



Trade Hot Topics

Operationalising Stiglitz-Charlton Proposals for Incorporating Right to Trade and Development in WTO Dispute Settlement Procedures: Some Thoughts

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Background

Nobel laureate Joseph Stiglitz and Andrew Charlton in their paper 'Right to Trade: Rethinking the Aid for Trade Agenda', prepared for the Commonwealth Secretariat, argue that there are significant elements of global trade policy regimes constraining the ability of developing countries in participating in international trade.¹ According to them, the Doha Development Round has 'almost faded away' with not much prospect for achieving a pro-development liberalisation of the multilateral trading system. The authors therefore suggest that a 'new and novel approach' should be adopted to address the underlying unfairness of the global system. Specifically, they call for 'a right to trade' and 'a right to development' to be 'enshrined in WTO rules and enforced through its dispute settlement mechanism'.

This issue of *Commonwealth Trade Hot Topics* examines the issues associated with operationalisation of the Stiglitz-Charlton proposals for incorporating right to trade and development into the rules-based multilateral trading system.

Main features of the Stiglitz-Charlton proposals

The Stiglitz-Charlton proposals are based on two elements. First, the 'right to trade and right to development of developing countries', particularly those that are least developed countries (LDCs), should be made an integral part of the World Trade Organization (WTO) dispute settlement system. Incorporation of these into the WTO framework would allow bringing cases for consideration under the dispute settlement procedures, even in cases where the policy-specific measures undertaken by advanced countries are otherwise justifiable under WTO rules but affect adversely the efforts made by LDCs for poverty alleviation.

Second, they suggest the establishment of a global financial facility for the purpose of consolidating Aid for Trade (AfT) into a more logical framework that ensures transparency and a competitive process for the disbursement of aid. Even though these two rights are considered to be mutually supportive, there are differences both in their scopes and objectives.

¹ Stiglitz, J E and Charlton, A (2013). *The Right to Trade: Rethinking the Aid for Trade Agenda*. Commonwealth Secretariat, London.

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The publication of the study has generated lively debate among the stakeholders on the proposals. Many have reacted favourably, while others, particularly trade policy officials with expertise in WTO procedures, and specialists in international trade law argue that further examination and cautious approaches may be necessary in considering these proposals.

Main features of WTO Dispute Settlement Understanding

The main provisions relating to dispute settlement are contained in Article XXIII – on nullification and impairment – of GATT (General Agreement on Tariffs and Trade) 1994 which *inter alia* provide that member countries could bring disputes for settlement not only in cases where (i) there is failure on the part of a member country to abide by its obligations, but also (ii) in cases where measures applied are consistent with the rules, if they cause nullification and impairment of the benefits accruing to them.

That Understanding on Dispute Settlement (DSU) which was adopted in 1995 when the WTO was established, lays down procedures and rules that should be followed in the settlement of disputes raised in pursuance of the above provisions. It calls on countries to resolve their differences through consultations on bilateral or plurilateral basis before bringing disputes to the Dispute Settlement Body (DSB) for settlement (DSU Article 4). The parties to the dispute are further encouraged to use the 'good offices' of conciliators and mediators or the Director-General to assist them in arriving at a satisfactory solution (DSU Article 5).

The formal dispute settlement procedures are triggered after the complaining country considers that efforts to find solution through consultation and conciliation have failed and requests for the establishment of a panel in a meeting of the DSB consisting of all WTO members. The Body is under a binding obligation to establish a panel and call on the Secretariat to determine its membership in consultation with the parties to the dispute. It is open to the parties to the dispute to appeal to the Appellate Body against findings and recommendations of the panel. Although the losing party and others are free to express their opinions, the rules impose a binding obligation on the losing party to implement the recommendations made by the WTO judicial bodies, within a reasonable period of time.

