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к.э.н., доц. В.Г. Шеров-Игнатьев

Рецензенты: ∂ .э.н., проф. С.П. Удовенко,

д.э.н., проф. В.М. Шавшуков

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St. Petersburg State University, Russian Federation

RTAS VERSUS THE WTO IN THE DISPUTE SETTLEMENT: LATIN AMERICAN EXPERIENCE*

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Abstract

The article analyses the experience of Latin American countries (LAC) with regards to their participation in various economic dispute settlement mechanisms. Despite the existence of multilateral bodies and rules for dispute resolution, countries creating regional trade blocs usually try to develop their own dispute settlement systems for the defense of national economic interests. Latin America and the Caribbean are not an exception. The Andean Community, CACM, CARICOM, MERCOSUR, and NAFTA all have more or less comprehensive dispute settlement bodies. One could expect that these bodies would be used for "internal" disputes and that the multilateral framework would serve to deal with "outsiders". However, the WTO dispute settlement system is very important for solving both disputes with countries that are not members of the blocs and "internal" ones.

 $\textbf{Keywords:} \ \textbf{WTO Dispute Settlement, Latin American Countries, RTAs, forum-shopping}$

Introduction

The World Trade Organization (WTO) provides the opportunity for both developed and developing countries to defend their national interests in trade disputes. One could argue that the WTO dispute settlement (DS) system is the most efficient DS procedure of any international body (Biggs, 2005). The WTO DS is nowadays proven to be the most comprehensive one as it, based on the rules, does not allow the losing party to block the decision and has an efficient enforcement mechanism. At the same time, the number of regional trade agreements (RTAs) has been growing and introducing a prominent challenge to the multilateral trading system. RTAs both compete and complement the WTO from the perspective of nations' trade policy. In particular, the main regional trade blocs provide their members with alternative mechanisms for the resolution of economic disputes. The "forum-shopping" as a choice between regional and multilateral DS systems has become a central issue for countries searching opportunities to defend their national interests in international trade.

A number of studies focus on RTAs and WTO DS procedures from different perspectives. In recent years, there has been an increasing interest in the impact of the WTO DS system on the bargaining position of developing countries (Abbott, 2007; Bown, 2004; Shaffer, 2006, 2010). Several studies have revealed that one of the constraints on developing countries participation in the WTO DS is their interests in trade under RTAs with a greater scope of regulation (Nottage, 2009; Bohanes and Garza, 2012). Moreover, it is difficult to ignore the overlapping jurisdictions of regional and multilateral DS systems (WTO, 2011).

Therefore, the research to date has tended to focus on the forum-shopping in the DS. The majority of studies in this field are conducted from legal or political perspectives (Busch, 2007; Henckels, 2008; Marceau and Wyatt, 2010). Capling, Low, et al. (2010) investigated the influence of state and non-state actors on the forum choice. So far, however, there has been little discussion on DS forum-shopping from an economic perspective.

Up to now, far quite little attention has been paid to the comparison of regional and multilateral dispute institutions and their enforceable capacity for developing countries. Maggi (1999) argued that the WTO can offer a distinct advantage over RTAs by verifying violations of agreements, informing third parties, and facilitating multilateral reputation mechanisms. To date it is a critical assertion; therefore, the authors consider the DS forum-shopping from a perspective of the institutional analysis on the example of Latin America and the Caribbean. The purpose of the paper is to ascertain the relevance of the various forums of dispute settlement for this region. The results of the research might be relevant to the Russian Federation. The country, being the WTO member also participates in various economic integration projects that have developed regional dispute settlement mechanisms.

Latin American countries in the dispute settlement

Latin American countries are active users of the WTO DS (Koval and Tro-fimenko, 2012). However, within regional integration one can also observe provisions for settling trade disputes as well as a special DS body (Helfer and Alter, 2009). We will examine the main regional blocks in Latin America such as MER-COSUR, Andean Community, CACM, CARICOM, and NAFTA. The recently established Pacific Alliance will be not investigated as there hasn't been initiated any dispute so far. However, the DS system of the Andean Community as one of the oldest in the region will be analyzed even that the regional integration within this block today is not developing and the last dispute was initiated was in 2008 (Table 1).

Regional trade blocks and their most active members	Number of initiated disputes (from the moment of RTA establishment until 2016)
MERCOSUR	575
Argentina	260 (71% against Brazil)
Brazil	182 (69% against Argentina)
Andean Community	462
Colombia	61
Peru	25
CACM (Central American Common Market)	27
Nicaragua	11
CARICOM (Caribbean Community)	7
Mexico (in NAFTA)	48 (from 188)
TOTAL	1119

Source: ECLAC Integrated Database of Trade Disputes for Latin America and the Caribbean (IDATD).

