

ICTSD Conference : DSU Reform and Beyond

3-4 November 2009

Closing Session: The Way Forward

Summary of points made by Stuart Harbinson

There had been very wide ranging discussions over the course of two days. It was not possible to mention all the many excellent contributions that had been made. However the discussions seemed to centre around four main themes or points, which seemed to suggest a fifth point as the conclusion and way forward.

1. Inefficiency of the DSU.

This was a theme taken up by a number of speakers. For example, timeframes for disputes were too long and remedies insufficient. SMEs in developing countries were very unlikely to show any interest in solving problems through WTO disputes for these reasons. Two suggestions for consideration:

- DSU Review: why not try to revitalize the negotiations? Not part of Single Undertaking. Since the DDA is in limbo it would be helpful to have some negotiations moving, even if results were modest.
- Encourage “softer” types of dispute resolution. Several speakers had pointed out that more use could be made of techniques such as mediation, good offices and arbitration. These could be much quicker and produce reasonable results. But probably some amendment would have to be made to current DSU provisions to really encourage use of these techniques.

2. Information deficiency

Participants had acknowledged that there was a clear deficiency in developing countries with regard to the availability of useful information and analysis of trade data of all sorts. Two tracks to address this problem could be canvassed:

- The role of the WTO Secretariat with respect to its “surveillance” of government measures and notifications could be strengthened.

Already some progress had been made through e.g. reports to G20. However it might be useful to promote a more independent, analytical and questioning role for the Secretariat.

- There had also been interesting discussion on the possibility of having an “external” and independent body to do such monitoring and analysis. The concept of an Institute for Assessing WTO Commitments had been had been proposed.

3. Capacity issues

Again, based on discussion at the conference, there appeared to be at least two facets of the problem to consider.

First, there was the question of lack of legal capacity in developing countries. Indeed some speakers had emphasized that the increasing complexity of WTO dispute settlement (burden of proof and mutually agreed solutions had been two areas highlighted) posed increased challenges and even dangers for developing countries.

A number of possible responses had been flagged at the conference:

- Developing countries using the services of the ACWL might look upon such casework as capacity building exercises rather than simple contracting out; and if this happened the ACWL itself might also be able to foster greater involvement of developing country lawyers. Capacity building was within the ACWL’s mandate but client countries also needed to look at its services in this light.
- There was a role for donor countries in making technical assistance available for legal capacity building.
- There was also a potentially very important role for NGOs to play in boosting legal capacity in developing countries. This depended on the excellence of the organizations involved. The ITCSD had already shown that it could make a significant and substantive contribution through its conferences and its regional dialogues.

Secondly, the question of institutional capacity had also been raised. In particular, it was felt that many developing countries lacked adequate

institutional frameworks linking businesses to government with respect to matters covered by the WTO. There was insufficient flow of information relevant to WTO rights and obligations in either direction. An interesting case study had been presented of efforts made by China to address this problem.

4. Deficiencies in WTO Rules

Participants had noted that the main deficiencies in WTO rules, many of them highlighted by the economic crisis, were in areas such as subsidies, stimulus packages and agriculture. These were areas where developed countries had resources to deploy and where WTO rules lacked clarity. While the effects of measures taken by developed countries would take time to work through, it was very likely that developing countries would be disproportionately affected by resultant trade distortions. There was a danger that, in trying to solve one problem, i.e. the crisis, new inconsistencies would be created.

There had also been an interesting discussion of the relationship between some WTO commitments and those included in some Bilateral Investment Treaties. Again, there appeared to be some inconsistencies and grey areas.

5. Conclusion

It would be very useful to draw up an agenda for further research and analysis based on the points emerging from the conference in the above four areas.