In the majority of instances, the member countries losing the cases and found to be in breach of

obligations take steps to bring the aggrieved measures in conformity with the recommendations within a reasonable period of time. However, if it appears to the winning member that the losing member may not be able to comply with the recommendations made within such period, the DSU gives it two rights. It may request the losing party for compensation and if this is not granted, request the DSB to authorise the aggrieved party to take retaliatory measures. The rules envisage that such retaliatory actions imposing restrictions on trade or involving suspension of concession can be taken on cross-sector and cross-Agreement bases. For instance for breach of obligations in trade in goods, it is open to an aggrieved country to apply restrictive measures not only in the goods sectors but also under other Agreements such as General Agreement on Trade In Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Special provisions relating to the settlement of the 'non-violation' cases

The procedures described above apply to disputes which are brought to the WTO for settlement involving breach of law as well as in cases where the complaining country has alleged that the benefits accruing to it under the system have been nullified by the measures taken by another country even though they do not conflict with the provisions of the WTO Agreements. Article 26 of the DSU however puts limits on the relief which the panels and the Appellate Body could provide to the complaining country in 'non-violation cases' where nullification of benefits has occurred, even though there is no violation of WTO law.

- In cases where nullification of benefits is established but there is no breach of obligation on the part of respondent country, the panels and Appellate Body are restrained from requiring it to withdraw the measure causing nullification and impairment. The maximum they can do 'in such cases' is to recommend that 'the Member concerned make a mutually satisfactory adjustment' in the offending measure that would facilitate the trade of the winning complaining country.
- If such efforts to find a solution by making adjustment in the applicable measures do not succeed, it is open to one of the parties to the dispute to request for the appointment of an arbitrator for 'the determination of the level of

benefits that have been impaired'. The arbitrator could also be requested to make suggestions on 'ways and means of reaching a mutually satisfactory adjustment' in the measures applied, in order to secure satisfactory settlement of the dispute. The provisions however clarify that the recommendations of the arbitrator shall not be binding on the parties.

Special provisions for developing countries

It is important to note that as mentioned earlier, the Understanding recognises that the emphasis it places on settling disputes primarily through strict legal interpretation of the applicable rules may put the developing countries in a disadvantageous situation, particularly in disputes brought by them against developed countries. Article 3: 12 of the Understanding therefore provides an option to a developing country to request the DSB that in such cases, the provisions prescribed by the 5th April Decision should be applicable. The Decision enables a developing country, where it considers that the benefits occurring to it are being nullified as a result of the measures taken by a developed country, to request the Director-General to use his good offices for finding solutions. This provision has however been invoked by developing countries only in one instance since the DSU was adopted in 1995. In 2007, Colombia made use of it in order to secure an early settlement of its longstanding dispute on bananas with the European Union.

Experience of the settlement of non-violation cases

Since most of the cases that may be brought by the LDCs under the Stiglitz-Charlton proposals would claim nullification of benefits even though there was no breach of obligation, it would be appropriate to note briefly the experience of examination of such cases by the panels.

Indeed, very few cases have been brought for settlement since the GATT was established in 1948 where nullification or impairment was claimed even though there was no specific infringement of the rules. The complaining countries had alleged in most such cases that the benefits of the tariff concessions they had obtained from another country by making in return equivalent concessions were being nullified by it, by the application of internal policy measures. The measures complained of included grant of subsidies to domestic producers, the governmental regulations relating to distribution of imported products and imposition of unreasonably strict

health standards. In recent years, it has been found not necessary to resort to the non-violation provisions as in most of these non-tariff measure areas legal frameworks have been developed.

It would appear that in all these cases, which have come to be called 'non-violation cases', the panels had shown reluctance to agree to the claim of nullification or impairment by the complaining country solely on the ground that the measures applied by the importing country were resulting in loss of trade. The few cases based on the 'non-violation provisions' in which panels had ruled in favour of the complainant were those in which it was possible for them to find some legal loophole such as breach of MFN (most favoured nation) or other obligations to extend the 'non-discrimination' principle, in the application of domestic regulations.

