The Second Caribbean Academy of Law and Court Administration (CALCA) Seminar on International Law, Hyatt Regency Hotel, Port of Spain Trinidad and Tobago, September 24-28, 2012.

THE WTO AND INTERNATIONAL TRADE: PROMISES AND PERFORMANCE

By Dr. Delroy S. Beckford*

WTO AND INTERNATIONAL TRADE

The advent of the WTO is regarded as a significant achievement over its precursor the GATT, boding well for growth in international trade and development by virtue of its emphasis on rule oriented recourse for advancement of its objectives. Inspired by this achievement, Julio Lacarte Muro and Petina Gappah remarked that the WTO represents the triumph of law over politics, implying the rule of law as the significant benchmark and driving force for the WTO to achieve its objectives.[1]

A less sanguine view is taken by political economy scholars noting that the WTO is no more than a reflection of asymmetrical power relations whereby trade negotiations and their outcome are decidedly in favour of the more powerful countries, and access to the dispute settlement system and enforcement of WTO rules are in line with the more powerful countries.

These contrasting views of the WTO imply different results in performance. Trade growth may be asymmetrical and pre-existing structures for the distribution of economic power may be

* BA, L.L.B. (UWI); L.L.M. (Columbia University School of Law) ; Ph.D., (Rutgers University), Newark, New Jersey, U.S.A.; Senior Legal Counsel, Fair Trading Commission, Jamaica ; Lecturer, Faculty of Law, University of the West Indies, Mona, Jamaica. Email: dbeckford@jftc.com; delroy.beckford@gmail.com.

[1] Julio Lacarte-Muro and Petina Gappah, '*Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*', Journal of International Economic Law, vol. 3.no.3, September 2000.

reified with the accompanying expectations of an unchanging global distribution of productive activity resulting in the WTO achieving what some may regard as its real aim.

On the other hand, privileging the rule of law approach, promises increased trade growth and development for WTO Members in general. It bears noting, however, that this rule oriented prism of analysis subsumes international trade theory as *a sine qua non* for growth and development within the WTO ideational and institutional framework.

MEASURNG PERFORMANCE AGAINST PROMISES

Measuring the performance of an international organization is often not without disagreement, even when performance is to be measured against express promises made. We may disagree on what is promised, how and when performance is to be assessed to determine if those promises have been met, and, not the least significant, whether there are over promises made for which the organization is ill-suited to tackle effectively.[2]

It should come as no surprise therefore that much disagreement exists as to how to measure the performance of the WTO. Should it be done against the goals and functions? And what goals and functions are to be emphasized in the analysis? Should it be the expressed goals or those regarded as the real though unstated basis of the WTO, for example, the claim that the WTO is about managing asymmetrical trade bargains without a sufficient focus on development, despite claims in the preamble to the agreement establishing the WTO of an important goal being sustainable development.

[2] George von Furstenberg '*Performance Measurement under Rational International Overpromising Regimes*' Centre for Applied Economics and Policy Research, Indiana University, CAEPR, Working Paper, No. 2008-005.

There is also disagreement on whether the expressed goals, even if accepted as the basis of the WTO, are capable of being sufficiently conceptualized as measureable criteria to assess performance, as in the case of sustainable development. The regime's guiding norms (such as MFN and national treatment) to realize macro-objectives such as improvement of market access and non-discriminatory treatment are often seen as ill-suited performance indicators because they are not easily operationalized (as in the case of special and differential treatment) or provide for exceptions as in the case of Article XXIV providing for exceptions from MFN with respect to regional trading arrangements.

Then there is the question of the period for assessment. Some scholars are of the view that the results of the conclusion of trade rounds do not constitute a good basis for an impact assessment[3], and much less is agreed on as to the precise period for conducting any assessment if development is a baseline for performance assessment[4] and the concept is multi-faceted and requires structural transformations within countries[5] and in respect of the international economy that one would be hard pressed to justify as to have occurred already given the average period it

[3] Rorden Wilkinson, 'Power, Performance and the WTO', Paper presented at the International Studies Association Venture Workshop on International Organisation Performance, 25 March 2008. See also, Rorden Wilkinson, The WTO: Crisis and the Governance of Global Trade, Routledge, 2006, (especially, chapters 3 and 5) for a comprehensive development of these arguments.

