS271: Australia – Certain Measures Affecting the Importation of Fresh Pineapple	Australia	In Panel
Cases as Respondent	**Complainant**	
DS74/DS102: Philippines – Measures Affecting Pork and Poultry	United States	Mutually Resolved
DS195: Philippines – Measures Affecting Trade and Investment in the Motor Vehicle Sector	United States	In Panel
DS215: Philippines – Anti-Dumping Measures Regarding Polypropylene Resins from Korea	Korea	Mutually Resolved
Cases as Third-party		
DS29: Turkey – Restrictions on Imports of Textile and Clothing Products	Hong Kong	Consultation Stage
DS58: United States – Import Prohibition of Certain Shrimp and Shrimp Products	India, Malaysia, Pakistan, Thailand	Panel/AB Report Issued
DS287: Australia – Quarantine Regime for Imports	European Community	In Panel

PROFILE OF DISPUTES INVOLVING THE PHILIPPINES AS COMPLAINANT OR RESPONDENT

The Philippines first served as a complainant in 1995 in a case against countervailing duties imposed by Brazil on Philippine imports of desiccated coconut.[1] The Philippines asserted that these measures were inconsistent with Brazil's commitments to the WTO (particularly, Art. VI of GATT 1994 and Art. 13 of Agreement on Agriculture) and thus nullified and impaired the benefits accruing to the Philippines under these commitments, a claim disputed by Brazil. Failing to resolve the dispute through consultations, a panel was established by the DSB to review the case. The panel ruled in favor of Brazil and the appellate body (AB) to which the Philippines had appealed upheld the panel ruling.[2]

The Philippines filed another complaint with the WTO in 1996 this time against import prohibition of certain shrimp and shrimp products by the United States (US).[3] The Philippines complained that the imposition of barriers to the entry of shrimp and shrimp products into the US violated the WTO agreement (particularly Articles I, II, IIII, VIII, XI and XIII of GATT 1994 and Art. 2 of the Agreement on Technical Barriers to Trade) consequently nullifying and impairing benefits accruing to the Philippines under this agreement.[4] The Philippines requested for consultation sessions with the US in order to settle the dispute. Japan and Australia requested to join the consultations, both claiming to have "substantial interests in the consultations" as shrimp exporters like the Philippines.[5] The results of consultations requested by the Philippines, however, are unknown to the researcher aside from that no panel was established to resolve the dispute. [6] Possibly, the case was closed or dropped because a similar case against the US was

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[1] See WORLD TRADE ORGANIZATION, BRAZIL - MEASURES AFFECTING DESICCATED COCONUT - APPELLATE BODY REPORT AND PANEL REPORT - ACTION BY THE DISPUTE SETTLEMENT BODY – REVISION, WT/DS22/1 (1995).

[2] See World Trade Organization, Brazil - Measures Affecting Desiccated Coconut - Report of the Panel,WT/DS22/R (1996) and Brazil - Measures Affecting Desiccated Coconut - Appellate Body Report and Panel Report - Action by the Dispute Settlement Body – Revision, WT/DS22/11/Rev.2 (1997).

[3] See World Trade Organization, United States Import Prohibition of Certain Shrimp and Shrimp Products - Request for Consultations by the Philippines, WT/DS61/1 (1996).

[4] See WORLD TRADE ORGANIZATION, UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS - REQUEST FOR CONSULTATIONS BY THE PHILIPPINES, WT/DS61/1 (1996).

[5] See World Trade Organization, United States Import Prohibition of Certain Shrimp and Shrimp Products - Request to Join Consultations - Communication from Australia, WT/DS61/2 (1996) and United States - Import Prohibition of Certain Shrimp and Shrimp Products - Request to Join Consultations - Communication from Japan, WT/DS61/3 (1996).

[6] World Trade Organization documents pertaining to these could not be found in the WORLD TRADE ORGANIZATION website http://www.World Trade Organization.org

already raised by India, Malaysia, Pakistan and Thailand less than a month earlier.[7] The panel established by the DSB that reviewed the case against the US ruled in favor of the four developing countries and recommended changes in the developed country's measures related to shrimp imports.[8] After the AB upheld the panel decision (albeit with modifications), the US complied with the panel/AB recommendations within the agreed 13-month period.[9] One among the 12 countries that reserved its third-party rights in this dispute, the Philippines profits from the adjustments in US shrimp import measures implemented to restore benefits to the complainants as recommended by the panel and the AB.