The Andean Community's dispute settlement system has such distinguishing features as the ability for individuals to directly submit complaints against Andean Community member countries (Saez, 2007). In the WTO DS system complaints can be initiated only by governments and that is why the development of coordination between government and business is very important for efficient dispute resolution. However, the total number of claims submitted to its General Secretariat and Court is 462, which is less than in MERCOSUR (575 submitted claims) (Table 1). Here, we should also note that in MERCOSUR private individuals could also initiate the cases but they have not yet used this right; this is in comparison with Andean Community where more than 50 cases have been submitted by individuals. Moreover, in the Andean Community the General Court itself can initiate disputes, and its share in all RTA disputes is more than 40%, which again is a significant difference with the WTO.

In CARICOM and CACM there were 7 and 27 trade disputes respectively. In NAFTA, all in all 188 disputes were submitted and Mexico participated in 71 of them (as a complainant in 48 and as a respondent in 23).

Such figures could be explained in the following way: firstly, intraregional trade is more intensive in the Andean Community and MERCOSUR than in CARICOM and CACM. Secondly, most of the disputes in MERCOSUR appeared in 1995 when the customs union was established. Moreover, the rise of disputes in the Andean

Community during the 90s could be explained by the development of free trade area during these years.

The main disputes under RTAs concerned tariffs and non-tariff barriers. Antidumping is the core problem raised in NAFTA, while in MERCOSUR it was technical barriers to trade, in the Andean Community it was safeguards, and in CACM it was sanitary and phytosanitary measures. In the WTO as in NAFTA the main subjects of disputes initiated by LACs were anti-dumping measures as well as for intraregional disputes. In intraregional disputes we can also note the interest of LACs in the regulation of safeguards, as in the Andean Community.

However, subsidies and countervailing measures take first place in interregional disputes and the share of anti-dumping disputes is very close, so the case in NAFTA is likely to be very similar to the situation on LAC interregional disputes under the WTO. However, the only exception is disputes on agriculture. Latin American countries initiate more disputes on agriculture in the WTO then in RTAs. Overall, non-tariff measures such as sanitary and phytosanitary measures, technical barriers to trade, etc. have more often been a central issue of disputes at the regional level. Disputes on trade remedies: anti-dumping and countervailing measures, safeguards, were both resolved in the framework of regional and multilateral DS systems.

Forum-shopping in trade disputes: Latin American perspective

Reasons for a forum-choice could be divided in two major groups: internal institutional factors and characteristics of enforcement mechanism while both RTAs and the WTO are incomplete contracts and have their specificity.

One should also take into account that RTAs represent "WTO-plus" agreements and include issues that can be solved only by a regional DS body. Nevertheless, there is no doubt about overlapping jurisdictions of RTAs and the WTO provide an opportunity for a forum-shopping and the same dispute could be initiated at both regional and multilateral levels (Lavranos and Vielliard, 2008; Huerta-Goldman, 2010a). Moreover, conflicting decisions could be approved by RTA' and WTO DS bodies (Sá Cabral and Lucarelli de Salvio, 2008). In addition, the proliferation of RTAs could lead to judicial confusion in the resolution of disputes whereby different resolutions are adopted against one country as a member of RTAs with different dispute settlement procedures (Salazar-Xirinachs, 2004).

The analysis of interviews with the WTO, ACWL, Latin American governmental officials identifies the following internal factors of forum-shopping. One of the main challenges is time and resource constraints. The WTO DS is usually more resource- and time-consuming than regional DS. For business it is very essential to resolve disputes as faster as possible. Nevertheless, not all RTAs have a long-lasting

and good experience of DS resolutions while the WTO has precedents on different issues.

At the WTO DS only governments could initiate and participate in disputes, some RTAs, as it was already mentioned, have a possibility for individuals to start a litigation process on several issues. For instance, according to Article 19 of NAFTA, disputes on anti-dumping measures could be initiated by the industry either by rules of domestic law or through the establishment of a bi-national panel. That's why, Mexico prefers to follow NAFTA DS process in case of anti-dumping (Huerta-Goldman, 2010b), but when governmental officials are supposed to negotiate, the forum-choice is not so obvious.

So far, the role of government and its links with business play an important role in country versus country disputes. The private companies are not directly involved in a litigation process, but they usually provide required information and in practice hire private lawyers assisting the governmental work. Such kind of help is very essential because especially in smaller countries one-two officials couldn't deal with all disputes at any levels. As the WTO is a more open forum, this constraint has a more evident impact. Furthermore, in smaller states business couldn't always resort to law firms due to scarce resources. However, under these circumstances the ACWL could help to a certain extent as well as WTO technical assistance programmes.