[4] That development is a goal of the WTO has been questioned given the hortatory terms infused in the special and differential provisions and the rejection of the notion that these provisions must somehow be operationalized by employing a special and differential interpretive principle informed by Article 31-32 of the Vienna Convention on the Law of Treaties (VCLT) to give effect to special and differential provisions in the context of the development purposes articulated in the Preamble to the Agreement Establishing the WTO and other S&D provisions in the WTO Agreement. See for example, Andrew Mitchell, and Asif Qureshi, '*Interpreting World Trade Organisation Agreements for the Development Objective*', Journal of World Trade, vol. 37, no.5, 2003, 847-882, for the view that WTO Agreements are to be interpreted to fulfill the development objectives of the WTO. For a contrary view see, for example, Andrew Mitchell, '*A Legal Principle of Special and Differential Treatment for WTO Disputes*', World Trade Review, vol. 5, no.3, 2006.

[5] See, for example, Yong Shik Lee, Reclaiming Development in the World Trading System, New York: Cambridge University Press, 2006.

took for today's developed countries to be transformed from agrarian or feudal to industrial economies[6] and the WTO's few years of existence.

And, even when there is little disagreement on the baseline for performance assessment of the WTO as in the case of tariff reductions, there is the issue of whether the performance indicator is attributable to the WTO.[7]

The task then of assessing the WTO's performance is to be treated as a continuing dialogue whereby the discussion and the conclusion cannot be otherwise than tentative.

A convenient starting point may be the goals and functions of the WTO. A familiar caution against this approach suggests that a critical institutional perspective be adopted to account for shortcomings in addressing ideals identified in the preamble to the WTO Agreement and a focus on the ideational basis of the WTO as an institution designed to manage trade in the context of asymmetrical power relations, asymmetrical bargains, and outcomes.

Given the championing of the WTO as an institution adopting a legalized structure to ensure equal protection of the interests of developed and developing countries in terms of the bargain struck it is perhaps appropriate to evaluate the WTO's performance against this standard.

[6] On some accounts this period was not less than 30 years; for the US between 1865, when the civil war ended, and 1898, with the advent of the Spanish American war; for the former USSR, between 1917, at the advent of the socialist revolution, and 1939 when World War II began; for Japan between 1868, at the time of the Meiji Restoration, and 1904, when the Russo-Japanese war began. See, for example, Chinweizu, Decolonising the African Mind, Pero Press, 1987, at p. 15.

[7] Joost Pauwelyn, 'New Trade Politics for the 21st Century', *Journal of International Economic Law*, vol. 11, no.3, September 2008, at p. 566. Pauwelyn notes (citing 'A Note on Sources of Tariff Reductions in Developing Countries, 1983-2003') that while tariffs have been reduced to 'historic lows' not less than two thirds of tariff cuts over the last 20 years were done unilaterally.

The WTO's performance in dispute settlement is perhaps the most popular of performance indicators because of the promise of 'rights triumphing over might' the inverse of which is said to have characterized the GATT era of positive consensus in the adoption of panel reports.

A plethora of studies have focussed on performance in this area, including studies addressing structural biases against developing country participation and issues of non-compliance.

My focus here is to draw on recent studies for an evaluation of performance in dispute settlement coupled with a critical institutional perspective of performance in the context of asymmetrical bargains and outcomes.

PROMISE MADE BY THE WTO AND THE NATURE OF WTO OBLIGATIONS

Before focussing on these questions, however, two fundamental issues are worth addressing, namely what is the promise made by the WTO and what is the nature of WTO obligations embodying the promises made.

The latter question is perhaps to be addressed first because of the implications for a conclusion on the first. The WTO is often conceived of as a type of constitution but also as some type of contract reflecting a set of bilateral obligations. The latter conception of the WTO if tenable would perhaps reduce the exercise of assessing the performance of the WTO as a non-starter if success or failure is really dependent on the party to the contract and not the WTO as an institution *per se*, particularly if the remedy available for breach or restrictions on the exercise of the remedy would be essentially the same with the counter-factual, that is, absence the WTO. The WTO then would be no more than an arena for managing bilateral promises and not promises it has made itself in the set of bilateral obligations.

On the other hand, if the WTO is to be conceived of as a multilateral regime embodying and promoting values independent of bilateral promises then the performance of the WTO in meeting these objectives would be worth exploring

WTO OBLIGATIONS BILATERAL OR HYBRID?