In 1997, it was the turn of the US to raise a complaint against the Philippines. The former alleged that measures taken by the latter towards the implementation of tariff-rate quotas for its pork and poultry imports violated Philippine obligations under the WTO, particularly, as stated in Articles III, X and XI of GATT 1994, Art. 4 of the Agreement on Agriculture, Art. 1 and 3 of the Agreement on Import Licensing Procedures and Art. 2 and 5 of TRIMs), thus distorting benefits accruing to the US by these agreements.[10] The US made a slight amendment of this case a few months later.[11] By the following year, the two countries arrived at a mutually agreed solution to the dispute that involved modifications by the Philippines of its rules and regulations governing the administration of its tariff-rate quotas.[12]

In the year 2000, the US raised another complaint against the Philippines this time regarding restrictive measures affecting trade and investment in the motor vehicle sector imposed by the Philippines. The US asserted that these measures

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[7] See WORLD TRADE ORGANIZATION, UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS - REQUEST FOR CONSULTATIONS BY INDIA, MALAYSIA, PAKISTAN AND THAILAND, WT/DS58/1 (1996).

[8] See WORLD TRADE ORGANIZATION, UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS - REPORT OF THE PANEL, WT/DS58/R (1998).

[9] See World Trade Organization, United States - Import Prohibition of Certain Shrimp and Shrimp Products - AB-1998-4 - Report of the Appellate Body WT/DS58/AB/R (1998), and United States - Import Prohibition of Certain Shrimp and Shrimp Products - Status Report by the United States, WT/DS58/15 (1999).

[10] See WORLD TRADE ORGANIZATION, PHILIPPINES MEASURES AFFECTING PORK AND POULTRY - REQUEST FOR CONSULTATIONS BY THE UNITED STATES, WT/DS74/1 (1997).

[11] See World Trade Organization, Philippines - Measures Affecting Pork and Poultry - Request for Consultations by the United States, WT/DS102/1 (1997).

[12] See WORLD TRADE ORGANIZATION, EUROPEAN COMMUNITIES PROTECTION OF TRADEMARKS AND GEOGRAPHICAL INDICATIONS FOR AGRICULTURAL PRODUCTS AND FOODSTUFFS - REQUEST TO JOIN CONSULTATIONS COMMUNICATION FROM MEXICO, WT/DS174/5 (2003) and PHILIPPINES MEASURES AFFECTING PORK AND POULTRY NOTIFICATION OF MUTUALLY-AGREED SOLUTION, WT/DS102/6 (1998).

violated Philippine obligations under Art. III of GATT 1994 and Art. 2 and 5 of the Agreement on Trade-Related Investment Measures (TRIMs).[13]

The US and the European Community (EC) had raised similar complaints against India the year before.[14] In their separate cases, India and the Philippines both agreed to consultations but objected to the request for the establishment of panels for these cases. The two countries had requested extensions in the deadline for the implementation of their obligations under the TRIMs agreement from the WTO Council on Trade in Good and were still awaiting the council's decision on this matter (ICTSD, 2000).[15] The US and the EC thus delayed submission of their requests but panels were eventually established upon their application a year later. [16] The panel handling the US/EC case against India ruled in favor of the two developed countries and India complied with panel recommendations within the suggested five-month period after the panel decision was given.[17] On the other hand, no ruling has yet been given by the panel handling the US case against the Philippines to the researcher's knowledge.

At present, the US has not brought a case against the Philippines regarding its anti-dumping policies. However, in 2000, Korea filed a complaint against the Philippines for that very same issue before the DSB, alleging violations following the Philippines's anti-dumping measures for polypropylene resins from Korean.[18] Following consultations held in January of 2001, the Philippines withdrew the anti-

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[13] See WORLD TRADE ORGANIZATION, PHILIPPINES - MEASURES AFFECTING TRADE AND INVESTMENT IN THE MOTOR VEHICLE SECTOR - REQUEST FOR CONSULTATIONS BY THE UNITED STATES, WT/DS195/1 (5 May 2000).

[14] See WORLD TRADE ORGANIZATION, INDIA MEASURES AFFECTING THE AUTOMOTIVE SECTOR - REQUEST FOR CONSULTATIONS, WT/DS146/1 (1998) and INDIA - MEASURES AFFECTING TRADE AND INVESTMENT IN THE MOTOR VEHICLE SECTOR - REQUEST FOR CONSULTATIONS BY THE UNITED STATES, WT/DS175/1 (1999).

[15] Art. 4 and Art. 5 of the TRIMs Agreement allows developing countries to deviate temporarily from TRIMs provisions to compensate for injurious Balance of Payments deficits to request implementation extensions for financial and development purposes.

