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INVOLVEMENT OF THE PRIVATE SECTOR IN THE WTO DISPUTE SETTLEMENT PROCESS: PARTICIPATION OF THE SWAZILAND SUGAR INDUSTRY IN THE EC SUGAR SUBSIDIES CASE

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Introduction

The objective of this paper is to tease out some generic lessons for the future participation of the private sector in the dispute settlement process of the World Trade Organization (WTO). These procedures are, in turn, governed by the WTO Dispute Settlement Understanding (DSU). The component of the private sector to receive focus in this paper will be the business community.

The fundamental premise underlying the analysis is that processing a case through the WTO dispute settlement procedures requires a huge amount of resources (expertise and finance). The question then becomes how best to use the limited resources at the disposal of developing countries to achieve the desired outcome. This will undoubtedly involve close collaboration between the public and private sectors.

The case study used in this paper is the challenge of the EU Sugar Regime by Australia, Brazil and Thailand (the complainants). The European Communities (EC) were the defendants in this case. The process started with informal consultations between the two parties intended to be the first step towards resolving the dispute and thereby avoid the lengthy and costly formal stages. By that time, the parties had done substantially all of the necessary research.

ACP sugar exporters (of which Swaziland is one) requested to participate as a single group of third parties with a common purpose. This stemmed from the fact that one of the potential consequences of the challenge was reduced earnings by ACP countries who were supplying sugar to the EU market under the ACP-EU Sugar Protocol. Being a signatory to the Sugar Protocol as well as holder of a substantial quota allocation, Swaziland became one of the countries applying for the third-party status. An additional consideration for Swaziland to get involved was the strategic importance of its sugar industry in the growth of the overall economy. On its part, the sugar industry saw a grave threat to its earnings from exports to the EU; hence its readiness to contribute resources towards the participation in the dispute settlement process.

Nature of the Dispute

The basic claim by the complainants was that the EC was exporting more subsidized sugar than it was permitted under the WTO Agreement on Agriculture (AoA). More technically, it was providing export subsidies on sugar which exceeded its reduction commitment levels and was, thereby, violating certain provisions in the AoA. In particular, it was exporting C sugar at prices below production costs through cross-subsidies linked to A and B quota sugars which were receiving artificially high prices.

The EC, on the other hand, denied that it was providing any subsidies on its exported sugar. It argued that the basis of the claim was erroneous in two respects. One was that it involved a contrived interpretation of what constitutes a subsidy. The other was that it included EC imports from ACP/India under the Sugar Protocol (a total of 1,6 million tons). These imports must be excluded because of having been notified to the WTO.

According to the EC, the ACP/India quantity is explicitly excluded from the calculations through a footnote inserted at the bottom of one of the schedules submitted to the WTO at the end of the Uruguay Round. The complainants disputed that the footnote absolved the EC from taking into account the ACP/India tonnage. It was primarily through the dispute around this footnote that the ACP countries felt a real threat on their interests.

In other words, by raising doubts around the footnote, the ACP countries saw the dispute as a direct threat to the value of their preferential access into the EU market. This was in the light of the overall nature of the EU Sugar Regime, especially the intricate inter-relations among its various components. This meant that touching one aspect would result in a domino effect affecting the others. Moreover, the Sugar Protocol is an integral part of the EU Sugar Regime.

Informal Consultations

This is the first stage under the DSU and it was requested by Australia and Brazil on 27 September 2002. On that date, these two countries submitted their formal notification at the WTO requesting the EC to consult with them over the EU Sugar Regime under Article 22 of the DSU. ACP sugar suppliers successfully requested to be joined in the consultations as interested third parties and the consultations took place in Geneva on 21-22 November 2002. A representative of the sugar industry was part of the Swaziland delegation at the consultations which were preceded by caucuses within the Swaziland delegation and within the ACP countries. The caucuses became a norm even at the subsequent stages of the DSU process through which the case progressed.

The main points made by the ACP countries at these consultations can be highlighted as follows:

- They were concerned about the possible impact of the dispute resolution on the value of their preferential access for sugar into the EU market.
- Sugar Protocol arrangements have been known to the WTO membership for decades and implicitly endorsed by them over time.
- Stable and predictable earnings from sugar exports have helped to offset low foreign direct investment inflows.
- The sugar industry plays a crucial multifunctional role in ensuring the viability of rural life through the provision of social facilities as well as helping protect the environment and ensuring food procurement needs.
- The world sugar market has been in a structural surplus for nearly a decade due to growing Brazilian exports.
- ACP countries share with Brazil a common classification as "developing countries". However, unlike Brazil, ACP countries could never become world-class multi-commodity exporters.
- Australia and Brazil should take their concerns to the WTO agriculture negotiations for a multilateral solution.