The claim is that the WTO is not a regime whereby obligations are owed to the collectivity without the possibility of variation by individual members of that collectivity as in a constitutional regime,[8] but a set of bilateral agreements between the parties, whereby any of these obligations can be varied by a few of the parties without affecting the other states. It is not a treaty designed to protect the interest of the collective (unlike human rights treaties).[9]

The claim is also supported by the view that WTO obligations are not binding on all members of the international community from which no derogation is permitted or that they constitute obligations owed to all members of the international community, even if there is the possibility of variation by agreement.

Obligations such as market access are bilateral in nature because they only affect the rights of parties to the breach [10]and the obligations are usually negotiated on a state to state basis and are not homogenous. The dispute settlement system for enforcement of obligations is also said to reflect the bilateral nature of obligations whereby the breach is in respect of nullification or impairment of benefits to a particular WTO Member[11] and authorization for retaliation in the

[8] Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EURO. J. INT'L L. 907, 937 (2003).
[9] Ibid. 908.
[10] Ibid. at p. 930.
[11] Ibid. at p. 934-935.

event of non-compliance of a ruling is not a collective right but is owed to the party whose benefits have been nullified or impaired.[12]

The constitutional view of the WTO advances the notion that WTO is constitutional in the sense of being a "higher" form of law that cannot be varied or violated.[13] This is exemplified by the creation of the WTO as a "single undertaking," incorporating a variety of agreements, and the "legal primacy of the WTO Agreement over other international trade agreements," evidenced in Article XVI(3) of the WTO Agreement, stating that "in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of this Agreement shall prevail to the extent of the conflict.", establishing a hierarchical ordering of international law.[14] In addition, attention is also drawn to the WTO's dispute settlement system and its capacity for judicial review to ensure that WTO Members comply with their obligations. [15]

The constitutional model of the WTO also advances the view that WTO obligations are not about trade *per se*, but 'rather about expectations concerning the trade-related behaviour of governments' which are 'unquantifiable and indivisible, and therefore fundamentally unitary in nature'.[16] On this view, the collective aspect of the WTO Agreement is said to exist by virtue of MFN, the dispute settlement system which privileges compliance over compensation and the

[12] Ibid. at p. 935.
[13] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organisations, and Dispute Settlement 47 (1997).
[14] Ibid. p. 51.
[15] Ernst- Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25, 33–48 (1998).
[16] Chios Carmody, *WTO Obligations as Collective*, 17 EUR. J. INT'L L. 419, 419 (2006).

overarching theory of the WTO Agreement as embodying a law of expectations, a law of realities and a law of interdependence.[17]

Without resolving the issue in a binary compartment, there is much to be said for treating the WTO as not necessarily fitting neatly into either category. Some obligations (for example, MFN) extend beyond those to whom they are originally owed and can be varied or specifically tailored (as under GATS or Article XXIV of GATT) and even though a cause of action is not maintainable by a collective for breach of the obligation, collective retaliation is absent in the event of non-compliance, or there is an option to buy out of obligations in the event of non-compliance.[18]

And, although the interest to be shown for a cause of action to be brought requires an identification of the measure at issue by the complaining party, the Appellate Body's treatment of the issue may be read as offering much latitude to a WTO Member whose specific interests are not necessarily implicated.[19]

[17] Ibid. at p.422.

[18] Warren F. Schwartz and Allan O. Sykes, 'The *Economic Structure of Renegotiation and Dispute Resolution'*, 31 Journal of Legal Studies, 179, 2002. For a contrary view on option to buy out of WTO obligations see, for example, John H. Jackson, '*International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*' 98 Am. J. Int'l L. 109-125 (2004).

[19] See, for example, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997. Here the EC challenged the standing of the US to be a complaining party on the grounds that public international law requires a complaining party to have a legal interest before an arbitral panel and that no such legal interest existed because the US had never exported banana to the EC. Relying on the Chapeau of Article XXIII of the GATT which stipulates the right to bring a matter before the Contracting Parties when a Member 'considers there has been…a violation' and Article 3.7 of the DSU cautioning WTO Members to determine if the cause of action would be fruitful before embarking on that course of action, the Appellate Body clarified these provisions as indicating that a WTO Member 'has broad discretion in deciding to bring a case against another Member under the DSU. See, para. 135. It is arguable, however, that wide latitude claimed above is not the case since the Appellate Body identified a specific interest of the US to justify standing, that is, the US could have a potential export interest (at para. 136).