[16] See WORLD TRADE ORGANIZATION, INDIA MEASURES AFFECTING THE AUTOMOTIVE SECTOR REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN COMMUNITIES, WT/DS146/4 (2000) and INDIA MEASURES AFFECTING TRADE AND INVESTMENT IN THE MOTOR VEHICLE SECTOR REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES, WT/DS175/4 (2000).

[17] See WORLD TRADE ORGANIZATION, INDIA MEASURES AFFECTING THE AUTOMOTIVE SECTOR - AGREEMENT UNDER ARTICLE 21.3(B) OF THE DSU, WT/DS146/13 and INDIA MEASURES AFFECTING THE AUTOMOTIVE SECTOR AGREEMENT UNDER ARTICLE 21.3(B) OF THE DSU, WT/DS175/13 (2000), INDIA MEASURES AFFECTING THE AUTOMOTIVE SECTOR - COMMUNICATION FROM INDIA, WT/DS146/14 (2002) and INDIA MEASURES AFFECTING THE AUTOMOTIVE SECTOR COMMUNICATION FROM INDIA, WT/DS175/14 (2002).

[18] See WORLD TRADE ORGANIZATION, PHILIPPINES - ANTI-DUMPING MEASURES REGARDING POLYPROPYLENE RESINS FROM KOREA - REQUEST FOR CONSULTATIONS BY KOREA, WT/DS215/1 (2000).

dumping order contested by Korea and Korea pursued no further action with the DSB (Ahn, 2003).

The most recent complaints filed by the Philippines concerns the prohibition of importation of Philippine fresh fruits and vegetables into Australia. One complaint contested measures restricting Philippine fresh bananas, papayas and plantains in particular while the other contested measures restricting the importation of Philippine fresh pineapples.[19] The Philippines alleged that the Australian measures restricting the said Philippine agricultural imports is inconsistent with the obligations of Australia under the GATT 1994, the Agreement on Import Licensing Procedures and the SPS Agreement of the WTO.[20] The two disputes, involving the European Community and Thailand as third-party participants, could not be mutually resolved through consultations and a panel has been established by the DSB to review the cases upon the request of the Philippines.[21] The cases are still under review by the DSB panel.

ISSUES CONCERNING PHILIPPINE PARTICIPATION IN WTO DISPUTE SETTLEMENT

In the light of the most recent Philippine experience in dispute settlement, this Note seeks to explore issues affecting Philippine participation in the WTO Dispute Settlement System under three main areas as developed in Romano's study on 'International Justice and Developing Countries' (Romano, 2002 and 2002a). According to Romano, the three main dimensions affecting 'use of international judicial bodies' such as the WTO DSB are: 1) **access,** 2) **capacity** and 3) **willingness to utilize these judicial bodies.**

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[19] See WORLD TRADE ORGANIZATION, AUSTRALIA CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH FRUIT AND VEGETABLES - REQUEST FOR CONSULTATIONS BY THE PHILIPPINES ,WT/DS270/1 (2002) and AUSTRALIA - CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH PINEAPPLE - REQUEST FOR CONSULTATIONS BY THE PHILIPPINES, WT/DS271/1 (2002)

[20] See WORLD TRADE ORGANIZATION, AUSTRALIA CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH FRUIT AND VEGETABLES - REQUEST FOR CONSULTATIONS BY THE PHILIPPINES, WT/DS270/1 (2002) and AUSTRALIA CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH PINEAPPLE - REQUEST FOR CONSULTATIONS BY THE PHILIPPINES, WT/DS271/1 (2002)

[21] See WORLD TRADE ORGANIZATION, AUSTRALIA CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH FRUIT AND VEGETABLES REQUEST TO JOIN CONSULTATIONS COMMUNICATION FROM THE EUROPEAN COMMUNITIES, WT/DS270/2 (2002) and AUSTRALIA - CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH FRUIT AND VEGETABLES REQUEST TO JOIN CONSULTATIONS COMMUNICATION FROM THAILAND, WT/DS270/3 (2002), AUSTRALIA CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH PINEAPPLE - REQUEST TO JOIN CONSULTATIONS - COMMUNICATION FROM THE EUROPEAN COMMUNITIES, WT/DS271/2 (2002) and AUSTRALIA - CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH PINEAPPLE - REQUEST TO JOIN CONSULTATIONS - COMMUNICATION FROM THAILAND, WT/DS271/3 (2002) and AUSTRALIA CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH FRUIT AND VEGETABLES - REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE PHILIPPINES – REVISION, WT/DS270/5/Rev.1 (2003).