In the majority of LACs, personal ties between government and business and a strong lobby influence significantly initiations of trade disputes. One could mention that under the pressure of the industry governments sometimes start obviously losing cases at any DS system. Such disputes could be also the decision of officials in order to develop bargaining power especially at the multilateral level. In comparison with regional disputes, WTO DS cases gain publicity around the world and have a big impact on national image. In a manner, participation in WTO DS favours better positions to conduct multilateral negotiations. Although in order to avoid publicity, LACs would prefer the regional DS system.

While comparing enforcement mechanism of the WTO and RTAs, international agreements has a global legitimacy as well as transparency and political determinants are much stronger in regional trade blocks. The regional DS process tends to be oriented more on diplomatic solutions than on legal principles. In this sense, for smaller countries with weaker bargaining power the WTO would give better opportunities to resolve dispute with more powerful partner. However, the country choosing an international forum needs to remember that in legal terms the initiated case may turns against it then.

Moreover, in RTAs it is easier to block decisions, more difficult to establish an independent DS body and equal regulation for all members. Hence, the enforcement mechanism of RTAs seems to be weaker than one of the WTO. Certainly,

there are also RTAs and PTAs with very broad and not working DS clauses. But it is not so obvious while analyzing deeper regional agreements of LACs with comprehensive legal practice.

Members of MERCOSUR, Andean Community, and NAFTA could prefer regional DS because negotiations on disputes are faster, diplomatic ties could be not only constraints, but even foster solutions (especially for trade blocks of nations with the similar bargaining power), and third parties as well as amicus curiae don't significantly influence decisions. There is no doubt that third parties adjudication process in the WTO seems preferable than party-oriented panel in NAFTA (Loungnarath and Stehly, 2000). Even if third parties participate for systematic reasons, they ensure transparency and credibility of the WTO. As was discussed before, the role of amicus curiae is critical enough. Nevertheless, most WTO members suspend disputes and reach mutual solution before the panel report because of not willing to notify concessions between the complainant and respondent and having new international commitments. Practically, countries tend to have bilateral negotiations at the WTO as in the framework of RTAs. Finally, retaliations as economic sanctions are used both by the WTO and RTAs. According to interviews, implementation of retaliation measures is easier at the regional level.

Therefore, both the WTO and RTAs have institutional constraints influencing forum-choice. Under RTAs, countries are usually able to choose either regional or the WTO DS system for disputes regarding the same matter. Some RTAs have an exclusion clause regulating a forum-choice. For instance, MERCOSUR Protocol of Olivos or Article 20 of NAFTA prevents forum-shopping when it isn't possible to use both regional and multilateral DS process.

In practice, however, if a solution between parties isn't reached within the framework of RTAs, the country could go further to the WTO. Mexico, for example, used this opportunity several times. The WTO couldn't refuse the complainant in a dispute initiation because of the RTA exclusion clause as only WTO agreements are taken under consideration. Thus, on the one hand, some disputes can be solved on the regional level, and the WTO could represent the final appeal institution. The WTO DS is very important for several LACs in order to defend their interests when all other options for negotiations have been exhausted. For example, for Ecuador the US-EU banana dispute was the reason to speed up the process of its accession to the WTO (Smith, 2006). On the other hand, depending on a case the WTO would be preferable from an institutional perspective.

Conclusion

To sum up, one could argue that the WTO DS system for LACs under investigation is successfully complemented by several regional ones that exist in parallel. At the moment some of the regional bodies are less in demand than others. But the

growing number of cases solved on the intraregional level proves the great need for the future development of these organizations. Moreover, the current regional DS system could be improved in order to prevent the initiation of intraregional disputes under the WTO. At the same time, the WTO having more legitimacy would continue to play an important role in dispute resolutions and could be more attractive improving its enforcement mechanism.

The WTO with its rules on the DS system should remain in existence as the "final" international body for settling trade disputes among LACs. One might argue that the WTO could even extend its functions by considering disputes in RTAs and thereby become a useful addition to the work of these organizations, but this would be a challenge for the WTO DS (Gao and Lim, 2010). The WTO DS should definitely be used in trade disputes with other countries which do not belong to the Latin American region. Therefore those countries that actively use the WTO dispute settlement mechanism should finance it and pay great attention to the negotiations on the improvement of the DS procedure within the Doha round.

The Latin American experience could be interesting for the Russian Federation in the formation of DS mechanisms in the framework of the Eurasian Economic Union (EAEU) as well as in the process of RTAs establishment between the EAEU and its trade partners. The set-up of an effective DS system in the framework of the RTAs will afford to minimize the possibilities for a forum-shopping and therefore decrease the costs associated with the dispute participation.

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