The hybrid nature of WTO obligations may also be seen regarding considerations of Article XXIV and the Enabling Clause,[20] both permitting deviations from core obligations such as MFN owed to the WTO Membership but at the same time insisting on conformity to WTO standards by, for example, the maintenance of a procedural oversight mechanism in the case of the former and the requirement that developing country RTAs do not create undue barriers to trade for other contracting parties in the latter.[21]

To the extent that the WTO provides an avenue for achieving commitments made within the context of a legalized regime, its promise set out in its goals and objectives are worth examining.

My focus will be a brief discussion on issues of concern to developing countries in particular, the question of economic development and dispute settlement and how the WTO has performed on these issues, the caveat being, with respect to the former, that there is no express reference to economic development as a promise by the WTO but rather that trade led growth is supported as a value, if not a precondition, for the achievement of that aim.

Conveniently, we may focus on the expressed goals and functions of the organization as a departure point for this examination.

The objectives of the WTO as stated in the Preamble to the WTO Agreement. These are stated as:

1. Increasing standard of living;

[20] *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) (permitting special and differential treatment to developing countries as an exception to Article 1 of GATT in the form of a Generalized System of Preferences(GSP)s and RTAs among developing countries).
[21] Ibid., para. 3(a).

2. The attainment of full employment;
3. The growth of real income and effective demand;
4. The expansion of production of and trade in goods and services.

We could also focus some discussion on the functions of the WTO as stated in Article III of the WTO Agreement and the extent to which these are being met. These would include

1. The implementation of WTO Agreements;
2. Negotiation of new agreements;
3. Dispute settlement;
4. Trade policy review;
5. Cooperation with other international organisations;
6. Technical assistance to developing countries.

The objectives identified in the Preamble may be subsumed under what may be called a grand bargain of trade led development. This is supported by further preambular language that stipulates the '*need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development*', language which is absent in the Preamble to GATT 1947.

This approach is doubtless likely to prompt the charge that the expressed goals and functions often mask the real goals and functions of international organizations and that performance assessment should be based on those real often unexpressed goals and functions.

On this latter view, Rorden Wilkinson posits that the performance of international organizations should be assessed by first identifying and examining 'the opportunity structures that the institution creates and to set these within a broader understanding of the core purposes that the institution serves,' namely the actors and interests they represent.[22]

Bolstering this view, Professor Wilkinson proceeds from a theoretical premise privileging 'critical historical institutionalism', and notes that:

'*Institutions are not neutral, autonomous entities; nor do they influence expectations and outcomes only at the margins. Instead, they reflect particular relations of power (both those in existence at the outset of an institution's creation as well as their development thereafter) and shape expectations and outcomes accordingly. At their broadest, institutions can be thought of as systems of rules, norms, practices and procedures that structure relations and affect outcomes. Inevitably, the manner in which institutions structure relations reflects the particular power configurations of which they are a product which, in turn, privileges some while putting others at a disadvantage*'.[23]

A similar view is expressed by Simon Bulmer and Martin Burch noting that institutions reflect 'a particular bias, allowing access to some interests while denying it to others and encouraging and highlighting some points of view at the cost of others'.[24]

[22] Rorden Wilkinson *supra*., p. 8.
[23] Ibid.p.4.
[24] Simon Bulmer and Martin Burch, '*Organizing for Europe: Whitehall, the British State and European Union'*, Public Administration, vol. 76: no. 4 (1988), p. 604.

For the WTO this 'entails an investigation of both the outcome of trade negotiations *and* an analysis of the way in which the institution structures the behaviour of participants (which, in turn, shapes those negotiational outcomes) over the course of the GATT/WTO's life cycle.'[25]

For the WTO its asymmetrical opportunity structures are said to be reflected in a carryover from GATT whereby liberalization was in sectors of little relevance to developing countries (i.e. reciprocal tariff concessions in industrial, manufactured and semi-manufactured goods, while excluding concessions in agriculture, textiles and clothing), and amplified by liberalisation in services, investment and intellectual property rights by virtue of the fact that developing countries lack the capacity and resources to exploit the competitive opportunities presented by such liberalisation.[26]

If this view of the WTO is tenable one should expect to see a widening disparity between industrialized and non-industrialised countries in trade growth in the newly liberalized sectors covering services, investment and intellectual property.

Also, to the extent that the advent of the WTO saw liberalization in sectors that were largely protected during the GATT era (such as agriculture, textiles and clothing) one should also expect to see trade growth in these areas.