ACCESS

According to Romano, since an international judicial body cannot hear a case without the consent of the countries involved in the dispute, the accessibility of an international judicial system to developing countries depends not only on the availability of the said system and its institutions but also on the manner by which consent to the body's procedures and jurisdiction is given by its members (Romano, 2000). When consent must be given expressly in each case by the countries involved in the particular dispute, developing countries have difficulty in drawing the consent of their trading partners to engage in dispute settlement through the given judicial system and its settlement process. On the other hand, developing countries have relative ease in getting their trading partners to acknowledge and respond to their complaints when consent is implicit in membership in the organization presiding over the given system.

Consent is implicit in membership in the WTO. The WTO dispute settlement system is in fact at present the only international judicial system not regionally based "where acceptance of the binding third-party settlement of disputes is *conditio sine qua non* of membership to the organization" (Romano, 2000). This was not always the case in international trade dispute. In the GATT dispute settlement system enforced prior to the establishment of the WTO, a consensus requirement made drawing consent from disputing partners problematic. Since consensus was needed to adopt decisions on establishment of panels and adopting rulings, the member country subject to a complaint (the defending party) could block its settlement by refusing to give their consent to these decisions. Even in the case where dispute settlement procedures are not blocked and are able to move forward, there is no way under the GATT dispute settlement system of ensuring the adoption of recommendations made to a defending party found to be in violation of their obligations under the GATT agreement on how to compensate the complaining party. For one, no time limit was set for a violating country to show compliance. In addition, while a complaining government could formally request authorization from the Dispute Settlement Body (DSB) to retaliate against a violating party that refuses to comply, the defending country could veto the complainant's request (Hudec, 2002).

In the Uruguay Round of 1995, the member countries sought to address these access problems through major reforms in the GATT dispute settlement to be applied to the new system under the WTO. The consensus-based decision-making central to GATT dispute settlement was reversed in the WTO system and replaced by a "negative consensus" requirement.

According to the WTO Understanding On Rules and Procedures Governing the Settlement of Disputes or DSU,[22] if 60 days after a request for consultation, disputing parties are not able to arrive at a "mutually agreed solution," the complaining party may apply for the establishment of a panel to review the case. Following a request, the WTO DSB requires that a panel must be established no later than its next meeting. The establishment of the panel can only be blocked by a consensus decision *against* its establishment. Moreover, the WTO dispute settlement system also requires automatic adoption of a panel report within 60 days after the panel issues the report. Again, adoption of the panel report can only be blocked if the DSB decides by consensus not to adopt the report or unless one of the disputing parties files an appeal to have the panel report reviewed. Like panel reports, the AB report is adopted and unconditionally accepted by the disputing parties within 30 days after the AB issues the report unless the DSB decides by consensus against its adoption.

The DSU further prescribes that if the panel or AB rules against the defending party, the disputing parties generally have 45 days or 90 days (if with arbitration) after the adoption of the panel or AB report to decide on the specifics of mutually acceptable compensation and a reasonable period for compliance by the defending party subject to DSB approval. If the violating country does not comply within the set period of time, the complaining country may request for authorization to suspend concessions or other obligations to the non-complying party. The DSB must grant authorization within 30 days after the set period of time expires for retaliation once again, unless the DSB decides by consensus to reject the request.

To summarize, the only way procedural decisions and legal rulings could be blocked is by a consensus by all member countries *not to adopt* a decision or ruling. Since achieving a negative consensus is highly unlikely given that at least one member, the complainant, would be against the consensus, the dispute settlement procedures under the WTO moves forward almost automatically. With more definite timelines for establishing panels and appellate bodies, issuing and adopting reports and enforcing compliance of rulings, the application of decisions and rulings to WTO members becomes "virtually automatic" and "binding" (Jackson, 2001).

In terms of access then to the WTO dispute settlement system and procedures, developing countries like the Philippines are not hindered by the lack of economic and political power in the international trading arena from maximizing its

[22] DSU Articles are found in the World Trade Organization website, <http://www.wto.org>

use of WTO dispute settlement to address complaints and settle disputes. The rule-based, automatic nature of the WTO dispute settlement makes small and poor countries like the Philippines less vulnerable to power politics and allows equal resort to the DSB to that of their economically and politically stronger trading partners. As argued by Hudec:

> The automaticity of the procedure makes it more difficult for larger countries to bully smaller countries into giving up their legal complaints. If developing countries want to have a legal ruling, it will not require less diplomatic confrontation to get one.

As of 1999, four years since the WTO was established, the Philippines has appeared twice as a complaining party before the WTO DSB. The frequency of appearance of the Philippines is exactly the median frequency for participation as complainant among all countries that have thus far participated in the DSB as shown below in Table 2. The Philippines can thus be said to have moderate involvement in WTO dispute settlement.