After opening statements by Australia, Brazil and the ACP countries, the informal consultations moved into a detailed question-answer session. Brazil was the first to field its questions, which were supplemented at various points by Australia. This was followed by another long list of questions from Australia, also supplemented by Brazil at various points.

The salient points made by the EC can be summarized as follows:

- Preferential trading arrangements give developing countries a fair chance to participate in the global trading system.
- WTO agriculture negotiations are a more appropriate forum for discussing the concerns by Australia and Brazil.
- The WTO schedules which Australia and Brazil are querying now have been there for a long time. Why should they be challenged now?

The salient points made by Australia and Brazil can be summarized as follows:

- The EC was either unable or unwilling to provide certain basic factual information.
- The complainants were not against the preferential arrangements benefiting ACP countries. It is up to the EC to commit that whatever the outcome of the challenge they will preserve the sugar preferences.
- The EC must comply with its WTO commitments under the Uruguay Round.

In an attempt to influence the outcome of the challenge in their favour, representatives of the ACP countries embarked on lobby missions. The sugar industry was part of the Swaziland delegation in those lobby missions. In some cases, it was the sugar industry representing Swaziland as a whole (i.e., it carried a mandate from government). The lobby missions were conducted immediately prior to and after the informal consultations. They comprised discussions with

representatives of Australia and Brazil. The objective was to get them to drop the challenge and take their concerns to the WTO agricultural negotiations. The lobby missions did not succeed in persuading the complainants to drop their challenge. They were determined to proceed under the WTO DSU.

Formal Panel Hearing

This is the second stage under the DSU process and it came about because the informal consultations were not successful in resolving the dispute. Australia and Brazil were joined at this stage by Thailand as a third complainant. The first and second attempts to agree on names of the panellists were unsuccessful because of objections by one or the other of the parties. Eventually, the WTO Director General intervened (as empowered by the DSU) and named the panel on 23 December 2003.

There were two substantive hearings. The first was conducted over the period 31 March to 1 April 2004. All the ACP sugar suppliers who had applied for third-party status sent delegations (some of which were led by ministers). The ACP delegations made statements essentially along the lines of those made at the consultations held on 21-22 November 2002 (and highlighted above). Arguments on technical issues were handled by a legal firm representing the ACP sugar suppliers. The complainants had an array of experts to handle different aspects of the dispute.

The second substantive hearing was conducted over the period 11-12 May 2004. In-between this and the first hearing was the exchange of documents among the parties. ACP countries (together with all other third parties) were invited as mere observers with no right to make further written or oral statements at this stage. The only rights that the WTO Panel granted to all third parties was to receive written questions posed to the parties by the Panel (and by the parties to each other) as well as written answers and rebuttals submitted by the parties.

The salient points made by the complainants can be summarized as follows:

- In the Preamble to the AoA, WTO members have recorded their long-term objective to provide for progressive reductions in agricultural support and protection.
- To do this, they have committed themselves to achieving specific binding commitments in several areas, including export competition.
- The EU Sugar Regime is inconsistent with the requirements of several specific provisions of the AoA designed to implement the goals of the Preamble.

In its rebuttal, the EC stated that unlike A and B sugars, exports of C sugar do not receive export refunds or any other form of export subsidy. Therefore, exports of C sugar are not in excess of the export subsidy reduction commitments. The mere fact that the domestic support provided to A and B sugars may have the incidental effect of “financing” exports of C sugar is not sufficient to consider that those exports benefit from export subsidies.

With reference to the footnote, the EC argued that a correct interpretation of the footnote leads to the conclusion that it is in fact a component of the EC's export subsidy commitments. These commitments are made up of two components – one (from which ACP/India equivalent sugar is excluded) which has been subject to gradual reduction, and another (being ACP/India equivalent sugar) which has not been subject to a gradual reduction.

After considering all submissions, the Panel found that the EC had indeed exceeded its commitment levels by an amount equivalent to its C sugar exports plus ACP/India imports. The subsidies in question were found to be indirect in the sense that they emanated from high internal EU sugar prices. Producers were able to export sugar to the world market at low prices because they covered the associated production costs from the high internal EU prices applicable to A and B sugars. In other words, there was cross subsidization.