Doubtless, trade liberalization fostered by insistence on core principles such as MFN and national treatment throughout the GATT and WTO era is expected to manifest in trade growth

[25] Rorden Wilkinson *supra*.p.8.
[26] Ibid. p.10-11.

and trade openness. Between 1950 and 1999, for example, trade grew at an average of 6 per cent per year, and in the same period trade grew faster than total world economic production.[27]

There is also evidence that trade openness has increased as well. This standard measures each country's total trade (its imports and exports) as a percentage of its total domestic production (i.e. its gross domestic product or GDP). In Western Europe, trade openness increased from 35 per cent in the early post-war period to nearly 50 per cent by 1990.[28]

However, the performance of developing countries during this period was less than impressive. For much of Africa and Latin America, trade openness was relatively constant.[29]

Importantly, during the period 1953 to 1999, advanced industrialized countries account for about 70 per cent of total world trade, but developing countries share of world trade grew as well, though from the modest figure of one fifth to one quarter.[30]

HAS THE PROMISE OF TRADE LED DEVELOPMENT BEEN FULFILLED?

While trade growth is manifested in the liberalisation efforts forged by multilateralism reflected in the GATT and the WTO, it can hardly be gainsaid that this has resulted in trade led development.

Development is often understood in an economic sense to involve an increase in average real income per capita maintained over a long period of time.[31]This view is often criticized as

[27] Thomas Oatley, International Political Economy: Interests and Institutions in the Global Economy, Pearson, 2010, p. 52-53.
[28] Ibid.
[29] Ibid.
[30] Ibid. p. 54.

overlooking structural conditions within countries that militate against real development that requires some level of income redistribution. An increase in average real income per capita may for instance, at the very least, be met by an increase in the output of goods and services within a particular country increasing at a faster rate than its population growth.

STRUCTURAL TRANSFORMATION OF THE ECONOMY

Rather, the focus of the process is often said to be on the intermediate stage between developing and developed. Following on this lead, Yong-Shik Lee in *Reclaiming Development in the World Trading System*, defines economic development as:

'economic development or, simply, development is the process of structural transformation of an economy from one based primarily on the production of primary products (i.e., a product consumed in its primary [unprocessed] state) generating low levels of income to another based on modern industries that provides higher levels of income'.[32]

This definition raises questions as to whether development may said to be occurring at the beginning of that process, the intermediate stage or the final stage of that process and what the benchmarks are or should be for identification of each stage of the process. Embedded in this definition is the notion that the locus of evidence for structural transformation is in the economy itself. Thus, if the fundamental structure remains the same there is no development.

[31] See, for example, George L. Beckford, Persistent Poverty: Underdevelopment in Plantation Economies of the Third World, Maroon Publishing House, 1988, at p. xviii of the Introduction.
[32] Yong Shik Lee, Reclaiming Development in the World Trading System, New York: Cambridge University Press, 2006, p. 3 footnote 7.

However, the conditions for structural transformation of an economy inhere in structures external to an economy as well, and it may be useful to query what these conditions are and if changes observed represent the beginning of the process of development.

EVIDENCE OF STRUCTURAL TRANSFORMATION

The evidence suggests that that there is little structural transformation of economies resulting from liberalization efforts of the WTO. Advanced industrialized countries hold a comparative advantage in capital and human capital intensive goods in areas such as pharmaceuticals, computers, software, and telecommunications equipment.

The Asian NICs, such as South Korea, Taiwan, Hong Kong, and Singapore, hold a comparative advantage in standardized capital intensive goods such as semi-conductors, and other computer equipment, automobiles and steel.[33]

The so-called second wave of NICs, such as Indonesia, Malaysia, Thailand, Mexico and Argentina, hold a comparative advantage in apparel, footwear, and the assembly of finished goods from component parts. These countries are not yet major producers of capital intensive goods.[34]

On the other hand, other developing countries hold a comparative advantage in land intensive primary commodities such as fuels, minerals, and agricultural products.

This state of affairs does not necessarily suggest that the WTO's promise of trade led development has not been fulfilled if twelve years is insufficient to expect any significant

[33] Thomas Oatley, supra.
[34] Ibid.

structural transformation of economies. For many industrialised countries the movement from agrarian to industrial status was accomplished in not less than three decades.

Yet, this global division of labour evident is precisely what trade theory predicts whereby in a fully open international economy each country produces commodities in which it has a comparative advantage and disregards industries in which it has a comparative disadvantage.