TABLE 2. PARTICIPATION OF COUNTRY-MEMBERS IN WTO DISPUTE SETTLEMENT (APRIL 1994 – MARCH 1999)*

Country-Members	No. of Cases as Complainant	Country-Members	No. of Cases as Respondents
United States	54	United States	30
European Community	43	European Community	26
Canada	13	Japan	12
India	8	India	12
Mexico	7	Korea	10
Japan	7	Canada	9
Brazil	6	Brazil	8
Thailand	4	Argentina	8
New Zealand	4	Australia	6
Honduras	3	Indonesia	4
Guatemala	3	Turkey	4
Switzerland	3	Mexico	3
Argentina	2	Chile	3
Hungary	2	Ireland	3
Australia	2	Guatemala	2
Chile	2	Slovak Republic	2
Philippines	2	Belgium	2
Panama	2	Hungary	2
Korea	2	Greece	2
Uruguay	1	Pakistan	2
Sri Lanka	1	Philippines	2
Singapore	1	Sweden	1
Poland	1	Peru	1
Columbia	1	Thailand	1
Costa Rica	1	United Kingdom	1

Indonesia	1	Denmark	1
Ecuador	1	Czech Republic	1
Peru	1	Venezuela	1
Hong Kong, China	1	Poland	1
Pakistan	1	Portugal	1
Malaysia	1	Malaysia	1
Venezuela	1	Netherlands	1
Czech Republic	1	France	1
By Groups:			
G4	118	G4	90
Other OECD	22	Other OECD	27
Developing/Transition	43	Developing/Transition	47
Least Developed	0	Least Developed	0

*Source of Data: Horn and Mavroidis, 1999.

By 2003, the Philippines raised two more complaints for a total of four complaints. Compared to the trading partners with whom the Philippines has had disputes, both developed (US with 75 complaints and Australia with 7) and developing (Brazil with 22 complaints and Korea with 9), the Philippines has had the least complaints brought before the WTO DSB as can be observed from Table 3 below. The country's small caseload indicates that Philippine involvement in WTO dispute settlement does not indeed depend entirely on ease in access to the organization's dispute settlement body. Other factors come into play as will be discussed in the following sections. It should also be noted that while this study does not give a comprehensive comparison of country participation as complainant in the WTO DSB for 2003, comparison with other East Asian country members as shown in Table 3 indicates that while Philippine participation may seem poor if compared to that of some of its trading partners, it is relatively good if compared to East Asian countries such as China, Taiwan, Hong Kong, Malaysia and Singapore, each with one complaint recorded, and Indonesia, with two complaints.

Table 3. Participation of East Asian Countries and Other Selected Countries in WTO Dispute Settlement (as of July 31, 2003)[23]

Country-Members	No. of Cases as Complainant	No. of Cases as Respondent	Total
East Asian Members			
China	1	0	1
Taiwan	1	0	1
Hong Kong, China	1	0	1
Indonesia	2	4	6
Japan	11	13	24
Korea	9	12	21
Malaysia	1	1	2

[23] D. Ahn, WTO Dispute Settlement in East Asia, (2003). <http://www.nber.org/books/ease14/ahn10-31-03.pdf>

Philippines	4	4	8
Singapore	1	0	1
Thailand	10	1	11
Notable Others			
Argentina	9	15	24
Australia	7	9	16
Brazil	22	12	34
Canada	24	12	36
European Community	62	59	121
India	15	14	29
Mexico	13	10	23
United States	75	81	156
Total by All Members	**326**	**299***	

* Difference in total number of cases is due to the fact that there are multiple complainants against one respondent.

It is also important to note that while ease in access is advantageous to countries like the Philippines as complaining parties, it is conversely disadvantageous to these countries as responding parties. While the Philippines has been able to raise complaints against Brazil, the US, and Australia before the WTO DSB, it in return has had to face complaints against it by Korea and the US Of the four cases where the Philippines served as a complainant, it lost its case against Brazil and dropped its case against the US. The last two cases the Philippines was involved in against Australia are still presently being reviewed by the panel. On the other hand, of the four cases where the Philippines served as a respondent, one case against the US is still unresolved, while the three others were resolved in consultation with the US and with Korea through mutually agreed solutions involving trade policy reforms enacted by the Philippines. As argued in one study, "early settlement offers the greatest likelihood of securing full concessions from a defendant at the GATT/WTO..." and "defendants tend to offer the greatest concessions in the consulting stage, or at the Panel stage but before a ruling" (Busch and Reinhardt, 2003). The study further argues that developing countries have been more likely to have Panel disputes against developed countries but, consequently, "have fared less well in exacting concessions from defendants." (Busch and Reinhardt, 2003). Assuming the validity of this argument, then a comparison of results of Philippine complaints, three of which have reached the panel stage, with complaints against the Philippines, three of which were settled through consultations, would seem to show that the Philippines has derived more costs than benefits from its participation in WTO dispute settlement. Facing complaints from stronger trading partners such as Korea and particularly, the US, the Philippines settled early and implemented trade policy reforms as agreed upon with the two countries. On the other hand, the Philippines was not able to push through one complaint against the US and while it was able to do so with the two related cases against the Philippines could not achieve an early

settlement and still awaits panel and perhaps appellate body rulings on the said complaints.