It is also important to note that, as stated earlier, the relief which is available to the complaining country when a non-violation case is successful is much weaker than is the case where its legal rights are violated. In the latter cases, where breach of legal obligation is involved, the panels or the Appellate Body can require the member which is in breach of obligation to bring the measure in conformity with WTO law.

The practical difficulties which are faced by the complaining countries in establishing nullification and impairment, and by the WTO judiciary bodies in dealing with non-violation cases, have resulted in trade policy experts and academicians involved in research work in WTO law and practice to express serious reservations on the recommendations made by economists to use non-violation provisions of the WTO to secure the removal of barriers to trade. They also consider that as the results in such cases are likely to be uncertain – and that the remedies available in the case of favourable decisions are weak – the effort and the time required in raising and pursuing such cases would be in most instances inappropriate and unjustifiable by the results. These considerations resulted in the 2012 WTO annual report to observe that since 'non-violation cases are difficult to establish, they are at present seldom pursued'.²

² See World Trade Report 2012, Trade and Public Policies: A closer look at non-tariff measures in the 21st century, page 205. See also Roessler F and Gappah P, 'A re-appraisal of non-violation complaints under the WTO dispute settlement procedures', in Macrory P F J, Appleton A E and Plummer M G (eds.) (2005), *The World Trade Organization: Legal, Economic and Political Analysis, Vol. I*, Springer, New York.

Special procedures that should be adopted for the examination of complaints brought by LDCs

Taking into account the above it is evident that the LDCs may be able to take advantage of the WTO dispute settlement system only if some improvements are made by adopting 'special procedures' that aim at settling such disputes through mediation and conciliation. To provide the basis for further discussion, an outline of such special procedures, elaborating on the provisions in the DSU relating to the settlement of disputes between developing and developed countries, is provided below.

- The Sub-committee on Least Developed Countries shall be used as a forum for discussions and consultations that are required under the provisions of Article 4 of the Dispute Settlement Understanding before the disputed issues are formally raised for settlement in the Dispute Settlement Body (DSB). One of the major advantages of integrating the Sub-committee in the work on dispute settlement would be that it would allow the complaining country or countries to get support of other LDCs and make, if possible, a joint complaint to the DSB.
- Any such complaint should be accompanied by detailed studies identifying the specific measures applied by the developed country, which though not in breach of that country's obligations under the WTO law are resulting in complaining LDCs not being able to take full advantage of their benefits under the WTO system in developing trade – and thus adversely affecting their efforts to promote development and to alleviate poverty. Such background studies should also include estimates of loss in trade that is resulting from the application of the measures.
 - Immediately after the receipt of the complaint, the Sub-committee shall constitute a Working Group consisting of ten to twelve members, the least developed countries making the complaint and the developed country against which complaint is made for consideration of the complaint and finding a solution that is acceptable to both the parties to the dispute.
 - If the Working Group fails to find a solution within a period of four months of its constitution, the complaining LDCs may raise the matter in the DSB. Instead of the provisions of DSU, the procedures prescribed

by the Decision on Conciliation adopted in 1966 shall be applicable to the examination of such complaint and it would be open to the complaining least developed country/countries to request the Director-General or any other office bearer for their good offices for mediation and conciliation.

- It should be agreed that the panels appointed should consist of five persons and include at least two persons with experience of work in the field of economic and social development. In addition, guidelines should be adopted for ensuring that the Appellate Body is able to draw on the advice of such experts in considering such disputes.
- In cases where the developed country fails to implement the decision of the panel and the Appellate Body, within a reasonable period of time, the Dispute Settlement Body may, at the request of the LDCs winning the case, require it to pay financial compensation in the form of Aid for Trade. Such compensation may include contribution for the loss of trade which has occurred in the past five years or so as well as the loss that is expected to occur in future, as a result of the continued application of the measures.

It is important to note that the adoption of special procedures described above for operationalising the Stiglitz-Charlton proposals would need not only modifications in the procedures followed by the Sub-committee on LDCs and in some of the provisions of the DSU but also in its basic approach in some areas.