Appeal Hearing

The EC was not satisfied with the finding of the WTO Panel and it elected to proceed to lodge an appeal, which is the third stage of the DSU. The formal hearing by the WTO Appellate Body was conducted on 7-8 March 2005. ACP sugar suppliers were once more represented – four of which were at ministerial level. The sugar industry was still part of the Swaziland delegation. The first day was devoted mainly to oral presentations by the EC, Brazil, Australia and ACP countries.

The main points made by the ACP countries at the Appeal Hearing can be summarized as follows:

- The Panel failed to recognize that the AoA is silent as to how a WTO member can structure its commitments.
- The commitments as specified in the schedules (including the footnote) are the result of a political process of multilateral negotiations and compromise.
- The AoA does not preclude, either explicitly or implicitly, a ceiling commitment such as the one contained in the footnote.
- The Panel incorrectly restricted itself to a literal, ordinary and grammatical reading of the footnote.
- Thus, it erred by failing to apply properly Article 31 of the Vienna Convention which provides for an obligation to make recourse to the context, object and purpose of the provision in question.
- The footnote was placed to ensure the preservation of balance within the EU Sugar Regime which incorporates the EC's commitments under the Sugar Protocol.
- The complainants understand the linkage between the EU Sugar Regime and Sugar Protocol. It is hypocritical, therefore, to argue that just because

they do not attack the ACP's market access directly, the ACP countries need not worry.
- ACP countries do not want to see the balance of concessions reached at the end of the Uruguay Round extinguished. The footnote is part of that balance of concessions.

The report of the Appellate Body was communicated to the parties involved in the case on 13 April 2005. The final report was published on 28 April 2005. The Appellate Body confirmed both aspects of the Panel ruling – namely that C sugar is cross-subsidized by virtue of governmental action and that the footnote on ACP/India equivalent sugar does not increase or modify the EC schedule of commitments. This marked the end of the process, which took 2,5 years from the informal hearings stage.

Lessons for the Private Sector

- There must be strong vigilance on developments at the WTO level which have implications for trade and development interests. Once threats have been identified, an appropriate proactive strategy must be implemented. The strategy must have technical, legal and political dimensions.
- Means should be found to educate all relevant stakeholders about the WTO dispute settlement mechanism – its nature, when to be invoked, costs, benefits, alternatives, etc. Once empowered with adequate knowledge, the stakeholders will be able to approach disputes in a rational manner.
- There must be strong and visible collaboration between government and the business community on the WTO dispute settlement process. Because it is the business community which is involved in trade, it must play a proactive role in the dispute settlement process.
- There must be genuine interaction among all the relevant stakeholders pertaining to the issues surrounding the dispute at hand. This will enable a full cost-benefit analysis of the various avenues for engaging in the dispute settlement process. If the resulting action is an outcome of this interaction, then it will receive all the necessary support.
- Participating as a third party is a good way of gaining knowledge and experience on the WTO dispute settlement system.
- Within a developing country like Swaziland, resources for pursuing issues through the WTO dispute settlement process are limited. However, with appropriate prioritization of public expenditure areas as well as fiscal discipline government can augment its limited resources through cooperation with the business community. The recently established Business and Economic Advisory Panel (BEAP) to the Head of State in Swaziland is a good initiative in this connection. BEAP brings together business and economic leaders from inside and outside Swaziland for purposes of generating recommendations on how to accelerate economic growth, reduce poverty and bring about human development. The governance system (in terms of transparency, consistency, accountability, etc) also becomes a factor to be considered because of its implications for the business environment. With

pooled resources, it then becomes possible for a small developing country to have an impact at the WTO level.

- Limited internal resources should be supplemented with external assistance. The Advisory Centre on WTO Law (ACWL) based in Geneva is a good example of a useful external source of assistance. ACWL is an international organization which is independent of the WTO and was established in 2001. It provides legal advice to developing countries on, *inter alia*, dispute settlement proceedings. Another external source is the set of legal firms specializing in international trade law which are willing to provide pro-bono legal services.
- Litigation is not the only route to be followed in the event of a dispute. Other routes include lobby missions (at the commercial and political levels), informal consultations and mediation by the WTO Director-General under Article 5 of the DSU.
- The WTO jurisprudence is deep and wide. To be able to use it effectively, African countries must develop the requisite skills as a top priority. As custodian of the global trading system, the WTO system can determine the destiny of African countries. To control that destiny, they must have the capacity to operate effectively and efficiently within the WTO structures. This requires a good understanding of the legal and technical instruments driving the structures.
- The WTO system is a “growth industry” in the sense that returns from investment are on an upward trend for the medium to long term. Therefore, African countries must invest adequately in terms of building WTO knowledge.