It is yet to be seen if the ruling on the Philippine cases against the developed country, Australia, gives support to the observation above regarding higher costs than benefits of Philippine participation in WTO dispute settlement. But at present, it is not farfetched to conclude that while countries may have equal access to the WTO DSB and dispute settlement procedures, the final outcomes of access and involvement are still greatly affected by the economic and political power of countries involved as evidenced by the Philippine experience.

CAPACITY

As explained by Romano and argued in this paper, it is not enough that developing countries have access to the international legal systems it seeks resort to (Romano, 2002). They must also have the capacity to effectively engage in dispute settlement and move a case forward to completion. Even if a legal system is available for the use of developing countries, it is likely that the cost of its use will be higher than benefits deriving from it if the country lacks the capacity to engage and defend itself in legal dispute.

The capacity of national governments to do so depends largely on its having the necessary resources needed to engage in dispute settlement. According to Romano, "to make effective use of [international legal systems] requires resources, human, financial and other" (Romano, 2002a). Romano further points out that:

> Having adequate human and financial resources are most critical for obtaining appropriate advice on procedural and substantive aspects of the law and weighing the prospects of success; obtaining necessary support on technical or evidentiary aspects; ensuring that all persons (or departments) involved in or affected by the litigation participate appropriately and that necessary approvals have been obtained; managing the team responsible for the conduct of litigation, and of course paying the costs involved; and implementing the judgment by taking all material and legislative steps necessary.

Even a matter seemingly as basic as identifying WTO violations becomes a problem when resources and mechanisms are not available to keep national governments informed of rules related to international trade and investment barriers and how countries follow them (Hoekman and Mavroidis, 2001).

In the Philippine case, as in the case with most developing countries, the lack of capacity to engage in legal dispute through the WTO DSB places the Philippines at a disadvantaged position particularly in cases against developed countries. Trying a case with the WTO is costly and the cost is relatively higher to poor countries. Rich countries, the major players in dispute settlement, have extensive resources from which they can draw.

They are well equipped with legal talent, are well briefed by export interests, and have a worldwide network of commercial and diplomatic representation (Hoekman and Mavroidis, 2001).

The Philippines, on the other hand, has limited legal expertise and lacks the financial and qualified human capital needed to bring in and defend cases with the WTO. There is also no permanent office in the Philippines to handle WTO cases. While the Philippines has a Department of Trade which could potentially serve as the permanent office looking into international trade issues of the country, this department presently does not have the capacity to facilitate the handling of cases with the WTO. The Philippine government resorts to assigning different government agencies to head its cases depending on the substance of the dispute. In its recent disputes with Australia regarding fresh fruits and vegetables, the Assistant Secretary of the Philippine Department of Agriculture leads the Philippine team (Montemayor, 2002). The problem with this set up is that the government agency assigned to handle a case must still look after its usual set of domestic responsibilities. The handling of the case is seen as a special task but nevertheless remains just one of many. In the disputes against Australia, the Philippine Department of Agriculture (DA) had to function as a regular government agency overseeing domestic agricultural concerns even as it built its case against Australia. Only one official from the agency was tasked particularly to look into the case.

The other problem with this institutional set up is that it lowers the Philippine learning curve in terms of international trade dispute settlement. Come the next dispute, a different agency with a different set of people will be assigned to the new case. The Philippines is thus not able to maximize the learning and experience of the previous agency and team.

To improve on its human capital and enhance the country's legal expertise, the Philippines will have to invest on building up its international legal education and training program in order to generate the country's future international trade lawyers and experts. This requires financial resources the country presently does not have. In the meantime, studies have pointed to the possibility of hiring private lawyers, possibly from Europe or the US, to assist in handling dispute cases

(Jackson, 2001; Hoekman and Mavroidis, 2001). This proposition will also still be costly for the Philippine government unless national private interest groups that have stake in the case could be made to share the costs of employing private lawyers.