If, therefore, development is conceived of a process of moving from one stage of production to another (as in agrarian to industrial and industrial to post industrial production) a fully open international economy could represent but a necessary stage in that process in the new dispensation of trade liberalization whereby producer surplus from specialization is transferred into more value-added bases of production to contribute to the next advanced stage of production.[35]

The theory of comparative advantage on which trade liberalization ethos is anchored and multilateralized in the WTO (at least as an ideal since the WTO as a site for this manifestation is contested, the WTO being regarded more as a forum for managing trade in the actual world without Ricardian assumptions of free movement of factors of production) would contribute to and intensify a global division of labour.

In other words, inherent in the theory of comparative advantage, with its emphasis on a global division of labour in the long run, is both an impediment and an opportunity for development, an impediment if the global division of labour amplifies specialization in productive activity that

[35] As to whether a fully open international economy is a necessary stage in the process of development as conceived, see for example, Ha-Joon Chang, Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism, Bloomsbury Press; First Edition (December 26, 2007); and Eric Reinert, How Rich Countries Got Rich and Why Countries Stay Poor, Public Affairs (October 7, 2008).

militates against structural transformation of economies, and an opportunity if the resulting specialization provides surplus for transfer to the next advanced or succeeding stage of production.

DISPUTE SETTLEMENT

In the area of dispute settlement, there is some evidence suggesting that developing country plaintiffs have had more success under the WTO dispute settlement system than was the case under the GATT by having had more sectors liberalized by defendants following the outcome of dispute settlement.[36]

This finding may seem startling given power asymmetries within the WTO dispute settlement system, the lack of collective retaliation to induce compliance, the disincentive of developing country participants to insist on enforcement if they are the beneficiaries of bilateral aid from the defendant in the dispute, and the potential for cosmetic changes to the measure recommended to be withdrawn by the panel or Appellate Body.

Using data of a sample of disputes initiated between 1978 and 1998 for breach of import liberalization commitments, Chad Brown found that liberalization was greater for developing country plaintiffs under the WTO than under the GATT by the sectors liberalized by defendant countries following the outcome of the ruling.[37] He defines liberalization as the growth in the real dollar value of imports in the disputed sector in the years between the year prior to the initiation of the dispute and three years after the dispute was completed, that is, (i) the year the appellate body report was adopted, if the panel report was appealed, or (ii) the year the panel

[36] Chad Brown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes', The World Economy, 2003.
[37] Ibid.

report was adopted, if it was adopted and not appealed, or (iii) otherwise the latest year that there was a formal correspondence between one of the parties and the GATT/WTO regarding the dispute.

Chad Brown finds that while the average dispute does not result in liberalization of the defendants disputed sector, there are increased liberalization gains by developing country plaintiffs under the WTO dispute settlement system than under the GATT. The increase in liberalization is not however substantial representing over 50 per cent of the cases under the WTO (15 out of 27) up from 43 per cent under GATT (16 out of 37), and the results are not attributable to the increased legalization of the system.

The most significant factor accounting for the increased liberalization when compared to GATT is the capacity of the plaintiff to retaliate, which in turn is related to the reliance of the defendant on the plaintiff's markets for its own exports. That is, the greater the value of the share of exports of the defendant received by the plaintiff the more likely there will be liberalization in the disputed sector of interest to the plaintiff.

For this reason, Brown notes that the increased liberalization when compared to GATT does not result from the increased legalization of the system but from developing countries learning from their experiences and initiating disputes where there are economic incentives to do so, particularly against countries from which they import more and which have a relatively greater share of their exports.[38]

[38] Chad Brown supra. p. 19.

Although the study used the term developing countries, there is no indication of least-developed countries featuring in the analysis, the countries being highlighted being the larger developing countries such as India, Brazil, Mexico and Argentina and Chile.

CONCLUDING REMARKS

Although there is disagreement on the promise and the performance of the WTO, there is some indication of successes in the nature of a legalized dispute settlement system. It may be too early to provide a proper assessment regarding performance in the area of economic development arising from trade led-growth and the nature of the dispute settlement system in its operation with regard to developing countries. There is little dispute, however, of the involvement or lack thereof of least developed countries in the dispute settlement system. And, although it is contested that the WTO is a development institution, the WTO's promise of trade-led growth leading to development has not yet materialized bearing in mind the existing global division of labour whereby the majority of developing countries are still pursuing the production of primary products.