The Missing Voice of Caribbean States in the Ongoing Debate on WTO Dispute Settlement Reform

By:

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After years of hearing that “the sky is falling” due to the fragile state of the WTO’s dispute settlement system, one may well conclude that everything that can be said, has been said, about the importance of retaining the WTO’s Appellate Body. Not true. Glaringly absent from the discourse so far is the perspective of Caribbean states. These countries are among the smallest and most vulnerable WTO Members and stand to lose the most if the Appellate Body implodes.

Along with the Pacific region and the African continent, the Caribbean region registers among the lowest rates of dispute settlement participation. This is not surprising given their low levels of trade (each accounting for less than 0.2% of merchandise trade) and limited export base. On the few occasions that they have approached the system, the results have been disappointing. To

recall, as third parties in the banana and sugar disputes, small Caribbean states had preferential access to their main agricultural markets deemed inconsistent with WTO rules. More disappointing was the fact that even when Antigua and Barbuda *did* prevail against the United States in the *US – Gambling* dispute, it was not able to force the United States to comply by "retaliating" through the suspension of concessions. Ten years on, the state of Antigua and Barbuda is still unable to enforce a judgment that went entirely in its favor. These WTO rulings have left a bitter taste in the mouths of many Caribbean countries. In short, whatever the technical legal merits, the rulings have resulted in the decimation of sectors on which entire economies depended.

And yet, to date, Caribbean states have made no proposals in current discussions aimed at improving WTO dispute settlement. The larger repeat players, like the EU, Canada and Japan, have put forward most of the proposals on the table. Some infrequent users like Paraguay, Uruguay and the African Group have also presented limited proposals.

It may be that Caribbean countries do not see their most pressing issues reflected in the current debate or are concerned about the repercussions of making their voices heard. Inspired by the US' recalcitrance regarding the Appellate Body selection process, the "reform" issues have a particular focus and orientation. But small states cannot afford to sit this one out. The reason is simple – they have fewer effective alternatives to the compulsory dispute settlement system that the WTO currently offers. That system places a premium on legal interpretation and reasoning, rather than on power diplomacy. Only in such a system are David vs Goliath outcomes – like the Antigua and Barbuda against the United States - possible. Antigua and Barbuda has not been able to enforce their judgment against the United States in the *US – Gambling* dispute. The victory may have been pyrrhic, but it was a victory nonetheless.

With weak bargaining power, small states have limited leverage in trade disputes, unlike bigger players which can resort to alternative arrangements – like the Canada/EU interim appeal arrangement under Article 25 of the DSU– and even unilateralism in the absence of an effective judicial arm. The absence of the appeal system would diminish the protections guaranteed by the rules

WTO Members negotiated when they established the Appellate Body at the conclusion of the Uruguay Round.

So, having not set the agenda, and coming late to the game, how are small states to appraise and respond to the current slate of reform proposals on the table? These proposals, which range from the procedural to the substantive, include topics such as:

- Completion of appeals by outgoing Appellate Body members
- The 90-day deadline for completion of appeals
- The meaning of municipal law as an issue of fact
- Treatment of findings “unnecessary” for resolution of a dispute
- The precedential effect of previous Appellate Body reports
- Interaction between the Appellate Body and WTO Members
- The terms and numbers of Appellate Body members
- Transitional rules for outgoing Appellate Body members
- The launch of the Appellate Body selection process

In my view, one simple and safe guiding principle for Caribbean states could be whether the proposals on the table advance or diminish the protections guaranteed by the rule of law. These protections include: supremacy of law, equality, accountability, fairness, separation of powers, participation in decision-making, certainty, avoidance of arbitrariness and procedural and legal transparency. Using this as the guiding principle, small states can meaningfully contribute to the debate.

For instance, a number of the reform proposals concern the selection process for Appellate Body Members. Ensuring that there is always a fully constituted court is a priority for all WTO Members, including small ones. Starving a court of judges is the best way of reducing its effectiveness because it simply cannot function. The proposals on the table seek to address this problem by requiring the automatic launch of the selection process well before the expiration of an Appellate Body Member’s term: some, like the African Group, recommend 3 months; while others, like the EU suggest a minimum 6 months.

While timely launch of the process is important, the proposals do not seem to get at the real issue. The current selection process is now essentially political,

and depends on major users not blocking the process, or selections made by the Selection Committee. A more draconian approach may be to make the selections of the Committee automatically binding on the membership. The Caribbean Court of Justice is an international court whose judges are chosen by an independent Regional Judicial and Legal Services Commission (comprising individuals that are not appointed by governments) thereby assisting in depoliticizing the decision.

The selection process should also prioritize the appointment of competent and independent judges. The DSU does not "define" what an ideal Appellate Body Member looks like, but those sitting in highest judicial positions should have a judicial temperament, and be able to understand complex legal arguments and the political and economic dynamics of the disputes before them.

Accompanying reforms to the selection process are also proposals for increasing the number of Appellate Body Members. The EU has proposed an increase from 7 to 9 judges. While this modification would assist with the back log of cases, if accepted, it would also mean that there is a higher chance for greater diversity on the court. The current system entrenches a certain mix on the court whereby certain nationalities are guaranteed a place. There is a higher chance of more nationalities – including those from the Caribbean – being reflected in a court with 9 seats. Caribbean states should therefore wholeheartedly support proposals like those from the African Group that favour regional balance, gender representativeness and multilingualism being taken into account in the selection of judges.

The proposals that seek to ensure that the DSU's 90 – 120 day time frame for deciding appeals is respected should be supported. For the most vulnerable, swift access to justice must be prized. That said, expeditious handling of disputes must be modulated by an understanding that cases have gotten more complex. Moreover, accelerating the time for the appeal stage alone, without larger consideration of the length taken for other stages of dispute settlement seems to offer only a lopsided and piecemeal solution.

Finally, a number of proposals seek to address what some Members consider to be both procedural and substantive "overreach" by the Appellate Body. One of

the main triggers for the current impasse concerns, for instance, the United States' formal objection to "Rule 15" of the Working Procedures for Appellate Review, which allows Appellate Body Members whose initial four-year term has expired to complete work on outstanding appeals. For the United States, it is the WTO membership, through the DSB, and not the Appellate Body, that should determine whether an Appellate Body Member whose term has expired may participate in deciding outstanding appeals to which he/she had been assigned. Other concerns have been raised about how the Appellate Body actually decides to discharge its judicial function, including, how it treats municipal law – whether as a matter of fact or law; how it treats judicial precedents; and which findings it must make to resolve a dispute.

While it is true that the Appellate Body must remain "accountable" to the WTO Members that established it, care must be exercised in interfering too heavily with the exercise of the judicial function. Some proposals seek to achieve accountability by suggesting a kind of "discourse" between the Appellate Body and the membership so that concerns may be aired by the Members. Arguably, the DSU currently provides enough of an opportunity for Members to ventilate concerns, through their right to make statements at DSB meetings on rulings, and their right to adopt authoritative interpretations on the meaning of WTO provisions. While the Appellate Body should be encouraged to heed calls for judicial restraint, small states should resist too heavy an interference with the judicial function by more powerful players who would have a greater voice in any such discourse due to their greater participation in the system.

The above suggestions represent just a start to some of the issues that Caribbean states should weigh in on. If the sky is indeed falling on WTO dispute settlement, it would be a mistake for Caribbean states to bury their heads in the sand. There is simply too much at stake.

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