Article 12.10 of the DSU allows for extensions (within "a relevant period") beyond the set periods for consultation (according to Art. 4.7 and Art. 4.8) in cases involving complaints against a developing country. The same article also allows for "sufficient time" for a developing country to prepare and present its argumentation. At least in terms of time, the WTO DSB has been able to give special consideration to developing countries due to this lack of capacity.

Also, Article 27.2 of the DSU provides for legal advice and assistance to developing country-members in the settlement of their dispute through a qualified legal expert from the WTO technical cooperation. This legal advice and assistance is available upon the request of country-members like the Philippines. However, this technical assistance from the WTO secretariat is inadequate in fulfilling the needs of developing countries such as the Philippines given the large caseload involving developing countries. Only two legal experts presently provide legal assistance for the WTO on a part-time basis (Hoekman and Mavroidis, 2001). Moreover, assistance given must be *neutral* so that it can give limited advice to developing countries like the Philippines on legal strategic issues (Delich, 2002). Finally, WTO technical assistance can only be availed of *after* a country has filed a complaint, meaning that the WTO legal experts cannot advice the country on the strength of its case *before* it decides to engage in dispute (Hoekman and Mavroidis, 2001). It is notable that of the cases reviewed by both a panel and an AB between the years 1995 and 2002, complaints were dismissed (no violation was found) in only four of the total forty-eight cases (Smith, 2003).[24] Three of the four cases involved developing country complainants including the Philippines in its case against Brazil concerning desiccated coconuts, the only case the Philippines has been able to carry to completion to date.[25] This seems to indicate that while most countries in most cases have been able to weigh prospects for success and bring their case to the WTO only after a favorable assessment, a few countries, particularly developing ones like the Philippines, have not been able to make accurate legal evaluations. Hence, it is important that countries that lack such capacity to assess the strength of their cases be given technical assistance not only in

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[24] *See* table WTO Apellate Body Reports: 1 January 1995 – 31 July 2002, in Smith, WORLD TRADE ORGANIZATION Dispute Settlement: The Politics of Procedure in Appellate Body Rulings', *World Trade Review*, 2(1): 65-100.

[25] Recall that it dropped its case against the US while its cases against Australia are currently still in panel.

actual dispute engagement but also in deciding which cases are worth bringing to the DSB, a kind of assistance not provided by the WTO Secretariat.

The lack of capacity of developing countries like the Philippines to engage in dispute settlement and the shortcoming of the WTO and the developing countries themselves in addressing this concern is at least mitigated to some degree by the establishment of the Advisory Centre on WTO Law or ACWL. The ACWL is an international organization founded in Seattle in 1999 by 29 WTO member countries, including the Philippines, in order to address the needs of developing countries for legal advice, support and training in WTO dispute settlement and law (Romano, 2002a; Delich, 2002). The ACWL is based in Geneva and is open to all WTO members but functions independently from the WTO. It finances its operations mainly through country member contributions. The ACWL has the capacity to provide more comprehensive, in-depth and particularized assistance to developing countries than that provided by the WTO Secretariat:

> ...legal advice might take the form of advisory opinions on particular questions of law, analysis of situations involving trade concerns, or legal advice provided throughout a dispute settlement proceeding. In recognition of the differences among developing countries, the extent of the support to be provided will depend on the needs and requirements of each member in each case (Delich, 2002).

Moreover, the ACWL provides regular seminars as well as on-the-job training for government officials assigned to a particular case and internships for government lawyers responsible for international trade issues (Delich, 2002).

When the Philippines sought assistance from the ACWL in its disputes against Australia, the ACWL assigned a team of its lawyers to work with the Philippine delegation in preparing the preliminary assessment of the legal aspects of the dispute, engaging Australia in consultations and in preparing and presenting reports and case documentation for panel review (Montemayor, 2002). The ACWL lawyers are expected to continue assistance to the Philippine team should the Philippines need to appeal its case to the AB. The Philippine government thus far views ACWL assistance as critical in its successful engagement in WTO dispute settlement (Serrano, 2002).

The issue of capacity of developing countries is relevant not only before and during engagement in dispute settlement, but also after a ruling has been given by the panel/AB and adopted by the DSB. As already noted above, Article 22 of the WTO DSU authorizes temporary retaliation as a final remedy for non-compliance of adopted panel/AB rulings by a violating party. The non-complying

party cannot veto a retaliation request by the complaining party ensuring that retaliation is authorized when non-compliance is established. The problem with this DSB measure of enforcement of its ruling is that developing countries cannot retaliate effectively and rationally particularly against economically stronger countries.

Trade retaliation harms the developing country more than it harms the industrial country defendant and retaliation is too small to inflict any meaningful pain on the industrial country (Hudec, 2002).