The DSU for instance gives a right to the aggrieved party to request for compensation, or to take retaliatory action, if it appears that the losing party is reluctant to implement the recommendations made by the panel or the Appellate Body, within a reasonable period of time. The rules, however, emphasise that both making a request for compensation and its acceptance are 'voluntary' acts on the part of the parties to the dispute. The rules further provide that 'compensation, if granted, shall be consistent with the covered (i.e. WTO) agreements'. As WTO Agreements lay down rules which countries should follow in their trade relations with one another, all of the compensation agreements that have been negotiated so far, between the parties to the dispute, have taken the form of providing improved market access to the losing country in the markets of the winning country

for products of export interest to it, to compensate for the loss of trade it is suffering because of non-implementation of the recommendations.

However, there has been one case in recent years – Brazil versus the USA on cotton subsidies – where the losing developed country has agreed to pay financial compensation for not being able to implement the recommendations of the DSB within a reasonable period of time. The decision to pay such compensation was however taken by the USA not under the provisions in the DSU described above relating to negotiations of compensation agreements, but to dissuade Brazil from applying the retaliation measures which it had announced. The measures provided for, in addition to increase in tariffs on 102 items of imports from the USA, withdrawal of the protection for the US intellectual property rights under the TRIPS Agreement. As the USA considered that the proposed measures would seriously harm its pharmaceutical industry, it persuaded Brazil not to apply the retaliatory measures by agreeing *inter alia* to establish a fund of US\$147 million to finance technical assistance to Brazil to build capacity in the cotton sector.³

The implications of the proposal made by Stiglitz and Charlton that the DSB should authorise payment of financial compensation to LDCs winning their cases would therefore have to be considered taking into account the relevant applicable provisions in DSU and the experience of their application, which emphasise that:

- The decision on whether to request for compensation is a voluntary decision on the part of the parties to the dispute.
- The compensation offered should be consistent with the objectives of the WTO Agreements.
- The compensation offered so far has generally taken the form of improved market access for the products of the winning country in the market of the losing country.
- Financial compensation was offered only in one case since the coming into existence of the GATT-WTO system and that too for persuading the winning country from taking retaliatory action.

According to some commentators, it may be desirable to consider LDCs using the non-violation provisions to secure the removal of barriers to trade applied by not only developed countries but also emerging economies and other relatively advanced developing countries.

Right to development

The discussion so far has centred on how the right to trade of LDCs could be made operational under the WTO system. Stiglitz and Charlton (2013) argue that the WTO system should also recognise LDCs' right to development. Under this right it would be open to LDCs to request the DSB to exempt them from abiding by some or all of the obligations under various agreements.

However, there could be serious doubts as to whether a country can invoke dispute settlement procedures to secure exemption from abiding by obligations which a particular Agreement imposes. The main function of the WTO panels and Appellate Body is to consider disputes where a member country complains that other members have adopted measures that nullify its expected benefits from the WTO system. They cannot go into the question whether the law that is adopted by consensus by member countries is fair or reasonable from the point of some countries on account of their lower stage of development.

The appropriate solution for the consideration of such a request – as suggested by Ismail (2007) – would be to establish a separate high-level mechanism or committee consisting of senior officials, to consider at policy level requests by LDCs for exemption of certain or all rules of an agreement if such a request is properly justified by development interests.⁴

From the above analysis, it is obvious that the issues that arise in operationalising Stiglitz-Charlton proposals would need further careful examination and discussion involving senior policy-makers, WTO trade negotiators, and experts in trade law.

³ Torres, R A (2012). 'Use of the WTO Trade Dispute Settlement Mechanism by the Latin American Countries – Dispelling Myths and Breaking Down Barriers'. WTO Staff Paper, February 2012.

⁴ Ismail, F (2007). *Mainstreaming Development in the WTO: Developing Countries in the Doha Round*. CUTS, Jaipur.

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