In case the WTO DSB rules in favor of the Philippines in its cases against Australia, recommending removal of Australian import barriers on Philippine products (by loosening the country's stringent sanitary and phytosanitary standards), non-compliance by Australia of official recommendations could lead to WTO authorization for retaliation by the Philippines against Australian products. The Philippines is one of the biggest markets for Australian dairy products and beef exports (Cabacungan, 2002). Should the Philippines obtain authorization to ban dairy imports from Australia, and should it decide to do so, Australia would lose $364.4 million from its dairy exports to the country. It would take time, however, for the Philippines to be able to establish new sources to meet local dairy demand and this would incur costs for the Philippine consumer. Moreover, this would not address the Philippine's objective of getting Australia to open its market to Filipino agricultural products.

Observers note, however, that governments have generally shown compliance towards WTO ruling (Smith, 2003; Hudec, 2002). Most countries and their officials view compliance as standard good policy.

Many officials and private interest groups within the national government's decision-making process perceive a value in the legal system itself, believing that both they and their country will gain more over the long term from an effective legal system than they will gain from noncompliance in individual cases that would damage respect for the system (Hudec, 2002).

The perceived legitimacy of the international legal body giving the ruling rather than fear of punishment is sufficient in most cases to make most countries comply with the body's recommendations. While retaliation is not the best remedy for non-compliance that could have been applied for disputes brought before the WTO DSB, the lack of capacity to retaliate is not as great a hindrance to Philippine participation in WTO dispute settlement as is the lack of capacity to achieve a just and favorable ruling on its disputes.

WILLINGNESS

According to Romano, developing country participation in international legal systems is dependent not only on ease of access and capacity to engage the system but also on the willingness of the country's government to utilize the said systems. Willingness, according to Romano, "is a quintessential political matter" (Romano, 2002a).

As a former colony of the US and its continuing ally, the Philippines has shown a great degree of openness to submission to GATT/WTO agreements and to the implementation of policy reforms implied by WTO membership despite criticism of this stance by certain social sectors and left-oriented groups (Bello, 2003). Since the formation of the WTO in 1995, Philippine trade policies reflect commitment to the WTO principle of liberalization given the large influence of the US, a leading player in the WTO, on the country's economic and political life (Bello, 2003). Since the administration of Philippine President Fidel Ramos until the present, Philippine governments have participated fully in WTO talks and negotiations when given the opportunity. In light of the generally positive stance of the Philippine government towards the WTO, the country's moderate participation in WTO dispute settlement can be viewed then as more the result of the lack of capacity rather than of willingness by the Philippines to resort to the WTO legal system.

Beyond the general policy stance rooted in the Philippine's close relationship with the US, willingness to engage in dispute settlement with the WTO depends also on the perception of country governments and their constituents of the fairness and benefits deriving from the use of the system.

Provisions in the DSU particularly for developing countries help draw the picture of the WTO DSB as a development-friendly legal body. Among the provisions in the DSU that show favor to developing countries such as the Philippines, Art 4.10 states that "During consultations, Members should give special attention to the particular problems and interests of developing country Members." Article 8.10 then states that in disputes between a developing country-member and a developed country-member, the developing country can request to have at least one panelist come from a developing country. Article 12.11 additionally states that with disputes involving one or more developing countries, the panel's report should explicitly state how account was taken of relevant provisions on differential and more-favorable treatment for developing countries that are related to the agreements raised by the developing country in the course of the dispute settlement procedures. Sections 7 and 8 of Article 21 provides for special consideration on

appropriate action to be taken in cases brought by a developing country, "taking into account not only the trade coverage of measures complained of but also their impact on the economy of developing country Members concerned."

The Philippines shows willingness to participate in dispute settlement because of the belief that the WTO DSB can handle trade issues fairly and with sensitivity to the country's development context (Montemayor, 2002). Studies have noted, however, that there have been no measures to ascertain that the special consideration provided by the DSU articles for developing countries are carried out (Hudec, 2002). The Philippines has not yet resorted to special treatment in any of its cases so far perhaps because additional development reports must be presented to the DSB to do so. The WTO could provide better measures to ensure that its dispute settlement system better facilitates the development of countries like the Philippines.

CONCLUSION

While the WTO allows ease of access to its dispute settlement system to developing countries like the Philippines, the lack of capacity and resources to engage in dispute settlement hinders the country's ability to maximize benefits deriving from this engagement. Developments and reforms within the system and outside of it, including the establishment of the ACWL, can help enhance Philippine involvement in WTO dispute settlement promoting greater willingness by the country's government and constituents to resort to the WTO DSB for resolution of trade problems and promotion of its trade and development interests.

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